FAMILY, PROPERTY, AND THE STATE IN GHANA

Changing customary law in an urban setting

by

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Dedicated to the memory of my aunt,
Mary Larteley Lawson
and to my mother

ABSTRACT OF THE THESIS

Judicial customary law, based initially on the works of indigenous scholars, has developed extensively in Ghana to provide the premise on which the country bases its laws of family, property and succession. Social enquiry, however, discloses a growing dichotomy between judicial customary law and the customary law that is actually practised by the people. This is due largely to the flexible nature of customary law and the continual development of new rules to meet changing conditions. Guided by the English doctrines of precedent and stare decisis the state courts have generally not recognised the new rules which regulate the day to day activities of ordinary people. As a result, a considerable gap exists between judicial customary law and social reality.

In recent years, the state has sought to ameliorate the social injustices caused by the untrammelled operation of the rules of judicial customary law through the enactment of legislation. The present thesis argues that the mere enactment of legislation is no guarantee of the reform of customary law. It is contended that the key to successful reform of customary law lies in the implementation of programmes aimed at ensuring that norm-addressees actually benefit from legislative enactments.

While the main aim of the present work is to assess the impact of recent Ghanaian legislation upon customary law in an urban environment, it also analyses the extent to which the modern law has been able to strengthen the claims of the nuclear family. The thesis concludes by making suggestions for further law reform.

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This thesis has been five and a half years in the making. This is due to a number of factors, one of the most significant being the fact that this research project has been wholly financed from my personal resources. This had the effect of limiting, earlier on in the project, the extent of official data and expertise that might have been available to me if I had been sponsored by a large organisation.

Many influences and individuals, both in London and Accra, have shaped this thesis. The main influence on the thesis has been the desire to state, as accurately as possible, the traditional norms, as applied today, that have directed and dominated the lives of numerous persons in Accra including those who contributed to my field material. I am particularly grateful to Nii Kojo Danso I, Nii Kwei Kuma II, John Cleland, Sheikh Mohamed Marquaye and Mrs Marian Cathline for helping me in various ways during my fieldwork.

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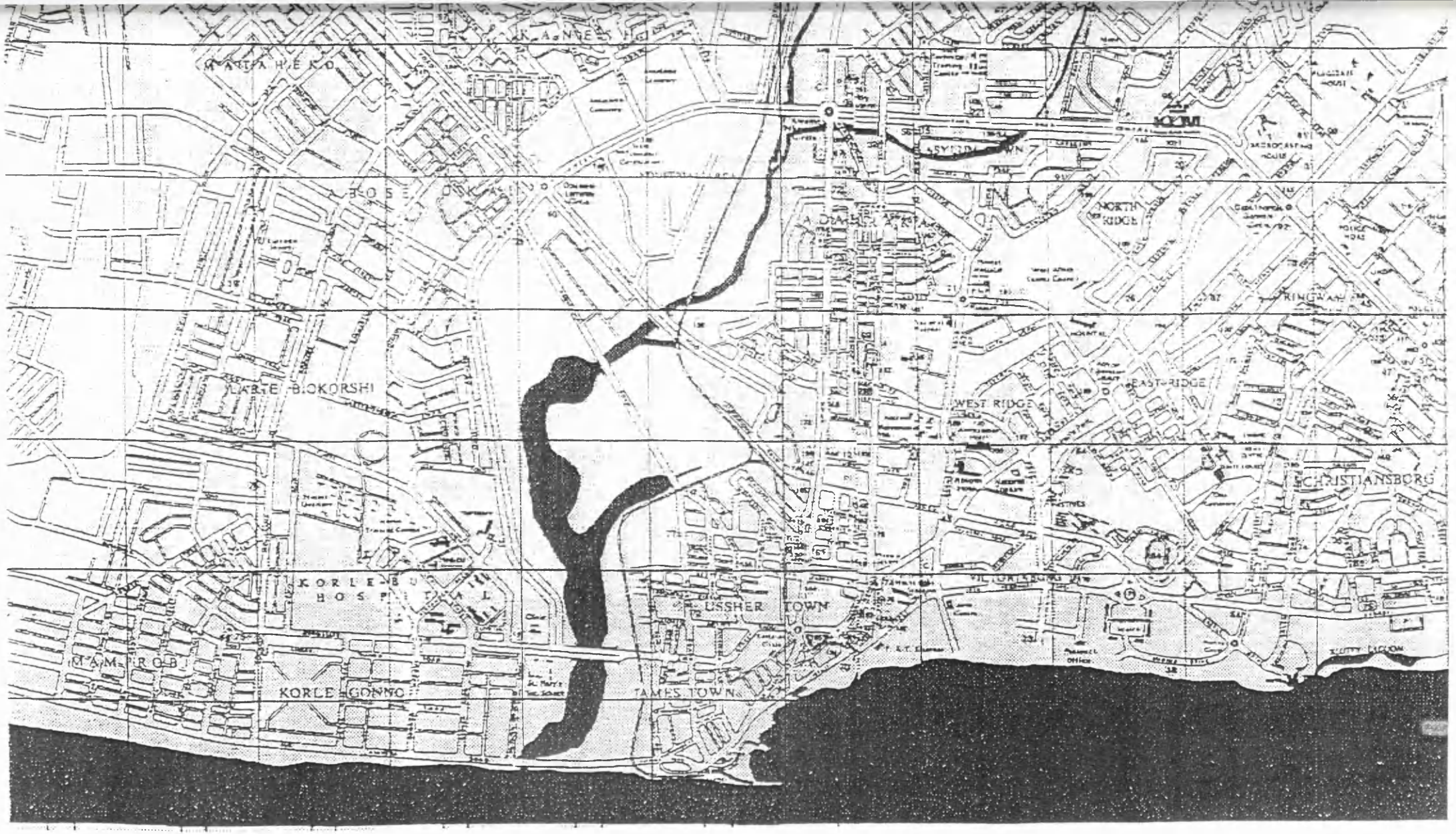

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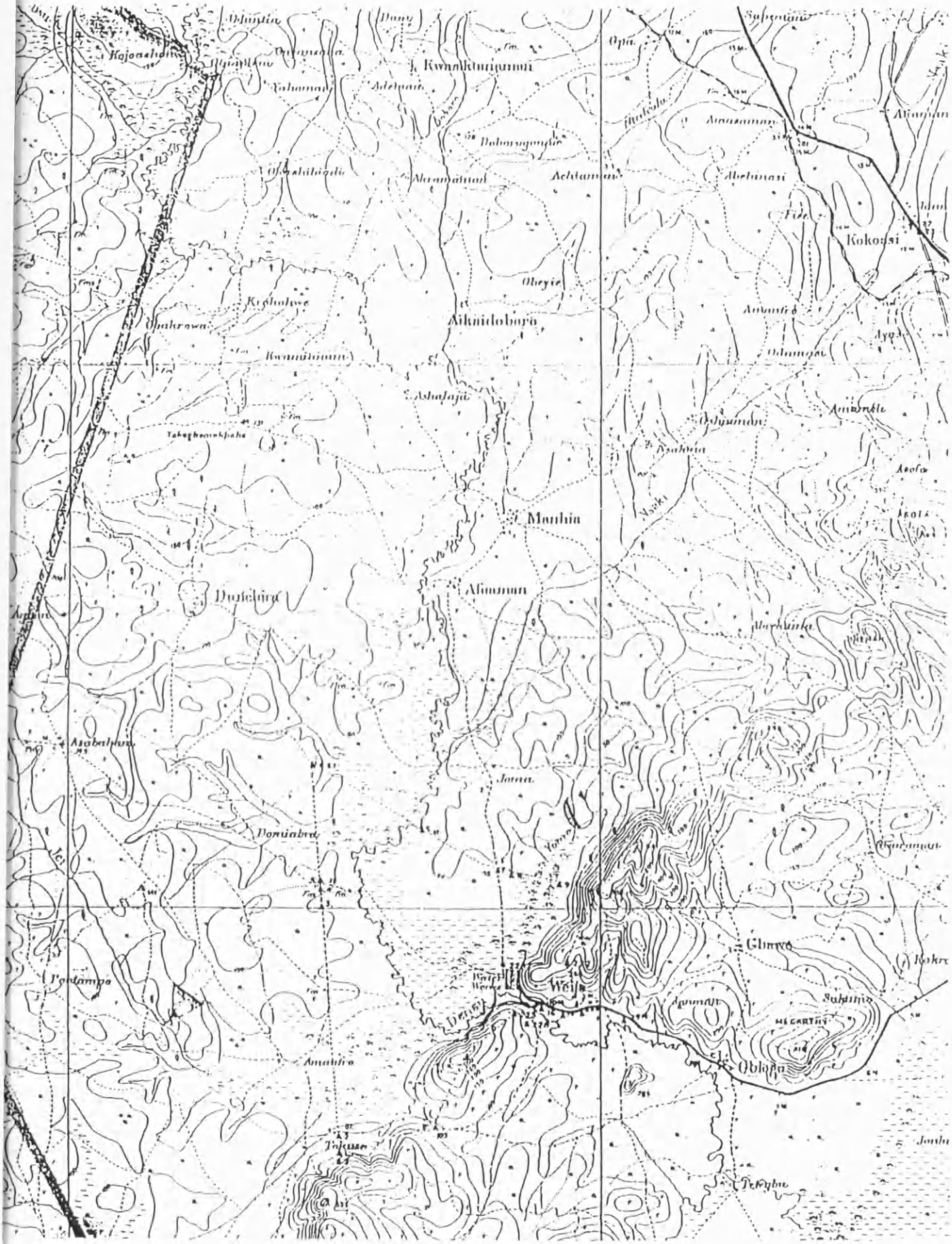

MAP OF THE WESTERN PART OF THE GREATER ACCRA REGION SHOWING DOMIABRA AND OTHER VILLAGES ON THE ACCRA PLAINS.

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Abbreviations

All England Law Reports	**All E.R.**
Appeal Cases	**A.C.**
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Chapter	**Cap.**
Chancery Court	**Ch.**
Chancery Division	**Ch.D.**
Current Cases (Ghana)	**C.C.**
Divisional Court	**Div. Ct.**
Full Court	**F. Ct.**
Ghana Law Reports	**G.L.R.**
Ghana Law Reports Digest	**G.L.R.D.**
Law Reports	**L.R.**
Ollennu's Principles of Customary Land Law in Ghana, 1962	**P.C.L.L.G.**
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Sarbah's Fanti Customary Laws, 1968	**Sar. F.C.L.**

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Weekly Law Reports	**W.L.R.**
West African Court of Appeal Reports	**W.A.C.A.**
West African Law Reports	**W.A.L.R.**

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GLOSSARY OF VERNACULAR TERMS

All words, terms, offices and practices mentioned in this glossary are Gá unless otherwise stated. The terms and words in this glossary are defined within their everyday meaning in the Gá language, but may be best appreciated within the contexts in which they occur in the text. Non-Gá vernacular words and terms have been ascribed the meanings which have generally come to be attached to them in the official customary law of Ghana. The plural forms of words and terms are indicated, where appropriate, and the literal meaning of each word is given beside the word.

Abunu: (Twi), tenancy of land already under cultivation with subsequent division of the harvest or proceeds between landlord and tenant

Abusa: (Twi), tenancy of virgin land or other uncultivated land under which the landlord takes one-third of the proceeds

Abehem: (Fanti), tenancy of land planted with oil palm under which the tenant is placed on the land in return for the delivery of a specified quantity of oil to the owner each year

Adode: a traditional system of tenancy under which a tenant is allowed occupation and use of land in return for the payment of a variable sum of money to the landlord

Akutso: (pl. akutsei), neighbourhood

Awomei ke Ataamei: Mothers and fathers

Bii: units or collection of items

Blema kusum: custom immemorial

Buleh: respect or discipline

Dzaleh: fairness or the obligation on traditional authorities and power-holders to rule justly

Ekar: (Fanti), headpad

Faa-nah: river bank

Gányo krong: pure Gá

Gbla taa eshweo weku: (aphorism), a marriage may end but the extended family remains

Gboshinin: legacy

Guaha: (Twi), a ceremony to mark the end of a sale of land

Hedzoleh: liberty or freedom

Ke akee abaada ni oba nina dze lomo: (aphorism), the saying that the undisciplined youth will grow up and experience the hardships of adulthood is not a curse

Ketlé: a special table behind which the directors of a funeral sit

Kpodziemo: naming ceremony for an infant

Ku: group

Man: town

Manbii: townspeople or stool subjects

Man sané: public dispute

Mankralo: assistant chief

Manché: chief

Mlidzaa eté: tenancy of land under which the proceeds are divided into three parts

Mojawe: house of blood

Niatse: a wealthy person

Nibii: accumulated property or collection of articles

Niké-nin: gift

Nin: goods, chattels or possessions

Niné: hand

Nná-no: open plains

Nubo: (also known as **numama**) man's cloth

Nsho-gonno: land abutting the sea coast, often characterisedby steep cliffs

Nyesee weku: maternal family

Mlidzaa edwe: tenancy of land under which the proceeds are divided into four parts

Okyeame: linguist or a chief's spokesman

Onukpa: (pl. onukpai), elder

Onukpa in eda efe okonfo: (aphorism), an experienced elder is greater than an oracle

Sheh: traditional bidding of farewell in anticipation of death

Shia: a building or household

Shia-nibii: household goods

Shia sané: household disputes

Shia onukpa: head of the household

Shidaa: traditional giving of drinks to symbolise acceptance of a gift

Shika: cash or money

Shikpon: undeveloped land

Susu: saving schemes organised by self-help groups

Tako mlifoo: ceremonial cutting of the headpad to symbolise severance of family relationships

Tsoshishi: under the tree

Tindana: (Dagbani), owner of the land

Toindzoleh: peace and tranquility

Trama: cowrie shells used in the payment of earnest money

Tsesee weku: paternal family

We: a household, especially of the extended family

Weku: extended family

Wekumei: members of the extended family
(sing. **wekunyo**)

Weku-nibii: movable properties of the extended family

Wekunin: landed property title to which is vested in the extended family

Weku yitso: head of the extended family

Wulomo: high priest
(pl. **wulomei**)

Yitso tashi ni kanto abu fai: (aphorism), where there is a head, it is the head the wears the hat, not the (bent) knee

Zigba yibapom: (Adangme) a ceremony to mark the end of a sale of land

CHAPTER 1

AIMS AND THEORETICAL FRAMEWORK OF THE THESIS

1. 1 *The objects of the research*

Customary law has remained at the heart of the land law and the laws of family and succession in Ghana. Those laws are widely seen to regulate the prosperity and well-being of the nation. They determine the nature of interests in land, who owns those interests, to whom land and other properties are devised or bequeathed upon the death of the owner, and how the family contributes to the stabilisation of society and the socialisation of its members.

Yet until recently these laws have, in Ghana, been left largely unregulated by the state. At the same time, considerable development has occurred within the official customary law of Ghana in the colonial and post-colonial periods, mainly due to changes in the legal principles declared by the courts. Each of these developments chipped away a piece of the edifice of the old customary law,[1] gradually replacing it with new legal principles. The result of this has been the creation of a strong thematic unity which binds the laws of the various communities of Ghana into a single official system of customary law. This official customary law is made up of the legal principles set out in the works of various scholars and customs immemorial which have found their way into the

[1]The terms "old customary law", "indigenous law" and "traditional law" are generally used in this thesis to refer to the pre-1985 customary law of Ghana. Wherever these terms are used, they are intended to include the opinions of Sarbah, Ollennu et al. and the legal principles developed and applied by the courts since the last century.

judgments of the superior courts. However, beneath the official customary law lies another body of law made up of a rich undergrowth of practices which have gradually developed to replace older customary rules. Generally, though unrecognised by the courts, they continue to regulate the behaviour of many Ghanaians. Many of these rules of unofficial customary law, as they have evolved among the people of Accra, are investigated here, particularly in those sections of the thesis that involve the discovery and statement of aspects of Gá customary law which have never been systematically researched.

Judicial pronouncements and social and legislative changes have all contributed to creating a divergence between the official customary law and the actual practices of the people. While some changes have occurred within officially declared legal principles, much more change appears to have taken place in the actual customary law practised by the people. The verdicts of the courts tend generally to conform to previous decisions on similar issues, creating bodies of precedents on various aspects of official customary law. Also, legislative changes frequently tend to overlook the practicality of new rules and the possibilities of their adoption by norm-addressees. On the other hand, ordinary people appear to mould their behaviour subtly over time to accommodate both changes in official legal rules and changing social practice. As both kinds of change are not necessarily in the same direction, official customary law, comprising judge-made law and and statutory law, can sometimes be seriously at odds with the customary law practised by the people themselves.

The present thesis focuses on recent changes within the customary law in urban Ghana and analyses, in particular, the impact of legislative intervention upon the evolution of that law during the late 1980s and early 1990s, investigating whether such intervention has actually produced the effects desired by the legislator and showing the persistent divergence between practised customary law and official customary law.

The thesis relies significantly upon fieldwork and theoretical models developed by Allott and others to assess the impact of legislative intervention upon urban customary law. Our focus differs from that of earlier writers by concentrating on a heterogenous urban society and investigating in detail the impact of the 1985/86 legislation on customary law in Ghana. By the time fieldwork was undertaken in 1989, only a limited number of cases on the 1985/86 reforms had been decided by the courts. Based on such limited evidence and findings in the localities (see pp. 92-107), it is argued here that legislation by the state results in an amalgam of official customary law and practised customary law illustrating, in an urban African context, the operation of Ehrlich's concept of "living law".[2]

Legislative intervention has been employed in Ghana, particularly over the last decade, to reform the customary law and provide a more uniform system of law for the country. In 1985, three important statutes were enacted, the Intestate

[2]See E. Ehrlich, Fundamental Principles of the Sociology of Law, Cambridge (Massachusetts) 1936, esp. pp. 472-506, which set out his methods of studying the "living law".

Succession Law,[3] the Customary Marriage and Divorce (Registration) Law,[4] and the Head of Family Accountability Law,[5] to reform and uniformise some of the main rules of customary law. In the following year, the Land Title Registration Law[6] was enacted. These statutes changed parts of the existing law, and provided detailed statutory rules for the regulation of intestate succession, registration of customary marriage and divorce, custody of extended family property and finances, and the registration of land titles and transfer of interests in land. It was probably assumed that the new legal provisions would rapidly replace the old rules of customary law, improve the position of widows, orphans, spouses and close family members, ensure greater accountability of heads of families for family properties under their control, and guarantee indefeasible titles to purchasers/holders of interests in land. It has been impossible to find written evidence of the motives of the law-maker because of the general dearth of information regarding the law-making process in Ghana during the 1980s.

Whether the statutory reforms have so far actually had significant effects has been a moot point not sufficiently covered in the literature. Although these new laws appear to be aimed principally at reforming the official customary law,

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[3]P.N.D.C.L. (Provisional National Defence Council Law) 111.

[4]P.N.D.C.L. 112.

[5]P.N.D.C.L. 114. A fourth statute, the Administration of Estates (Amendment) Law, (P.N.D.C.L. 113) 1985 is beyond the scope of this thesis.

[6]P.N.D.C.L. 152.

they are also likely to have been modified in practice to achieve harmonisation with the pre-existing customary law.[7] To what extent and how this may have been achieved remains to be seen.

The present work, therefore, explores the relationship between unofficial customary law and the new legislation,[7a] investigating to what extent the latter may actually have contributed to improving the former. For this purpose, the main principles of Ghanaian customary law are re-examined in the light of the actual practices of people in the urban context of modern Accra, where the complex mix of customary law-based rules and new legislation seems to have given more emphasis to nuclear families and to the individual citizen, creating a need to study the unofficial customary law more closely. Although less central to our purposes the thesis also considers, in appropriate cases, the influence of customary law and legislation on development.

The thesis proceeds on the central assumption that legislative impact would be greatest in urban areas which, unlike rural areas of Ghana, have experienced extensive changes in social structure and behaviour, arguably creating a divergence between the practised customary laws of urban and rural communities. One of the central arenas of change in urban society has been the family, as growing individualism and the gradual breakdown of traditional structures appear to be leading to the emergence of a trend towards nuclear units. This development, among others, raises serious questions about the

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[7]Cf. S.F. Moore, Law as Process: An Anthropological Approach, London 1978, pp. 65-78, esp. at 66, showing that studies of some African societies suggest that the effects of legislative innovations are frequently not those anticipated by the law-maker.

7a The discussion in this thesis concerns Ghanaian law and society up to the institution of the current Constitution at the beginning of 1993. Any statements referring to current law should be understood to refer to the law of 1992.

continued application of traditional rules of distribution of property. Another important area of change has been within the nature of relationships between citizens and traditional authorities. In essence, urban citizens appear to be losing their traditional rights to land due to a growing dichotomy between their theoretical rights to land and the actual tendency of stool occupants and elders to ignore those rights.[8] At the same time, descendants of non-stool citizens who settle permanently in urban areas appear to lose land rights in their own communities of origin but do not gain the stool citizen's right to land of their new settlement. As urban society continues to develop, these and other problems have demanded the attention of law-makers.

As we assess the impact, of recent legislative reforms on the old body of customary law in an urban area of Ghana, we need to examine the ways in which customary practices perhaps impede the effectiveness of statutory law or modify its actual application. Urban customary law is here shown to be in a constant state of change, influenced largely by the perceptions of ordinary people about current custom rather than legislative innovations. Field data will be used to demonstrate that the practised customary law of urban Ghanaians frequently represents adaptations of official customary law.

For a long time after independence, changes in the official customary law of Ghana came solely from the courts, and the state remained wary of relying upon legislation to achieve more rapid effects. Several factors, however,

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[8]The concept of the stool in Ghanaian customary law is explained in detail in chapter 3 below (pp.122 - 126).

contributed to the policy of using legislation as an instrument of law reform. As the volume of case-law on the indigenous law increased, and the social context within which the indigenous law operates changed, ever more aspects of the native law were exposed to remorseless judicial scrutiny. This, in turn, led to wide-ranging critical commentary, urging the need to reform particular aspects of the customary law of Ghana. Much of the ensuing debate centred on the desirability or otherwise of legislative intervention in the customary law.[9]

Legislative reform, in particular, has been seen by state officials and some academics as the panacea to the manifold problems of the indigenous law. But it has to be seriously doubted that legislation can by itself lead to significant reform. Research from other parts of Africa shows that legislative intervention in the indigenous law has not always produced the desired effects.[10]

The enlargement of the state's role in the area of customary land law and the development of traditional and statutory rules of property and family law in Ghana are analysed in detail in the major chapters of the thesis. In spite of the impressive array of statutory mechanisms for state control of lands, the thesis portrays a parallel paralysis of enforcement measures to give effect to the statutory aims, as well as a corresponding decline of chiefship as an organising principle of life in the urban areas. On the other hand, rules of practised

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[9]See in particular, G.K.A. Ofosu-Amaah, "The Law Reform Commission - N.L.C.D. 288", University of Ghana Law Journal, Vol.6 (1969) pp. 142-146 and K.T. Opoku "Custom, Statutory Interpretation and Cases: The Civil Law Approach", University of Ghana Law Journal Vol. V. (1968) pp. 6-12.

[10]See e.g. Allott 1980, pp. 191-193, where he cites the case of the failure of land reform in Kenya. On this, see in detail S.F.R. Coldham, "Land Control in Kenya", Journal of African Law, Vol. 22 (1978) pp. 63-77.

customary law continue to be re-moulded and adapted through changing social practice to meet new social and economic conditions. In this active and complex process of change individual rules of customary law are continually subjected to growth and evolution, thus ensuring the continued relevance of customary law rules to new social phenomena accompanying urbanisation. Legislation is only one factor in this context.

Altogether, this thesis provides a picture of a living, changing and constantly growing process of informal formulation and re-formulation of customary law rules in the modern urban setting, played out within the context of a veritable social pact involving intricate sets of rights, duties and obligations of individuals to members of their nuclear and extended families as well as to in-laws, chiefs, stool elders and heads of families.

The active development of unofficial customary law in Ghana has been aided by processes of change which have gradually moulded existing rules of customary law to the demands of the more complexly organised societies of modern Ghana. Such processes of change involve a number of steps. Firstly, changes in economic organisation and the imposition of English law appear to have introduced new concepts which in turn necessitated changes in social behaviour. Secondly, the usurpation of the judicial and legislative powers of chiefs by urban-centred colonial and post-independence governments of Ghana increased the propensity of new social customs to develop in an unregulated pattern, widening the dichotomy between official customary law and unofficial customary law. Lastly, the rules of unofficial customary law have acquired a

stronger vitality of their own in spite of attempts by the judiciary to restrict legal validity to official customary law. In view of the numerous systems of customary law in the different communities of modern Ghana, the process of change compounded the problems of judicial ascertainment of the law of each community.

1. 2 The theoretical and conceptual framework

The interplay between official legal intervention and urban customary law in Ghana today must be seen within the wider context of a running debate about customary law in Ghana since independence, and in Africa generally.[11] That debate pitches those who call for legislation as the critical instrument in reforms of the customary law[12] against those who suggest a more cautious approach to changing the customary law, advocating an increase in critical scholarship as a way of analysing problems and finding solutions.[13]

In order to formulate an appropriate framework for testing the thesis that customary law, even in an urban setting, continues to have the potential to modify or frustrate enacted law, the present work combines the straightforward

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[11]See generally, J. Lewin, Studies in African Law, Philadelphia 1947; H. Kuper and L. Kuper (eds.), African Law: Adaptation and Development, Berkeley and Los Angeles 1965; E. Cotran and N.N. Rubin (eds.), Readings in African Law, Vols. I & II, London 1970; and J.F. Hollemann, Issues in African Law, Leiden 1974.

[12]See e.g. T.W. Hutchison (ed.), Africa and Law, Madison 1968, pp. xi-xii; and R.B. Seidman, The State, Law and Development, London 1978, esp. pp. 15-23. Allott, too, seems to recognise a role for legislation in the modernisation of African law. See his "Future of Law in Africa", in Kuper and Kuper 1965, pp. 216-240, esp. at 223-224 and, most recently, V. Guni and A.N. Allott, "E Pluribus Unum: Towards a New, Truly Zimbabwean Legal System", Commonwealth Judicial Journal, Vol.10 (1994), pp.10-13.

[13]E. Cotran's article, "The Changing Nature of African Marriage" in J.N.D. Anderson (ed.), Family Law in Asia and Africa, London 1968, pp. 15-33, illustrates the position of this group of scholars.

evaluation, criticism and analysis of recent legislation and existing official customary law with testing the conclusions of earlier writers. By applying the sociological model of law to the legal system of Ghana, we hope to throw new light on the recent legal developments and advance their analysis.[14] This theoretical model involves textual analysis as well as examination of the possible and actual effects of the new laws on society.

As a genre, the sociological school of jurisprudence is marked by its sharp contrast with the approach of analytical positivism.[15] While the latter school

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[14]The literature on the sociology of law is vast and varied and it is not necessary for the present thesis to provide a detailed overview. For an up-to-date survey of the field see R. Cotterrell, The Sociology of Law: An Introduction, (2nd ed.), London 1992.

[15] As in the case of the sociological school (see note 14 above) it is not relevant here to provide a detailed survey of analytical positivism. See generally J. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, Vols. I&II, London 1911. See also, W.L. Morison, John Austin, London 1982; W. Friedmann, Legal Theory, London 1959, esp. pp. 253-311, and J. Finch, Introduction to Legal Theory, London 1979.

emphasises the obedience of subjects to the law maker, the sociological school emphasises the relationship of law to the respective society and encourages empirical social enquiry. More specifically, the theoretical framework of the present thesis is derived from the notion of "limits of law" as developed by Allott in an important study which attempts, within a sociological framework, to explain limitations on the effectiveness of legal norms.[16]

Concern for possible limits to the effectiveness of law as an instrument for social change becomes a major issue for a thesis such as the present one, which sets out to assess the impact of legislative reform upon a particular community. It enables us not only to evaluate changes in customary law with greater insight, but also allows a critical assessment of the effects of over-ambitious legislation.

To show the weaknesses in theories of law that seem to advocate the untrammelled use of legislation in the law reform process and to put Allott's ideas with regard to the limits of law in perspective, it is useful to preface a more detailed examination of the limits of law with a brief account of jurisprudence relating to the role of legislation as a source of law. Such an approach has the advantage of putting the problem of law reform in developing countries into a wider context.

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[16]A.N. Allott, The Limits of Law, London 1980. G.R. Woodman's perceptive review of Allott's The Limits of Law in "The Limits of "The Limits of Law", Journal of Legal Pluralism and Unofficial Law, (No. 21), (1983), pp. 129-146 has sought to show the major weaknesses in Allott's approach. Allott's response to the main issues raised by Woodman is set out in A.N. Allott, "The Limits of Law: A Reply", Journal of Legal Pluralism and Unofficial Law, (No. 21), (1983), pp. 147-153.

Under the positive law doctrine, it is an axiom that the sovereign, usually now represented by an elected assembly, is regarded as the dominant political authority and the source and repository of all legal powers in a nation state.[17] The issuing by the sovereign of commands backed by threats addressed to subjects constitutes the kernel of the positive law doctrine.[18] From this view, a legal system comprises a series of coercive orders, non-comformity with which attracts sanctions for the erring subject. The concept of legal rules as formulated by Austin in the Province of Jurisprudence Determined comprises orders issued by the sovereign and backed by threats to ensure obedience to the sovereign's will by his subjects.[19] However, this has been seen as an over-simplistic situation, comparable to the holding of a pistol to a bank clerk's head by a gunman.[20] Moreover, classical positivism, based on the issuing of commands by a defined sovereign, does not provide a useful framework for analysis of customary systems of law, and of societies without a defined sovereign or commander, where legal rules seem more often to spring from the regular behaviour of people.

Analytical positivism envisages a situation where the majority of a social group habitually obey the orders of the sovereign person or persons, who themselves habitually obey no one.[21] This has been criticised as focusing too

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[17]See e.g. Hart 1994, pp. 50-78.
[18]Ibid. pp. 18-25.
[19]Austin 1911, pp. 1-103.
[20]Hart 1994, p. 19. See also, R. Dworkin, Law's Empire, London 1986, pp. 1-44, esp. at pp. 34-35.
[21]Hart 1994, p. 100.

closely on the relationship between sovereign and subject and ignoring the relationship between law and society.[22]

Hart, whose work represents modern legal positivism,[23] has progressed from analytical positivism in the strict sense already defined, and goes beyond Austin's simple model of law as commands and orders by a sovereign to the subjects. [24] Enquiring into the relationship between duty-imposing rules, power-conferring rules, rules of recognition, acceptance of rules, internal and external points of view and legal validity,[25] Hart criticises the simple model of law constructed by Austin and other jurists, identifies shortcomings in the positivist theory of law and adds new perspectives to his gunman case to explore the nature of law.[26] But, as we shall see below, Hart did not go far enough in his analysis, and his work has become a major stimulus for Allott's work on the limits of law.

For our present purposes, the most relevant of the approaches within the sociological school of law appear to be the notion of "living law" propounded by Ehrlich[27] and the concept of "limits of law" discussed more recently by Allott.

In a sharp departure from positive law doctrine, Ehrlich asserted that

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[22]See ibid. pp. 79-80. See also Dworkin 1986, p. 34.
[23]Hart 1994, p. 244.
[24]For details see ibid. pp. 18-25.
[25]See ibid. pp. 50-78.
[26]For details see ibid. pp. 18-78.
[27]See above note 2.

order in human society is grounded in the acceptance of certain rules for living, not sheer compulsion by the state.[28] Ehrlich saw society and its actual practices as the critical arena in which legal rules are shaped, adapted or frustrated. Social order, Ehrlich maintained, is based upon the fact that legal duties are being performed in an actual living socio-cultural context, not simply that failure to perform them gives rise to a sanction or cause of action. In other words, Ehrlich appears to reject legal centralism, based on the notion that all legal powers emanate from a central authority, and to adumbrate what has today developed into the concept of legal pluralism.[29]

In Fundamental Principles of the Sociology of Law, Ehrlich set out his methods of studying the "living law" and rejected the idea, predominant among jurists of his day, that every judicial decision must be derived by purely logical process from established legal premises: the provisions of a code, or of statutes or of juristic or judge-made law. He showed that instead, the phenomena of legal life arise in society and exert strong influence on state law.[30] Law, the sociological school emphasises, is far wider in scope than the norms created and applied by state institutions. Not surprisingly, scholars of the sociological school are much concerned with limits imposed on the effectiveness of law by factors located in society itself.

Ehrlich drew a sharp distinction between norms of conduct which govern

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[28]Ehrlich 1936, pp. 20, 21, 22, 81, 388 and 401. See also E.M. Schur, Law and Society, New York 1968, p. 37.

[29]On legal pluralism see e.g. M.B. Hooker, Legal Pluralism, Oxford 1975; and more elaborately J. Griffiths, "What is Legal Pluralism", Journal of Legal Pluralism and Unofficial Law, Vol. 24 (1986), pp. 1-56.

[30]See also R.W.M. Dias, Jurisprudence, London 1976, pp. 588-590.

life in society and norms of decision which correspond to officially declared law.[31] He showed that there is frequently a considerable divergence between the two types of norm. For instance, a commercial usage may develop, but it is only after the lapse of a considerable period of time that it will be acknowledged by the courts and imported into contracts or even become embodied in a statute.[32] In the meantime, modifications of the usage may have developed in society which the courts might again take time to incorporate into official law.[33] Thus, there is a continual gap between the actual rules in society and the law contained in formal legal material. Moreover, only a small fraction of social life comes before the courts, and even then it usually represents some form of breakdown of social life.[34]

Ehrlich maintained that social facts including usage, domination, possession and declaration of will underlie all laws. Official laws simply seek to give effect to the relationships these facts create by controlling or validating them or by attaching consequences to them.[35] The proper task of formal law-makers, in Ehrlich's view, is therefore to keep as nearly abreast of the living law as possible.

Adopting Ehrlich's model for our analysis, we have to look for the factors that shape Ghanaian legal phenomena in the larger social world. We need to look particularly at the actual daily transactions of ordinary people, and at the

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[31]See in detail Ehrlich 1936, pp. 61, 122, 123, 137, 154 and 198.
[32]Ibid.pp. 84-85 and 486-488.
[33]Id.
[34]On this see Dias 1976, pp. 588-589.
[35]Ibid. p. 589.

manner in which chiefs and heads of families discharge their duties and office-holders carry out their obligations, rather than only studying legal documents, the official customary law, doctrines or even courtrooms. In other words, fieldwork becomes an essential tool of legal analysis. If we follow Ehrlich, the "living law" that is discovered through such a method would be a better reflection of current social fact than the sizeable body of customary law contained in the published reports of the higher courts of Ghana and described by numerous textwriters as well as followed by legislation on customary law.[36] More central to the focus of the present study, it appears that an analysis of the 1985/86 legislation in Ghana would be incomplete without attempts to uncover and understand how the new laws work in practice.

Within the sociological school of jurisprudence, Ehrlich's more theoretical approach can be distinguished from the institutionalist model which advocates the use of legislation in changing the behaviour of norm-addressees in Third World countries.[37] Derived essentially from a broad study of various anglophone sub-Saharan African countries, the institutionalist theory is based on the premise that society constitutes an extensive and interconnected system. It seeks to discover the connection between law and social behaviour, and calls for legal

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[36]For the purposes of this thesis we use the term "active customary law" interchangeably, but not necessarily with the same meaning, with Ehrlich's "living law" to describe rules of customary law that have evolved in urban society and elsewhere in contradistinction to statutory and court-declared rules of customary law.

[37]For a comprehensive exposition and analysis of this model, see R.B. Seidman, "Law and Poverty", in Marasinghe and Conklin 1984, pp. 229-252. See also Seidman 1978, esp. pp. 15-23 for an elaboration of the view that the state must induce social change by the formulation of new rules.

solutions to economic and social problems. According to the institutionalist model, institutions, behaviour and law are the main tools of legal social engineering.[38] The concept of institutions emphasises the repetitive patterns of behaviour of groups and persons similarly situated in society and thus leads almost inevitably to a consideration of custom.[39] Choice, determined by punishments, rewards, resources, constraints and many imponderables is the institutionalist model's central assumption.[40] The model regards any regular behaviour by individuals and social groups occupying different positions in the social structure as an institution.[41] According to those who advocate the adoption of the institutionalist model, once rulers know how to use law to change repetitive behaviour, they might achieve their policy goals more easily.[42]

However, the issues raised by Seidman and the arguments put forward in their support are far from clear; they become murkier when we enquire closely into the validity of the conclusions drawn from them as well as the evidential basis of the main postulates of the institutionalist theory of law. Although various

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[38]Seidman 1984, p. 231.

[39]By focusing on behaviour rather than rules of law, the institutionalist model is particularly suitable for effecting changes in the customary law. In his work, Law As Fact, London 1971, pp. 105-106 K. Olivecrona defines custom in the following terms: "A custom as such is a certain manner of operating, regularly observed within a community...When a man wants to marry he proceeds in a certain way to obtain the consent of the relations of the prospective bride...Thus the life of the community follows a regular pattern. The same ways of acting are invariably observed by all...A custom becomes a rule of behaviour that one is considered bound to follow; and one feels entitled to claim that others follow it too." Customary law may therefore be defined as conduct which has become institutionalised within the society.

[40]See in detail Seidman 1984, pp. 246-251.

[41]Ibid. p. 231-245.

[42]Ibid. 231.

postulates and statements are put forward in support of the institutionalist model, hardly any evidence is employed by Seidman to show their feasibility in terms of social engineering through law. Allott has noted unanswered vital questions as to why for instance programmatic law reforms tend to fail.[43] One may perhaps avoid such awkward questions altogether by insisting with Seidman that the institutionalist model of law is only an agenda for law reform,[44] the specific details of which have to be carefully worked out under each reform programme.

Some answers to the problems posed by the inadequacies of Seidman's model for law reform in a developing society can perhaps be sought in Allott's concept of the limits of law. In The Limits of Law, Allott considers the theoretical nature of law, investigating whether there is anything in the nature of law and in society which limits the effectiveness of law, providing a well-supported argument for the view that rules of law can achieve greater efficacy if in the process of their formulation sufficient attention is paid to the notion of compliance by norm-addressees. In pursuit of this, one of the perennial issues of legal scholasticism and of the sociological school of law in particular, namely the idea that there are constraining factors on law which are located in society at large, is developed by Allott into a comprehensive theory of law embracing the legal systems of both developed and developing countries.

Allott's study of the limits of law draws its evidence from both developed and developing societies, including a number of traditional African societies.

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[43]See e.g. Allott 1980, pp. 174-236, esp. pp. 182-196.
[44]Seidman 1984, p. 245.

Thus it provides an analysis of legal phenomena which is equally applicable to developed societies with codified laws and customary societies with largely unwritten laws, evolving a common language for description of legal concepts in both systems of law. It should therefore constitute a reliable basis on which to premise a systematic enquiry into the changing customary law of urban society in Ghana. Allott's conceptualisation of law as a communication system further facilitates our understanding of the nexus between law-maker and norm-addressees or recipients of norms.[45] By concentrating on limitations or obstacles to the impact of law on norm-addressees, rather than the critical evaluation of the provisions of statutes for reform, we are able to gain fresh insights into the nature of law and the limits that may in practice militate against the direct use of law as an instrument of social engineering.

Though he attempts deliberately to steer clear of anchoring his thesis in a specific school of law, it is obvious that Allott's method is partly sociological,[46] especially as he draws frequently on the writing of Hart and even appears to compare his approach to Ehrlich's.[47] Much evidence is also derived from the customary law of traditional African societies in support of his principal thesis.[48]

Allott uses three different forms of typography to distinguish between what he perceives to be the three main notions of law:[49]

"LAW = the general idea or concept of legal institutions

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[45]Allott 1980, p. viii.
[46]See ibid. p. xiii.
[47]See ibid. pp. 291-294 esp. at 292.
[48]Ibid. esp. pp. 49-67.
[49]For details see ibid. pp. 1-9 and 302-310.

abstracted from any particular occurrence of them
Law = a coherent, total, particular legal system prevailing in a given community or country
law = a particular normative provision of a Law; a rule or norm of a given legal system."[50]

Contending that previous enquiries into the nature of law have concentrated on LAW to the exclusion of the other elements of his typography, Allott seeks to provide an analysis of legal systems that focuses on compliance with the purposes of norms by norm-addresses. Allott confines himself largely to "Law" in the sense of a particular legal system prevailing in a given community or country and consisting of norms, processes and institutions. In this sense, "Law" is seen first as a system of communication, the functioning of which requires, among other things, an emitter, a recipient, a code and a message.[51] But even more critically for Allott's thesis, the view is put forward that there may be obstacles to communication of legal norms which in turn lead to questions of potentiality, variability, and adaptation of the individual communications or norms.[52]

Central to Allott's analysis of the limits of law is the view that, if we see law as a communication system, the purpose of the emitters of norms is to persuade or to induce specific forms of behaviour in norm-addressees. The effectiveness of individual norms can therefore be measured against the level of compliance that is secured in norm-addressees. In the present thesis, Allott's model of Law as a communication system is used to assess particularly the impact of the

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[50]Ibid. p. 2.
[51]Ibid. pp. 9-16.
[52]For details see ibid. p. 15.

1985/86 reforms of customary law in Ghana.

Apart from the elaboration of basic concepts of law, The Limits of Law provides a detailed and sustained discussion of the various factors that impose limits on the effectiveness of law and the employment of relevant evidence to show the effectiveness or ineffectiveness of law in specific instances. From the extensive enquiry into the limits of law undertaken in Allott's work the conclusion is drawn, inter alia, that laws are often ineffective and doomed at birth by a variety of factors, including under-provision for the necessary requirements for an effective law as well as the unacceptability of a law.[53] Also, since laws may be rendered ineffective by changes in attitude and behaviour, changes in the effectiveness of law must be met with appropriate remedial steps.[54] Allott prefers model laws which are more cautious, less assertive and which people may adopt or accept if they choose.[55] From this conclusion he argues for a consensus approach to law-making as the best way to construct effective laws, also because it is wrong to impose laws, often reflecting only the opinion of an élite, on people against their will.[56]

Both Allott and Woodman have debated possible weaknesses in the theoretical basis of The Limits of Law.[57] Woodman, whose critique of Limits of Law seems to relate principally to the purposes of law and legal facilities, appears to object on three grounds to Allott's notion of the purpose or purposes

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[53]Ibid. p. 287.
[54]Id.
[55]Id.
[56]Ibid. p. 288.
[57]For details see Woodman 1983 and Allott 1983.

of law: first, no law is made with a single, easily perceived purpose. Instead, typically, law evolves from a complex interplay of various factors in society.[58] Secondly, Woodman argues that Allott wrongly assumes that there is a single moment when a law is made, whereas in fact the later process of judicial interpretation by judges and other officials can produce radically different perceptions of the law from those intended by the legislator.[59]

Thirdly, the notion of the purpose of a law tends to over-emphasise compliance and thus diminishes or prevents an accurate perception of the law's total effects of which compliance is only one aspect.[60]

Woodman therefore argues that one of the weaknesses of Allott's exposition of the law-making process is the failure to realise that empirical studies of the law-making process should be continued beyond the moment of first promulgation of a law. This, Woodman considers, stems from Allott's approach to law-making as a mechanistic process with a single discoverable purpose. Woodman urges the contrary view that no law is made with a single perceived purpose; instead, he contends that the formal process of law-making

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[58]See Woodman 1983, pp. 133-136.

[59]Ibid. 134-135. However, Allott (1980) himself suggested, at pp. 28-29, that a legal system may have a variety of purposes, some of which, he states, might be discerned by external observers. Allott also maintains (ibid. p. 28) that the problems of ascertaining the purpose or purposes of law may be particularly acute in societies without a defined legislator. On Woodman's claim that Allott disregards the process of judicial interpretation by judges which often produces different perceptions of the law from those intended by the legislator, see Allott 1980, pp. 33-34 pointing to the role of judges in matching the facts of a case or dispute under their consideration with the hypothetical-conditional case instanced in the norm, and thereby stretching and distorting the hypothetical to make it fit the actual. See also chapter 4, ibid. esp. pp. 100-109, discussing other mechanisms by which the law as applied develops and varies from time to time away from its original form and purpose.

[60]Woodman 1983, pp. 135-136.

is accompanied simultaneously and followed immediately by different interpretations by officials and norm-addressees.[61]

Woodman's immediate concern was probably not with the phenomenon of changes in practised customary law, occurring as it frequently does in spite of the intention of law makers. He states that by focusing on the distinction between the originator and the emitter of law, a complex bundle of purposes is revealed behind the law making process.[62] He goes on to observe that judicial and other interpretations of law can produce perceptions of the law radically different from those intended by law makers as "laws never are, but always are being made" and we falsify if we try to freeze on one frame.[63]

Regarding Allott's ordering of the elements of a legal system, Woodman puts forward the following counter-arguments.[64] First, it would be more helpful to approach the conceptual analysis of legal systems as composed entirely of norms, of which the imperative hypothetical-conditional is only one, the other forms requiring individual examination. Hence Allott's analysis, based as it is on the analysis of norms as hypothetical-conditional, is too remote from usual views of legal systems to provide a useful analysis of law.[65] Secondly, Allott's ordering

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[61]Ibid. p. 134. Allott seems to have been aware of this. See Allott 1980, pp. 159-160: "The play of social forces is endlessly moulding the existing principles of the Law and leading to the formation of new ones. One of the best and still current examples of this process at work is the gradual emergence of the institution of the "house-mate" or common-law wife in English Law. Conflicts arise during the process of emergence of such an institution, because of the tension between the formal letter of the existing law and the aspirant law which is seeking to emerge."

[62]Woodman 1983 p. 132.

[63]Ibid. pp. 134-135.

[64]For details see ibid. pp. 138-139.

[65]Ibid. p. 137. Cf. Allott 1980, p. 7 describing legal systems as consisting of "norms, institutions and processes." See further pp. 20-26 where legal systems and legal statements which do not appear to be in the hypothetical-conditional form are considered.

of the elements of the legal system hinders enquiry into the nature of law. Even if it is accepted that selected bundles of hypothetical-conditional norms can have a purpose or purposes, there would still be difficulty in accepting that facilities had purposes.[66]

It is, for example, difficult to determine what is meant by compliance with the central norms which provide the facility for marriage if their use is optional. It would be even more difficult to explain the purposes of the facilities for divorce. Finally, this ordering of the legal system leads to an underuse of the illustrative value of facilities.[67] Noting that Allott failed to test his conclusions against actual facilitative laws, Woodman argues that there is a difference between the use of facilities which requires only a knowledge of their existence, and not of the detailed norms governing them, and hypothetical-conditional norms which are addressed to the public and which will not achieve their objects if members of the public do not know of them. Woodman concludes that by giving less attention to legal facilities than was warranted by their significance, Allott's discussion tends towards an Austinian view of law but without a sovereign, making it easier to assume that effectiveness is compliance and that the notion of social engineering provides a basis for assessing the success of a law.

That Woodman's criticisms prompt doubts about some aspects of Allott's

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[66]Woodman 1983, p. 138.

[67]Ibid. p. 139. But see Allott 1980, pp. 12, 19-22, 26-27, 31-32, 47-48, 222-224, 259-286 and 304-305 where the role of facilities is used to establish some of the major points analysed by Allott. For instance, the English housemate relationship analysed at pp. 259-286 and 304-305 may now be legally relevant in determining rights and duties of partners by invocation of the laws of constructive trust and licence. If a partner to such a relationship successfully invokes any of the above laws he or she would have complied with the appropriate norms which, in turn, would involve a recognition of the status conferred by the housemate relationship.

thesis is reflected in the fact that Allott himself seems to consider that some of the criticisms, particularly those relating to the purpose of law, throw a revealing light on the subject of his enquiry.[68] Woodman's critique enables us, from various new standpoints, to see afresh the weaknesses and strengths of some aspects of Allott's analysis. Allott seems to think, retrospectively, that it would probably be more accurate to isolate a hierarchy of purposes in a norm rather than insist that a law has a single, discoverable purpose.[69]

In spite of these criticisms, the ideas examined in The Limits of Law are not decisively weakened. I submit that they provide a useful basis for the enquiries carried out in the present thesis, for the following reasons. First, Allott's work utilises ideas developed and subjected to extensive criticism within the traditions of European and American jurisprudence and applies them, in appropriate cases, to the assessment of the effects of legislative intervention in developing countries. Second, The Limits of Law contains a sustained analysis of the impact of legislative intervention in a number of traditional African systems which might usefully provide some insight into the effects of new legal rules in urban Ghanaian society.

As Allott's most notable theoretical work, The Limits of Law appears also to provide an analysis and some answers in a long-standing debate regarding the best approach to changing customary law in Africa. Such concerns led, in part, to the establishment of the Restatement of African Law Project in 1959.

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[68]Allott 1983, p. 149.
[69]For details see ibid. pp. 148-150.

This project attempted, among other things, to examine ways of bringing about changes in African customary law as well as investigate how legislation might be used to modify African law and render it more certain.[70] The issues raised by the Restatement of African Law Project, and debated at a number of conferences on African law in the early 1960s, clearly inform the approach adopted in The Limits of Law, which gave fresh impetus to the debate surrounding African law by noting that law everywhere has limits of effectiveness and calling for a more critical study of law to focus on the usefulness or uselessness of law-making by the state.

Allott pointed inter alia to the ease of producing statutes through such mechanical means as the type-writer, the printing press and the Xerox machine, as well as the inadequate investigation of particular legal problems prior to the enactment of legislation.[71] He saw this as a major reason why laws may in some circumstances not fit the social context in which they operate.[72] He argued that the problem lies less in the statute-law itself than in its inability to affect the behaviour of norm-addressees. He identified as a gap in the study of law the lack of investigation into the limits of law. In a later work, Allott has argued that African customary law can be reformed by studying it more carefully and closely,

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[70]On the debates which surrounded the establishment of the Restatement of African Law Project and the various solutions canvassed, see in particular A.N. Allott (ed.), The Future of Law in Africa, London 1960; and The Proceedings of the African Conference on Local Courts and Customary Law, Dar es Salaam 1963, referred to hereinafter as The Proceedings of the Dar es Salaam Conference. See further, A.N. Allott "What is to be Done with African Customary Law", Journal of African Law, Vol. 28 (1984), pp. 56-71 at pp. 67-68; and Moore 1978, pp. 249-250.

[71]Allott 1980, p. vii.

[72]Ibid. pp. v-vi.

extracting from it what is of benefit and dovetailing this with the imperatives of the steadily more complex societies of modern Africa.[73]

As the assessment of the impact of legislation on Ghanaian customary law is one of the principal purposes of this thesis, we need to remind ourselves that law-making by legislation is not unknown in traditional African societies.[74] Issues in regard to the role of central government legislation in changing customary law were among the most frequently debated topics at the London and Dar es Salaam Conferences. At the London Conference, it was argued that legislation could be used to modify the customary law and render it more certain.[75] Legislation taking the form of statute or orders made under a statute, or bye-laws, was also considered at the Dar es Salaam Conference as one possible way of reducing customary law into writing.[76] However, it was recognised from the start that the effects of legislation may be stultified where the people themselves persist in doing what they are supposed by the legislation to have ceased doing.[77] It was therefore considered essential that legislative changes should not run too far ahead of public opinion.[78] These concerns have also influenced the cautious approach to legislative intervention in customary law adopted in this thesis.

In Ghana, as we have noted (see above pp. 36-37), judicial reform has

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[73]Allott 1984, pp. 56-71, esp. at p. 70.

[74]See e.g. A.N. Allott, "The People as Law-Makers: Custom, Practice, and Public Opinion as Sources of Law in Africa and England", Journal of African Law, Vol. 21 (1977), pp. 1-23, esp. pp. 6-9.

[75]See in particular Allott 1960, p. 33.

[76]Proceedings of the Dar es Salaam Conference 1963, p. 34.

[77]Allott, 1960, p. 33.

[78]Id.

been the normal mode of encroachment on customary law. It is only recently, particularly since the mid-1980s, that legislative intervention has been used more boldly to make changes in the customary law. But its antecedents stretch back a long way: the abortive Crown Lands Bill of 1894 and the Marriage Ordinance (Cap. 127, 1884) were the first enactments. They arrived in the face of considerable opposition, as a result of which the 1894 Bill was dropped[79] and the Marriage Ordinance as originally enacted was amended to give the extended family a share in the deceased's estate.[80] In each case no clear penalties and rewards appear to be intended or actually used to transmit the new rules of law into society.[81]

It would, thus, seem that there are major problems in the transmission of statute law into society, and its voluntary adoption in the arrangement of private interests. Though new rules do not necessarily cut across the grain of traditional behaviour, the remoteness of the state and non-identification with it by ordinary

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[79]The introduction of the Crown Lands Bill drew widespread protests across the colony. See D. Kimble, A Political History of Ghana, Oxford 1963, p. 330 where he notes: "The creation of the Aborigines' Rights Protection Society (ARPS) in 1897 was perhaps the first organized protest on anything approaching a national scale in the Gold Coast."

[80]As in the case of the Crown Lands Bill the introduction of the 1884 Marriage Ordinance met with vehement opposition by the chiefs and peoples of the Gold Coast. See N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana, London 1966, p. 243. The Ordinance had originally provided that upon the death intestate of a man married under its provisions, his family had no interest in his estate which vested as to 1/3 in his widow by the marriage and as to 2/3 in his children of the marriage, in equal terms absolutely. As a result of widespread protests, section 48 which vested 1/3 of the estate of an intestate in his extended family was introduced.

[81]Section 48 of the Marriage Ordinance may be construed as an incentive to parties who married under the provisions of the Ordinance. But doubts exist as to whether in the Gold Coast's peculiar social circumstances in the late nineteenth and early twentieth century, when most people saw the consanguine family as the focus of their lives, it did not really work as a disincentive to prospective spouses. The effects of section 48 of the Marriage Ordinance of 1884 are considered in more detail in chapter 4 below.

people tend to work as an effective counterweight against their effectiveness. Moreover, as Allott observed, in traditional society "linkages and gearing between social authorities and those subject to them are much tighter and more numerous than in modern societies."[82]

The problems of law identified in the foregoing theoretical and conceptual framework of the present thesis seem to apply worldwide, and the various models developed for their study will therefore be of relevance to both Africa and Ghana. In view of the limits of law identified by Allott we expect significant problems in the transmission of legislation into Ghanaian society, to be discussed in the chapters that follow. In what remains of this chapter, we briefly survey the works of the major writers on Ghanaian customary law and outline the scope of the present thesis.

1. 3 *Literature review*

Since legislative intervention in the customary law of Ghana had until 1985/86 been generally minimal, the literature on the role of legislation in Ghanaian customary law has on the whole been limited in scope. In examining the role of legislation in Ghanaian law, both Asante and Bentsi-Enchill confined themselves almost exclusively to statutes relating to government intervention in Ghanaian land law.[83] Though Kludze's comments on the 1985/86 law reforms are wider in

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[82]Allott 1980, p. 69.

[83]See S.K.B. Asante, Property Law and Social Goals in Ghana, Accra 1975, pp. 163-169 and Bentsi-Enchill 1964, pp. 285-332.

scope, they do not investigate the actual impact of individual statutes on norm addressees.[84]

The present study relies heavily on the writings of J. M. Sarbah,[85] J.B. Danquah[86] and N.A. Ollennu,[87] whose works and opinions have been a major factor in the evolution of the official customary law of Ghana.

In ascertaining the present nature of the customary law, the existing literature on Ghanaian law has been our starting point. The present study draws largely on the works of Ollennu and Sarbah who summarise the main points that emerge from earlier writing and from the works of their own contemporaries.

J.M. Sarbah's Fanti Customary Law was the first major work on the indigenous law of Ghana. As an English-trained lawyer and eminent legal

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[84]For details see A.K.P. Kludze, Modern Law of Succession in Ghana, Dordrecht 1988, esp. pp. 161-203.

[85] See particularly the exposition of the indigenous law in J.M. Sarbah, Fanti Customary Laws, London 1968, first published in 1897. References here to pagination in Fanti Customary Laws are to the 1968 edition. Although in its day a considerable undertaking and one that strongly influenced the development of official customary law in Ghana, Fanti Customary Laws is essentially a description of rules of customary law practised by the Fanti in the nineteenth century, and therefore probably of minimal validity as a record of current customary law in Ghana. Sarbah's other major work, Fanti National Constitution, London 1968, (first published in 1906) depicts the nationalist feeling and abhorrence of British imperial rule in the Gold Coast that inspired his exposition of the indigenous law. His main concern was to establish that the natives had their own elaborate system of law and were quite capable of governing themselves. Sarbah's feelings reflected the work of his coeval, J.E. Casely-Hayford, whose Gold Coast Native Institutions, London 1970, first published in 1903, was equally strenuous in advocating the adoption of traditional institutions as a paradigm of African government. Cf. the statement of J.B. Danquah in L.H. Ofosu-Appiah, The Life and Times of Dr J.B. Danquah, Accra 1974, at p. 148 that his work on Akan law and customs "analysed the organisation of a Native State and gave a pointer to the direction of future development" in Ghana. A good account of Sarbah's life and works can be found in S.A. Crabbe, John Mensah Sarbah 1864-1910, Accra 1971 and M.J. Sampson, Gold Coast Men of Affairs, London 1969, pp. 212-224. See further I. Sinitsina, "African Legal Tradition", Journal of African Law, Vol. 31 (1987), pp. 44-57 where the author discusses the works of Sarbah, Danquah and Ollennu and their exposition of Ghanaian customary law.

[86]See J. B. Danquah, Akan Laws and Customs, London 1928a; and by the same author, Cases in Akan Law, London 1928b.

[87]See Ollennu 1966 and N.A. Ollennu, Customary Land Law in Ghana, London 1962. The most recent authoritative work in this area is N.A. Ollennu and G.R. Woodman, Ollennu's Principles of Customary Land Law in Ghana, Birmingham 1985.

practitioner at the Gold Coast Bar, Sarbah's main concern was to develop a systematic body of law to aid the resolution of native disputes by European judges and to establish that the native had his own comprehensive system of laws by which he organised his affairs. Widely used by European judges on the Gold Coast, Sarbah's magnum opus significantly shaped the early development of indigenous law. But it was not based on any form of fieldwork. What Sarbah described as the rules of native law appeared to have been based largely on notes he took from the records of the Court at Cape Coast Castle[88] and on his own knowledge and observations of local traditions and practices. Even though he stated that he tested the accuracy of his material by comparison with "information gathered from all classes and conditions of men from all parts of the Gold Coast",[89] Sarbah gives no account of the exact methodological approach he employed in eliciting such information. He appears to have generalised excessively from largely Fanti material to other Akan and non-Akan groups, claiming for instance that Fanti laws and customs apply to all Akans and Fantis, and to all persons whose mothers are of Akan or Fanti race.[90] Nevertheless, Fanti Customary Law is widely regarded as a preliminary survey of the

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[88]See Sarbah 1968, in the preface, where he notes (p. x) that the expert evidence of the chiefs on points of customary law was carelessly and sometimes inefficiently translated to the Court and that no attempt had been made to test its accuracy by comparison with similar cases in other districts. It is also worth noting that the form in which decided cases of Fanti customary law, on which Sarbah based his writing, are reported in Fanti Customary Laws (pp. 117-270), suggests that they were scantily argued before European judges in Cape Coast Castle. Moreover, if the territorial limits of the court's jurisdiction and the names of the parties are taken as reliable guides, almost all the cases reported by Sarbah involved Fanti parties from Cape Coast and towns immediately surrounding it. As a result, Sarbah's findings are of little necessary validity for non-Fanti peoples.

[89]Id.

[90]Ibid. p.15.

indigenous law. The arrangement of his material according to systematic classification and division based on court decisions has been followed by many scholars of Ghanaian customary law. Sarbah's immediate concern was with Fanti (and Akan) society and law, which he portrayed as based on a hierarchical system of authority.[91] Authority in traditional society, as he saw it, resided in the stool and was generally administered in the larger society through heads of families. Given this emphasis on traditional authority, his method was to present all practices and customs within Fanti society as having the force of law if they accorded with the opinions of chiefs and heads of families. This approach logically excluded from his findings the actual practices of many common people which, unlike the more rigid opinions of chiefs and heads of families, were liable to change in matters of detail from situation to situation and over time. Indeed, Sarbah himself seemed to have been aware of this danger when he noted:

> "I am quite alive to the danger of reducing Customary Law to a condition of fixity in a semi-developed state of society, the effect of which may hinder the gradually operating innate generation of law by a process of natural development, independent of accident and individual will, which best accords with the varying needs and spirit of a people so

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[91] Ibid. pp. 2-3. Cf. Danquah 1928a, p. 1 where he appears to note the possibility of inaccuracy in the application of the term "Akan" to all the component elements of the "Twi-Ashanti-Fanti" cluster of tribes and tribelets. It is arguable that Sarbah's work, in so far as it seeks to designate all the inhabitants of the old Gold Coast Protectorate (including such non-Akan peoples as the Adangme, the Effutu of Winneba, the Awutu and other Guang tribes) except Accra and its districts as Akan Fanti, constitutes the invention of tradition. See T. Ranger, "The Invention of Tradition in Colonial Africa", in E. Hobsbawn and T. Ranger, The Invention of Tradition, Cambridge 1992, pp. 211-262 at 253; and J.B. Danquah, The Akan Doctrine of God, London 1944, p. 198 which embroiders on the geographical extent of the present-day Akan by including populations in "some parts of French West Africa, up to the old kingdom of Ghana (near present Timbuktu)" in modern Mali among them. See further R. Rathbone, Murder and Politics in Colonial Ghana, New Haven and London 1993, pp. 33-34 on the invention of (Akan) tradition by Nana Sir Ofori Atta 1, chief of Akim and one of the colonial government's most important sources of customary law.

circumstanced as the inhabitants of the Gold Coast."[92]

In fact, Fanti Customary Laws not only had the effect of reducing official customary law to a state of fixity but also resulted in the application by the courts to the inhabitants of the Gold Coast of uniform principles of official customary law. Inevitably, thus, the customary law recorded by Sarbah in the nineteenth century appears to diverge in many respects from current customary law practised in the communities of Southern Ghana.

The methodological issues raised by the reliance of early scholars on official sources were encapsulated in the approach of Casely-Hayford. Like Sarbah, much of Casely-Hayford's work was an exposition of traditional African government and constitutionalism. In a prefatory note to Gold Coast Native Institutions he stated:

> "Now the sources of information in regard to the Gold Coast are so meagre and, in parts, so unreliable, that the intelligent reader may justifiably enquire how I have come by the facts recorded in this book."[93]

The learned author claims to have found the evidence on which he based his work in "tomes of official reports and Government Blue Books".[94] Aside from extracts from official records, Casely-Hayford and his contemporaries do not appear to have made much use of any other tools of data collection.

J.B. Danquah continued the tradition of presenting customary law from

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[92]Ibid. p. x.

[93]Casely-Hayford 1970, p. xi.

[94]Ibid. p. xii.

the official standpoint of the practices of specific ethnic groups. Although of less importance than Sarbah's Fanti Customary Laws, Danquah's Akan Laws and Customs[95] expanded the ideas about Fanti customary law expressed by Sarbah and applied them to the Akim. Danquah wrote at length about the administration of law by native authorities at the Akim capital of Kibi, where he worked for a long time as secretary to the chief and registrar at the Akim Abuakwa state tribunal, meticulously compiling a list of cases tried by the tribunal.

Instead of being coherent, the picture that Danquah presents sometimes becomes fragmented. This is to a large extent due to the devotion of the greater part of his labours to stating and analysing the constitution of Akim Abuakwa, the intermingling of the customary law with the constitutional law, and his attempt to extrapolate his findings about the Akim into a general Akan customary law. He devoted rather less effort to the exposition of property and family laws, providing much sociological information but also repeated much that had already been stated by Sarbah. In spite of its frequent excursuses into aspects of traditional constitutional law, Danquah's work had some corroboratory value in confirming a number of the principles which had come to be generally applied to native communities. Concerning the difference between his work and that of others, Danquah said:

> "Both Mr. Sarbah and Mr. Casely-Hayford wrote as members of an Akan tribe, but, while Mr. Sarbah's book teems with learned legal discussion and Mr. Casely-Hayford's with well-argued and eloquently presented

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[95]Danquah 1928a.

> political theories, the present writer, also an Akan, would consider his labours amply done if this book be accepted as a plain and simple presentation of Akan customs by one from within. With one or two exceptions, the principal chapters of this book were all complete in manuscript two years before the author had a chance of reading any scientific book on sociology or anthropology, and the statements in the book may safely be accepted as uninfluenced by preconceived ideas or theories of what Akan customs probably are or ought to be. The book is written by an Akan from the purely African standpoint."[96]

Such early works, clearly aimed at setting out an official system of Akan customary law, were sometimes more ethnographical than legal treatises. N.A. Ollennu has been the major continuator of the works of these earlier writers by relying mainly on the tribal structure, particularly chiefship, as the very plinth on which the analytical positivist model of customary law rests. In the works of Ollennu, we finally see the first attempts to re-cast and formulate the principles that underly the decisions of the courts of Ghana into a single body of law for the majority of Ghanaians irrespective of ethnic origin.

Ollennu's work marked a significant departure from the paths blazed by earlier writers. A Professor Emeritus of law at the University of Ghana and a leading judge, he relied on a mass of court judgments, information gathered from traditional elders[97] and the opinions of Sarbah, Danquah, and Casely-Hayford to produce a comprehensive set of principles of customary law. The topics he presents in his works are pursued through ordered search of court cases and various scholarly works, uniting isolated themes, principles and verdicts into a coherent pattern. His approach was to let his sources, particularly judgments of

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[96]Ibid. p. 5.

[97]For details see Ollennu and Woodman 1985, p. ix.

the Superior Courts, tell the story of Ghanaian customary law, supporting it with the opinions of earlier writers and connecting its main episodes by but a slender thread of commentary. In his work on the Bench he also contributed significantly to the enunciation of many of the landmark principles that shaped Ghanaian customary law in the 1950s and 1960s.

In Ollennu's Principles of Customary Land Law in Ghana[98] and Law of Testate and Intestate Succession in Ghana[99] he elevated the concepts and ideas that had hitherto been applicable largely to specific communities in the country into a juridical scheme that can truly be said to be applicable to much of Ghana. His basic technique was to rely on cases decided by the Superior Courts of Judicature which involved people from various ethnic backgrounds.[100] This approach had the advantage of relying on legal principles that had been declared only after the expert opinions of chiefs and heads of families and trial judges had been taken into account and which can therefore be said to represent a national juridical view-point. Yet for all their comprehensiveness and analytical vigour, Ollennu's works left out of account the views and practices of ordinary people and did not seek to discover the nature of the customary law through general social enquiry. As a result, it has been shown that his works do

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[98]N.A. Ollennu, Customary Land Law in Ghana, London 1962, now published in a second edition as Ollennu and Woodman 1985.

[99]Ollennu 1962.

[100]This method contrasts with, for instance, the approach of A.K.P. Kludze, Ewe Law of Property, London 1973, which relies on a mass of dicta from Native Courts and other inferior courts which are evidently of low precedential authority to set out an Ewe law of property.

not adequately reflect the practised customary law of some Ghanaian communities.[101] Also, even in Ollennu's most magisterial accounts of Ghanaian customary law, there is a tendency to formulate principles of customary law by relying on cases decided by himself.[102]

Although the bulk of Ollennu's work was concerned with the customary law of Ghana, he also authored a number of articles on law reform and the relationship between customary law and statutory law. His work in this area is exemplified by a 1970 article.[103] He argued that in order to provide more effective remedies customary law and statutory law could complement each other in much the same way as common law and equity have become complementary in England.[104] He equally argued for a clear restatement of customary laws, especially in the Northern and former Upper regions, before any reform of Ghanaian law is attempted.[105] Ollennu's view that law must be continually reformed to keep pace with changes in society appears to indicate an important

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[101]See e.g. Kludze 1973, pp. 33, 115, and 179.

[102]See e.g. Ollennu 1962, pp. 111, 114-115, 124-125, 148, 225, 232, 241, 249 and Ollennu 1966, p. 179 for examples of cases decided by himself which were subsequently used in his works to support his perceptions of the customary law of Ghana. See also Kludze 1973, pp. 127-129, esp. p. 128 and pp. 229-230, noting Ollennu's tendency to self-citation, and showing instances of views previously expressed by Ollennu at the Bar being entrenched and clothed with judicial authority once Ollennu was appointed to the Bench.

[103]N.A. Ollennu, "Law Reform in Ghana in the 1970s", University of Ghana Law Journal, Vol. 7 (1970), pp. 1-30. See in the same volume, N.A. Ollennu, "The Case for Traditional Courts under the Constitution", pp. 82-106, esp. pp. 105-106 arguing the case for the fusion of customary law with the received law. He noted (p. 105): "In the evolution of any state, the growth of law thrives on admixtures from alien systems of jurisprudence. It is impossible to keep them permanently apart, or, at best, an enforced separation can only be achieved at the cost of fossilisation of the indigenous system." See further, N.A. Ollennu, "The Changing Law and Law Reform in Ghana", Journal of African Law, Vol. 15 (1971), pp. 165-175 providing a broad account of customary law and law reform in Ghana, and touching briefly on early post-independence statutes affecting the land law of Ghana.

[104]Ollennu 1970, pp. 27-28.

[105]Ibid. pp. 28-29. He further notes (p. 29) that any restatement of Ghanaian law should be in clear, brief and simple terms.

role for legislation in the reform of Ghanaian customary law.[106] None of the above writers, however, paid much attention to the effects of social change, state intervention and the decline of chiefship on indigenous law.[107]

Finally, the contributions of another group of more recent writers and commentators whose works have largely been devoted to the augmentation, critique and analysis of the customary law of Ghana require some comment. K. Bentsi-Enchill,[108] A.K.P. Kludze,[109] S.K.B. Asante[110] and G.R. Woodman have through incisive analyses and commentaries sought to bring to light deficiencies and problems in the customary law of Ghana and have made many useful and imaginative contributions to the study of customary law. Their efforts have to some extent been directed towards the integration of customary law and statutory law and are, thus, very relevant to the present thesis. Their works generally evince greater analytical vigour and critical scholarship than the roughhewn expositions of indigenous law by earlier writers.

Bentsi-Enchill's Ghana Land Law[111] was the first in this line of works. It drew largely on the old and familiar sources of Ghanaian customary law, the author's original contribution to the land law of Ghana being limited to chapters

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[106]Ibid. p. 29.

[107]A.K.P. Kludze 1973, suggests in his prefatory note that the approaches adopted by the early writers in the study of Ghanaian customary law have led to a difference between what he described as practised customary law and judicial customary law.

[108]Bentsi-Enchill 1964.

[109]Kludze 1973.

[110]Asante 1975.

[111]Bentsi-Enchill 1964.

8 and 9, which deal with the control of land use[112] and machinery for assuring titles.[113] Bentsi-Enchill's main aim seems to have been the collection into one volume of all the major cases, statutes and principles that underly the land law of Ghana. This concern for the roundness of the picture he presented, rather than depth of commentary and completeness of analysis, appears to be a major drawback.

Several criticisms can be levelled against Bentsi-Enchill's method. Firstly, his treatment of control of land use overlooked customary control of land use by traditional authorities and concentrated exclusively on the control of land use by the state. Secondly, he tended to rely heavily on lengthy quotations to the detriment of commentary and analysis. For instance, much of chapter 8 is devoted to the examination of rent control legislation and other matters pertaining to the law of landlord and tenant.[114] Again, whole pages of chapter 9, which deals with the machinery for assuring titles, are devoted to the wholesale quotation of legislation without much comment.[115] As a result, the picture that Bentsi-Enchill presents of Ghanaian land law is formally complete but disjointed.

Asante's work dwells largely on the philosophical, social and economic implications of Ghanaian property concepts and institutions.[116] He examines the

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[112]Ibid. pp. 285-309.

[113]Ibid. 310-343.

[114]Ibid. pp. 295-309.

[115]See e.g. p. 317 where he quotes at length sections of the Land Registry Act, 1962 without comment. This is followed by nearly a whole page of quotation of another section of the Act which is then followed by over 6 pages of continuous quotation of the judgment in the case of Crayem v. Consolidated African Trust Ltd. ((1949) 12 W.A.C.A. 443).

[116]Asante 1975.

impact of the social and economic pressures of the colonial and post-colonial periods on indigenous legal institutions and makes a number of useful recommendations for shaping those institutions to respond to the needs of Ghana's rapidly changing society. He delves deeply into the sources of earlier writers, reviews traditional property concepts and examines the erosion of the trusteeship idea which is implied in the concept of the stool. He also discusses the emergence of the English concept of the freehold and links this to the appearance of individualism in Ghanaian society. Further, he traces the decline in traditional fiduciary standards and the reaction of post-colonial governments, concentrating on how governmental intervention might be used to maximise wealth-creation, stabilise the extended family and foster a co-operative spirit that should ensure a wider sharing of wealth. He concludes by suggesting that the traditional idea of trusteeship, when suitably adapted to modern conditions, can constitute the basis of a useful scheme for a society which is preoccupied with raising the standard of living of its people.

Asante's concern, like Bentsi-Enchill's, is with developments in the Ghanaian law of property generally up to the early 1960s. Asante's work on Ghanaian customary law throws new light on the property law concepts developed by earlier writers but does not cast any doubt on those concepts. Also, Asante does not address the multitude of issues raised by post-1960 case-law, scholarship and legislation. The present thesis, to some extent, is intended to fill that gap.

The most comprehensive attempt to portray the customary law of a

non-Akan people in Ghana resulted in the publication of a book on the Ewe law of property in 1973 by A.K.P. Kludze.[117] Kludze's early works represent an attempt to state the customary laws of a Ghanaian community by the discovery and statement of social practices through actual social investigation.[118] However, his latter works appear to lapse into the general concern of the majority of Ghanaian jurists with the official customary law.

His was a pioneering effort to state the customary law of the Northern Ewe and, included a biting critique of the works of Ollennu and others. While acknowledging that we cannot speak of "Ewe Customary Law" as a corpus juris, Kludze sought nevertheless to develop the principles underlying the various customs of the small, independent northern Ewe chiefdoms of the Volta Region of Ghana into a unified body of Ewe law.[119]

In a sketchy introduction, Kludze states that his method of approach was to "read as many Native Court decisions as possible."[120] He also relied on some "declarations" of the customary law that the Clerk of the Volta Region House of Chiefs made available to him,[121] but the bulk of his research was based on oral interviews with chiefs and other traditional dignitaries. There is no indication of the use of a systematic method of sampling in the collection of his data. The corpus of Ewe law set out in Ewe Law of Property is therefore liable to all the

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[117]Kludze 1973. Ewe Law of Property was based on the author's doctoral thesis: The Family, Property and Succession Among the Northern Ewe-Speaking People of Ghana, London 1969.

[118]See Kludze 1969 and Kludze 1973.

[119]Kludze 1973, pp. 25-26.

[120]Ibid. p. 4.

[121]Ibid. p. 5.

biases in research methodology that the use of sampling methods seeks to eliminate (see pages 106-111 below). Thus, Kludze's information may be biased in favour of particular social classes or geographical locations or may even be a reflection of what the chiefs and elders he interviewed thought Ewe law ought to be. Many of Kludze's assertions are not supported by the judicial customary law of Ghana.[122] The findings themselves are presented as propositions of Ewe law without much attempt to state the specific sources from which they were derived.

Verdon has produced evidence from field-work among the Northern Ewe of Kloe that contradicts some of Kludze's assertions.[123] For instance, he found evidence showing the creation of new lineages,[124] contrary to Kludze's contention that the lineage as understood among the Northern Ewe does not permit the creation of new lineages today.[125] Also, he contradicts Kludze's assertion that it is one family (i.e. dzotinu) that releases its lands for occupation by the whole community as town land.[126] Nevertheless Ewe Law of Property[127] exploded the assumption that there is a single body of customary law applicable to Southern Ghana.

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[122]See e.g. Kludze 1973, p. 181 where the author acknowledges the lack of judicial support for some of his propositions.

[123]M. Verdon, The Abutia Ewe of West Africa, Berlin 1983.

[124]Ibid. p. 56 .

[125]Kludze 1973, p. 79.

[126]Verdon 1983, p. 63.

[127]Kludze 1973.

The recent efforts of Kludze have been directed towards the exposition of Ghanaian law generally, commenting broadly on both statutory and customary law. In 1988 he published two books.[128] The first, Modern Law of Succession in Ghana, made a wide-ranging attempt to summarise the customary and statutory laws of succession of Ghana.[129] It was not based on any fieldwork and, in its most original sections, sought to assess the effect of recent statutes on Ghanaian law of succession by stating the various provisions of the Intestate Succession Law[130] of 1985; and commenting and speculating on their possible effects upon Ghanaian society. The major part of Modern Law of Succession in Ghana is an exposition of the old customary law of Ghana, and seeks to provide answers to various old questions raised by discussions in law journals. The present thesis goes further than Kludze's work by using fieldwork conducted among norm-addressees as a basis for assessing the impact of the Intestate Succession Law and other recent legislation.

Kludze's second work of 1988, Modern Principles of Equity[131] contains a good review of the law of mortgages and pledges.[132] Kludze's views are used as part of the background material in our examination of the law of pledges in Ghana. The bulk of the discussion in Modern Principles of Equity is, however,

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[128]A.K.P. Kludze, Modern Law of Succession in Ghana, Dordrecht 1988 and Modern Principles of Equity, Dordrecht 1988.

[129]See in detail, Kludze 1988a, esp. pp. 6-123, 161-203 and 205-236.
[130]For details see Ibid. pp. 161-203.

[131]Kludze 1988b.

[132]Ibid. pp. 359-448 .

beyond the scope of the present thesis.

The bulk of the critical literature on the role of legislation in Ghanaian law, particularly land law, is found in various reviews and articles by Woodman, the leading Western scholar of Ghanaian law.[133] By constantly probing, analysing, uncovering new materials, questioning the reasons behind court decisions, and making many useful suggestions for reform, Woodman has significantly enhanced the critique and exposition of the customary law of Ghana. His continuous stream of articles has been the most consistent fount of criticism running through the body of Ghanaian customary law.

It appears from the majority of Woodman's writings that he prefers the study of Ghanaian customary law through case-law and state legislation to the discovery of evidence of practised customary law through fieldwork. Woodman's critical comments on Ghanaian legislation will be considered at appropriate points in this thesis.

In 1975 Woodman published an important article setting out an alternative approach to law reform.[134] In Woodman's view a theory for law reform is a

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[133]For details see e.g. G.R. Woodman: "The Alienation of Family Land in Ghana", University of Ghana Law Journal, Vol. 1 (1964), pp. 23-41; "The Allodial Title to Land", University of Ghana Law Journal, Vol. V (1968), pp. 79-114; "Palliatives for Uncertainty of Title: The Land Development (Protection of Purchasers) Act, 1960 and the Farm Lands (Protection) Act, 1962", University of Ghana Law Journal, Vol. VI (1969), pp. 146-158; "Two Problems in Matrilineal Succession", Review of Ghana Law, Vols. I & II (1969-70), pp. 6-30; "Registration of Instruments Affecting Land", Review of Ghana Law, Vol. II, No. 1 (1975), pp. 46-61; "Land Use Policy and the extent of the Usufruct", Review of Ghana Law, Vols. 13-14, (1981-82), pp. 200-204; "Ghana Reforms the Law of Intestate Succession", Journal of African Law, Vol. 29 (1985), pp. 118-128; and "Land Title Registration Without Prejudice: The Ghana Title Registration Law", Journal of African Law, Vol. 31 (1987), pp. 119-135.

[134]G.R. Woodman, "A Basis for a Theory for Law Reform", University of Ghana Law Journal, Vol. 12 (1975), pp. 1-20.

consistent set of principles which indicate how existing law can be replaced by better law, and which can be used as a basis for a programme of investigation and discussion directed towards proposing improvements, presumably through legislation.[135] Rejecting the view held by Bentham, Pound, Seidman and others that law should have an end, Woodman set out to construct a theory which does not postulate a particular end or class of ends as the proper end of law.[136]

Woodman propounds the view that the law reformer or investigator should examine all possible laws.[137] This he considers to be both possible and practicable. He argues that, in practice, the expression "all possible laws" imports a greater restriction than might at first sight appear since it not only excludes those laws which are physically impossible of implementation but also all those laws which, if proposed, would have no chance of acceptance by the (élite) groups which determine what the law is to be. Therefore the investigator would be compelled to study the value acceptances of society and the distribution of influence in relation to the law-making power.[138] This enables the investigator to eliminate certain lines of action.

Woodman does not rest his case upon the examination of all possible laws and the study of the value acceptances of society alone. Further restrictions of the possibilities open to the law reformer will, according to him, be frequently imposed by the delimitation of the subject of enquiry.[139] Thus the

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[135]Ibid. p. 1.
[136]Ibid. p. 17.
[137]Id.
[138]Id.
[139]Ibid. p. 18.

investigator should be able to classify and sub-classify the possible laws, ensuring at each stage that his classification includes all possibilities. Woodman considers that the programme of investigation could proceed in either of two ways: the investigator could either enumerate all possible laws and assess the probable consequences of each; or he could enumerate all possible consequences and then examine the laws which will produce those consequences.[140] This approach to law investigation and reform rather than concentration on the ends of law, Woodman appears to suggest, would produce legislated rules that would accord with the value acceptances of the relevant community. Thus, he argues that the imposition of rules unfamiliar to persons subject to them could cause disappointment of expectations and lead to social friction.[141]

Having rejected the view that law should have an end, Woodman argues that lack of an end in law reform would have the advantage of producing rules that accord with the value acceptances of the community. But it is debatable what actually constitutes the value acceptances of a country such as Ghana, in which various systems of customary law are recognised and where traditional systems of law co-exist with received laws. As Allott has suggested, too, legislation often reflects the opinions of elites rather than the value acceptances of ordinary members of the community.[142]

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[140]Ibid. pp. 18-19.

[141]Ibid. p. 6.

[142]Allott 1980, pp. 94-97, 100, 174-175 and 288. Allott has further suggested (pp. 67-72 esp. at p. 67) that the effectiveness of laws promulgated by elites may be limited by the ambitions of a legislator, frequently resulting in the imposition of the legislator's view of society on a society without a formed

We can, thus, see that the on-going discussion about law reforms in Ghana is not oblivious to the many obstacles to successful law reform. The present thesis, based on fieldwork evidence and study of the literature, will seek to make a contribution to this debate by focusing especially on change in urban Ghana.

1.4 Scope of the thesis

The present work, employing techniques of social science research, seeks to ascertain the actual state of Ghanaian customary law in a modern urban setting, depicting it as a new "living law" or "active customary law" which is built on concepts of traditional customary law and the influence of recent statutes.[143]

We have seen in the previous sub-chapter that much of the existing work on the customary law of Ghana concentrates on the description of the laws of various communities. Little attempt has been made to explore how state law and policy may be used to systematise and reform those laws. Customary law as portrayed in the existing literature is underpinned by two main institutions, namely the stool[144] and the consanguine family. Within the traditional

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view, or perhaps with contradictory views on the matter.

[143]The findings presented in this thesis are of relevance only to the specific communities under investigation and may well have been influenced by the unique social and economic conditions in Accra. No claims whatever are made regarding their applicability to other Ghanaian communities. Besides, as will be shown in chapter 2 below, while the material presented in this thesis may be a fair description of urban customary law in Accra, it does not amount to a comprehensive statement of Gá customary law, as my material relates primarily to areas within Jamestown or under the jurisdiction of the Jamestown chief. A comprehensive statement of Gá customary law would, among others, require a wider range of data derived from intensive and expert investigation of traditional and modern customary laws in such other major Gá towns as Tema, Osu, Labadi, Teshie and Nungua.

[144]For details see above, p. 39.

framework, the stool ultimately regulates all rights in land, while succession and marriage are the preserve of the consanguine family which may also have extensive interests in land.

The nature of individual rights within this framework has largely been worked out by the courts in line with what, in their view, accords with the actual practices of the people. But the nature of the relationship between the state and traditional institutions has never been clearly articulated by the case-law.

Chapter 2 of the present thesis concentrates on fieldwork methodology. First, it gives a brief account of the history as well as social and political organisation of the people of Accra. The chapter thus also provides a brief socio-economic background picture, showing how the unofficial urban customary law of Accra has evolved. It traces the main socio-economic features of the field-areas which provided data for the present research, highlighting the complex ethnic mix of traditional Gá society. Analysis of data collected through fieldwork is the main method through which the operation of the living customary law is observed. The chapter sets out the methodologies used in the collection of such data. Fieldwork involved the collection of data on both official and unofficial customary law and their assessment in the light of the existing literature on Ghanaian customary law.

Chapter 3 briefly examines the general background against which Ghanaian customary law has evolved. It considers the socio-economic and political factors that have influenced the development of indigenous Ghanaian law. It also examines Ghana's legal system in some detail and describes the

nature of legal processes under customary law.

Chapters 4-8 form the analytical core of the thesis. Chapter 4 considers the family law of Ghana within the wider context of conflicts about property interests between the consanguine and nuclear families. First, the conceptual confusion surrounding the concept of the family in Ghanaian customary law is examined in some detail, showing that the nuclear family has acquired much greater importance in urban Ghanaian society than the customary law recognises. It is argued that in order to give greater efficacy to child-centred laws and to enhance the stabilisation of the urban family in Ghana, legislative reform should favour the nuclear family more clearly than has been done. This argument is supported by evidence of a rapidly changing "living law" in regard to Accra families which seems to be at variance with the official customary law.

Chapter 5 focuses on the nature of customary land law, which is considered in the light of the extensive case-law that has shaped it. The chapter uses fresh evidence of customary law influenced by recent developments in the suburbs of Accra to cast doubt on the relevance of some of the officially accepted principles of customary land law for contemporary urban Ghanaian society. Chapters 6 and 7 consider the various post-independence statutes affecting rights to land in Ghana and critically assess the impact of those statutes on the customary land law. This involves an examination, inter alia, of the laws on deeds registration and land titles registration. Also, transfer of interests in land under customary law and state intervention in land-holding are considered extensively through an examination of case-law and a number of statutes

regulating ownership and transfer of interests in land. The Land Title Registration Law, 1986 and its initial implementation in selected parts of Accra are examined in extensive detail, and shortcomings in the implementation of the present scheme are identified.

Chapter 8 is concerned with the laws of testate and intestate succession as practised within the community. The types of property known to the Gá are considered together with the active customary law of the ownership of such property within the family. Again, the various new statutory provisions enacted since 1985 are considered in detail and the chapter assesses the effects of the Intestate Succession Law, 1985 on the present law of intestate succession in Ghana. The customary law relating to the traditional nuncupative will or samansiw is critically examined on the basis of fresh evidence. Finally, field data are used to analyse the distribution of property by testators in Accra. Chapter 9 concludes the study with a summary of the main points covered in the above chapters and suggestions for further statutory reforms of the customary law of Ghana.

In presenting and analysing the material contained in each of the chapters, data collected from fieldwork in Accra are used to support the main arguments of the thesis. The officially accepted principles of customary law are all along compared with information elicited from a number of respondents and sources in the field. In this way many discrepancies between the officially declared rules of customary law and the customary law that actually regulates the practices of the people have been discovered. Both the effects of social

change on customary law and in particular the impact of legislative intervention upon social behaviour are closely analysed. The resulting overall picture is one of constant change, a complex process in which legislation by the modern state is but one factor.

CHAPTER 2

THE FIELDWORK

2. 1 The urban setting of Accra

The field-study for the present thesis was conducted in selected areas of Accra between March and August 1989. It was an empirical process that consisted in the gathering of a mass of data on the customary law, statutory rules on land law and family law, and the activities of a number of legal practitioners in Accra. The purpose of the field-study was two-fold. Firstly, it aimed to elicit information from respondents and other sources in order to test the continued validity of the findings of earlier writers on Ghanaian customary law. Secondly, and most importantly, it sought to assess the impact of recent legislation on the behaviour of the respondents.

Accra was chosen as the location for the present study for several reasons. First, being the seat of government and closest to the centres of policy formulation and implementation, it was felt that the social effects of new legal rules are most likely to be evident in Accra. This is because literacy levels are higher, and the power of traditional authorities arguably much weaker in Accra than elsewhere in Ghana. Secondly, Accra is the most urbanised and developed part of Ghana. It has been the scene of the most significant political struggles in modern times, and due to its high level of urbanisation and ethnic integration, it is undoubtedly the location in which every shade and strand of ethnic and

cultural opinion might be discovered.

Accra[1] itself is the heart of what might be termed the Accra(-Tema)-Kumasi-Takoradi triangle in Southern Ghana, the most developed and urbanised part of the country. Accra is easily the most developed part of the triangle. It is the nation's capital and the seat of government. Its development from inauspicious beginnings was temporarily halted in the early 1960s with the emergence of the nearby town of Tema as an important harbour, industrial and manufacturing centre.[2] The city developed around the early European settlements of James Fort (British), Christiansborg Castle (Danish) and Fort Crevecoeur or Ussher Fort (Dutch) (see map of Accra, p. 10 above).[3]

The Gá are today almost totally urbanised and ethnically mixed.[4] Kilson

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[1]For a perspicacious sketch of the development of Accra up to the 1950s see, I. Acquah, Accra Survey, London 1958. There are several other accounts of the growth of Accra, the most important of which are: E.A. Boateng, "The Growth and Functions of Accra", Bulletin of Ghana Geographical Association, Vol. 4 (1959), pp. 4-15; M.D. Kilson, Urban Tribesmen: Social Continuity and Change Among the Gá in Accra, Ghana, Ph.D Dissertation, Harvard 1967; and by the same author, "The Gá and Non-Gá Populations of Accra Central", Ghana Journal of Sociology, Vol. 2. No. 2, (1966), pp. 23-28. See also, A Plan for the Town, The Report of the Ministry of Housing, prepared by the Town and Country Planning Division of the Ministry of Housing, 1958. M. Manoukian, Akan and Gá-Adangme People, London 1950 and M.J. Field, Social Organization of the Gá People, London 1940 offer a good account of the social organisation of the people of Accra. Further information on the ethnic diversity of the Gá can be obtained from linguistic sources. See e.g. M.E. Kropp Dakubu, One Voice: The Linguistic Culture of an Accra Lineage, Leiden 1980.

[2]The port of Tema, 18 miles east of Accra, was established in 1959 to replace the old harbour facilities at Jamestown. Though it developed into Ghana's foremost industrial town and is today the country's third largest city, Tema has failed to rival Accra in terms of importance. Present day administration strategy seems to concentrate on its merger with Accra.

[3]Ussher Town or Kinka which adjoins Jamestown is the official seat of the Gá Manche. The official residences of four out of the seven divisional chiefs of Accra are also located at Ussher town. The other three divisional chiefs of Accra reside at Jamestown.

[4]The heterogenous composition of Gá society has led one commentator to observe: "The intermittent influx of immigrants for centuries back into the portion of the community under the direct rule of the Gá Mantse, under the English government, and known as the country of the Gás or Akras, has made it necessary for anyone who writes on the customs of the Gá tribes to be very careful indeed." See A.B. Quartey-Papafio, "Law of Succession among the Akras or the Gá Tribes Proper of the Gold Coast", Journal of African Society, 1910, p. 64, quoted in Ollennu 1966, p. 185. See further, M. Kilson, "Variations in Gá Culture in Central Accra", Ghana Journal of Sociology, Vol. 3, No. 1, (1967), pp. 33-54 at 33, where she suggests that for nine out of ten Gá, Central Accra, in the heart of the Ghanaian capital, is the homeland rather than some distant village.

noted that many Gá are the descendants of non-Gá settlers who became assimilated to Gá cultural standards. She stated that:

> "In modern Accra, Gá distinguish between the true "Gá" (Ganyo krong) and other Gá. The former are descendants of the Gá who in the mid-seventeenth century lived either on the coast or in the inland town of Ayawaso, which is known in European sources as Great Accra; the latter are descendants of later immigrant non-Gá settlers."[5]

The original settlers seemed to have been Gá immigrants and Kpeshi aborigines who founded a number of villages along the littoral. The arrival of the Gá settlers probably at the end of the fourteenth century did not seem to have had any important effect on land tenure. Wulomei or religious leaders,[6] were still recognised as the owners of the land, and the people remained more or less acephalous in a system that Pogucki described as based on theocratic principles.[7]

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[5]M. Kilson, Kpele Lala, (Cambridge), Massachusetts 1971. Kilson also observed (p. 15) that: "During the era of British colonial rule, the strategic coastal location of the Gá people facilitated their participation in Western religious, educational and administrative institutions... Consequently, the proportion of Gá who are Christian, educated and occupy skilled Western occupational categories exceeds that of other Ghanaian peoples."

[6]For a detailed account of the religious institutions of the people of Accra, see ibid. pp. 3-106.

[7]R.J.H. Pogucki, Gold Coast Land Tenure, Vol. III, Accra 1955, p. 7. The original religious institutions of the Gá appear to have been substantially weakened by the early introduction of Christianity into Gá society. Much of the activities of the early Christian missionaries on the Gold Coast was concentrated around Accra and the South-Eastern parts of present-day Ghana. Basel missionaries established the Presbyterian Church in 1828. They were followed by the Methodists who established a particularly strong foothold in Jamestown and founded many schools and churches. Other missionaries from various parts of Europe made valiant attempts to win native souls for Christ through educational and charitable activities. The translation of the Bible into the Gá language by the German missionary, Rev. Johannes Zimmermann in 1865 gave a new impetus to the work of the missionaries and made significant inroads into the influence of traditional religion on Gá society. For further details see C.C. Reindorf, The History of the Gold Coast and Ashanti, Basle 1966 (originally published in 1895), pp. 203 et. seq.; H.W. Debrunner, A History of Christianity in Ghana, Accra 1967.

The introduction of the slave trade[8] and the resultant tribal warfare had far-reaching consequences for Gá society. The areas around the forts became major slave-trading centres and the wealth made from the slave trade resulted in a considerable degree of social stratification among the Gá. Also, displaced people of Guan, Fanti, Akwapim, Denkyira and Akwamu origin settled and founded quarters in Accra,[9] importing new principles of military organisation and novel ideas about chiefship from the hinterland. Accra was now constituted into seven quarters, each with its own stool, stool elders, and war leaders.

In the meantime, Gá society underwent extensive changes as a result of the appearance of Europeans on the coast. After the first Portuguese traders left, Accra came under the influence of the Dutch, Danes and the British who operated from their respective forts and castles on the coast of Accra. After the departure of the Dutch and Danes, the British, as in the rest of the Gold Coast, gained sole influence in Accra.[10] The Company of Royal Adventurers which monopolised the trade was soon replaced by the Royal African Company which

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[8]Reindorf 1966, offers the most detailed description of the history of the people of Accra in pre-colonial times. For an early account of the nature of the trade between Europeans and Africans in Accra and elsewhere, see generally Jean Barbot, Barbot on Guinea, Vol. II, London 1992, esp. pp. 430-558. First published as A Description of the Coasts of North and South Guinea in 1732, the work of Barbot, a French Huguenot who twice sailed along the coast of modern Ghana between 1678-79 and 1681-82 as a commercial agent on slave ships and noted his observations, contains the most detailed description available of the kingdom of Accra in the seventeenth century. He enlarged and filled in the picture presented of the West African coast by a Dutchman. See: W. Bosman, A New and Fuller Description of the Coast of Guinea, London 1967, originally published in Utrecht 1704 as Nauwkeri Beschrving van de Guinese goudtand en slaven-Kust.

[9]Manoukian 1950 p. 68. Large numbers of Ashantis later settled at Christiansborg after the Battle of Katamanso and founded the Osu-Ashanti or Ashanti-Blohum quarter. See e.g. M.J. Field, Religion and Medicine of the Gá People, London 1937, p. 64.

[10]For a useful account of the departure of the Dutch, in particular and the manner of the consolidation of British authority on the Gold Coast, see D. Coombs, The Gold Coast, Britain and the Netherlands, London 1963.

was established under the patronage of the King of England and the Duke of York and was granted exclusive rights to the Gold Coast trade for a period of a thousand years. The position of the King of Accra or Ga Manche as overlord of the Ga was given statutory recognition by the British i n 1927 in furtherance of their policy of indirect rule.[11]

Today, the various families, both by name and by family origin, identify themselves with a particular quarter. Members of each quarter, in turn, founded remote agricultural villages on the Accra plains which continued to identify themselves with the original quarter.[12]

Many of the ordinary people of Accra remained fishermen and petty traders while the tiny military elite monopolised the middleman's role in the slave and gold trade with the Europeans.[13] The transfer of the seat of government in 1877 from Cape Coast to Accra assured the town's leading role in the country. The British, having seen or bought off their trade rivals, established Christiansborg Castle as "Government House," a function it still performs. A

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[11]This was effected by way of the Native Administration Ordinance, 1927. The Gá of Accra themselves had always acknowledged the Gá Manche as their supreme leader, but his constitutional authority over other Gá towns was never very clear.

[12]See D.G. Azu, The Gá Family and Social Change, Cambridge 1974. The villages or aklowai scattered across the Accra Plains were probably first settled by hunting parties whose descendants still retain their links with the family houses in the old quarters. M.E. Kropp Dakubu, "Search Sweet Country and the Language of Authentic Being", Research in African Literatures, Vol. 24, No. 1 (1993), pp. 19-35 has stated that most of the villages have a high ethnic mix, including Ewe-speaking people and other migrants, and the villagers themselves often have family connections with Twi-speaking people whose lands adjoin theirs on the hilly fringes of the Accra plains.

[13]By the middle of the seventeenth century, Accra was the greatest gold market on the Gold Coast. For an account of the early archaeological evidence of settlements around Accra and the denizen's middleman role in the early trade with the Europeans, see J. Anquandah, Rediscovering Ghana's Past, Accra 1982, esp. pp. 113-125.

basic harbour was constructed at Jamestown, and linked by rail to the cocoa-growing hinterland. The resultant international and national commercial activity and the establishment of the ministries at Victoriaborg led to the influx of more migrants into Accra. The town started to expand and the suburbs filled out and merged with the original seven quarters. Schools, offices, market places, churches and even homes, as a result of intermarriage, became new social melting points.

Most of the new suburbs lacked the old tribal structures and, significantly, they had no chiefs. Even more significantly, those Gás who moved into the new suburbs, and who by means of education and business severed themselves from the pre-capitalist economy, started to lose their automatic claims to land rights from the old quarters to which their ancestors belonged. It was a classic transformation from the old status-based society to one based on contract. In recent times, the physical expansion of the city has continued apace with the establishment of such new suburbs as Legonman, New Dansoman, and McCarthy Hill. While some of these developed from old villages, others were the direct result of the activities of the State Housing Corporation.

Today there is a wide gulf between the old Accra quarters and the new suburbs. In the old quarters, the family houses and the political and religious institutions that underpinned traditional society are still firmly in place. Even with the influx of migrants and the secularisation of traditional society, the old quarters have more or less retained a stable population. They pullulate with a teeming population of fishermen who use the old Jamestown Harbour, petty traders and

labourers and the unemployed, and traditional life appears at first glance to run along its accustomed paths. Chiefs' palaces compete with the spires of the orthodox churches for the modest skyline. However, the old quarters have lost the air of glamour; there is no new land and the chiefs spend most of their time mediating disputes.

By contrast, most of the suburbs are new and are inhabited by Ghanaians of all ethnic backgrounds as well as a significant number of Gás who are increasingly involved perforce in new sets of relations with non-Gá neighbours and co-workers. The old European quarters are now occupied by the middle class salariat, while the ordinary African continues to live in the suburbs. For these people, the extended family is no longer a residential unit. Its members live in dispersed households scattered across the city and occasionally converge on the old family house or the village for funerals or festivals. Inter-tribal and even inter-racial marriages have further strained the hold of the traditional family on the individual.

Today, the population of the Accra metropolitan area is well over one million.[14] As of 1990, the population of Greater Accra stood at 1,781,100.[15] This represents a significant increase on previous figures and has created administrative problems of its own. An Accra-wide administrative body, the Accra Metropolitan Authority, now performs the functions of local government.

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[14] J.J. Tetteh and C.S. Botchway, Accra: Capital of Ghana, Accra 1989, p. 24 put the population of Accra in 1989 at 1.2 million.

[15]See Ghana: A Brief Guide, Accra 1991, p. 14.

With the advent of the PNDC government in 1981, local People's Defence Committees (PDCs) were formed in every ward to organise people at the grassroots level. However, these bodies as well as the auxiliary People's Militia are widely seen as partisan organisations designed to impose the will of the government on an indifferent or reluctant people.

2. 2 The field study

For the purpose of analysis, Accra was divided into three distinctive field-areas, Jamestown, Domiabra and Old Dansoman/West Korle-Gonno Estates. By trawling through each of these field-areas we arrived at three baskets of information which form the basis of the present study. The first field-area was Domiabra, a small village[16] just outside Accra, off the Winneba road. Its name (Do-mi-a-bra), which literally translates from the Fanti as "come, if you love me," denotes its remoteness and isolation. Since this thesis is essentially a study in the evolution and change of customary law in an urban setting, Domiabra is used as a control for the other two field-areas. Small, homogeneous, and a subsistence farming community, Domiabra comes closest to resembling the customary law-governed society depicted in the writings of Sarbah and others. The village has, with the development of the Weija dam along the River Densu and the acquisition of much of its lands as part of the Weija Irrigation Project,

[16]It is not clear how men from Jamestown founded a village well beyond the traditional food-growing district of the arc of the River Densu and as remote as Domiabra. One informant suggested that the village was founded as one of several garrison-outposts of the chiefs of Jamestown and was originally manned by slaves.

been removed to a new location on a grassy rise complete with modern housing. It is, thus, not a traditional Ghanaian village, but has many of its characteristics.

Prominent among these is the fact that it is governed by a chief and a number of elders. Family heads and religious leaders play an important role in the social organisation of the village. The majority of its people work as small-scale commercial farmers; while a significant minority eke out a meagre living as peasants in the surrounding plains or work as lorry drivers and traders. A few newcomers have arrived from the city and elsewhere to work as medium-scale farmers and ranchers. Though some of the newcomers expressed the opinion that the construction of the dam has barely ruptured the integument of Domiabra society, it is obvious from the villages lying to the immediate south of Domiabra that population influx and the spatial encroachment of the city may not be very far away.

Jamestown, our second field-area, is the oldest of the three communities. It is one of the earliest settlements in Accra, nestling beside an old British fort and the Jamestown harbour; and together with nearby Ussher Town encases a history of about five hundred years of European activity and influence on the West coast of Africa. Most of the lands to the west of Accra right up to the border between the Greater Accra and Central regions are vested in the Jamestown stool. In terms of traditional administration, the other two areas of study are directly under the authority of the Jamestown chief. But chiefship in Jamestown has long been a matter of protracted dispute between royal houses. The present chief lives outside the quarter, as do most of his elders. The

community is now generally poor and a pale shadow of its former prosperous self, with much of it in a sorry state of dilapidation. But many of the old political and social structures are still in place.

Jamestown is made up of three political units, namely Alata,[17] Sempe and Akumajay. Each unit comprises a number of quarters or akutsei[18] which are in turn divided into family houses or we.[19] Each quarter has its own leader who is, at least in theory, in close contact with the Jamestown chief to whom he communicates the needs of his people. The we or family house is made up of a number of people who trace their ancestry to a common male or female. The members of a we[20] are usually, though not always, identified through a common nomenclature. Though the members of the we may actually be widely dispersed

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[17]"Alata" is a term generally used by Ghanaians to describe Nigerians in general, and Yorubas in particular. Several political divisions in Accra, notably Christiansborg or Danish Accra, have their own Alata quarters. (Cf. Reindorf 1895, p. 40.) It was mainly in these quarters that merchants and other non-Gá aliens resided in pre-colonial and colonial times. According to the traditions of the people themselves, the Alata quarter of Jamestown or British Accra was founded by Yoruba immigrants whose leader, having found favour with the British authorities, was made paramount ruler of the other two quarters of British Accra. Although the terms "Ngleshi" (English) and "Alata", the latter in a deprecatory sense, are still used by the other Gá in reference to the area under consideration, the people themselves prefer the term Jamestown, which is now generally used to refer specifically to the Alata stool. Any reference in this thesis to Jamestown (unless otherwise stated) is intended to refer to Alata. The other two quarters are referred to by their own names, namely Sempe and Akumajay. Nearly all Accra lands to the west of the capital belong to one or other of the Jamestown divisional stools.

[18]The Gá word akutsei is derived from ku (group) and tsei (trees or family trees) indicating that the quarters may have originally been made up of a few families. These may have been made up of groups of agnatic or cognative descendants of a real or hypothetic ancestor. Cf. Pogucki 1955. In his work, Indigenous African Institutions, New York 1991, p. 159, G.B.N. Ayittey contends that Accra was originally a confederation of seven extended families, and that the real government of the Gá towns was in the hands of the elders- "a democratic gerontocracy." Many of the akutsei in Jamestown, such as Adansi, Ajumaku, Moree and Adenta, bear names which suggest that the founders might have been Fanti immigrants.

[19]The we is usually named after the founding ancestor with the suffix we or house. Thus they bear names like Ofori Solo We or House of Ofori the Smith. Other names include Abbeytse We (Abbey's father's House) and Korle We (Korle's House).

[20]The members of a we constitute the we-ku (house/group) which is the consanguine family of all individuals within the group.

across the city, they normally converge on the ancestral home for funerals and festivals. The we normally has no lands under its control.[21]

Apart from the various quarters there are distinct communities within Jamestown whose ancestors migrated into the area only in the last century and a half or so.[22] While they are to all intents and purposes regarded as Gá, they do not appear to have any land rights beyond what was originally granted to the Brazilian community.

Within Jamestown itself, there appears to be sharp distinction between the old sector south of Zion Street and the new sector to its north. The system of akutsei and we does not seem to be firmly established in the communities to the north of Zion Street. There is no unoccupied land in the old quarter of Jamestown and unlike his counterpart in Domiabra, the allocation of land does

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[21]This appears to be mainly the result of the economics of the early settlements around the forts. The areas now known as Ussher Town and Jamestown became clearing posts for the overseas and inland export and import trade in slaves and goods (Cf. Pogucki 1955, p. 10.) and the relative unimportance of agriculture appears to have diminished the importance of the ownership of land to the Gá, trade and fishing being the main economic activities.

[22]In addition to long-established Akan groups, such communities include Kroos (Liberians), settled in Kroo Towns along the Southern ends of Bannerman Road and Hansen Road; various Moslem groups who work as butchers and cattle-dealers around the Slaughter House; and Brazilians who arrived in Accra in 1836. See generally, J.N. Matson, "The Common Law Abroad: English and Indigenous Laws in the British Commonwealth", International and Comparative Law Review, Vol. 42 (1993), pp. 753-779, esp. at pp. 769-771 for a review of the customary laws of various Akan groups already integrated into Gá society. For a discussion of the Brazilian community see Debrunner 1967, p. 170; and for evidence of an early effort to integrate the Brazilian community into Gá society by the provision of a tract of land at Adabraka by the then Gá Manche, Nii Tackie Commey, see Azuma III v. Aruna (1950) D.C. (Land) '48-'51, 258, 259. See also Josiah v. Viera (1898-99) Ren. 147-149 at 148. Drawn mainly from ex-Brazilian Muslim slaves of Hausa, Fon, and Yoruba extraction, they are presently known in Accra as the Tabong after the initial settlers' habit of frequently commenting in Portuguese "Tao bom" or "So very good." Cf. J.G. Christaller, C.W. Locher and J. Zimmermann, A Dictionary, English, Tshi (Asante), Akra, Basel 1874, (subsequently re-published as J. Schopf and L. Richter, An English-Accra or Gá Dictionary, Basel 1912) p. 161 where they state that "Tabonnyo" or "Tabong person" is one of the Gá words used to describe a Mohammedan. Today, of the above groups, the Tabong are the most fully integrated into the fabric of Gá social and political life. See further Republic v. Gá Traditional Council;Ex Parte Damanley (1980) G.L.R. 609 suggesting that other long-established Muslim communities in Accra have been incorporated into the Gá political structure.

not appear to be a significant part of the political leader's duties. The Jamestown chief or manche, however, retains control of much of the unoccupied lands to the west of Accra. These are sold on a strictly contractual basis. The oft-repeated tenet of customary land law that stool subjects have an inalienable right to stool lands[23] is not borne out by the evidence in Jamestown.

Our third area of study comprises the West Korle-Gonno Estates (also known as Mamprobi) and Old Dansoman. This is a large housing estate founded by the colonial government to re-house displaced persons from Jamestown after the 1939 earthquake. For the purposes of this study, data collected from the West Korle-Gonno Estates are put in the same category as data collected from the adjoining suburb of Old Dansoman.[24]

Unlike Domiabra and Jamestown, the West Korle-Gonno Estates do not have a stable population and the ethnic mix is higher. It is an average working class sector of Accra and, like many of the new suburbs, has no chief and elders. It is a typical social melting pot of urban Ghana. Social organisation along tribal lines is minimal, but equally there is no political organisation to replace the functions performed by chieftaincy. The majority of the people still see themselves as Jamestown citizens, but since the old system of akutsei and we has not been established, an even greater gap exists between the people of the West-Korle Gonno Estates and the political authorities of Jamestown.

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[23]See e.g. Ollennu and Woodman 1985, p. 34.

[24]Cf. chapter five below where the development and social conditions of Old Dansoman are described in greater detail.

Although most families have a head of family, he or she has no political function, duties being restricted to the resolution of disputes and the co-ordination of such family activities as marriages and funerals. Nevertheless the people on the estates are better integrated into the national economy than the people in Jamestown. Many of them have been able to acquire outlying Jamestown lands on contractual bases and the estates, which were originally made up of four bedroom bungalows surrounded by Madras thorn hedges, have been physically transformed through building developments. The breakdown of the tribal structure here illustrates the obsolescence of the old structure of property which depended on stool membership.

2. 3 *Research methods*

The methods employed in data collection included interviews of ordinary members of society, official interviews, participant observation, studying court records, household surveys and genealogical research into family trees. The methods of research are considered here seriatim. In each case informants were selected in each of the three field-areas on the basis of the random sampling methods described below. But once a particular household had been selected, the basis for the choice of interviewees was their personal knowledge and experience of specific aspects of the customary law. It might be objected that this might lead to a lack of fairness and definite criteria in the collection of data, as with this method there is often a tendency to over-select from a particular category of persons. An answer to this problem was found in the

restriction of the number of such respondents in each category to a predetermined percentage of the overall figure. Needless to say, there were many difficulties with the "personal knowledge test" for the selection of informants, thus justifying the use of a variety of information gathering methods in each case.

The use of personal interviews was dictated by the large number of illiterate and semi-literate persons chosen for the fieldwork. As far as possible, the interview was mostly conducted in the local Gá language, with the aid of three assistants who sometimes explained questions in greater detail to illiterate respondents. Each informant was carefully taken through a number of fixed questions on specific aspects of customary law, and the perceived social effects of new legislation on customary law.

The interview was based on a number of questionnaires.[25] In framing each question for the questionnaires, care was taken to ensure that it has a single meaning, and the same meaning to every respondent. Words which are not precise in their meanings were deleted, and the questions were made as short as possible. Leading questions were avoided and simple words were used.[26] As far as possible only questions which the informant could answer from personal knowledge or experience were asked.

Each person was interviewed in his or her own home in the presence of

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[25]See the Appendix for a list of questionnaires used in the field-work.

[26]See L.H. Kidder & C.M. Judd, Research Methods in Social Relations, New York 1986, pp. 243-265.

family members; corroboration for some of the less lucid statements was sought on the spot from other members of the family. Each informant was gently prodded for his or her reasons for doing things in one way rather than another. Particular emphasis was laid on matters relating to customary marriage, divorce, nuncupative will or samansiw, customary land transactions, registration of deeds and litigation arising out of the acquisition of land. Where informants had no personal knowledge or experience of a particular rule of customary law, they were asked if they knew of another person who had used that rule. This method often prompted respondents to suggest other individuals who might be interviewed. Where a particular rule of law was universally accepted, informants usually had no difficulty in stating that rule of law. However, where a particular rule, long fashionable, was falling into desuetude, some aging informants appeared to have difficulty stating the content of the rule. This may sound obvious, but in a society where older people are generally acknowledged to be the repositories of traditional custom and wisdom, their own lack of knowledge of the contents of particular rules, which they nevertheless regard as valid, appears to be a pointer to the dynamism of traditional society.

There were a couple of problems associated with this method. Eager respondents appeared too willing to exaggerate the extent of a particular norm, some informants of substance tended to be suspicious and diffident. Due to the large number of ethnic backgrounds involved there were often problems of meaning and language. The last problem was overcome through the use of an interpreter, who first conducted the interview, wrote it down in the informant's

own language and then translated it into English. In this way, the accuracy of the informants' original statements was sought to be preserved. Altogether 195 people, including 160 people representing households, and 35 heads of families, chiefs and traditional elders were interviewed.

Hypothetical questions were used as part of the interview. This method was used sparingly and consisted of seeking to discover an informant's reaction to a likely imagined situation. The major drawback of this method was that it sometimes led to endless conditional statements. But used skilfully, with well-timed strategic interventions, it disclosed what informants might do in response to some of the new statutory provisions on customary law. The problem, quite inevitably, was that informants' answers were frequently conditional. For instance, to a question: "What would you do if the government declared your old family quarter at Jamestown a registration area?", one often got the reply "If Jamestown were declared a registration area, and if my family were able to resolve differences as to family headship, I would support the family house being registered if I liked the new head of family." Nevertheless by the use of this method, it was possible to predict, fairly accurately, popular reaction to the new statutes. There are, of course, several other interelated difficulties associated with the hypothetical question approach, including the generalised and idealised nature of responses as well as questions of unconscious and active prejudice. These were often overcome by insisting that informants base their answers on concrete instances, and by examining for myself cases on which verifiable hypothetical answers were based.

Interviews of key witnesses were used as a gap-filling and corroborative technique.[27] Key witnesses were selected for their familiarity with the rules of practised customary law or their knowledge of the local scene. The selection of key witnesses posed peculiar problems of its own. The main problems were the selection process itself and the criteria for qualification as a key witness. There were no easy solutions to either problem. The problem of selection was overcome by asking the chiefs in the sample to give a list of thirty-five people within each field-area whom they considered to have special knowledge of the customary law and by selecting thirteen names randomly from a list of lawyers within the field area.[28] As these lists contained a disproportionate number of heads of families and elders, it became necessary to randomly eliminate thirty-one people who described themselves as either heads of families or elders. Of the seventy-four names that remained, 15 (fifteen), 13 (thirteen), and 7 (seven) were selected at random as key witnesses for Districts A-C, D-F and G-H

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[27]Key witness evidence is sometimes considered overdrawn and their use as a source of data collection is thought to affect the reliability of conclusions drawn from such data. However, the use of key witness evidence, particularly as part of the restatement of customary law in Africa has been fervently defended by Allott, who has suggested that the authoritativeness of the Restatement of African Law Project of the School of Oriental and African Studies was derived from the expert opinions of those recognised locally as having specialist knowledge of customary law. See his Introduction to E. Cotran, A Casebook on Kenya Customary Law, Oxford 1987, p. xiv. On the notion of restatement of laws in general see, Restatement of the Law of Judgments as adopted and promulgated by the American Law Institute at Philadelphia 1942, St. Paul 1942. See further, E. Cotran, Report on Customary Criminal Offences in Kenya, unpublished, no date (circa 1962), pp. 2-6 for a brief account of some of the methods of investigation employed in the restatement of customary law, and for the view that one of the reasons for the failure of the 1948 District Law Panels of Kenya was the fact that the Panels were not always composed of experts on customary law. See finally, Allott 1960, p. 16, recommending that native law in each African territory should be recorded in consultation with the "elders" of each community; and The Proceedings of the Dar es Salaam Conference 1963, pp. 33-34 which recommended the recording of African customary law and considered the use of Law Panels in that endeavour.

[28]As there were two other lawyers in the main sample of 160, the total number of lawyers who were interviewed was 15.

respectively.[29] By interviewing these 35 key witnesses, certain instances were discovered of the sharp divergence between legal fact and social fact. Key witnesses, in many cases, also provided theoretical explanations of aspects of actions observed through participant observation. Among key witnesses interviewed were heads of families, linguists, chiefs and elders of stools.

It is appropriate to mention and address here some of the major criticisms which have been levelled against the use of key witnesses or customary law experts, particularly in regard to the restatement of customary law. Among other things it has been claimed that statements of rules obtained from key witnesses by restators of customary law tend to make "conclusory statements" which are lifeless and consist of totally disembodied propositions, some of which cannot be reconciled to facts that give rise to legal action;[30] and that the experience of any individual is necessarily limited, his memory imperfect and the individual is thus unlikely to be able to give a spontaneous recitation of all the rules they know.[31] It has also been said that key witnesses are seldom a reliable guide as to the law actually applied in disputes and tend to prescribe an ideal course of conduct, widely considered desirable but seldom regularly attained in practice.[32]

In view of the above criticisms, we must state that key witnesses interviewed in our study constituted a minority of the total sample, and

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[29]For detailed description of the structure of the districts see p. 107 below.

[30]R.L. Abel, "Customary Laws of Wrongs in Kenya: An Essay in Research Method", American Journal of Comparative Law, Vol. 17 (1969), pp. 573-626 at pp. 573-574.

[31]Ibid. p. 576.

[32]S.A. Roberts, Tswana Family Law, London 1972, p. xii.

statements taken from them were scrupulously checked against those made by other respondents. Still, it is necessary to add that as has been suggested in regard to works compiled under the Restatement of African Law Project, in cases of doubt statements attributed in this thesis to key witnesses may be regarded as guides only, being prima facie evidence of customary law, placing the onus on the other party opposing the statement to show that the law has changed or the statement is incorrect.[33]

Abel's criticisms of the use of expert witnesses seem to stem in part from the assumption that the interrogator or researcher is an alien with an incomplete knowledge of the society under scrutiny.[34] As to this assumption, it ought to be pointed out that the present writer has maternal links with two of the communities under investigation, and has detailed knowledge and experience of Gá society.

Many important data were collected through participant observation. This refers to the researcher's technique of gathering evidence of specific social practice by dissembling, and so immersing and integrating oneself in a particular social activity that the persons under observation lose the unnaturalness of action that comes with the awareness of being watched, while the researcher is rewarded with a relatively pure form of the object of his observation. In practice,

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[33]Proceedings of the African Conference on Local Courts and Customary Law 1963, p. 34. Cf. J. Vanderlinden, "The Recording of Customary Law in France during the Fifteenth and Sixteenth Centuries and the Recording of African Customary Laws, Journal of African Law, Vol. 3 (1959), pp. 165-175, at p. 168 for the view, held in some quarters, that in order not to freeze in statutory form customary laws which are still evolving, restated customary law should be in a clear and precise manual which should not have the force of law.

[34]Abel 1969, p. 576.

as social scientists now admit, the stranger's presence is always noticed, even though it might be disregarded to a greater or lesser degree.[35]

This particular form of information gathering was employed at trials and other sittings before the elders on occasions of births, marriages, deaths and land transactions. Significantly, these were considered the most important points in a person's life cycle and the occasions on which the communal character of the society was most emphatically demonstrated. Through participant observation, I obtained a good feel of the natural environment and the moral ambience at a traditional dispute settlement forum. The use of such fora by the urban salariat and other educated people is, however, on the decline.

Court records and official interviews were also used as methods of research. The former were mainly obtained from the library and registries of the Supreme Court in Accra. Court records examined included unreported cases, letters of administration and wills admitted to probate. Official interviews mainly involved interviews with state officials in the courts, the Land Titles Registry at Victoriaborg, officials of the Lands Commission, officials of the Births and Deaths Registry, officials of the Registrar-General's Department and officials of the Accra Metropolitan Authority.

We turn finally to the last method of data collection employed during field work, namely, genealogical research. More than anything else, the difficulties of genealogical research emphasise the complexity of the problem of rights to

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[35]See e.g. M. Peil, Social Science Research Methods: An African Handbook, London 1982, pp. 159-164.

property. Both the past and present systems of birth and death registration are far from effective. Figures available from the Births and Deaths Registry and the Office of Population Censuses are patchy and unreliable; in the case of population statistics, they tend to be reliable for particular years in which a census was taken, but due to the patchy nature of birth- and death-reporting, they are notoriously unreliable for non-census years.[36] But for our purposes in this study, it is significant to note that even where births and deaths are registered, such certificates are hardly used in disputes about rights to property. The undisputed fount of claims based on family membership seems to be the collective memory. While this may have served the simple and homogeneous family structures of a generation or so ago perfectly well, it is a potential threat to future claims, especially with the increasing incidence of inter-tribal marriages and rural-urban migration. Genealogical research was conducted among older members of families and expert witnesses; it sometimes disclosed interesting lapses in their own memory.

Thus, the methods of field research adopted for this study are many and varied. By a careful commingling of the different methods, we have sought to bring to light new and hitherto unremarked trends in the law. While the quantitative methods described above were used as the main basis for obtaining results in this research, qualitative views on those findings were also sought through the various interviewing methods already described.

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[36]S.K. Gaisie, Estimating Ghanaian Fertility, Mortality and Age Structure, Legon 1976, pp. 54-76.

The interviewing methods and questionnaires described above were pilot-tested on parts of the West Korle-Gonno Estates under conditions which reflected the main research in miniature. Piloting involved thirty informants and raised a number of important points. It was realised, for instance, that several of the original questions would lead to considerable misinterpretation if the questionnaires were administered in the original form. As a result the phrasing of many questions was changed to suit the various classes of respondents. The length of questionnaires was also reduced, as it was recognised that long interviews often resulted in respondent fatigue, which might consequently affect the quality of the data. In addition, it was realised through pilot-testing that in-depth interviews (in which the respondent was encouraged to talk in general terms about the subject, covering a list of points in the process) in addition to structured interviews were a good way of eliciting information from elite informants. Consequently, a combination of interview by questionnaire and of key witnesses was used.

2. 4 Sampling

In order to ensure the scientific accuracy of the findings presented in this thesis, various sampling methods were adopted. Basically, the sampling methods were determined by the nature of the field-area and the difficulty of obtaining an accurate sampling frame. Faced with the impossibility of obtaining up-to-date official statistics of the target population, the fieldwork was based largely on neighbourhoods and households. Land/house was taken as the basic statistical

unit. Each of the three field-areas was divided into distinct districts on the basis of income, education, and the proportion of strangers in the population.[37] Having stratified the target population into various districts, the selection of respondents in each of these districts was based strictly on random sampling. Under this system, a comprehensive list was prepared of all the households in each district. Each household was then given a number and sixty numbers were drawn at random to constitute the basis of the interview sample. Altogether, 60 households were covered in Jamestown, 60 in Old Dansoman/West Korle-Gonno Estates and 40 in Domiabra. Thus, by basing the selection purely on chance, we sought to eliminate sampling bias.

The figures above are remarkable since they indicate absolutely no degree of non-response. Non-response remains one of the biggest sources of bias in sampling. Generally speaking, the larger the proportion of non-respondents in the sample, the more serious the resulting bias. We therefore took particular steps to reduce or eliminate the degree of non-response. Firstly, the familiarity of many influential people in Jamestown, Old Dansoman and the West Korle-Gonno Estates with the writer and his field

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[37]Under this scheme, the following structure emerged. Jamestown was divided into the following districts: District A made up of the Sea View Hotel/Lighthouse area, the Cleland Road/City Engineers area and the Old Customs/Bible House area; District B made up of the London Market/Palladium area and District C made up of the Ayalolo, Timber Market and the Galloway areas. Old Dansoman/West Korle-Gonno Estate was divided into the Girl's School(Mamprobi Girls 1&2)/Christmas in Egypt/Zion School area, which constituted District D; Central Old Dansoman (District E); and Outer Old Dansoman (District F). Because of the smallness of its population, Domiabra was simply divided into the Old Quarter and the New Quarter, being Districts G and H respectively. (See maps on pages 10 and 11).

assistants and their families significantly increased the rates of response.[38] Secondly, the technique of recalling and interviewing the "not at homes" in the sample reduced non-response to nil.

But other methods were also used. In certain instances, where random sampling failed to yield a sufficient number of respondents with enough knowledge or experience of a particular custom to assist us in the discovery of new evidence, the technique of chain sampling was employed. By using the chain sampling technique, each respondent with experience or knowledge of a particular custom was asked to name others in the target population with experience or knowledge of the same custom. We followed up every contact mentioned, interviewed the persons concerned and asked for further contacts until a specific number of respondents (20) had been obtained. In cases requiring specialist knowledge of the customary law, such as the nature of customary interests in land, requisites of a valid sale of land, essential validity of customary marriage, essentials of a valid samansiw, etc., we used the technique of the quota sample. This required that each of the field assistants employed was given a quota of certain categories of people to interview. Each assistant was told to ensure that each respondent was selected on the basis of specific quota controls. This included age, experience in the relevant subject area, and status in the traditional hierarchy. As a result, most people interviewed

[38]In the case of Domiabra other factors worked to our advantage. A land transaction in which I was involved immediately before the commencement of the main research earned the trust of the Acting Chief and principal elders of the village. Further, a relation with farming interests in the village gave some assistance to field-work in the area.

under this category were chiefs, stool or family elders, linguists, heads of families and leading authorities on traditional custom.

Using the above sampling methods, a total of 160 households (20 from each of the eight districts selected), representing a wide geographical spread and including 41 heads of families, were covered by our fieldwork. Also chiefs, stool and family elders and linguists were interviewed by using the quota sampling technique. Altogether, as indicated, 60 households were covered in Jamestown, 60 in Old Dansoman and 40 in Domiabra. In addition, the chief and some elders of Old Dansoman, some leading citizens of Jamestown as well as the principal elders of Domiabra were interviewed. Tables 1 and 2 show a breakdown of the number of respondents in the various districts, and indicate their levels of education and income. Furthermore, fifteen legal practitioners were interviewed and their role in the resolution of land disputes and the registration of deeds analysed.

Tables 1, 2 and 3 below illustrate the background of our informants in the various districts.

TABLE 1

EDUCATIONAL BACKGROUND OF RESPONDENTS			
	District		
Education	**A - C**	**D - F**	**G - H**
1. None	21	2	34
2. Middle School	21	29	6
3.Secondary School	16	24	0
4. University	2	5	0
Total	**60**	**60**	**40**

TABLE 2

INCOMES OF RESPONDENTS			
	District		
Income (cedis)	**A - C**	**D - F**	**G - H**
1. 0 - 5000	22	6	23
2. 5000 - 15000	26	14	17
3. 15000 - 25000	12	25	0
4. 25000 - 50000	0	15	0
Total	**60**	**60**	**40**

TABLE 3

OTHER (ELITE) INFORMANTS				
	District			
Status	A - C	D - F	G - H	Total
Chief	1	2	-	3
Head of family	4	6	2	12
Elder	6	2	2	10
Linguist	1	-	1	2
Others	5	14	2	21
Total	17	24	7	48

It is necessary to say a few words about tables 1, 2 and 3 above. Clearly, they cover informants from all manner of economic and educational backgrounds. But many other facts about the sample are not revealed by the statistics. For instance, even though the majority of informants were persons of Gá extraction, there were also significant numbers of informants from other parts of Southern Ghana. Also, because the forebears of many of the informants had come from Jamestown, it was fairly easy to trace family histories, to analyse the patterns of landholdings and intermarriages among certain families and to assess the degree of breakdown of traditional structures.

There were significant social and occupational differences between informants from the various field-areas. While farmers and fishermen dominate the figures for Domiabra, bureaucrats, professionals and civil servants form a significant part of the figures for the other field-areas. However when respondents' knowledge of the actual contents of the various rules of customary law was measured, using information from elite informants in the sample as the point of reference, it was found that market women, fishermen, and farmers were far more likely than bureaucrats and professionals to produce a detailed recollection of the rules of customary law. It is difficult to explain why this is so, but it appears that the social lives of fishermen and market women are still very much regulated by traditional precepts and their relative lack of formal education has made them less liable to be influenced by modern ideas.[39]

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[39]Kilson 1967, p. 35 has suggested that since women have less access to Western education and thereby the requisite skills for effective participation in an industrialised economy, they are more culturally conservative than men.

CHAPTER 3

THE SOCIO-ECONOMIC AND POLITICAL BACKGROUND OF GHANAIAN CUSTOMARY LAW

This chapter sets the socio-historical background to the thesis by broadly tracing the development of the main economic, political and social institutions of Ghana. Thus, it seeks to highlight the major events within the pre-colonial and colonial periods that shaped the development of the legal institutions of Ghana. Some attention is paid to the present political system because this has important implications on the law-making processes in Ghana. The present legal framework of the country and its origin in the colonial period are examined to see how the state, in its various manifestations in Ghana, has treated customary law. The various statutory enactments through which the official customary law came to be established are outlined briefly. We will seek to bring to light the various principles and influences that underlie customary law in traditional society and show how the emergence of the modern state in Ghana has checked those principles and influences. The process of dispute settlement (involving the use of the rules of customary law) in the state courts is compared to the traditional approach to dispute settlement in Accra with a view to isolating the influences that account for the gap between official and unofficial customary law.

3.1 The socio-economic framework

Three distinct periods of crucial importance can be identified: the pre-colonial, colonial and the post-independence eras. The origins of European settlement on the Gold Coast are very briefly outlined in this chapter. Colonial rule, ending with independence in 1957, set the context for the legal regime that is extensively analysed in this thesis. The Ghanaian polity today constitutes an enforced unity of various indigenous states and kingdoms that predated colonialism and, as a result of the twin processes of colonisation and colonialism, it is also a legal condominium that embraces both the indigenous customary law and the received English law.

Onto the confused cocktail of the colonial system has been imposed a modern Austinian state - functioning as part of the "global village" and integrated into the world economy.[1] In short, the state has added a veneer of modern law to a hard substratum of indigenous and received institutions. As already outlined, it is the aim of this thesis to make a window through this new facade in order to observe and analyse the dynamics of contemporary Ghanaian society in relation to changes in the laws of the family and property.

Even though agriculture is the most important occupation in Ghana,[2] it is

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[1]Kimble 1963, p. 1. See also G. Andrae, Industry in Ghana, Uppsala 1981, pp. 16-17 esp. p. 16 where it is stated that the process of integrating Ghana into the world economy has entailed the superimposition of a "formally" organised export economy based on high level technology and market principles of organisation on a "traditionally" organised and highly locally-oriented structure based on artisan and peasant skills.

[2]E.A. Boateng, A Geography of Ghana, London 1963 offers a good background to the physical and human geography of the country.

not an important part of the economy of Accra. Such agriculture as is practised in isolated settlements on the Accra plains is mainly on a small-scale and is often characterised by intensive and inefficient use of labour.

Until recently, large-scale manufacturing industries were practically unknown. Colonial rule and the early post-independence period saw the development of small-scale industries,[3] saw-milling, and the acquisition of modern technological skills among the emerging class of workers. Further, increased concentration of population[4] in the urban areas provided both the source of labour and the market as a basis of steady industrial development. The consequent thinning out of rural areas radically changed the demographic balance, and disrupted the old web of economic and social relations that had underpinned pre-colonial society. An emergent transportation network linked little and large towns to the cities, while isolated villages and hamlets, and entire swathes of the countryside, were effectively cut off.

Accra falls within a belt of low rainfall that stretches along the south-eastern coast of Ghana. In many places, including Domiabra, cattle are kept in large herds but often as much for prestige purposes as for economic reasons.

The historical and political factors that bear on the nature of economic

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[3]See W. Birmingham, I. Neustadt and E.N. Omaboe, A Study of Contemporary Ghana, London 1966, pp. 250-273. See also H.K. Anheier and H.D. Seibel, Small-Scale Industries and Economic Development in Ghana, Saarbrücken 1987.

[4]E.V.T. Engmann, Population of Ghana, Accra 1986, pp. 21-33.

activities in Ghana are sketched out in sections 3.3 and 3.4 below. Here, it is necessary to describe broadly the spatial distribution of occupations in Accra and the surrounding region. The major occupations in the Accra metropolitan area range from large-scale industries to service industries, which provide employment for the city's teeming population. The foregoing factors as well as rapid population growth and the spatial expansion of the city have reduced almost to a minimum the possibilities of subsistence from the land, with long-term consequences for the relationship between chiefs and their subjects. Land has become a commodity to be bought and sold in a market where increasingly no distinction whatever is made between an alien and a subject of the stool.

3. 2 Family and property in Ghana

Present-day social structures of Ghana are based on relations between the individual, the extended family and the stool or chiefship. The interplay among these constituted the traditional normative order. It is the extended family rather than the conjugal family or the individual that has generally been assumed to be the basis of Ghanaian society.[5] It continues to be the basis of social organisation of many Ghanaians in the rural areas and others working within the large pre-capitalist sector of the Ghanaian economy.[6] The conjugal family now plays

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[5]Danquah 1928a, p. 197.

[6]See Anheier and Seibel 1987, pp. 45-62 showing that relatives and friends, rather than formal sources, are the sources of support for entrepreneurs in the informal sector of the Ghanaian economy.

an increasingly important role in social organisation in the urban areas, where chiefship has undergone significant changes.

The long period of contact with Europe left the traditional scheme largely intact.[7] The Republic of Ghana was only established in 1960, but the area known today as Ghana had enjoyed centuries of contact with Europe, even before the discovery of such places as America and Australia. As elsewhere, the Europeans restricted themselves initially to trade,[8] and the people continued to live under their own laws and customs.

The family as a supportive cradle of social and religious life, was the basic cognative group, holding together all of its members through a network of reciprocal rights and duties. As a group, it has undergone profound changes under the combined assault of economic development, religion, and western education. But in its pristine, extended form, it provided its members with a useful ballast against the rigours of a harsh world, and remains the most effective means of exercising social control and of ensuring conformity to the mores of society.[9] It embraces the web of kinship and it is the main means of

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[7]See W.W. Claridge, A History of the Gold Coast and Ashanti, London 1964, for a detailed account of the pre-colonial and colonial history of Ghana.

[8]Trade on the Gold Coast involved merchants from practically every major European nation, including the Dutch, the Danes, the French, the Swedes and the Brandenburgers (Prussians) who joined the Portuguese and British and created spheres of influence around their forts and castles. One major result of European trading activities was to deflect the ancient trans-Saharan trade in gold and slaves to the coast. See the introduction to van Dantzig 1980 where he describes the volume and intensity of the trade as making the Gold Coast the ancient "shopping street" of West Africa. Cf. K.G. Davies, The Royal African Company, London 1957 p. 240 where the Gold Coast is described as "the chief region of settlement." See also, J. Carmichael, African Eldorado, London 1993, esp. pp. 81-90.

[9]Ollennu 1966, pp. 240-241.

transmitting society's cultural capital as well as its weaknesses to succeeding generations. The family is by far the most important of the building blocks of society; in pre-colonial times, it was the hub of social life, providing the essential nexus between different generations, and between the living and the dead.

Ollennu identified three forms of family in Ghanaian society: the patrilineal family, the matrilineal family, and the joint patrilineal and matrilineal families.[10] Each of these had a common family house, a common burial ground, united in the performance of funeral rites, and shared a common liability to pay family debts.[11] The family was to all intents and purposes a corporate body, its executive arm being the family council, often acting through its agent, the head of family. It is in this person that the religious and secular functions of the family were focused, for the traditional scheme did not recognise a separation between the secular and religious functions of its functionaries. In fact, the coercive aspect of the normative scheme was embedded in religion. In traditional philosophy, life was seen as metaphysically cyclical, full of ups and downs, and thus the wider members of a person's family had to share in his fortunes so they could, in turn, help in times of need. The head of family had to litigate, enter into contracts, perform ceremonies and propitiate the gods on behalf of the family. As Busia put it,

> "Kinship, reverence for the ancestors, and belief in the spiritual power of the Earth have combined to give land tenure...its peculiar character. The

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[10]Ibid. p. 72.

[11]Sarbah 1968, p. 36.

earth was regarded as possessing a spirit or power of its own which was helpful if propitiated, and harmful if neglected, but the land was also regarded as belonging to the ancestors."[12]

A remarkable aspect of the family is its religious function. It is really in this function that the ultimate sanctions of the society and its authority in matters of succession and land rights were located. For the family or kinship group was not only an economic unit, but was also a ritual unit, communitarian in character, and served as a form of social and economic insurance. This idea is forcefully expressed by Danquah:

> "Under the ancient regime, private ownership of movable and immovable property was not the basis of Akan political and social life. Land, the most valuable of earthly possessions, was held in common by the people...The pursuit of wealth was followed for the sake of the family, for on the death of a wealthy member...all his wealth - land, slaves, wives, houses and all personal property became subject to family control and disposition...for under that system, it was scarcely possible for an ambitious or aspiring member of the family to amass great wealth without enlisting active or other support from individual members of the family."[13]

While all this might have served a rural subsistence economy well, it certainly does not fit in with the modern ideas of wage labour, individual responsibility and individual property rights. Nevertheless, the family has held its own, and identification with it strengthens the other great traditional institution of the stool, and thereby preserves the bastions of ethnicity.

Family heads and chiefs were the custodians of the land, and even

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[12]K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti, London 1968, p. 40.

[13]Danquah 1928a, p. 197.

though there is as yet insufficient evidence from which to reconstruct accurately the formation of towns and villages, it is probably fair to suggest that from the original ethnic heartlands, families spilled out to form new homesteads in adjoining territories and hunting grounds as the population expanded. As they buried their dead in particular locations and seasonally collected fruits, snails and firewood, hunting game in recognisable patches of land, they also had to defend those lands. In this way, families came to have specific rights and interests in what was generally tribal land. These rights crystallised as more permanent fixtures were attached to the land - tombstones, houses, perennial crops, etc.[14]

Today, urbanisation has led to the dispersal of family members across the city, country and beyond. The old system of lineages and quarters appears to have been abandoned already in the new suburbs where the ownership of land and its allocation by the head of family is largely a thing of the past. As a result of the emerging trend towards individualisation of property rights, the head of family increasingly plays only a ceremonial role.

Though the traditional scheme ascribed an important place to the individual, the rights of individuals were seen in the context of their obligations to their families. The individual was generally subsumed under the family whose head was his representative in most social matters. Social mores demanded that each individual knew his place within the family. But the new values

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[14]A. N. Allott, The Ashanti Law of Property, Stuttgart 1966, pp. 161-162.

introduced by colonialism and Christianity emphasised individual rights and obligations.[15] The upshot is that while in pre-colonial times the individual's welfare was the obligation of his family, he has today assumed a more independent role in society. In matters of property and property relations, the status of the individual is now determined more by the English law of contract than by status within the family.

The creation of individual rights in group-held land was always bound to result, in the long run, in the disintegration of old communal rights. In the same way as the family acquired its right in land, so the individual, by expending his own labour in the cultivation of crops on the land and by defending it, acquired his own inalienable rights in land. The efflux of time and the passing of the generations bestowed a sanctity of its own on the individual or family's interest. Uninterrupted and undislodged occupation of a particular piece of land came to be seen as giving rise to an individual's title to the land and a natural right. This process is best described in Herskovit's oft-quoted passage:

> "An individual owns the utensil or other object on which he has expended effort, whether it be a mortar, a canoe or the harvest of a field he has worked. The land he farms, though theoretically it "belongs" to the chief as representative of the community, is his for use, and as long as he uses it, cannot be used by another...A corollary to the principle of ownership provided the sanctions needed to accomplish the transfer from a communal to a more personal form of landholding when treecrops became important. We have noted the traditional code whereby the individual has a personal, inalienable claim to those things for whose

[15]J.C. Caldwell, Population Growth and Family Change in Africa, Canberra 1968, p. 54.

existence he has been responsible."[16]

Of course, in practice, matters were not so clear-cut. In an unwritten legal scheme, the passage of time, the temporary abandonment of plots, ill-defined boundaries, and the operation of the extended family system must often have given rise to serious disputes. Today with many new social pressures on the increase, the archetypal family is struggling to hold its own. It appears that the old-fashioned families, with origins shrouded in antiquity, reverence, and the notion of the remote ancestor are giving way to a new type of family. According to the principle in Mills v. Addy,[17] in the matrilineal areas of Ghana, every woman who is married and has children, originates a family. The family so originated is a branch of the wider family to which the originator belongs. Thus, we have moved one step further from the original extended family to the sub-family or nuclear family.

All this appears to be in line with the crystallisation of new ideas of property within the society. The trend appears to have shifted from "ours" to "mine," from "our family's" to "my family's." It marks a crucial change from communal property to private property properly so-called. This remarkable change in property notions is the key to understanding the modern customary law of Ghana. It embraces and rationalises the specific and inalienable rights

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[16]M.J. Herskovits, The Human Factor in Changing Africa, London 1962, p. 145.

[17](1958) 3 W.A.L.R. 357.

of individuals and sub-groups (such as the conjugal family and the sub-stool) within the larger and equally inalienable rights of the extended family and the stool.

3. 3 The impact of economic change on chiefly authority

It is thought that the idea of the stool developed from family stools, occupied by family heads, to town stools, occupied by chiefs, and so on.[18] Of course, the class of electors in each case was different. The family stool provided the blueprint in the pyramid of authority which was supported at the base by the body of individuals and headed at the top by paramount stools.

With its origins in pre-colonial times, the stool represents the highest form of legal abstraction known to the traditional scheme. Together with its northern equivalent, the skin, it symbolises the locus of traditional authority. If ever we could speak of the sovereign in colonial and pre-colonial Ghana, we must locate him or her in the occupant of the stool or skin. Chieftaincy is based on the idea of the stool - a quaint and clever legal fiction which is the nearest thing one can find to Rousseau's idea of social contract in Ghanaian customary law.[19]

On all public occasions, the chief sits on a stool which symbolises the collective spirit of the people. Stools are believed to hold the soul of the people,

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[18]See A.N. Allott, The Akan Law of Property, London 1954, Unpublished Ph.D thesis, esp. pp. 133-134.

[19]Allott 1966, pp. 133-134.

especially the spirits of illustrious former occupants.[20] Chiefly office, one step up the legal ladder above extended family headship, represented a more complex but direct development of the latter office.[21] Like the family head, the chiefs represented their people - the tribe, the village or the quarter - and surrounded themselves with their own court of stool elders, often family heads in their own right and repositories of traditional knowledge and wisdom.[22]

Chiefly office comprised executive, judicial and legislative functions, often involving complicated procedures in which the unique traditional functionary, the okyeame or linguist, acted as spokesman. But the stool's most important source of authority stemmed from the fact that it owned the land on which the town or village was founded.

It was the duty of the chief to keep the peace, ensure the liberty of the individual, raise an armed force for the defence of the realm, and to see to its peaceful development. This is embodied in the Gá concepts of toindzoleh (peace and tranquility), hedzoleh, (freedom or liberty) and buleh (respect and discipline) which underlie the exercise of public and household authority. In general, all actions and orders of public officials, judicial pronouncements and customs must reflect these principles which the Gá regard as absolutely

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[20]In ancient times, stools were carried to war and were held aloft well beyond the front line. As it contained the spirits of the ancestors, and was thought to have special magical powers, its presence inspired the troops to greater heights of valour; and of course the capture of the opposing stool became a prime object of the battle.

[21]Allott 1966, pp. 15-78.

[22]The information that follows is based on the replies of both elite informants and other respondents.

necessary for the regulation of society. These principles secured civil order and economic prosperity and also ensured harmonious social and familial relationships in traditional society. Buleh is regarded as the vital principle that governs relations between the extended family and its members. It ensures obedience to the rules of customary law and the edicts of the political authorities.

In principle, toindzoleh and hedzoleh are linked to the co-ordinate of buleh which is considered the most essential requirement for the proper functioning of civil society. Respect for public officials and their edicts, and for elders and the ancestors is regarded as the standard of good citizenship. In turn, freedom, peace and tranquility are considered the natural result of citizens' obedience to the rules of society.

The emergence of modern urban society, accompanied by an influx of non-stool citizens, modern modes of production and the enlargement of the state's authority, weakened the principles upon which traditional Gá society and obedience to its rules of customary law were based. However, a new body of official customary law was developed by the courts which recognised aspects of traditional customary law, including rules relating to family, succession and land.

Land was, in strict theory, regarded as belonging to the ancestors whose collective spirit the stool embodied. The occupant of the stool therefore represents the authority of the ancestors, and the same awe in which the people hold their ancestors must attach to the chief. In this sense, the chief represents the sovereign of his people, issuing commands, directives and prohibitions to

them and punishing transgressions. Clearly then, it is the legal fiction of chiefship, especially in its corporate sense of the stool, that provides the traditional constitutional framework.[23]

Sarbah, in tracing the rise of chiefly authority and the development of customary law, observed that the towns of the Gold Coast had developed from villages originally founded and occupied by single family groups. As the villages grew into towns, so the village council, sitting together and acting judicially as a local tribunal, grew into a law-making body.[24] From isolated instances of repeated action, habits were acquired and usages emerged which, in the process of time, came to constitute the customary law.[25] New entrants to the community found existing general usages which regulated rights and obligations, and to which they must submit through the fear of popular sanction or the pressure of circumstances. Another source of such laws were orders or commands issuing from the chief regarding the regulations and prohibitions of the community. These were published by the beating of the drum or gong gong in the streets and "in places where those to be affected are wont to assemble."[26] Busia described chiefship in the following words:

> "The chiefs were the custodians of the land...the custodianship of the chief entailed certain rights and responsibilities. The chief was responsible

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[23]See e.g. R.S. Rattray, Ashanti Law and Constitution, London 1956, esp. pp. 75-80.

[24]Sarbah 1968, pp. 20-22.

[25]Ibid. p. 20.

[26]Ibid. p. 24.

> for the defence of the land at law, and by arms. He also had certain defined rights which were co-existent with the rights of lineages, and individuals of his Division. In case of extreme need he could sell the land, but not without the consent of his council, and a sacrifice to the ancestors...But over the same land his people had rights of usufruct. Any piece of land to which no lineage had the claim of usufruct came directly under the chief in his official capacity. Strangers wanting land on which to settle or farm would ask the chief, who would give them portions of these lands."[27]

Here we find all the attributes of chiefship and the germ of the principle later developed by the judiciary that the chief could not alienate land without the consent and concurrence of his elders.[28] Today, grafted on to the state through a system of salaries and a rigid hierarchical arrangement involving a national and regional houses of chiefs, chieftaincy is part of the state approach to local and regional control. It is occupation of the stool, then, that gives the chief authority to rule. The commands he issues are generally held as binding on the society. In return, he is in duty-bound to rule justly, and seek the welfare of both the dead and the living as well as that of generations unborn. As a complex juridical concept, the idea of the stool represents the flowering of the native legal genius.[29] It belongs to the same genus as a throne or a bishop's see, representing the centre of authority.[30]

Sarbah and others have stated that there is no land without an owner in

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[27]Busia 1968, pp. 44-45.

[28]See e.g. Ollennu and Woodman 1985.

[29]Rattray 1956, pp. 75-130.

[30]See Allott 1954, pp. 15-78.

Ghana.[31] This principle, used as a tool of convenience, has preserved for stools and chiefs, titles of lands over which they exercise little or no acts of ownership. The effect, as we shall see, has been to divide the country into a mosaic of tribal territories. The assumption was that as a tribe expanded, it would eventually extend its frontiers over all the surrounding areas. Even when stool land has been occupied by purchasers, the stool's right is merely reduced and does not disappear altogether. Families, though they might for all practical purposes be firmly ensconsed in their lands, still own it at the stool's pleasure, in theory. In practice, most lands are permanently occupied by families, while the stool owns most unoccupied lands.[32]

Needless to say, colonialism had a considerable effect on native institutions, mainly through the steady enlargement of the powers of the colonial authorities and a corresponding diminution of the powers of traditional authorities.[33] The ideas underlying the colonial economy favoured the individual to the detriment of the corporate elements in the traditional normative order.[34] But above all, the new jurisprudence of the English law of contract, torts, equity and property had little concern for the corporate group. Therefore the traditional scheme had to be redrawn (with the aid of the repugnancy clause) to suit English

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[31]See e.g. Sarbah 1968, p. 66.

[32]In parts of Ghana, such as the territories of the Northern Ewe, where there are no stool lands unoccupied lands are vested in families.

[33]For details see Busia 1968, pp. 139-164.

[34]Asante 1975, pp. 29-45.

notions.[35]

The growth of towns, and the spread of the population were the prime factors in the development of the new economy.[36] From small isolated villages and kingdoms of the eighteenth and nineteenth centuries, the development of transportation aided the formation of urban centres.[37] Finally, in 1899, gold dust and nuggets were demonetised. The emergence of a cash economy led directly to the development of export-oriented commercial agriculture in tropical produce.[38] In the words of Polly Hill,

> "The cocoa companies came into existence soon after 1900 in response to the realisation that the demands of commercial agriculture required a commercial attitude to land as a factor that is bought and sold. In the eighteen nineties, each parcel of land was unique, to be described like a painting or a piece of sculpture, in its own terms. There was a scramble for land without there being a market in land."[39]

The cocoa farmers described by Hill were men who had migrated from Krobo, Accra, Shai, Akwapim, and other Southern areas of the country into the forest belt to seek their fortunes. In buying what was previously virgin forest,

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[35]A.N. Allott, Essays in African Law, Westport (Connecticut) 1975, pp. 3-27. On the repugnancy clause see in detail pp. 143-144 below.

[36]See, J.C. Caldwell, African Rural-Urban Migration, The Movement to Ghana's Towns, Canberra 1969, pp. 5-29.

[37]See J. Hinderink and J. Sterkenburg, Anatomy of an African Town, A Socio-economic Study of Cape Coast, Ghana, Utrecht 1975, esp. pp. 191-193. Also, E. N-A. Kotey, Residential Tenancies and the Urban Land Law: The Ghanaian Experience, London 1981, Unpublished Ph.D thesis, pp. 41-45; and R.L. Birmingham & C.S. Birmingham, "Legal Remedies for Over-urbanisation: The Ghanaian Experience", University of California Los Angeles Law Review, Vol. 18 (1970-71), pp. 252-270, esp. 257-269.

[38]S. La-Anyane, Ghana Agriculture, Oxford 1963, esp. pp. 172-190.

[39]P. Hill, The Migrant Cocoa Farmers of Southern Ghana, Cambridge 1963 p. 49.

they rarely, in the first instance, bought from individuals. The land was usually sold corporately through the agency of the chiefs whose authority derived from the people whose land they were selling. All over the country, and particularly in the forest belt, this process was being repeated and a new legal system was emerging, moulding customary law rules into a systematic order to aid the acquisition of individual interests within group interests. Also, new professions and occupations were being created, new services and products appeared, and new relationships were being formed that were alien to the old system. The almost complete monetisation of the economy brought wages and salaries in place of the old communal and barter systems. New professions emerged with the creation of the civil service, local authorities and other agencies of the central government. Besides, there were such new relationships as landlord and tenant that created new legal problems not provided for by customary law.

Both the large-scale acquisition of land for the purpose of commercial agriculture and the acquisition of landed interests by aliens in the cities and large towns for residential purposes increasingly compelled the state in its adjudicative processes to back the acquirer, especially where there was evidence that he had entered into a contract of purchase with the original owners.

It was the Guggisberg administration of 1919-1928,[40] with its emphasis

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[40]See R.E. Wraith, Guggisberg, London 1967, esp. pp. 98-159; and F. Agbodeka, Achimota in the National Setting: A Unique Educational Experiment in West Africa, Accra 1977. See further, C.K. Williams, Achimota: the Early Years, 1924 - 1948, Accra 1962, pp. 4-36. Sir Gordon Guggisberg was the Governor of the Gold Coast colony between 1919 and 1927 and was widely credited with the main infrastructural developments in the colony before the Second World War.

on planned economic development, that saw the first real emergence of a national economy. Before, there had been a general absence of transportation, and a very limited range of goods and services. The Guggisberg years saw the laying of the first railway tracks in 1923, the construction of the first harbour at Takoradi, the building of Africa's best contemporary hospital at Korle-Bu, and above all, the founding of Achimota School which produced most of the nationalist leaders and acted as a melting pot for boys and girls from all, parts of the country, provided an African middle class and created a sense of national identity. Thus, the Guggisberg years saw the integration of all four parts of the new colony into a single economic and national unit. As has been observed,

> "Guggisberg provided the schools from which the next generation of nationalists emerged, the roads along which they travelled, and the harbour from which prospective leaders sailed into a national-minded world."[41]

With the World Depression and slump following shortly afterwards, the Guggisberg years laid the economic foundations on which independent Ghana was built. On the attainment of independence, a small elite had been created and the middle schools had produced a vast number of people with a basic education. The suburbs of Accra had developed into smart residential areas. The traditional socio-economic system did not entirely wither away; but a new system, initially precariously juxtapositioned alongside the old, was now firmly entrenched, and the frontiers of traditionalism had been inexorably rolled back.

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[41]Kimble 1963, p. 60.

Chieftaincy was equally affected by the changes wrought by colonialism. Its religious underpinnings were thoroughly weakened and the very essence of chiefship undermined.[42] It succumbed to the new central authority but the most telling of the blows against chiefship was dealt by the rise of individualism which threatened to destroy the ground on which the communalistic values of pristine chieftaincy were based.[43] Urbanisation and greater geographical mobility brought a lot more persons into the jurisdiction who had no loyalty at all to the chief, and who indeed had no cause to pay him any respect. Education and Christianity also took their toll. But the greatest assault was mounted by the central government in an interminable battle that ended in the near-demise of chiefship. In fact, most stools today, save for their considerable control over unoccupied lands, are empty shells of authority. Many people who had no traditional titles in native law ended up being made chief simply because of their loyalty to the central government. But the seeds of destruction lay in the very nature of the new order.

Colonialism entailed enormous cultural interaction between African and European ideas.[44] European cultural ideas were principally based on the notion of individualism. This was widely advocated by the main cultural arm of

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[42]For details see Busia 1968, pp. 102-198.

[43]Id.

[44]See in general B. Malinowski, The Dynamics of Culture Change: An Inquiry into Race Relations in Africa, New Haven 1945 which provides a useful concentration of viewpoints on cultural change in post-colonial Africa.

colonialism, Christianity, through its insistence on monogamy. As most educated Africans also converted to Christianity, they were faced with a dilemma between the communalism of traditional society and the individualism of the new dispensation. Concerning the centrality of individualism to Western legal tradition, Roscoe Pound noted,

> "If we look narrowly at our legal tradition, we shall see that it has two characteristics...It is concerned not with social righteousness but with individual rights. It tries questions of the highest import as mere private controversies between John Doe and Richard Doe...Moreover, it is so zealous to secure fairplay to the individual that often it secures very little fairplay to the public. It relies on individual initiative to enforce the law, and vindicate the right. It is jealous of all interference with individual freedom of action, physical mental or economic. In short, the isolated individual is the centre of many of its most significant doctrines."[45]

This apotheosis of the individual and the diminution of the corporate body was the very antithesis of the traditional order on which chiefship was based. Even though chiefship and the traditional mechanism have generally shown remarkable powers of adaptation to the new legal order, there was no doubt which way the tide was flowing. The idea of contract had taken hold of the traditional scheme.

The effect of Sir W. B. Griffith's judgment in Lokko v. Konklofi[46] was to give legal recognition to the conversion of stool property into private property. In that case, one Konklofi borrowed a sum of money from Lokko, using his land as security. When he defaulted, Lokko obtained judgment, and took out a writ

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[45]R. Pound, The Spirit of the Common Law, Francestown (New Hampshire) 1931, pp. 12-13.

[46](1907) Ren. 450.

of fieri facias, and Konklofi's house was attached in execution. The local chief, representing the stool, then put in an interpleader arguing the stool's reversionary interest in the land which had been granted by the stool to Konklofi's father a number of years previously. It was held that the occupation of the land had been continuous, and of such a character that the land must be deemed to be the property of Konklofi. It was therefore, seizable in execution. Konklofi could have argued that the land was family property; of that, the judge said:

> "Stool land has been settled by a father, the son has succeeded, has built a village, and there has been no alienation by the stool, but there has been recognition of the exclusive occupation. Suppose the Berekusu stool fell into debt, I can quite understand that Konklofi would be expected to share the debt, for he is subject to the stool, but if stool land were to be seized in execution, can there be a doubt that Konklofi could successfully interplead? As soon as the court ascertained that he and his family had had continuous occupation for 40 years or over, and that he had permanent cultivation upon the land, it would decide that he had appropriated that portion of the stool land to himself with the tacit consent of the stool, and that it was no longer stool property...I am of opinion that the occupation has been of such continuance and of such a character that the land must now be deemed to be the property of Konklofi and seizable in execution."

With the advent of cash crop cultivation around the turn of the nineteenth century settlement upon stool land in the above manner by stool subjects as well as outright sale of stool land to strangers increased markedly. The sale of land, in particular, brought access to funds to chiefs and other traditional authorities, leading to new problems over the disbursement of the proceeds of such sales, frequently undermining traditional authority as funds could not be properly accounted for, and lengthy disputes ensued. These often led to disenchantment

with traditional authorities and the decline of their power. Of the resulting decline in chiefly authority, Busia noted that before 1900 chiefs were mostly destooled for failure to consult the elders or for breaking custom; but that after 1900, the most common cause of destoolment was that of misappropriating stool funds.[47]

3. 4 *The constitutional position under colonial rule*

The modern nation state established on the Gold Coast by the British was an entirely European transplantation onto African soil.[48] The first English voyage to the Gold Coast was made by an obscure captain, Thomas Windham, who together with the Portuguese, Antonio Anes Pinteado, sailed out of Portsmouth in 1553.[49] We have already seen how the British, in pursuit of economic interests, set up the Royal African Company, which was soon superseded by the Company of Merchants. In 1821 this Company of Merchants was abolished and its possessions on the Gold Coast were transferred to the Crown, and placed under the Government of Sierra Leone.[50]

An important development in regard to relations between the natives and

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[47]For details see Busia 1968, p. 214.

[48]D.E. Apter, The Gold Coast in Transition, Princeton 1955, esp. pp. 175-198 describes the gradual development of the structures of secular government in the Gold Coast by the colonial authorities. See also, R. Rathbone (ed.), Ghana, London 1992 which brings together a number of important documents that illuminate the processes which led to the end of British colonial rule in the Gold Coast and, provide a clear insight into the establishment of the state of Ghana.

[49]Claridge 1964, p. 60. The following works also contain useful detail on the initial English voyages to the Gold Coast: W.E.F. Ward, A History of the Gold Coast, London 1948, p. 66; F.M. Bourret, The Gold Coast: A Survey of the Gold Coast and British Togoland, London 1949, pp. 15-16; and G. MacDonald, The Gold Coast Past and Present, London 1898, pp. 1-29, esp. p. 14.

[50]Claridge 1964, p. 331 .

the Crown was the signing of the Bond of 1844. Under the Bond of 1844 made with Commander Hill, selected chiefs of the Gold Coast acknowledged the power and jurisdiction which had been de facto exercised in the territories contiguous to the British forts and settlements, and declared that the first objects of law were the protection of individuals and property, and that human sacrifices, kidnapping of hostages for debts or "panyarring" and other barbarous customs "are abominations, and contrary to law."[51] The chiefs and Commander Hill agreed that serious crimes be tried by the Queen's judicial officers sitting with chiefs, thus "moulding the customs of the country to the general principles of English law."[52]

The emerging constitutional process was accelerated by the separation of the Gold Coast from Sierra Leone in 1850. The Gold Coast now had its own Governor together with an executive and legislative council. However, an attempt in 1852 to create a Legislative Assembly including chiefs with full powers to enact laws failed when an annual poll tax it imposed met with massive popular resistance.[53] The Assembly never met again. The Supreme Court Ordinance of 1853 established the Supreme Court of Her Majesty's Forts and Settlements, to be presided over by a Chief Justice of British extraction. This court was later abolished in 1866, and replaced by the Court of Civil and Criminal Justice.

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[51]Ibid. p. 452.

[52]Id.

[53]For details see Reindorf 1966, pp. 325-326.

A proclamation declaring the Gold Coast a British colony was published in September 1874.[54] It regularised British administration and provided for the establishment of laws and ordinances for the peace, order and good government of persons within the settlements on the West African coast. The Supreme Court of the Gold Coast, consisting of a Chief Justice and no more than four puisne judges, was re-established by the Supreme Court Ordinance, 1876. The British finally consolidated their power by adding Ashanti, the Northern Territories and Western Togoland to the original Gold Coast Colony between 1874 and 1920 when the Governor of Gold Coast started to make laws for Western Togoland.

The geographical boundaries of the colony were first defined by the Constitution of 1901 which also declared annexed all territories within the new boundaries that were not already part of the colony. The 1925 constitution, for the first time, gave the Gold Coast an elected Legislative Assembly, and by 1935 it was possible to legislate for the Gold Coast, Northern Territories and Ashanti by one ordinance. In the meantime, the establishment of the West African Court of Appeal had improved the system of appeals.

The colony achieved representative government for the first time under the Burns Constitution of 1946 and Africans were elected to the executive council. The Constitution of 1954, which applied uniform constitutional provisions to all parts of the colony was replaced by a new Constitution in 1954

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[54]Claridge 1964, p. 177.

which retained the basic features of the 1951 Constitution, adding detailed provisions on finance and the judiciary.

3. 5 Constitutional changes since independence

The period under discussion has been one of continual constitutional and political tumult. An extensive body of literature has emerged diagnosing the political and social malaise of the era and advocating a variety of solutions.[55] It began with independence in 1957 under the Convention People's Party (C.P.P.). In July 1960, Ghana became a republic within the Commonwealth, and a new constitution was adopted vesting sovereignty, for the first time, in the people of Ghana. But in its formal aspect, the constitution remained a product of modes of thought and verbal construction largely deriving from British practice. The office of President was established, and the executive, judiciary and the legislature kept separated. However, the ruling party was also influenced by the ideas of Marx, Lenin, and traditional African philosophies.[56] Later, Ghana was declared a one party state and Kwame Nkrumah made Life President.

Between 1966 and 1981 there was a long period of military rule, punctuated by two brief periods of civilian rule and ending with the establishment

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[55]The following adequately reflect the main viewpoints: N. Chazan, An Anatomy of Ghanaian Politics: Managing Political Recession, 1969 - 1982, Colorado 1983; A.A. Boahen, The Ghanaian Sphinx: Reflections on the Contemporary History of Ghana, 1972 - 1987, Accra 1988; Major-Gen. H.I. Alexander, African Tightrope, My Two Years as Nkrumah's Chief of Staff, London 1975; E.D. Austin and R. Luckham, Politicians and Soldiers in Ghana, 1966-1972, London 1975; K. Batsa, The Spark, From Nkrumah to Limann, London 1985; J. Herbst, The Politics of Reform in Ghana, 1982-1991, Oxford 1993 and D. Pellow and N. Chazan, Ghana, Coping with Uncertainty, London 1986.

[56]See in some detail Apter 1955, pp. 206-213.

of the Provisional National Defence Council (P.N.D.C.) government which has retained power to this day. The P.N.D.C. Proclamation[57] declared:

> "Whereas the Government that assumed office upon the coming into force of the said Constitution had betrayed the trust reposed in them by the people of Ghana under the said Constitution...the P.N.D.C. assumed the reins of government of the Republic of Ghana in the interests of the sovereign people of Ghana."

The P.N.D.C. government suspended the constitution, proscribed all political parties, dismissed the President and Vice-President from office, dissolved Parliament, and declared that it "shall exercise all powers of Government."[58] It also set up public tribunals which were not subject to the supervisory jurisdiction of the regular courts.[59]

After a decade or so in government, the P.N.D.C. has recently indicated its intention to return the country to constitutional rule by early 1993 under a constitution drawn up by a Committee of Experts,[60] and debated and adopted by a Consultative Assembly[61] set up by the government.[62]

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[57]Provisional National Defence Council (Establishment) Proclamation, 1981.

[58]Ibid., the Preamble. The 1979 Constitution was formally abrogated by section 66 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982, P.N.D.C.L. 42.

[59]Ibid. s. 10. Section 9 further provided that "No court or other tribunal shall have jurisdiction to entertain any action or proceeding whatsoever for the purpose of questioning any decision, judgment, finding, ruling, order or proceeding of a tribunal set up under this law."

[60]See the Committee of Experts (Constitution) Law, 1991, P.N.D.C.L. 252.

[61]Consultative Assembly Law, 1991, P.N.D.C.L. 253.

[62]Since this thesis was completed a new Constitution of Ghana has been promulgated and legislative powers have become invested in an elected parliament.

The constitutional changes were accompanied by far-reaching social and economic changes very much in keeping with the country's status as an emergent state and developing country. Access to education ripped apart the old social fabric, and a new underclass was created, cut off from the political process, in a state where the official language is at best every citizen's second language, by a curtain of literacy.

3. 6 The legal system and the structure of the courts

Apart from its strong customary law content, the Ghanaian legal system is closely modelled on the English system. Equally, the court system is structured along the same pyramidal lines as the Anglo-Saxon model and its jurisprudence relies basically on English concepts, doctrines and precedents. At the top of the judicial pyramid is the Supreme Court, headed by the Chief Justice, who sits with a number of senior judges. Ultimate judicial authority is vested in the Supreme Court and all other courts follow its precedents, and conform to the directives of the Chief Justice. The Supreme Court has supervisory and appellate jurisdiction over all other courts, being the final court of appeal. Even more important, it has original jurisdiction in all matters relating to the enforcement of or interpretation of any provision of the constitution. However, it has no jurisdiction whatsoever over decisions of the Public Tribunals. Immediately beneath the Supreme Court is the Court of Appeal which has power to hear appeals from the High Court, and any other appellate jurisdiction as may be conferred on it by law. Under article 125 (1) of the 1979 Constitution the High Court has jurisdiction in civil and

criminal matters, and such other jurisdiction as may from time to time, be conferred on it by law.[63]

At the lower end of the judicial pyramid are the inferior courts comprising the District and Circuit courts. By Legislative Instruments L.I. 45 (1960) and L.I. 46 (1960), the entire country was divided into districts delimited by the Chief Justice. Article 132 of the 1979 Constitution provided for justice in each district to be administered by a District Court, presided over by a magistrate. The District Courts are divided into grades 1 and 2 and one magistrate, sitting without jurors or assessors, constitutes the court. Also, under section 28 of the Courts Act, Act 372, Circuit Courts were delimited by the Chief Justice. A "circuit" is made up of a number of districts and a Circuit Court has original jurisdiction in all criminal matters, except treason and offences punishable by death, and in civil matters involving suits up to a fixed amount.

In addition to the regular courts,[64] the P.N.D.C. government, which has been in power since 1981, has set up a number of Public Tribunals under the Public Tribunals Law, 1984.[65] These have jurisdiction over almost all criminal matters and a few civil matters. They may also try matters relating to so-called

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[63]Article 125(1) of the 1979 Constitution.

[64]The Provisional National Defence Council (Establishment) Proclamation of 1981 (s. 9) provided for the continuance of the court system.

[65]P.N.D.C.L. 78. This repealed P.N.D.C.L. 24 which gave considerable authority to "revolutionary organs." For instance, s. 13(1) of Law 24 provided that "It shall be the duty of the Peoples Defence Committees and the management of any public body to inquire into any allegation of an offence under this Law...and to report any findings or observations, and to make such recommendations as they consider necessary to the Special Public Prosecutor appointed under this Law". Further, under s. 13(2), "Peoples Defence Committees shall not be held liable in any court or tribunal in respect of any act done by them which is reasonably necessary for the exercise of their functions under this section."

"economic crimes", and subversion. Under section 16(1) of the Public Tribunals Law, 1984 they can impose the death penalty "in respect of cases where the tribunal is satisfied that very grave circumstances meriting such a penalty have been revealed."

At independence, the sources of Ghanaian law comprised English law, customary law and statute, including the Constitution. Under article two of the 1979 Constitution these were divided into five heads as follows:

> 1) The Constitution,
> 2) Enactments made by or under the authority of the parliament established by this constitution,
> 3) Any orders, rules and regulations made by any person or authority pursuant to a power conferred on that behalf by the constitution,
> 4) The existing law, and
> 5) The Common Law.

Section 2 of the same article explained "common law" as comprising the rules of law generally known as the Common Law, the rules generally known as the rules of equity and the rules of customary law including those determined by the Superior Court of Judicature.[66] The Ghanaian common law, then, is dual in character as it embraces both English law and indigenous law. The term "common law" was defined by section 17 of the Interpretation Act, 1960 (C.A. 4), as follows:

> "The Common Law, as comprised in the laws of Ghana, consists in addition to the rules of law generally known as the Common Law, of the

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[66]Customary law generally was not part of the common law of Ghana in 1960, whereas it is today. See article 2(3) of the 1979 Constitution.

> rules generally known as the doctrines of equity and the rules of customary law included in the common law under any enactment providing for the assimilation of such rules of customary law as are suitable for general application."

Also, the Courts Act, 1960, (C.A. 9) section 154(4), provided for the continued incorporation of English statutes of general application into Ghanaian law as follows:

> "The repeal by this Act of section 83 of the Courts Ordinance shall not be taken to affect the continued application of some of the statutes of general application which were in force in England on 24th July, 1874, as applied in Ghana immediately before the commencement of this Act; provided that the said statutes shall be subject to such modifications as may be requisite to enable them to be conveniently applied in Ghana."

The application of "English statutes of general application in force in England on 24th July 1874" in the resolution of issues in Ghanaian law was abolished by the Courts Act, 1971 (Act 372) which repealed a number of English enactments that had been in force in Ghana and provided a list of English statutes (specified in the First Schedule (section 111)) which were to continue to apply in Ghana subject, inter alia, to "such verbal amendments not affecting the substance" as may be necessary to enable them to be conveniently applied in Ghana.

On the other hand, an attempt was made to incorporate rules of customary law into the official law of Ghana through what was intended to be a process of assimilation. Assimilation of customary law is quite different from the

judicial recognition of customary law through the case law method.[67] By section 45 of the Chieftaincy Act, 1971 (Act 370)[68] the National House of Chiefs may consider whether a rule of customary law practised within the community should be assimilated into the official customary law. Section 45(2) provides for the National House of Chiefs to carry out such investigations as it may think fit and consider such evidence and representation as may be submitted to it; and if satisfied that a particular rule should be assimilated into the official customary law, draft a declaration describing the rule with such modifications as it may consider desirable. The declaration is submitted to the President who may, after consultation with the Chief Justice, make a legislative instrument giving effect to the rule and declaring it assimilated. However, no rule of customary law has ever been assimilated under the above enactment.

Initially, the incorporation of rules of practised customary law into the official customary law had been prevented through the use of the repugnancy clause or repugnancy doctrine. Before 1960, this was provided for under section 87(1) of the Courts Ordinance, (1951 Rev.) Cap 4, which specified that the customary law enforced by the courts should not be repugnant to natural justice, equity and good conscience "nor incompatible either directly or by necessary implication with any ordinance for the time being in force." Under this provision,

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[67]On the incorporation of rules of customary law into the official law of Ghana and their consequent evolution into a unique system of law see, W.B. Harvey, "The Evolution of Ghana Law since Independence", in H.W. Baade and R.O. Everett (eds.), African Law, New York 1963, pp. 47-70.

[68]See also, Part VII of the Chieftaincy Act, 1961 (Act 81).

customary law was a question of fact and came to be increasingly recognised as those rules which since 1876 had passed the repugnancy test and which had been proved as facts in court so often that judicial notice had been taken of them.[69] The calling of expert witnesses was the first step in the ascertainment of Ghanaian customary law from first principles, and its subsequent universalisation to cover the entire country. Though occasionally the courts referred questions directly to native authority, more and more experts came to be persons other than chiefs and heads of families.

With independence, the Courts Ordinance Cap 4 (1951) Rev. was repealed and the Courts Act, 1960, (C.A. 9), enacted. Section 67 of the Courts Act now provided that any question as to the existence or content of a rule of customary law is a question of law for the Court and not a question of fact. Consequently, the customary law of Ghana was considered part of the general law of Ghana. Even though section 67 of the Courts Act was repealed by section 65 of the Courts Decree, 1966, (N.L.C.D. 84) the form and substance of section 67 of the Courts Act were still retained in section 65 of the new Decree. The Courts Decree, 1966[70] was in turn, repealed by the Courts Act, 1971 (Act 372) which provided as before:

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[69]See, e.g. Angu v. Attah (1916) P.C. '74-'28, 43 and Amissah v. Krabah (1936) 2 W.A.C.A. 30, P.C. See further, G.R. Woodman, "Some Realism About Customary Law", Wisconsin Law Review, Vol. 1 (1969), pp. 128-152 for a fuller discussion of the methods of proving customary law in the Gold Coast courts. Section 19 of the Supreme Court Ordinance, 1876 (ultimately section 87 of the Courts Ordinance, Cap 4, Laws of the Gold Coast 1951 Rev. provided for the incorporation of practised customary law into "official customary law by preserving for the Courts "the right to observe and enforce the observance ... of any native law or customs..."

[70]N.L.C.D. 84.

> "S. 50(1) Any question as to the existence or content of a rule of customary law is a question of law for the Court and not a question of fact. 50(2) If the Court entertains any doubt as to the existence or content of a rule of customary law relevant in any proceedings after considering such submissions thereon as may be made by or on behalf of the parties and consulting such reported cases, textbooks and other sources as may be appropriate..."

The laws of land, family and succession of Ghana which we examine in this thesis have largely been developed from customary practices of the people, recognised and incorporated by judges into the official law through the above process. As we pointed out in chapter 1 above, recent reforms have sought to impose the will of the legislature on these aspects of Ghanaian law, but it is almost certain that legislative intervention will serve to clarify those laws and make them more responsive to the changing needs of society rather than destroy their customary character.

3.7 Customary law and the legal process

Customary law as applied in Ghana today is a far cry from the rules enunciated, and varied from time to time, by chiefs, heads of families and village councils. In traditional society rules of customary law depended on consensus for their validity, reflecting the on-going life of the community and changing from time to time to accommodate changes in the practices of the people.[71] Consultation with the elders of the community, rather than legislation by chief's decree, was

[71]Harvey 1963, pp. 58-59.

considered the normal method of altering customary law to meet the changing needs of society.[72] This was quite different from the approach that the courts and later the state adopted to customary law.

Where a party in an action sought to rely on customary law, the particular rule of custom had to be specifically pleaded. Thus, considerable authority and weight came to be given to the written works of Ghanaian jurists. It was facilitated by section 56 of the Courts Ordinance, 1951 which empowered the courts to "give effect to any book or manuscript recognised in Ghana as a legal authority". This led to the wide recognition of Sarbah's Fanti Customary Laws as the basis of much of the customary law of Ghana.

The creation of state courts had several consequences for the administration of traditional justice by chiefs and their elders. Firstly, the administration of criminal justice was restricted to the state courts. In Accra, this meant that criminal cases could no longer be heard at the state criminal court of the Gá manche or mojawe,[73] which in pre-colonial times had exclusive jurisdiction over cases involving treason, murder, etc. Also, the principles on which English justice is based, including stare decisis, are quite different from the concepts of buleh and toindzoleh with which traditional authorities were mostly concerned.

If we examine briefly the process by which official customary law is

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[72]T.O. Elias, The Nature of African Customary Law, Manchester 1959, p. 192.

[73]This literally means "house of blood".

created in the state courts and also consider the operation of customary law at the traditional level, we can point out various factors which tend to result in a divergence between the content of those norms applied as customary law in the state courts and the content of the customary law which is socially recognised outside.[74]

Relying upon the records of state courts in Ghana and Nigeria during the past one hundred years, Woodman has argued that even assuming the courts receive reliable information about customary law as it is actually practised by the people, the courts will not and cannot apply it as official customary law.[75] This, he claims, is due to the process of reasoning adopted in the state courts. He cites the giving of evidence in the form of answers to questions put by counsel as designed to elicit answers which can be incorporated into the established processes of reasoning.[76] Also, if it is known that certain types of norms are systematically excluded by judges from consideration, it is likely that members of the legal system will cease to present to judges information about such norms,[77]despite the continued existence of such norms in society.

Once the case is listed and enters into the state court system, forms of

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[74]G.R. Woodman, "Customary Law, State Courts, and the Notion of Institutionalization of Norms in Ghana and Nigeria", in A.N. Allott and G.R. Woodman (eds.), People's Law and State Law: The Bellagio Papers, Dordrecht 1985, pp. 143-163 at 152.

[75]G.R. Woodman, "How the Courts Create Customary Law in Ghana and Nigeria", in B.W. Morse and G.R. Woodman (eds.), Indigenous Law and the State, Dordrecht 1987, pp. 181-220 at 183.

[76]Ibid. p. 184.

[77]Id.

claims, procedures, remedies and modes of enforcement which are all based on English practice serve to widen the gulf between practised customary law and official customary law.[78] This has resulted in what has been described as "a bastardised form of customary law",[79] which does not reflect the real practices of the people which it purports to represent.

Outside the courtroom, financial problems are a formidable deterrent for many litigants with a good cause of action. Since many disputes involve the same social groups, witnesses often come under immense social pressure, and may sometimes change sides dramatically as honour and other non-economic considerations are brought to bear on them. Most litigants are illiterate or semi-literate but court proceedings must be conducted in English. This leads to problems of interpretation and delay; and often erodes much of the direct impact of witnesses' demeanour on the judge. Because of widespread illiteracy, there is often little recourse to contemporaneous evidence. The rules on land law, therefore, depend still more on the case-law that has been developed since the late nineteenth century and on the opinions of the text-writers, although these may not necessarily accord with the actual practice of the people. Many people probably fail to understand the full meaning of a court action. Where, for instance, a stool for lack of financial resources or out of ignorance failed to defend an action over the ownership of land against a rival stool, the doctrine of

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[78]Ibid. pp. 184-202.

[79]A. Seidman and R. Seidman, "Political Economy of Customary Law in the Former British Territories of Africa", 1984, Journal of African Law, Vol. 28, pp. 44-71 at p. 48.

res judicata operated to prevent it from subsequently disputing the title.[80]

While the other field-areas covered in the present thesis have been spared the problem of chieftaincy disputes, there has been considerable litigation and factional fighting within the ruling house in Jamestown over the succession to the last chief who was himself unceremoniously destooled.[81] Increasingly, the main protagonists in chieftaincy disputes are well-educated, professional men[82] who seem to have successfully sidelined the less wealthy traditional power-holders. A wide gap still divides the ordinary person, who seeks to protect his interest in a piece of land which he has bought or inherited from his ancestors, from the courts. Nothing in the court premises demonstrates the difference between traditional values and the modern systems more graphically than the sight of traditional elders carrying the linguist's staff and other paraphernalia of office with clothes draped toga-like around their bodies crowding around the well-shod and sharply dressed advocates with their middle class manners. Quite apart from this is the effect of the courtroom atmosphere on the witness: the image of the grim, bewigged judge, gun-toting police guards, and the use of long-winded esoteric language by counsel complicated by the slowness of the judicial process itself. The judge records the evidence in long hand, a slow and laborious process, and trials are punctuated with

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[80] I am grateful to Dr. Woodman for clarifying this matter and pointing out that possibly the related doctrine of estoppel could also apply.

[81] See p. 273 below.

[82] The present occupant of the Jamestown stool, Nii Kojo Ababio II, is a well-known dentist.

adjournments. The dramatic clash of opinions between counsel in the courtroom is a far cry from the conciliatory approach of the system of family and chiefly adjudications which nowadays lack the authority of courts.

The following table describes the role of informants who have been parties to land litigation up to at least the High Court.

TABLE 4

PARTY TYPE IN LAND DISPUTES		
Plaintiff type	**Plaintiffs sample**	**Defendants sample**
Stool	3	-
Extended family	4	1
Individual or nuclear family	16	22
Government	-	-
Total	**23**	**23**

Both the plaintiff and defendant samples were dominated by private individuals representing nuclear families. While stools and extended families were the plaintiffs on seven different occasions, the stool never appeared as a defendant in any of the cases investigated, and an extended family appeared only once as defendant. Stools and extended families sued individuals on no less than six different occasions for trespass to land, declaration of title to land and injunction. Many of the legal battles were between private individuals over who had acquired the better title to a piece of land and related actions. Many individuals seem driven into litigation by the need to protect expenditures they have already made on the land. Significantly, the state never appeared as a party. Much of the litigation involving stools concerns accountability, struggles

over chiefship, and the right to various traditional offices. Such cases tend to be arbitrated by either the Gá Traditional Council or the Regional House of Chiefs.

While, on the whole, individual litigators represent a cross-section of the society at large, property litigation tends to be characterised by a core of highly tenacious litigants, acting on behalf of extended families who, year in year out, keep the courts engaged with various aspects of litigation over the same tracts of land, involving countless appeals. Many of our informants in this category, though not eager litigants initially, were gradually transformed (by a transparent sense of injustice) into bellicose persons, full of aggressive drive and an undisguised love of conflict by some real or imagined falsehood on which their opponent's claims are based. Litigation within some of the largest extended families has dragged on for years, producing some of the most celebrated litigants known to the courts, including various members of the Manche Ankrah and Onamrokor-Adain families of Accra.

Of the 10 informants in the sample who appear to have been multiple-litigants, nine were found to have the following in common: they appeared to possess an indomitable will allied to a high intelligence, but average or below-average formal education. They had all mastered the procedural mechanics of the courts honed on long years of court attendance in various capacities. Lawyers consider litigants in person as notoriously difficult. Their pleadings are often based on copies of pleadings of previous suits to which they had been parties. With their pettifogging, cumbersome, unprofessional manner, and their frequent requests for adjournments as they scurry between various

courts, litigants of this mould are a despair to every legal practitioner. Conversely, such litigants seem to have a certain contempt for the quality of service offered by lawyers. Nevertheless, they prosecute and defend their cases with a passion and enthusiasm that is lacking in most professional practitioners. Perhaps their activities should serve to illuminate, rather than obscure, the urgent need to speed up and simplify courtroom procedure for the benefit of the ordinary person.

Lawyers tend to rely on clients to adduce their own evidence, and often meet witnesses in court without a previous interview. As it happens, many good cases suddenly unravel and collapse as witnesses embroider, forget and lie. But many of the more reputable firms of lawyers increasingly display a high degree of professionalism. Litigation involving chiefs still forms an important part of the property lawyer's brief but increasingly the successful businessman with a large property portfolio and the occasional aggrieved purchaser of land also form an important part of his clientele.

Some 15 per cent of all property law cases brought to the chambers investigated as part of this study involved conflicts within the same family or social group. The pattern is often one of small units within the group asserting rights and claims against the larger group. Over 60 per cent of cases involving property commence with applications to the court for an injunction, or for damages for trespass. This often develops into a full-blown dispute over title to the property or recovery of possession. The progress of a case through the court is often bedevilled with problems of finance and interpretation. One

informant estimated that over 40 per cent of all property cases are abandoned. This is, in part, due to the dearth of documentary evidence; and it is clear that a more efficient system of birth and death-reporting as well as a system of title registration would serve as a valuable source of evidence in many land cases.

The proceedings of the court of law may be compared to the traditional forums at the opposite end of the spectrum. It is not just a simple contrast between an essentially adversarial system and an inquisitorial system. A court-room experience goes against the whole grain of traditional social experience. Though an increasing number of educated chiefs and heads of families admit and give considerable weight to documentary evidence, lawyers, affidavits, statements of claim etc. are, for many litigants, a far cry from the familiar way of settling disputes.

The nature of dispute settlement among the Gá has never been fully described, let alone systematically investigated. We may distinguish between two main forms of traditional disputes among the Gá: shia sane or household dispute and man sane or town dispute. Shia sane generally involve minor disagreements between siblings, spouses, neighbours or members of the same weku. Such disputes affect harmonious relationships between members of the same family or the same neighbourhood and threaten group solidarity. They are normally easily dealt with by the head of the extended family or an influential neighbour.

Man sane on the other hand, mainly involve serious shia sane which heads of extended families and other elders have been unable to resolve,

defamation of character,[83] and the swearing of oaths. Several chiefs and linguists stated that they would not hear a matter until an attempt had been made to have it resolved as a shia sane. In practice the situation is much more confused than the above distinction might suggest. The forum to which a man takes his case often depends on a number of factors. Many public disputes are decided by traditional religious authorities such as the wulomo or high priest; and a man may decline to take a dispute to his own head of family because of a legacy of bitterness over a previous dispute.

Traditional litigation involving man sane is commenced by the despatch of the chief or head of family's emissary to summon the defendant to appear at the chief's court on a specified date for a hearing.[84] The emissary apprises the defendant of the identity of the plaintiff and the issues at stake.

There are no pleadings but either party may call witnesses. In the case of particularly serious crimes and slander, the chief's jurisdiction may be invoked through the oath procedure:[85] the wronged party swears his innocence on pain of instant retribution by some chief or fetish who was owner of the oath. The effect was to transform a private quarrel into a public matter to be adjudicated upon by the appropriate authorities. The matter also involved the contestants'

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[83]This usually stems from accusations of witchcraft and sorcery.

[84]According to the chiefs of Old Dansoman and Jamestown, the plaintiffs need not be their own citizens. Sometimes, it is the defendant who approaches the chief to "intercede" in a case and have it withdrawn from the regular courts. In such cases they maintain that their role is purely that of arbitration, and should the parties fail to reach an agreement the plaintiffs are at liberty to go back to the regular courts.

[85]See Allott 1966, p. 207.

immediate social groups since the gods could wreak vengeance at random on family members until the oath was removed.

Private disputes, including matrimonial disputes involving divorce, custody and maintenance of children, are usually settled at family meetings. At such forums, parties usually represent themselves, and are examined by a group of elders. Each party introduces his or her own argument and adduces evidence in support of the case. Witnesses are called and examined and, the evidence is tested. Documents may also be entered in support of a claim. The speeches of the disputants are often impassioned and reflect the fluctuating fortunes of the trial, while the presiding elders skilfully direct the procedural aspects of the trial.

The truth-seeking element is combined with intense moral pressure on the erring party without the theatricality of the courtroom performance. Access to the forum is usually easy, and the trial is cheap and speedy. The losing party usually pays compensation to the successful party and offers drinks to the adjudicators.

The hearing of public disputes is more formal. The case is heard publicly at the palace of the chief or manche we[86] before the chief or his appointee and a number of elders. The verdicts delivered by the chief or his appointee closely reflect time-honoured principles of justice and customary law developed and

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[86]In the case of a dispute heard by a wulomo the hearing takes place in the courtyard of his official residence. Thus disputants may talk of taking their case to Sakumo We or Korle We which are the official residences of the Sakumo and Korle priests respectively. The residence of the wulomo or important priest is also called tso'ishi, a contraction for tsoshishi, (under the tree) in reference to the giant fig-trees which normally dominate their courtyards. Among others Sakumo Tso'ishi and Nii Kwei Kuma Tso'ishi regularly attract large gatherings and are generally acknowledged as centres of public debate and dispute resolution.

applied by previous holders of his office. They often show a deep reflection upon the social and moral consequences of disputes. At the basis of the principles of law administered by the traditional authorities lie custom immemorial or blema kusum[87] which are subtly combined with the social realities of each generation. Thus though there is no conscious plan of reform, some customs are occasionally held to be outdated.

Each verdict accords with countless precedents stored in the memory of the presiding authorities. Though the verdict dwells principally on the particular customary law principles that are applied in the case, it also has a moral dimension which is popularly seen as reflecting the sagacity and fair-mindedness of the chief or head of family and his elders. Thus particular effort is made to ensure that the dispute and its outcome do not damage the peace and harmony of the family, neighbourhood or town. Reconciliation is therefore encouraged.

With the decline of the traditional system, enforcement is often left in the hands of the families involved. Today, though this form of adjudication is usually ignored by the educated classes, for many Ghanaians it is still the normal method of dispute settlement. The hearing is usually fair, and a reasonable attempt is often made, in arriving at the decision, to reconstruct events on the basis of both circumstantial evidence and the direct evidence of witnesses.

The traditional system of dispute settlement as sketched out in the foregoing discussion is now largely confined to the pre-capitalist and rural

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[87]The promulgation of new customary laws through direct legislation by chiefs has become less important today than it appears to have been in former times.

sectors of the society. For the majority of rural persons, it remains the only recourse to justice.

3. 8 Conclusion

The present chapter has highlighted the major developments in Ghana's political and legal history. Today, in many ways, it remains an unfulfilled nation, functioning inefficiently within the world economic order. This may largely be attributed to the underlying dualism of the legal system, long nurtured, by governments of all shades. Indigenous law has continued to regulate the laws of family and property but these have been bedeviled by problems of uncertainty of title and conflict between modern and ancient ideas of responsibility. The opinions of judges and textwriters have for some time been the final oracles of what constitutes customary law, thus creating a gap between practised customary law and judicial customary law.

The abysmal record of political instability since independence has not nurtured institutions that are crucial for steady socio-economic development and no machinery has been created for the effective study and reform of customary law as it emerged. This means that context within which the recent reforms of customary law have been introduced is one of an antiquated legal and bureaucratic infrastructure with perennial funding shortages.

In many ways, education, rather than economic power and skill, has become the key to social mobility, leading in turn to a rapid turnover of personnel

at the helm of affairs. Ruling by decrees, the army have formulated no clear mechanism for the exercise of state power. Scant attention was paid to the science of legislation, including a study of the pre-enactment and post-enactment stages of legislation with a view to making legal rules more effective. As a result, judicial law-making was, for a considerable length of the period under consideration, the main method of achieving social change through law.

Most important for our analysis is the observation that the issue of divergence between official customary law and practised customary law has never been addressed by the various post-independence governments of Ghana whose major preoccupation with the legal system of Ghana has centred on the outer forms of constitutionalism. For this reason , Ghanaian customary law has mainly developed around the verdicts of the state courts and has seldom reflected actual changes in social practice.

The customary law reforms of 1985/86 (see above p. 37) purported to effect changes in customary law to ensure social justice in matters of intestate succession,[88] customary marriage and divorce[89] and accountability over extended family property.[90] The 1985/86 reforms also purported to ensure certainty over title to land as well as cheapness, efficiency and speed in the

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[88] The Intestate Succession Law, 1985.

[89] The Customary Marriage and Divorce (Registration) Law, 1985.

[90]The Head of Family (Accountability) Law, 1985.

registration of titles to or interests in land.[91] There is no evidence of an express intention in the 1985/86 reforms to address and resolve the gap between official customary law and actual social practice.

It seems, therefore, that on the whole both economic policy and legal reform in Ghana have tended to be done by fiat.

[91]The Land Title Registration Law, 1986.

CHAPTER 4

THE FAMILY

This chapter provides a detailed analysis of the concept of the family in Ghanaian customary law, particularly in relation to the enactment of the Customary Marriage and Divorce (Registration) Law, 1985 (P.N.D.C.L.112). Family law is probably the greatest area for change within the indigenous law of Ghana.[1] The Customary Marriage and Divorce (Registration) Law, 1985 and the Head of Family (Accountability) Law, 1985 (P.N.D.C.L. 114) have sought to change key areas of the family law of Ghana with as yet limited consequences. This chapter seeks to enquire into the reasons for the hitherto apparently limited impact of these statutes upon traditional customary law.

Within the wider confines of that endeavour, an attempt is made here to question the current legal definition of the Ghanaian family on the basis of present sociological evidence and to throw light on the confusions and contradictions in the works of various jurists over the nature of the Ghanaian family. Thus this chapter seeks to define more sharply the major forms of family in Ghana and examines the nature of individual membership in a nuclear family as well as various forms of the extended family, with resultant conflicts of loyalties. This is of immediate relevance for our later discussion of the property law of Ghana, helping us to clarify the nature of interests in land and determining more precisely who may transfer property rights with the least risk of

[1]For the most authoritative works on Ghanaian family law, see Ollennu 1966 and Kludze 1973.

consequential litigation.

This focus differs from that of the existing literature on the legal character of the Ghanaian family. It is argued here that the traditional model of the Ghanaian family as being based on a number of units, which are in turn connected by common blood through to the remotest ancestor, does not adequately describe the situation of urban-based families in Ghana today. The rapid changes that have characterised urban life and increased access to off-the-land sources of income have weakened the link between the two major pivots of traditional customary law, land and the extended family. The traditional extended family has undergone significant mutations within the urban setting. Underlying its breakdown is the changing social context dictated largely by a changed economic milieu. There are now different means of measuring prestige and social importance than merely traditional status. The evolution of the concept of freehold and rising individualism have also taken their toll. Heads of families and family councils have now little powers of enforcement beyond the unwritten moral code, while coercive powers are reserved for the state courts. Also, modern institutions like banks, insurance companies, courts, employers and mortgagees in enforcement actions make a clear distinction between the individual and the extended family.

Having examined the nature of the Gá extended family as well as its major organs, the head of family and the family council, we will seek to show that the obligations entailed by membership of the extended family contrast, at times dramatically, with the obligations involved in membership of the nuclear family. In this context we will attempt to assess the impact of recent legislative

intervention in the family law of Ghana which appears to strengthen individualism and loyalty to the nuclear family.

4.1 The family in customary law

4.1.1 The conceptual confusion over the Ghanaian family

Ever since the publication of Sarbah's seminal work on Fanti customary law,[2] there has persisted, in the literature on Ghanaian customary law, a diversity of opinion regarding the legal and sociological character of the Ghanaian family. The traditional view of the Ghanaian family stresses the importance of the extended or consanguine family over the nuclear family. On the other hand, recent legislation and judicial pronouncements have tended to assume the pre-eminence of the nuclear or conjugal family. Several attempts have also been made to identify a smaller unit within the extended or consanguine family as the body that is entitled to the enjoyment of the self-acquired property of a member of the extended family after his or her demise. In the analysis that follows we will seek to cut through the terminological and conceptual confusion that surrounds the nature of the modern Ghanaian family and lay bare its essential characteristics. In his attempt to locate the roots of the individual deeply within the political and legal structures of Fanti society, Sarbah emphasises connection to a remote ancestress as a major element in his definition of the matrilineal family.[3] He says blanketly that "A Fanti family

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[2]Sarbah 1968.

[3]Ibid. pp. 36 and 62.

consists of all persons lineally descended through females from a common ancestress",[4] emphasising elsewhere that there is no limit to the number of persons of whom a family may consist or to the remoteness of their descent from a common ancestress.[5] At the heart of Sarbah's analysis of Fanti customary law is the concern to stress the interconnection between the village community, the patriarchal family and the "joint family" or extended family.[6] This appears to account for the amplitude of Sarbah's definition of the family.

Such a definition is liable to jumble an infinite number of different nuclear and even extended families together, as it can logically be expanded to cover all clan members claiming even the remotest connection to an ancestor, however distant and detached their own relations with other members of the family may be.[7] Besides, the claims of individuals on the periphery or even outside the family to ancestral connection cannot be easily refuted in the absence of well-defined genealogical trees connecting the living members of a family to successive generations of ancestors through whom the link to a remote ancestress may be established. It would therefore be wrong to conceive of the Ghanaian extended family only as some standing business concern that is obliged to attend to the everyday needs of its members. Most extended families observed in the area of study might be compared to sleeping collectives that

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[4]Ibid. p. 33.

[5]Ibid. p. 36.

[6]Ibid. pp. 62-63.

[7]See e.g. Bentsi-Enchill 1964, p. 27: "The clan covers a larger group comprising several extended families all of which acknowledge a common ancestor, although the identity of the ancestor or the line of descent from him is usually forgotten."

may be aroused into action when members are faced with crises or during social occasions.

Another commentator, Agbosu, writing specifically about the Akan family,[8] emphasises that there is only one type of family in Akan family law, namely what he calls the "maximal family", which consists of lineages segmented into branches. Seeking to dispel the view that there is any such thing as the "immediate family" in the indigenous law, he argues perceptively that many scholars and jurists erroneously equate branches of lineages and sub-lineages with the maximal family of which the former are mere segments. In Agbosu's view, therefore, the family is an immutable institution, impervious to social change and evolution. All this is in keeping with his well-known thesis that the indigenous laws of Ghana are based on a naturally communalistic scheme and that the process of individualisation would have the effect of speeding up the disintegration of the traditional family with undesirable consequences. Evidence in the field-area, however, suggests that in modern urban conditions geographical dispersion and consequent isolation, participation in the formal economy, individual responsibility and various economic and social pressures render a communalistic family scheme simply impracticable. The immediate family with a head of family who co-ordinates the affairs of its members is certainly more important in real life than the maximal lineage and other smaller segments of the extended family, including the minimal segment identified by students of Ghanaian customary law.

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[8]L.K. Agbosu, "The Legal Composition of the Akan Family," University of Ghana Law Journal, Vol. XV (1978-81), pp. 96-111.

Emphasis on the remoteness of ancestral connection might have helped to establish the extended family as a coparcenary in the small-scale pre-industrial societies of the Gold Coast, re-distributing the property of deceased members of the family among a large number of people and ensuring property rights to the majority of citizens. This was helped by the common local residence of members of the extended family.

In recent times various attempts have been made to re-define the Ghanaian family. Such attempts have, however, never been able entirely to dispel the influence of Sarbah upon Ghanaian legal thought and to deal adequately with the precise definition of a remote ancestor. Both Ollennu[9] and Bentsi-Enchill[10] followed the broad definition of Sarbah. Bentsi-Enchill, while he extends Sarbah's matrifocal definition to cover patrilineal communities, is careful to avoid falling into the error committed by Sarbah by emphasising the origin of the family in a common ancestor/ancestress rather than a remote ancestor/ancestress.[11] Thus he leaves open the possibility that while the members of a family may not be able to trace their roots to the distant past, they can acknowledge common recent ancestry.

Ollennu defines the extended family simply as the social group into which a person is born.[12] He then traces the distinguishing characteristics of the

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[9]Ollennu 1966, pp. 71-81.

[10]Bentsi-Enchill 1964, p. 25.

[11]Id.

[12]Ollennu 1966, p. 71.

extended family among the most prominent Ghanaian communities, briefly noting the similarity of the various traditional philosophies regarding the extended family.[13] Even though Ollennu avoids basing the Ghanaian extended family on the concept of a remote ancestor/ancestress,[14] aspects of his views on the nature of the Ghanaian extended family have been criticised as reflecting traditional Akan concepts of the extended family too closely.[15]

The views of Ollennu and Bentsi-Enchill appear to suggest that in an increasingly sophisticated modern society the connection to a remote ancestress/ancestor is no longer tenable as the basis of the extended family. Yet both Ollennu and Bentsi-Enchill pointedly refrain from designating the nuclear or conjugal family as the basis of Ghanaian customary law.[16]

This is a continuation of the tradition developed by Sarbah and Danquah. As a result, we are faced with a situation where the official customary law that has evolved from the works of Ghanaian jurists continues to employ the word "family" but by it means mainly the extended family. Also, much of the discussion on Ghanaian family law that has been generated by the official customary law has been focused on the link between an individual family and its founding ancestor. This tends to obscure the underlying question of solidarity

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[13]Id. But see Kludze 1973, p. 76 where he de-contextualises Ollennu's opinions on the nature of the patrilineal family and ascribes them solely to Akan philosophy.

[14]Ibid. p. 79. But see Kludze 1973, p. 76 who erroneously relies on the same quotation to show that Ollennu traced the family to the remotest ancestor.

[15]Id.

[16]The term "conjugal family" is here used to refer to a husband and wife as well as their natural and/or adoptive children.

between group and individual, or between group and sub-group(s). This aspect of Ghanaian family law, therefore, seems to have been under-researched.

Another fetter on attempts to analyse the concept of the family in Ghanaian customary law more clearly has been the continued use of a variety of terms of no precise meaning to distinguish units of the family. This is partly in recognition of the increasingly separate and independent position of the conjugal or nuclear family and its potential conflicts of interest with the extended family. The traditional response of jurists and the state courts has been the formulation of a variety of terms to delineate close relatives from remote relatives and to confine the enjoyment of property rights to the latter. Terms such as "the trunk family",[17] and "the wider family"[18] have been used to describe the extended family. Other terms like "the branch family",[19]"the sub-family",[20] and "the immediate family"[21] have been employed to describe a smaller section of the extended family, though not necessarily the nuclear family.

It is not quite clear whether these terms have similar and precise meanings to various jurists and the courts. For example, Bentsi-Enchill asserts that a sub-family can be founded by anyone with substantial self-acquired property and that the immediate family which such a person founds is

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[17]Mills v. Addy (1958) 3 W.A.L.R. 357, 362.

[18]Id.

[19]Id.

[20]Bentsi-Enchill 1964, p. 26.

[21]Id. Here, we will employ the terms "extended family" or "consanguine family" to describe the wider traditional family, and "nuclear" or "conjugal family" to describe the type of family that is essentially made up of a man, his wife and their children. See in more detail p.169 below

determined by reference to him or his mother according to the type of community to which he belongs.[22] On the other hand, in Mills v. Addy, the Court of Appeal, without adding the qualification that the founder needs to be a person with substantial self-acquired property, stated that every woman becomes the originator of a branch family.[23] None of the above terms, however, refers specifically to the conjugal family. They are merely employed to distinguish competing sections of the extended family, mainly in the context of determining contested rights to property. This want of precision is apt to obfuscate considerably attempts to analyse the Ghanaian family and determine the rights of individual family members to property.

Under the old customary law, the interest of the conjugal family in property was always subordinated to the interests of the extended family. This was amply demonstrated in Amarfio v. Ayorkor.[24] The question that arose for adjudication in that case was the nature of the family to which a man from a matrilineal community in Gá Mashi belonged. The court held that he belonged to his grandmother's family, rejecting the argument of the defendant/appellant that the family to which he belonged was the immediate or conjugal family whose members ought to be the persons entitled to the enjoyment of his property.[25]

Having shown the extent of the conceptual confusion that surrounds the legal definition of the Ghanaian family, we now attempt to discover more about

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[22]Ibid. p. 27.

[23](1958) 3 W.A.L.R. 357, 362.

[24](1954) 14 W.A.C.A. 554.

[25]Ibid. at 556.

the actual character of the modern Ghanaian family by direct reference to the household composition of the urban family[26] and by drawing on various anthropological and sociological writings which shed some light on the nature of such a family. In so doing it is worth bearing in mind at the outset that it has been observed even in relation to English society that the word "family" is difficult if not impossible to define.[27]

To avoid the difficulties that we have shown to exist in the various definitions of the Ghanaian family we have in this thesis adopted the following definition of terms. The terms "nuclear family", "conjugal family" and "immediate family" are used here in reference to the unit made up of husband and wife and their natural or adopted children.[28] References here to "the modern Ghanaian family" are to the urban family as observed in Accra, which tend to be of the nuclear type. On the other hand the terms "extended family", "consanguine family"[29] and "traditional family" are employed in reference to the aggregate of blood relatives from a number of nuclear families claiming descent from the same ancestor or ancestress.

The most significant point to grasp is that the family in Ghana, as elsewhere, is a variable conception, consisting on the one hand of husband and wife and those children towards whom they assume the role of parents.[30] In

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[26]See A.M. Shah, The Household Dimension of the Family in India, Berkeley (Los Angeles) 1974, esp. pp. 19-79 where he employs the same approach to assess changes in the nature of the Indian family.

[27]P.M. Bromley and N.V. Lowe (eds.), Bromley's Family Law, London 1992, p. 3.

[28]Cf. Asante 1975, p. 269; and G.K. Nukunya, Tradition and Change in Ghana: An Introduction to Sociology, Accra 1992, p. 47.

[29]Cf. Asante 1975, pp. 20, 220 and 269.

[30]L. Broom and P. Selznick, Sociology, Evanston (Illinois) and White Plains (New York) 1960, p. 367.

another sense the family consists of a larger consanguine unit made up of all persons lineally descended from a common ancestor. Due to a process of continual segmentation the consanguine unit is usually made up of a network of relatives comprising various smaller family units and sub-units. The place of the conjugal or marital group within the consanguineous group appears to have traditionally been one of sub-ordination to the larger groups.[31]

In investigating the nature of the family in Accra, some guidance can be obtained from the anthropological writings of Fortes which deal in part with the process of family segmentation among the patrilineal Tallensi of Northern Ghana and reveal the complex nature of consanguineous family organisations.[32] Fortes' studies show how by a process of segmentation a family founded by a person gradually becomes a maximal lineage consisting of the most extensive group of people of both sexes, all of whom are related to one another by common descent traced from one known or accepted ancestor.[33] According to Fortes, a maximal lineage is divided into a number of segments of regularly diminishing order of segmentation, each segment being identified by reference to its founding ancestor.[34] At the opposite end of the lineage scale to that represented by the maximal lineage is the minimal segment or the minimal lineage made up of the children of one man (or woman).

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[31]Cf. W.F. Ogburn and M.F. Nimkoff, A Handbook of Sociology, London 1947, pp. 461-462, suggesting that marital groups in consanguineous family organisations tend to be sub-ordinated to the blood group and that the bonds between blood kin made up of brothers and sisters and others claiming direct ancestry from a common ancestor or ancestress is stronger than that between mates.

[32]M. Fortes, The Dynamics of Clanship among the Tallensi, London 1945; and by the same author, The Web of Kinship among the Tallensi, London 1967.

[33]Fortes 1967, p. 4.

[34]Fortes 1967, p. 7. Cf. Pogucki 1955, p. 3 noting a constant process of fisson among the Gá. Pogucki, however, attributes the emergence of new segmentary groups among the Gá to the process of inheritance under which inherited property transforms into group property but the width of the inheriting group actually narrows.

Considered abstractly, it is possible to discern within the extended families of Accra patterns of segmentation similar to those observed by Fortes among the Tallensi. However, in Accra a better picture of the urban extended family, while retaining aspects of Fortes' observations, also discloses significant differences due mainly to the relative absence of subsistence production and a greater ethnic mix as well as the frequent tendency of the non-Gá children of Gá females, particularly where they adopt the Gá tongue, to be identified with the weku and quarter of the mother's extended family (see p.172 below). Thus we frequently have in Central Accra consanguineous family organisations in which connection to the founding ancestor or ancestress may be traced through either a male or female parent.

The greater economic independence of the conjugal family in Accra as well as their involvement in other sets of relations and interests means that generally speaking, the Gá household unit is increasingly made up of a husband and wife and their children.[35] The role of the consanguine family in the organisation of conjugal family units, most respondents agreed, has diminished markedly in modern times. This is not to suggest that networks of relatives no longer play a role in the array of social relationships in which the urban Ghanaian is involved.[36] We suggest merely that, on the whole, their role is no longer crucial to the economic and social organisation of the urban conjugal unit. It therefore seems appropriate that the household, especially where it consists largely of a conjugal family unit, should constitute a more realistic basis for assessing the

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[35]Cf. Epstein 1958, p. 239.

[36]Cf. A.L. Epstein, Urbanisation and Kinship, London 1981, pp. 186-248, esp. at p. 186.

nature of the urban family than any other segment of the extended family.[37]

The evolution of the "active customary law" in regard to the above process can best be demonstrated here by reference to the genealogical chart below (see p. 176). In two of the six families shown in the chart (ii and vi), the informants' (widows) fathers were non-Gás but the children regard themselves and their own children as Gá of the mother's (informant's) patrilineal weku. It is possible that association with the mothers' families in these cases may well have arisen from the demise of the father, and the inability of the extended families of the deceased fathers to make any significant contribution to the children's welfare. In each case the marriage of the children as well as the outdooring of their own offspring had been overseen by elders of the mother's extended family. In the third family (iv) the father, who hails from Takoradi in Southern Ghana, no longer maintains contact with his own extended family; even though he has relatives in Accra, they are so widely dispersed as to be unable effectively to play a significant social role in the lives of the children. On the other hand, the lives of the children are intimately interwoven into those of their mother's relatives. Also, the fact that the father hails from a matrilineal community may have encouraged the virtual absorption of the children into the mother's extended family.

In families (i) (iii) and (v) we notice the expansion of the Gá extended family along the general patrilineal principles of males and their male descendants only becoming members of the extended family. But even in the

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[37]In the examples that follow, we have sought to place the families of the informants within the context of their extended families. This should not detract from the general decline of the influence and authority of the extended family over its constituent units which has already been observed above.

case of the patrilineal extended family, the segmentation may not be along the clear-cut principles observed by Fortes among the Tallensi. Apart from the examples cited above, several instances were observed of the offspring of female descendants being absorbed, at least in theory, into the mother's extended family where their own father either abandoned them or had no tangible connections with his own extended family and place of origin. In that case the offspring of both female and male children and their own children normally identify themselves with the mother's patrilineal family.

Families (iv) and (vi) are illustrative of cases in which descent is traced through the female even though the extended family itself is considered patrilineal. In family (iv) the children of the informant female are considered as belonging to their mother's patrilineage. In family (vi) the abandoned children of a marriage between a daughter of the female informant and a non-Gá male are regarded as belonging to the grandmother's patrilineal family.

A typical example was the extended family of the Old Dansoman chief which originated in the marriage of a man from the Akwapim hills to a Jamestown woman. Two members of this family were interviewed. Both acknowledged their non-Gá origins, but insisted that they now consider themselves to be fully Gá; and that they and their children regard themselves as members of the patrilineal lineage of their Jamestown ancestress. This is in spite of their Akwapim surname. Even though some members of the family still bear such Akwapim forenames as Ofei, Sarfo, Nana (males) and Ofeibia (female); others have adopted the Gá male twin names: Okoe and Arteh; and yet others bear names such as Nii Arko which derive partly from both

communities.

In (i) the divorced female's father has assumed responsibility for the children of his daughter by a Fanti father even though the children bear Fanti names. Apart from family (v) which was observed at Domiabra all the above families, except families (iii) and (vi) lived at Jamestown or Old Dansoman.

It is suggested that in practice the distinction between maximal and minimal segments of the extended family is apt to lead to immeasurable confusion, not least because the maximal family usually consists of many branches and sub-lineages and it would, at least in theory, be difficult to rigidly demarcate particular branches and individuals of the extended family as constituting a minimal segment without further complicating the definition of the Ghanaian family. We suggest that the critical distinction in Ghanaian customary law ought to be between the extended family and the nuclear family. Little explanation is needed of the advantages of this approach. It will, among other things, ensure a sharper definition of the class of family members who may be entitled to property and minimise family disputes.

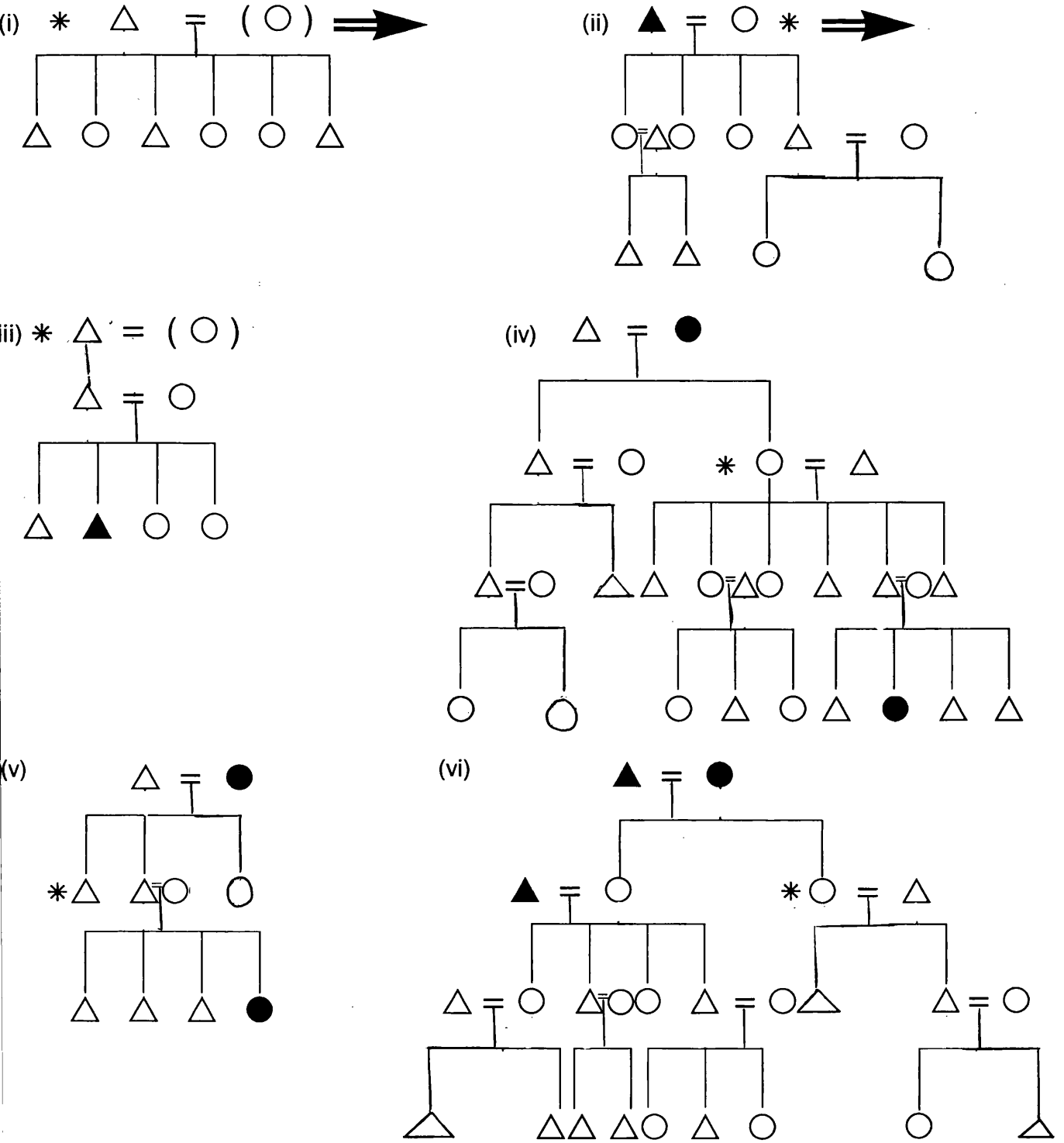
Table 5 below presents statistical information on the composition of a sample of Accra families. It shows the six main types of residential patterns into which nuclear and extended families are organised.

TABLE 5

COMPOSITION OF A SAMPLE OF ACCRA FAMILIES	
Composition	**No. of Households**
(i) Man and his wife with or without unmarried children.	50
(ii) Widow or widower with married and/or unmarried children.	12
(iii) Divorced man or woman living with own children.	31
(iv)Man and his wife and children living with members of man's or wife's extended family.	29
(v) Unmarried or divorced man or woman with or without children living with members of extended family.	58
(vi) Widow or widower and children living with members of extended family.	11
(vi) Others.	17
Total	**208**

The genealogical chart below represents the family trees of five respondents randomly selected from each of the five main types of household (excluding "others") above. It shows the composition of the households of those respondents and the link between their nuclear families and extended families within or outside the household. The families shown in the chart below by no means represent the entire range of family and household types in Accra. They are simply reproduced here as illustrating the range of households encountered in the field and depicted in Table 5.

GENEALOGICAL CHART FOR TABLE 5



△ Male, alive

▲ Male, dead

○ Female, alive

● Female, dead

✳ Respondent

Sibling relationship

Related by descent

Linked to larger family outside household

= Related by marriage

( ) Divorced

Table 5 above shows the household composition of the families of the 208 respondents in my sample. The table divides respondents into categories using marital status and the distinction between the nuclear and extended families as variables. The findings are presented in six groups of i-vi. We take the view that even though the household composition of a family in no way denotes completely the structure of family solidarity and allegiance, it is a reliable way of determining dominance as between the nuclear and extended families. This is particularly so as our observations in the field indicated that the household organisation of a family is a good indicator of economic independence and consequent social detachment from the extended family. On the whole the more economically independent a family is, the more socially detached it is from its extended kin, and the more its affairs are run along nuclear lines.

Whether the nuclear family prevails over the extended family, on the basis of the figures presented in Table 5, is a fine question. Defining the nuclear or conjugal family to mean a married couple and their children, including adopted and fostered children, as well as the couple's natural children,[38] but excluding the children's children, it is clear that about half of the households (groups i, ii and iii) are organised on a nuclear basis. These include the majority of households in Old Dansoman and the West Korle-Gonno Estates. It is probable, though it cannot be demonstrated here, that many of the households in groups (i), (ii) and (iii) which include several non-Ghanaian families will in time constitute the basis of new extended families.

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[38]Encyclopaedia Britannica, Chicago 1993, Vol. 19, p. 66.

All nuclear families, however organised, are presumed to be part of an extended family. In spite of this, many nuclear families are becoming more and more recognisable within extended family patterns as independent units that seek the solidarity of the extended group only on ceremonial occasions. Comparable figures were recorded (groups iv, v and vi) of households where various members of the extended family resided, including the siblings and spouses of the informants as well as more remote members of the extended family. Groups (iv), (v) and (vi) mainly represent household formations in Jamestown and Domiabra, often comprising several generations of agnatically and cognatically related males and females. Significant numbers of households with such compositions were also recorded in Old Dansoman and on the West Korle-Gonno Estates.

"Others" comprise types of household falling outside the six main categories depicted in Table 5. They include polygamous households and the households of migrants living with members of landlord's extended family or with other tenants. These households do not, however, complicate the broad division of households in the main categories into nuclear and consanguine families.

The overall results are equivocal. The figures contain no decisive evidence that nuclear family arrangements have superseded those of the extended family. However, considered in conjunction with the genealogical chart above they seem to suggest that urbanisation promotes nuclearisation of the family. For instance, sample (i) of the genealogical chart, which shows a strictly nuclear family structure also replicates or approximates the family structure of three-quarters of the 9 respondents in the "others" category who had recently

settled in the city.

Table 5 certainly shows that the extended family no longer has the exclusive social importance that the official customary law tends to ascribe to it. The above conclusion, however, needs qualification as living arrangements, on which Table 5 is based, are only one indicator of family solidarity. It was often stated in informal conversation that economic co-operation, though not necessarily financial support, was a common way of expressing family solidarity among siblings who live in dispersed households. In Domiabra, this often takes the form of a sister marketing the produce of a brother's farm and sharing the proceeds with him.

There appears to be a continual cycle of nuclearisation and recommunalisation of families, partly in response to the modified communal values of Gá society.[39] Many respondents recalled families which were nuclear (many of them founded by recent immigrants to Accra) a few generations ago, but which have become extended families in recent times as succeeding generations of children have retained their ties to each other, albeit in a modified and largely ceremonial form. On the other hand, nuclear units continue to break away from the extended family as their members gain more economic and social independence. Their descendants, in turn, create their own extended family. As a result, the distinction between the various segments of the typical weku[40] is not fixed but shifts according to the impact of various demographic, economic

[39]Cf. Fortes 1945, pp. 192-193; and Fortes 1967, p. 63.
[40]On the concept of the weku see pp. 184-189 below.

and social factors upon each weku.[41]

Kinship still plays an important part in Gá social organisation, but in the process of evolution through time, the nuclear family has acquired a comparable if not greater social and economic prominence than the extended family. The extended family nevertheless remains the core kin group. This traditional importance of the extended family over the nuclear family is expressed in the Gá proverb: Gbla taa eshweo weku, meaning "a marriage may end but the extended family remains". However, many respondents admitted in informal conversation that the extended family can no longer be relied upon to play its traditional role.

As Table 5 (see p. 175 above) shows, many extended families are no longer household or even localised units. Rather, they are made up of parts of dispersed nuclear units, (comprising, on account of prevailing rules of exogamy among the Gá, alternatively of husband and children or wife and children as the case may be) that constitute a kin network stretching around the city and beyond. This has not entirely broken the authority of the extended family, but its role has become largely ceremonial, with cousins, aunts, uncles and nephews and nieces often acting as a social solidarity group for those nuclear families to which they are closest.

It is apposite here to make a brief explanatory point about the role of cousins, uncles, nephews, nieces, etc. in the life of an individual before returning

[41]It is noteworthy that even "stool families" or single families within the main Accra traditional quarters of Accra, from which by custom the occupants of public stools are selected, and which as a rule have well-kept genealogical records, have not been immune to the general process of nuclearisation and recommunalisation of families. Indeed, the general consensus among informants is that factional fighting within the main ruling houses makes such families more susceptible to disintegration than ordinary families.

to the principal argument. This group of cousins, uncles, aunts and other close-knit relatives can be called the "active family" of an individual. For the most part, it is members of the active family, rather than the entire consanguine family, who assist an individual in his career and achievements, and rally to his or her aid during setbacks in his or her life, making financial and other contributions when appropriate and sharing in the joys and sorrows of triumphs and setbacks. The majority of respondents agreed with the above view of the active family. It could therefore be argued that members of the active family ought to have a greater share in the enjoyment of the assets/estate of a family member than the law presently grants them.

To make this point clearer, the active family within the extended family of an individual can be distinguished by the closeness of its members to each other. Its members normally include dependants of the individual (children, grandchildren, parents, etc.) as well as those he or she can hope to depend on during moments of crisis, such as relatives who will nurse a person during illness, support his or her children or look after them during his or her absence or incapacitation.

The definition of this group of active family members is not fixed but shifts according to the circumstances of each individual and the nature of his or her relationship with the various members of the extended family. This in turn depends on such factors as childhood socialisation, residence in the same locality or household and disputes between various branches of the extended family. Thus it is possible to find first cousins or even brothers who play no active role in each other's activities. On the other hand it is not uncommon to

come across second cousins who actively support each other.

Whether the concept of the active family can be usefully employed in the resolution of legal issues relating to the family in Ghana including matters in regard to succession is problematical. One possible approach is to amend or adapt the provisions of section 13 of the Wills Act, 1971 (Act 360) in such a way as to include relatives other than the father, mother, spouse and children under eighteen years of age of the testator in the list of dependants who can make an application to the High Court for the share in his or her estate.

The definition of the "active family" should be a question of fact to be determined by the court having regard to the closeness or remoteness of the various members of an individual's extended family to him or her. It is submitted that the test for closeness to an individual should involve consideration of mutual help and gifts inter vivos between members of the extended family. It is also submitted that dependants of such an individual, for example spouses, children, parents and grandparents, could be regarded as members of his or her "active family".

To return to the main point of the present discussion, we have tried to show that the nuclear family is now of equal importance to the extended family in matters of family organisation and property and succession laws. We have further shown that within the extended family, groups of relatives can be distinguished by their closeness and active efforts to support each other. If the premise and conclusion of this argument are correct, it can safely be urged that in further attempts to reform the official Ghanaian family law, recognition must be given to the nuclear family as the focal unit, but also to the role of cousins,

aunts, uncles, nephews and nieces as an essential social support mechanism. However, this should only be the case if such relatives are actually part of the "active family" and the formal claims of inactive family members should be diminished or even extinguished.

The crucial question which arises from the foregoing discussion is whether explicit legal recognition ought to be given to the active family. If this question could be answered cogently by the courts, then it is likely that official legal recognition will eventually be given to the active family and one of the fundamental sources of group solidarity within the Ghanaian family will have been strengthened. This approach, it is submitted, has the advantage of simplicity as well as fairness. Arguably it would be unfair for cousins who may have contributed to the achievements of another cousin or paid his or her medical bills to be entitled to a smaller share of his or her asset/estate than a sister or brother who studiously avoided assisting him or her. It also avoids the difficulty of distributing the residue of an estate and other trifles among a large number of extended family members.

At the basis of recent policy objectives of the central government has been the assumption that the consanguine family is everywhere being superseded by the nuclear family. No conclusive evidence has ever been put forward to support this assumption. As has been noted already, it is difficult to assess in detail whether the nuclear family is today more important than the extended family. That it plays a larger role today than it did traditionally is apparent. How far state law should go in enhancing the rights of the nuclear family over the extended family remains to be seen.

Sarbah's statement that the matrilineal family consists of all persons lineally descended from a common female ancestress[42] has been applied mutatis mutandis to other types of Ghanaian family, including the Gá family. It seems possible, however, that Sarbah may have confused the consanguine family with the clan and thereby exaggerated the importance of the former, for his definitions of the two are strikingly similar.[43] Faced with the difficulty entailed by Sarbah's wide definition of the family, the state courts and some writers have tended to emphasise the distinction between the branch or immediate family and the root or trunk family. Certainly Sarbah's definition of the family does not shed any light on the nature and origins of the Gá family, as the practice of tracing family origins to the remotest ancestor/ancestress is unknown among the Gá who have no clans.[44]

To the observer of Gá society it is not remote ancestral origin that defines the contemporary Accra family. It is the bonds of unity formed through continual social co-operation between groups of nuclear families united by common recent descent from a known ancestor that determine membership of the consanguine family or weku. In practice, as we saw, the extended family is formed and re-formed all the time as groups of nuclear families within recognisable consanguine families break away from them through marriage and geographical dispersion. Numerical increase and such circumstances as mutual

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[42]Sarbah 1968, p. 33.

[43]Ibid. pp. 4-5 and 36.

[44]A better reflection of current realities is found in Nii-Aponsah 1978, pp. 44-45.

interdependence and investment in the education and future of the younger generation may restrict social co-operation to their descendants and nearest consanguine relations.

Thus we may here refine our terminology and designate the family that breaks away in this fashion as the active family which is that group of close-knit persons, linked by blood or marriage or even by trust and friendship, who attend all marriage ceremonies, funerals, make an active financial or other contribution to family matters and are bound by the pressures of loyalty and reciprocation.[45] It gradually becomes the weku of the younger members who in time cease to be bound by the co-operative ethos of the original weku from which their forebears initially broke away.

Within the new weku, the immediate or conjugal family has assumed special importance, as members of the extended family tend to live in dispersed households within the community. The nuclear family is small, compact, residential and above all self-interested. Ultimate responsibility within the nuclear household is vested in the shia onukpa or head of the household, who now exercises the old authority of the head of an extended family. The responsibility of the shia onukpa is for the socialisation and economic well-being of the nuclear family of which he is head. The shia onukpa directs affairs in a management capacity, channelling household income into education, and investments in business and property. The nuclear family is therefore eminently suited to integrate and perform efficiently within the modern economic

[45]This group, while it almost always contains a core of close blood relations and elderly kinsmen, is nevertheless never sharply defined.

framework.

Conversely, the consanguine or traditional family[46] is large, unwieldy, non-residential and often riven with disputes. In cases where the head of family had been unacceptable to powerful personalities within the branch families, financial and other resources at its disposal have simply been frittered away in often interminable disputes. Also, talent and resource often reside in diverse nuclear units within this parent body which leads almost inevitably to various frictions.

Given the family's role as the main engine of development within the framework of social engineering, the crucial issue facing Ghanaian family law today is how to re-formulate the relationship between the extended and nuclear families in such a way at to retain the extended family as a "safety net" in the background, while a new legislative regime emphasises the primacy of the immediate family in the development of the individual personality and its importance in harnessing the resources of the community. This is particularly so in view of the different functions that the two types of family are required to perform.

Under the collective assault of all these pressures, the old extended family seems to be giving way slowly to the nuclear family, which still retains strong ties to its roots. The decline of the extended family will, inter alia lead to

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[46]Within the relatively backward social framework of the rural areas, the extended family still provides an admirable social support mechanism for the poor peasant families. But in Jamestown, well-off cousins tend to organise their lives away from their poorer relatives. Their role during ceremonial occasions like funerals tends to be more or less limited to helping discharge the business on hand, and promptly departing for their homes in the suburbs.

the decline of the trusteeship idea.[47]

4. 1. 2 The family in Gá customary law

The traditional Gá extended family or weku is a unilineal descent group.[48] It denotes a group of persons who trace their origins to the same house or we,[49] share the same blood through descent from a common progenitor or progenitress and act as one unit on requisite social occasions, particularly through a recognised head of family. The term "family" as understood among the Gá has gained wider connotations. Membership of the same we and common ancestry do not by themselves make two people members of the same weku even though they may bear the same family name. It is common recent or contemporaneous ancestry with attendant bonds forged through shared experiences that holds the key to family membership. For instance, though two men may both belong to say, Frimpong We and bear the same family names they may not necessarily belong to the same weku.

Some of the factors that have contributed to the evolution of the Gá concepts of family need mention here. The first is the affiliation of children of marriages between Gás and non-Gás to Gá families. This is especially the case where the father belongs to a matrilineal community where the children are not

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[47]Asante 1975, pp. 82-121. According to this idea, land was held in trust for the ancestors and children unborn as well as the living, and its custodians are therefore enjoined to honour the ancestors, promote the prosperity of the kin group, and ensure the security of generations unborn, insuring them against poverty.

[48]The information that follows is based on the replies of all informants and was checked against what, in the opinion of elite informants, was the old customary law.

[49]See already above, pp. 94-96 on the meaning of we.

regarded as belonging to their father's family.[50] Secondly, the urbanisation of Accra has arguably led to a deeper rupture of Gá society than can be found in similar Ghanaian societies. The development of suburbs, education and the implantation of the apparatus of modern government into the heartland of the Gá have led to the loosening of the old fabric of Gá society. Many Gás live outside the milieux that foster participation in traditional family life. In practice these individuals are more or less detached from their consanguine families, their nuclear families and their children's children being the focus of their social activities.

Today there is an increasing tendency to involve both maternal and paternal relations in social activities concerning the individual. Thus the tsesee weku (father's extended family) and the nyesee weku (mother's extended family) may take equal responsibilty for an individual. At funerals and weddings both the maternal and paternal wekus often share the responsibilities assigned to the extended family. This trend was most pronounced in Districts D-F but is equally evident in Jamestown and Domiabra. The involvement of both the nyesee weku and the tsesee weku in social activities is also consistent with the concept of the active family. The inactive members of the extended family usually involve themselves in the social activities of other members of the extended family and thus create their own active families.

The above development, as we have suggested, is probably the consequence of the emergence of a more complex society in urban Ghana and

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[50]See Kropp Dakubu 1981, pp. 21-22.

the appearance of forms of marriages that defy traditional categories. We were able to trace several instances where alien males from other West African countries had married Accra women, adopted Gá names for their children and by implication incorporated themselves into the families of their wives.

As between the tsesee weku and the nyesee weku, informants showed a tendency to regard the family that had influenced their lives the most as the family to which they belong. This again, is in consonance with the concept of the active family, as it conduces to the idea of a social support group that is not strictly based on traditional legal precepts. Thus a man who has been brought up, educated and housed by his maternal relations is more likely to regard his nyesee weku as his family. Yet his paternal relations may contribute to his marriage and his children will normally bear the names of the patrilineage.

Every weku has a head or the weku yitso[51] who directs its affairs and represents the legal personality of the family. He is quite different from the shia onukpa or household head who is usually nothing more than the head of a nuclear family.

In spite of the stronger emergence of the nuclear family, the consanguine family continues to have considerable social importance. With the relative decline of chiefship among the Gá, the extended family or weku clearly has become the basis of social organisation in the city. Funerals and other group-based activities are still organised by the weku, often in support of the active family. Under the official customary law the structure of the ownership of

[51]On the position of the head of family in Accra see below, pp. 206-219.

land and succession also continues to depend largely on the extended family, as we shall see in detail in chapters 5-8 below.

The consanguine family's role today is, however, increasingly limited to matters relating to marriage, divorce and funerals where social conventions still emphasise group-activity. The alienation of its major resource, land, is often organised by the head together with a few leading members. Sometimes this is done clandestinely and to the exclusion of major branches of the family, thus feeding the cycle of family disputes and complicating the problem of security of titles. Besides, with the advent of new concepts of land-holding[52] and the progressive development of urban lands, the extended family's capacity for holding property is becoming correspondingly diminished.

Some controversy exists as to whether the Gá Mashi who include the people of Jamestown are matrilineal. While it is generally acknowledged that the Gá as a whole are patrilineal, the courts insist that those Gá who originate from the old settlements of Central Accra or Gá Mashi are matrilineal. Ollennu has no doubt that the approach of the courts that the Gá Mashi are matrilineal is correct. He goes to considerable length to show that many of the families in Central Accra originated from tribes that are matrilineal.[53] There is a non-sequitur

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[52]In the West Korle-Gonno Estates, the extended family did not have any interests in property beside the family house which is often partitioned among siblings and their respective families, each of which organises its affairs on a self-reliant basis. It was only in the rural area, with its vast swathes of uncultivated land, that the family is still conceived of as a property-holding unit.

[53]Ollennu 1966, pp. 183-199. This view reflects an approach that has become crystallised in the decisions of the courts. See e.g. Larkai v. Amorkor (1933) 1 W.A.C.A. 323; Solomon v. Botchway (1943) 9 W.A.C.A. 127; Nunoo v. Cleland, unreported decision of the Land Court, Accra, 3 July 1945; Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554; Cobblah v. Bannerman, unreported decision of the Land Court, Accra, 29 November 1958; Baddoo v. Baddoo, unreported decision of the Land Court, Accra, 2 December 1958.

in the argument that because certain Gá Mashi families originated from tribes that are matrilineal, the Gá Mashi themselves must be matrilineal. If the families in question now regard themselves as Gá who are patrilineal, then a more logical argument can be made that they ought to be patrilineal like the rest of the Gá.

Several writers have criticised the view that the Gá Mashi are matrilineal. Allott observed that,

> "One of the supreme examples of judicial straying in the matter of customary law in West Africa is over Gá law of intestate succession which a series of Gold Coast cases decided in the Supreme Court have tended to mould in a manner alien to the indigenous institution. The authority of Sarbah, authority though he was on the rules of Fante law, on the topic of Gá succession is highly dubious. The evidence (other than that contained in the reported decisions) goes to show that in the majority of the quarters of Accra inheritance is predominantly patrilineal in character, and not matrilineal."[54]

More recently, Nii-Aponsah, himself a lawyer from Gá Mashi, has made a spirited attack on the judicial doctrine that the Gá Mashi are matrilineal.[55] Drawing on evidence from Gá ideology and sociology, he argued that the purpose of Gá marriage is to define the paternity and legitimacy of children as well as to define the family to which they belong.[56] His conclusion that Gá

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[54]A.N. Allott, editorial note to the case of Aryeh v. Ankrah in (1958) Journal of African Law, p. 27. See also similar comments by the same author in an editorial note on the case of Vanderpuye v. Botchway in (1957) Journal of African Law, p. 42. Cf. Bentsi-Enchill 1964, p. 162: "The present writer can testify, as can anyone who has had the handling of succession disputes in Accra, to the existence of a widespread belief held in many high quarters, that succession to property is patrilineal."

[55]D.A. Nii-Aponsah, "Law and Social Reality: The Effect of Marriage and Paternity on Membership of Family Among Ga Mashi People", (1978) Review of Ghana Law, pp. 32-46. In conversation with the present writer, Nii-Aponsah drew on his own childhood socialisation and his adult experience as a Gá to refute the view that the Gá Mashi are matrilineal.

[56]Ibid. p. 33.

families are defined patrilineally[57] appears to reflect the opinion of the majority of Gás.

Our own findings revealed that the majority of people in the main sample considered themselves patrilineal. Of the 160 people in the main sample only 7 thought that the Gá Mashi were not patrilineal. Even non-Gás were unanimous that the Gás of Central Accra are patrilineal. However, a surprising number of elite informants (30 out of 48) indicated that the Gás of Central Accra are partly matrilineal and partly patrilineal. When asked to explain how some families came to be patrilineal and others matrilineal, this group of informants usually stated that it depends on the ancestral origins of each family. A minority of informants in this group were of the view that it depended on the outcome of previous court cases decided by the regular courts. This group was dominated by lawyers and heads of families. Apart from the lawyers, who were obviously stating the official legal position, it is probable that the opinions of the others have been influenced by their knowledge of previous court decisions.

The wekumei or the members of the family are the most important of the organs of the extended family. They comprise all persons related by blood, nomenclature or by incorporation into the family, and acknowledged as being members by the principal family members. It is the members who ultimately make the major decisions of the family, including the choice of head of family.

The basic rule is that an individual belongs to a family as an incident of his birth. Since the Gá practise patri-descent, the primary method of

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[57]Ibid. p. 43.

incorporating male and female infants into a family is through the naming ceremony which occurs on the eighth day after the birth of a child.[58] On that occasion he or she is introduced to the patrilineage and given a name of the quarter of Accra from which his or her father originated. Each quarter has its own set of names which are arranged in an alternate generation pattern with children bearing the names of the father's father and his brothers and sisters.[59] Thus each child is born into his or her name. As Field has observed, it is possible with experience to assign a Gá man or woman to his quarter on hearing his or her name.[60] It is also possible to tell, for instance, whether he is a first- or fourth-born son or daughter.

In addition, infants may be given day names[61] or the names of ancestors. He or she acquires a family name, and with it automatic rights in land and other

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[58]The eighth day coincides with the day on which the child was born. Thus a child who is born on a Monday is named on the following Monday. The naming ceremony is an important part of Gá tradition. During the ceremony prayers are said seeking the blessings of God and the ancestors to guide the child in its journey through life.

[59]Thus listing all names in order of seniority, the naming system of families from Lamptey Djan-We or Lante-Dzan We is as follows. First generation males of Lamptey-Djan We: Odartey, Odartei, Odarquaye (Odarkwei), Odarlai, etc. First generation females of Lamptey-Djan We: Koshie (Odarley), Odarkor, Odarkai, Odarcho, etc. Second generation males of Lamptey-Djan We: Lamptey, Lantei, Lanquaye, etc. Second generation females of Lamptey-Djan We: Lamiley, Lamiokor, Lamkai, Lamcho, etc. The Gá naming system is often based on such recognisable root-names as Ayi, Addo, Abbey, Commey, etc. from which each quarter or family derives its names by simply adding the appropriate suffixes. E.g. from the root-name Ayi are derived the ranking-names Ayitey (Aryeetey), Ayiquaye, etc. (males); Ayeley, Ayorkor, etc. (females). There are, however, many Gá family names, such as Koney, Sai, Oto, Sackey, Maaley, Trebi, Amon, Ashie, Laryea, Sojah, Odai, Mankatah, Annan, etc., (males); and Koshie, Djama, Deedei, Momo, Akushia, Fofo, Lekia, Dede, etc. (females), which do not fit the clear-cut system described above.

[60]Field 1937, p. 174.

[61]Day names for male infants are: Monday (Kojo), Tuesday (Cobblah or Kwabla), Wednesday (Kwaku or Quarcoo), Thursday (Kwao), Friday (Kofi), Saturday (Kwame) and Sunday (Kwashie or Quarshie). Day names for females are Monday (Ajua), Tuesday (Abla), Wednesday (Akua), Thursday (Aba), Friday (Afua or Afi), Saturday (Ama) and Sunday (Akoshia or Ashia). These names are commonly used with slight variations throughout Southern Ghana and parts of Togo and the Ivory Coast. See Kropp Dakubu 1980, p. 84 for commentary on Gá day names. See also, A. A. Amartey, Omanye Aba, Accra 1969, pp. 42-56, esp. p. 45.

family property, especially access to the family house and the protection of the head of the family.

Family membership may also be acquired through adoption. Adoption in the English sense is unknown among the Gá, while fostering arrangements are very common. It is not unusual for parents to place their offsprings with more fortunate relatives for education and upbringing. Thus parents in the rural areas may send their children to relatives in the city while they are minors. This is considered a good way of increasing the child's prospects. It is also common for strangers to attach their children to the households of others. Where such children attain the age of majority or marry and are unable or unwilling to trace their own relatives, they may become incorporated into the family of their host and may give the family names of their host to their own children.

Family membership may be severed through public ceremonies in which the disaffected member virtually renounces his connections with the family. Ollennu referred to the custom of severance of family ties among the Gá as tako mlifoo or severance of the headpad.[62] It is considered an abomination which constitutes a grave threat to family unity.[63] The family elders and traditional authorities do not countenance it and would go to considerable lengths to get the parties involved to recant.[64]

We will now state the situations in which this general rule may be

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[62]Ollennu 1966, p. 104.

[63]Ibid. p. 105.

[64]See id. for a fuller account of the implications of tako mlifoo. See also the opinion of the chief linguist of the Gá State on the same in the case of Okaikor v. Opare and Anor. (1956) 1 W.A.L.R. 275.

inapplicable. The first situation is where the child's mother is unmarried. In such a situation the alleged father is invited to claim paternity and perform the naming ceremony. If he declines, the naming ceremony is performed by the mother's paternal family who then claim the child as their own. Such a child becomes a member of his or her mother's family.

In former times when a child was found abandoned it was taken to the chief who attempted through public announcement to trace the foundling's parents or family. If nobody claimed the child the finder was entitled to adopt it into his or her own family. Today foundlings are reported to the police who then forward them to the Social Welfare Department. There is a Social Welfare Department compound to the south of the West Korle-Gonno Estates where foundlings and homeless persons may be taken, but there is no evidence to suggest that attempts are ever made to attach persons sent to the compound to specific families. Nevertheless by living among Gá people and speaking the Gá tongue many seem to have become naturalised Gás.

In the olden days naturalisation involved specific public ceremonies to publicise the naturalised person's new status. Today naturalisation occurs mainly through the gradual adoption of Gá cultural standards by an immigrant without the need for specific public ceremonies.[65] The naturalised person is gradually absorbed into Gá society through his own marriage or those of his or

[65]But see Field 1937, p. 176 where she says that circumcision of a foreigner implies his naturalisation as a Gá. Male (but never female) circumcision is universal among the Gá and is one of many examples of Hebrewisms among the Gá and kindred peoples that have been noted by several commentators. See e.g., Bosman 1967, pp. 150 and 210; Reindorf 1966, p. 21; J.J. Williams, Hebrewisms of West Africa, London 1930, p. 101; and H. Meredith, An Account of the Gold Coast of Africa, London 1967, p. 194.

her children and the adoption of Gá names for his or her descendants.[66] As he or she becomes related to Gás by marriage, as his or her descendants adopt the Gá tongue at home and as his or her forebears become buried in Ga soil, he or she becomes a de facto Gá.

Family membership entails extensive rights and duties.[67] These include the liability to contribute to all family debts, and to contribute to other family expenditure, including litigation, preparation of food at festivals, maintenance or refurbishment of the family house, and obedience to the summons of the head of family for the purpose of dispute settlement. In return, the member has a right to enter the family house, especially on festive occasions, though not to take up residence. He also has a right of audience before his family head, and on his death, to be laid in state in the family house. In Domiabra, he also has a right to enter onto uncultivated family lands to trap, hunt, fish, gather firewood, snails or fruits, pick herbs and to draw water from a family well.

Major decisions of the council are taken by the family-in-council or the family council. The family council is traditionally one of the most important of the organs of the family. It is not a standing body and is only convened on an ad

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[66]See Quarcoopome v. Quarcoopome, an unreported judgment of the High Court, 22 January 1962, where it was held that a Nigerian who settled permanently in Accra and gave Gá names to his children became a Gá man. Among strangers who adopt Gá cultural standards and naturalise most easily are people from Anecho or Little Popo in neighbouring Togo who bear Gá names. The evidence for this is the unanimity of opinion among those descendants of Anecho settlers in Accra who were interviewed during fieldwork that they consider themselves to be Gá. The people of Anecho are the descendants of Gás who migrated from Accra in the seventeenth century. They are still regarded by the modern Gá as their kith and kin. See D. Westermann, Die Glidyi-Ewe in Togo, Berlin 1935, pp. 248-250. See further A. van Dantzig, Les Hollandais sur la Cote de Guinee, 1680-1740, Paris 1980, pp. 273-277. Nii-Aponsah has suggested that adoption of the Gá kpodziemo or naming ceremony is a critical factor in the naturalisation of non-Gá persons. See D.A. Nii-Aponsah, "The Rule in Angu v. Attah Revisited", Review of Ghana Law, Vol. 16 (1987-1988), pp. 281-292 at 292.

[67]Sarbah 1968, pp. 33-34 and Ollennu 1966, p. 73.

hoc basis. Its composition may vary from occasion to occasion. Being a decision-making body, it consists of an assemblage of selected adult members of the family. Usually, this comprises the principal members of the main branches of the family. Other prominent members may be co-opted, even though their own branches may already be over-represented. The meetings of the family council take place in the family house, or failing that, the house of the head of family. Whatever the functions of the family council in the past, it has little power to make rules and regulations for the rest of the family today. Today its agenda comprises mainly marriages, family property, funerals and the settlement of disputes. Matters like childcare, individual welfare and education are seen more and more as the responsibilities of the nuclear families concerned. Once a decision has been taken, its execution is usually left in the hands of the head of the family who may levy a family tax to meet the obligation. In a sense, the head of the extended family is merely an adjunct of the family council, acting as its mouthpiece, and carrying out its decisions. He cannot, for instance, alienate land without the consent and concurrence of the principal family members.

The family council is hardly a democratic system as only the branch heads may be represented. These are often the oldest members of the family, hardly abreast with modern times. Younger members of proven ability may, however, be co-opted into the council. All the same, the family council in its present form is poorly equipped to meet the demands of a nuclear family-centred approach to the socialisation and economic support of children. As we have seen, the existence of family councils has not prevented some heads and

leading members of families from effectively appropriating family property.

Several meetings of family councils were recorded during the period of fieldwork. The following meeting of a family council at Jamestown was selected for presentation in this thesis, as it fairly summarises the main procedures of the other meetings and demonstrates the essential character of the family council. The council had been summoned to discuss arrangements for the impending memorial service of a deceased relative who had died a year earlier. Prior to the meeting the head of family had, through emissaries, sent notice of the meeting to the homes of the leading members of the family as well as to some influential junior members. The meeting itself was held in an ancestral home in Jamestown, where the participants squeezed themselves into a corner of the spacious yard.

Opening the meeting, the head of family offered a prayer to the ancestors and the soul of the departed relative. He then told the meeting of the debts outstanding from the funeral, pleading with participants to help remove the stigma of debt from the family. He produced a small notebook and outlined his proposals for the memorial service. He then invited comments on his proposals. After an animated discussion in which a few complained of the astronomical costs of such expenditure, the head of family reminded the meeting of the necessity to let honour outweigh what he called "the small financial sacrifice" they had been called upon to make. After a whispered conversation with prominent leading members he announced a figure (7000 cedis) which he said every member must contribute, indicating that one of the leading members had undertaken to bear the rest of the financial burden. The leading member was

thanked profusely, and the meeting proceeded to discuss a number of issues raised by the participants. In particular, participants wanted to know what had happened to a promise to approach the headman of a village outside the city for land on their behalf. The head of family recounted his problems with the headman and concluded firmly that he thought the headman was more interested in selling the land to "strangers" who offered him substantial sums of money. The meeting then dispersed.

An important point to be noted is the absence from the agenda of the plight of the deceased's children who, I was later informed, were staying with their mother. The head of family explained that any money realised from family contributions would be strictly for the memorial service and not for the children. He said that many issues facing the family today turn on finance, adding ruefully that as a result, the most influential members in the family are often the wealthiest. The facts about this particular family support the view that the extended family has little time for the welfare of the children, but the attitudes of other families I observed seem to negate this. In both Domiabra and Old Dansoman extended families were encountered that were not only deeply concerned about the plight of children and other junior members of the family, but made financial provisions for them (Cf. pp. 201-203).

Asked to comment on the character of the family meeting described above, most heads of families in the sample described it as fairly typical. The heads of families were also asked about the apparent dominance at the meeting of financial issues. Most agreed that it tended to divert attention from more important matters. Some heads of family however did point out that issues

about money were inevitable if the family were to effectively carry out its plans into action.

In summary, the concept of the family in Gá customary law has undergone considerable changes with the nuclear family assuming more prominence. This does not mean that the future of the extended family has become bleaker. Rather, there has occurred a subtle re-negotiation of the relationship between the extended and nuclear families, allowing the nuclear family greater control over its own affairs. The purpose of this section has been to trace and analyse the main changes in the practised customary law of the Gá. It has been shown that the membership of the modern Gá family is made up of two main classes of people: active members and inactive members. It is the active members of a family who in modern Accra constitute the modified extended family of the individual and effectively perform the role of the old extended family.

4.1.3 Nuclear families and their approach to family solidarity: a case study

The 1985/86 reforms of customary law in Ghana have in many ways sought to give greater rights to the nuclear family than the old customary law recognised. This partially reflects social realities. In Accra, the traditional family is increasingly non-residential and the new recognition given to the home as the point of socialisation, acculturation and stabilisation of the population[68] shows the

[68]On this see in general T. Parsons and R.F. Bales, Family, Socialization and Interaction Process, New York 1955.

extent to which the nuclear family has gained prominence. In many ways, the typical urban "compound house" has become an ethnic melting pot, as several families of different ethnic origins may live there and bring up their children. A marriage or home-centred legislation based on a well-formulated code might result in the greater application of household incomes to the education, upbringing, etc. of family members.

The following examples, drawn from Jamestown, will serve to illustrate the practical implications of the differences between a consanguine family and the nuclear family. Each example is fairly typical of the average family in the field-area, save Domiabra. In the case of Domiabra, almost all recorded marriages were customary law marriages, and incomes which are almost exclusively generated from farm-related activities are highly variable. The findings in Domiabra are therefore of little value to us as they are not comparable with findings in the more urbanised other field-areas. In each of the following cases, wage earnings constitute a significant part of the family's income. They tell a story of different economic conditions even though both households earn roughly the same income, and bring out the human and social realities behind the two forms of family.

Merley Martey lives in a compound house in Jamestown together with members of her extended family and a number of tenants. She has five children who are encouraged to regard themselves and the children of Merley's siblings as members of one family unit.

Merley is divorced from her first husband who pays no maintenance, but she receives financial support from various members of her extended family. To

a suggestion that the ex-husband be taken to court, Merley half-joked: "Who can get money out of this man. His pocket is full of holes." Her second husband, a welder who has two other wives, is supportive. Together, this household earns an income of 26,000 cedis a month. But they are almost as obliged to care for other members of the extended family as they are to care for their own children. Merley estimates that apart from food, she spends about 5 per cent of her income on education, clothing and the general upbringing of the children. A sizeable proportion of her income goes to her extended family. She also admits to disappointment about her brothers' unwillingness to support her children, pointing to their inability to sponsor her fifteen year old to go to a technical college. The termly fee is, however, half of her husband's monthly wage. The boy remains at home. Her husband's income is shared among his three sets of children and he divides his time between his three wives.

Merley's extended family-centred approach to solving her problems is in sharp contrast to Kojo Yankey's. A "stranger" from Discove, near Cape Coast, Kojo's family occupy two rooms in the Martey household as tenants. He is far removed from his kith and kin. His personal ethic seems to be based on the philosophy that he can only improve himself and his family in an alien urban environment through long and hard work at the textile mill where he works. Sarah, his wife, is a market trader who bears the responsibility of looking after the children's education. She is a Gá from Tema, but has minimal contact with members of her consanguine family. She is illiterate, and says her greatest ambition is for her daughters to become "ladies" (educated women) as she has always respected education and admired such women. Unlike the Marteys, the

income of the Yankeys is spent entirely on the parents and the children. The household income of 23,000 cedis is slightly less than the income of the Martey household, but by Kojo's calculation, they spend about 25 per cent of that income on the children's education and development. Theirs is a close-knit, ambition-driven family with middle class values, the children promptly taking their place at the family dining table at the appropriate times and eagerly offering to say grace.

These examples are typical of many. They demonstrate the economic circumstances of the two types of family. The case of the Martey family illustrates the interplay between the extended family, polygamy and the pressure on financial resources. Conversations with neighbours were particularly revealing: a sixth child had suffered from kwashiorkor[69] and died in its infancy of whooping cough, property inherited from a grandfather had been lost because of lack of resources to fight the case in court, and their present property itself had been in a state of disrepair for a long time. It is not difficult to see the link between the circumstances of the family and their extended family-based view of life. While poverty occurs on a fairly large scale throughout low-income households, it is probably accurate to say that the plight of this particular family is aggravated by the income-dissipating tradition that obtains in the household. Paradoxically, Merley's ragged-trousered husband is, from the traditional point of view, a better family member than Kojo Yankey, who ignores his extended family. The Yankey children will probably enter secondary school, acquire

[69]A protein deficiency. The term Kwashiokor is derived from a contraction of the Gá-Adangme names Kwashie and Korkor, and is used to describe the birth of two children in quick succession which was traditionally thought by the Gá to deprive the elder child of nourishment provided by the mother's milk, giving rise to the symptoms associated by modern doctors with the disease.

modern economic and learning skills, and be integrated into the new social order. The Martey children will probably grow to form part of another generation that perpetuates both traditionalism and the pre-capitalist economy.

This case study is given a special cast by the fact that it is played out in an urban environment. Within the context of the urban economy, there is less evidence to support the continued reliance on the consanguine family in its pristine form as an essential pivot of Ghanaian social organisation than in the rural areas. In the face of increasing social complexity it offers a less stable framework for the stabilisation of society and for the development of the personalities of children. As in the case of Merley's husband, the husband is often accused by each of his different wives of favouring the others and their children; the tension that this creates often finds its best expression in the scramble for succession that follows the death of the husband.[70] None of the households of a polygamous husband has a constant father-figure, and the husband's financial support, instead of being concentrated on one household, is permanently divided between the various wives.

Both polygamy and the influence of the consanguine family have declined appreciably in the areas under investigation, existing only in various residual forms throughout the districts. For instance, many informants stated that at one time or the other they had married polygamously, but in almost every case, the pressures of dealing with two sets of families had proved too much for the husband. What remains is a series of short-lived "marriages" with various other

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[70]See e.g. Coleman v. Shang, (1959) G.L.R. 83. See also, Yaotey v. Quaye, (1961) G.L.R. 573.

women during the subsistence of the first marriage. Occasionally, a new relationship manages to supplant the first marriage as either the first wife finds the new marriage intolerable or the man simply deserts her for the other woman.

Among families in both the West Korle-Gonno Estates and Old Dansoman the degree of detachment from the maximal lineages in the old quarters since the earthquake of 1939 is remarkable. It is easy enough, through a man's name, to trace his origins to a particular house, maximal lineage or quarter of the old quarter, but it is far more difficult for him to feel any affinity or attachment to that house or lineage; even to define in very clear terms his exact connections to it. Even though the older generations recall perfectly well the major events of 1939, they are far more likely to define and value their relationships with cousins and even friends with whom they grew up in the same household or in the same neighbourhood. Many of the informants, though they described themselves as Gá, bear other southern Ghanaian (especially Akan) or English-derived surnames.[71] If the Akan-derived surnames are any indication of the continuing integration of others into the basic urban population, it does show the role of outsiders in the breakdown of the maximal lineages of Accra.

The discussion in this section touched on some of the cultural values that inform the customary law of Ghana and noted their role in shaping social behaviour. But there are other relevant variables that influence the behaviour

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[71]A sixth of all informants had names that were either Akan- or English-derived. English-derived surnames such as Nelson, Bannerman, Hansen, Commodore, Squire, Hammond, Lawson, Brown, Mingle, Abrahams, Bruce, Simmons, Hyde, Solomon, Thompson, Slater, Johnson, Smith and Cleland were almost as common among persons describing themselves as Gá as Akan-derived surnames. Common Akan-derived surnames include Ansah, Amu, Ankama, Yankey, Ankrah, Darku, Mante, Danso, Owusu, Amponsah, Acquah and Abekah. There were even more names that were corruptions of Akan names: Amuah (Amoah), Ashrifie (Essilfie), etc. The list is long and ever-growing.

of individuals towards their kinsmen. The most important variables are poverty and the concern to alleviate the hardship of one's kith and kin. Arguably, in situations of widespread poverty an extended family system that distributes available resources across a large number of persons through an extended family network may be preferable to exuberant individualism that leads to extreme inequality in the distribution of wealth. However, the declining role of the extended family threatens the continued existence of this distributive mechanism. This strengthens our contention that the concept of the active family be developed further to occupy the role of the extended family.

4.1.4 The head of the extended family and the Head of Family (Accountability) Law, 1985

Today, the head of the extended family occupies a less important place in the hierarchy of social and political authority in urban society than his or her predecessors.[72] Short of conjecture, it is difficult to reconstruct with any degree of accuracy the position of the head of the extended family under the ancient socio-political scheme of the Gá. It seems probable that in pre-colonial times the importance of the head of a Gá extended family depended on the wealth and size of his extended family. The heads of wealthy extended families appear to have played major roles in the planning and execution of military campaigns, due largely to their ability to supply war leaders with troops and logistics. Such family heads acquired great power and influence over the occupant of the stool and

[72]The information that follows is distilled from the replies of informants to questions about the past and present roles of the head of family in Accra.

often played an important role in the administration of Gá towns.

It is easier to assess the role of the Gá head of family in the colonial period when permanent British presence on the coast secured a long period of peace between the Gá and their neighbours. During this period the role of the head of the extended family became largely one of domestic leadership and the maintenance of harmony among various sub-groups of the extended family. Most heads of extended families, regardless of the size and wealth of the families over which they presided, were adept at these tasks and came to be regarded with enormous respect. Some heads of families extended their authority through increases in landholdings and the education of the younger members of the extended family. In this way, heads of extended families also increased the power that inhered in their office.

It is noteworthy that the position of the head of the extended families in the Gá political hierarchy became progressively less clear-cut throughout the period of colonial rule. We have just noted above how heads of pre-colonial extended families might play a major role in the administration of Gá towns in ancient times. During the colonial period this was undermined by the growing importance of the educated elite in the administration of the Accra municipal area. Yet until comparatively recently, some heads of extended families in Accra held positions of influence or authority in the courts of divisional chiefs. This has declined both as a result of the diminishing importance of divisional chiefship and the increasing complexity of urban administration.

The present functions of the head of the extended family as extracted from interviews, both with heads of families and family members within the

field-area, can be described as follows: The family conducts its day to day activities through the weku yitso (see p. 189 above) or head of family.[73] The head of family has ultimate control of the extended family and he or she alone can sue and be sued on its behalf. In former times, the head of family kept the family stool, poured libations at family gatherings, and liaised with the ancestors in the nether world who closely invigilated the affairs of the living. His or her counsel was usually sought by members of the family in moments of crisis or when they embarked on a hazardous enterprise. The experience of the older generation, particularly of heads of families, is highly valued as a reliable guide to the future conduct of people and the outcome of events. This is reflected in the Gá maxim Onukpa ni eda efe okonfo, "an experienced elder is greater than an oracle."

An effective head of the extended family regularly convokes meetings of key family members over which he presides, and his or her home often becomes the centre of extended family activity where principal family members congregate in times of crisis. The attenders of such meetings often represent a wide span of elders and key family members either in authority over their own branches of the extended family or exercising considerable influence over other members of

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[73]See Sarbah 1968, esp. pp. 37, 89 and 90. Many of the families studied in Jamestown and the West Korle-Gonno Estates had little or no landed property. Yet the heads were distinguished by their moral stature among their peers. Many of them held their office by popular acclamation rather than election. But perhaps many of the peculiarities of urban family headship are due to the lack of uncultivated land in the urban setting. In the rural areas, the control and allocation of the family's ancestral lands ultimately constitutes the basis of the head's authority. Cf. A.N. Allott, "Legal Personality in African Law," in M. Gluckman (ed.), Ideas and Procedures in African Customary Law, Oxford 1969, p. 190: "Sarbah, perhaps influenced by the writings of Sir Henry Maine on Indian village communities, felt that the village community was the basis of Fante land tenure." See H.S. Maine, Early Law and Custom, London 1901, pp. 335-361 and H.S. Maine, Village-Communities in the East and West, London 1907, esp. pp. 12-75 showing the nature of the village community's authority over land and its alienation in India.

the family. At such meetings the head of family may, among other things, act as an organiser, planning ordinary rites de passage of family members or as an arbiter and reconciler, settling disputes, encouraging conciliations, ordering restitution and apologies, and effecting reconciliations between members of the family.

The head of family also ensured the propriety of the actions of the family, and largely saw to it that such actions conformed to the standards and precepts of the ethnic group to which the family belonged.[74] The head of family was usually the most revered and oldest member of the family, who by experience and achievement was held up as an example to all. The position and duties of the head of a Gá family were not unlike those of other heads of families throughout Southern Ghana. He or she was beyond reproach and his or her integrity was generally taken for granted. Most respondents agreed that continual rebarbative conduct or moral turpitude can seriously undermine a head of family's authority. On the whole, however, the word of the head of family bound the entire family, though a wise family head, to avoid serious rifts, often showed great discretion and took the views expressed at meetings of the family into consideration.

However, the functions of the head of family appear to have changed substantially in recent times. Throughout the areas under consideration, save Domiabra, the functions of the head of family have become more and more ceremonial when compared to other heads of families outside Accra. This can

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[74]Wayward and improvident adolescents, in particular are constantly reminded of the error of their ways and the danger of departing from time-honoured rules of behaviour with such aphorisms as Ke akee obaada ni oba nina dze lomó, meaning "The saying that the undisciplined youth will grow up and experience the hardships of adulthood is no curse."

principally be attributed to the progressive shortage of land in the city and the dispersal of many members of the extended family into the suburbs and elsewhere. Without land, the erstwhile principal asset of the family, the head's connection with the rest of the family has become more tenuous. Even in cases of disputes involving family land, a head no longer appears to be the only person who can litigate the family's title. This is done by the most able member of the family with the consent of the family council.

The post-earthquake era (post-1939) of reckless land sales by heads of families, accompanied by widespread attempts to avoid an honest account of receipts from those sales, appears in many cases to have diminished the standing of the head of family in the eyes of many people. Indeed, the great majority of head of family accountability suits in that era arose from transactions relating to Accra lands. In the case of Domiabra, the pre-1948 character of family relations appears to have been substantially preserved. The head of family continues to control vast tracts of land and is revered by both members of the family and the community at large. Out of the reverence and respect in which the head was held grew the doctrine that the head could not be held accountable for squandering or misappropriating movable properties of the family. He or she only had a life interest in immovables which could not be alienated without the consent and concurrence of the family elders. In the words of Sarbah,

> "If the family, therefore, find the head of the family misappropriating the family possessions and squandering them, the only remedy is to remove him, and appoint another instead; and although no junior member can claim an account from the head of the family, or call for an appropriation to himself of any special portion of the family estate or income, therefrom arising, yet the customary law says they who are born, and they who are

still in the womb require means of support wherefore the family lands, and possessions must not be wasted or squandered."[75]

We see in this passage the germ of two ideas running through Ghanaian family law. Firstly, the head of family, being the family's very embodiment and personification, empowered to act alone, and entrusted with vast amounts of property, cannot be held to account.[76] Secondly, he is enjoined to hold the property in trust for the living and the dead as well as the unborn. He is not irremovable, though, and his excesses cannot go unchecked for too long.

The head of family's liability to account is today governed by the Head of Family (Accountability) Law, 1985.[77] This legislation clearly introduced the element of accountability of the head to his family. The first two sections of the legislation are as follows:

> "(1) Notwithstanding anything to the contrary, any Head of Family or any person who is in possession or control of, or has in his custody, any family property shall be accountable for such property to the family to which the property belongs.
> (2) Every Head of Family or any person who is in possession or control of, or has in his custody, any family property shall cause to be taken and

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[75]Sarbah 1968, p. 90. Sarbah's comments on the extended family's obligations to both living and unborn family members echo observations made about the joint family in India. This reflects ancient concern that the living hold any property in trust for those yet to be born. See G.D. Sontheimer, The Joint Hindu Family, New Delhi 1977, p. 185, quoting earlier authorities: "They, who are born, and they who are yet unbegotten and they who are still in the womb, require the means of support, no gift or sale should, therefore, be made."

[76]It has, however, been argued that the rule concerns only the liability of the head to be sued for an account; and that it does not extend to "accountability" in the wider sense: G.R. Woodman, "The Rationale of the Head of Family's Immunity to Actions for Accounts", 8 Review of Ghana Law, (1976), p. 147. The head, according to Woodman, is not "unaccountable" as he can be requested by the principal members to account to a family meeting where if he is found to be misappropriating the family possessions and squandering them he may be deposed. Cf. Ankrah v. Allotey (1944) D.C. (Land) '38 -'47, 132; Owoo v. Owoo (1944) D. C. (Land) '38 - '47, 137; and Ollennu 1966, p. 163.

[77]P.N.D.C.L. 114. Many heads of family were unaware of this legislation, and only 2 per cent of family heads interviewed had any kind of inventory of family properties. For important commentaries on P.N.D.C.L. 114, see, A.K.P. Kludze, "Accountability of the Head of Family in Ghana: A Statutory Solution in Search of a Problem," Journal of African Law, Vol. 31, Nos. 1 & 2, (1987), pp. 107-118. See also, W.C. Ekow Daniels, "Recent Reforms in Ghana's Family Law," Journal of African Law, Vol. 31, Nos. 1 & 2, (1987) pp. 93-106.

filed an inventory of all such family property."

The above sections clearly create two duties for heads of families, namely the duty to account to the family concerned, and the duty to compile an inventory of all family property. Section 2 confers on any interested family member the right to resort to the courts for either of the two duties of the head of family to be discharged.[78] Section 2 further sets the conditions which must be met before the head of family can be called upon to discharge his duties in the following terms:

> "Provided that no such application shall be entertained by the court unless the court is satisfied by the applicant that he had taken steps to settle the matter within the family, and that all such attempts have failed."

The transactions of practically all family meetings go unrecorded, and it would be difficult to establish the nature of the accountability of a head of family. Would a mere oral statement by the head to the family council as to the whereabouts of properties in his care suffice? Would a mere statement of expenditure of money, however reckless, be sufficient? And what would be the courts' attitudes in suits where the head of family contends that any of the above is sufficient?[79] It would appear that these lacunae can only be filled by case law. The best interpretative approach would be to construe the key word

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[78]Kludze 1987 has argued that the policy underpinning of section 2 of Law 114 is to liberalise the rule on locus standi to compel the head of family to account for family property. The old rule on locus standi had been constrictive and had the effect of precluding accounts against the head of family by any member of the family, however senior or important his status. But he contends that in the decision to reverse the old preclusionary rule, the policy choice has swung to the other extreme, and may lead to a cascade of litigation. See, Kludze 1987, esp. p. 113.

[79]See Hansen v. Ankrah (1980) G.L.R. 668 at 671 where the defendant head of family contended that he had spent various sums of money received on behalf of the family on "various rituals, customary observances and ceremonies which every head of the...family is in duty bound to perform and observe at every...festival."

"accountability" restrictively and thereby impose on heads of families a duty to render carefully prepared accounts on the state of family properties in their care. In line with this mode of interpretation, the liability to be deposed for failure to account should be read into section 1(1). Without such a sanction, the courts would simply be restricted to making mere declarations on the state of family assets, and financial irresponsibility would continue.

The next difficulty is the duty imposed on the family to exhaust all avenues for dispute settlement in the family before commencing action in the courts. What is the meaning of "settle the matter within the family"? It is submitted that where all attempts to convene a family meeting with a view to getting the head of family to account fail, where interested members deliberately stay away with a view to preventing a quorum or where the meeting ends inconclusively or, one way or the other, the head finds an excuse not to render accounts or file an inventory, the conditions of this clause will have been met. Kludze has suggested that accountability within the meaning of the law should be interpreted to mean accountability within the procedures and consequential remedies known to the common law jurisprudence.[80] This, he says, follows as a logical deduction from the use of the word "accountable" and its cognate forms of "accountability" and "render account" in the law. He states further that this is reinforced by the provision in section 2 of Law 114 that the application for an order for an account may be made "by motion to a court".

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[80]Kludze 1987, pp. 114-115. He argues forcefully for the need to provide effective enforcement of a judicial order for accounts. He contends that if a party is ordered to render accounts and accounts are taken, there is need for the court to make consequential orders with respect to the state of the accounts.

Both heads of families and ordinary family members were questioned about their views on the new law. The findings in the three districts are reasonably comparable. Twelve out of the sample of 208 informants described themselves as heads of families. Those 12 heads of families were fairly evenly distributed over the three districts: Jamestown (5), Domiabra (4) and West Korle-Gonno Estates/Old Dansoman (3). When asked whether they thought making detailed records of all landed properties under their control available to members of their families was necessary, the sample was almost evenly split with 6 of the 12 heads of families saying "yes" and 6 saying "no". Almost all of them thought the new levels of accountability required under Law 114 could lead to a severe curtailment of their powers and probably lead to demands for the partitioning of family properties and would thereby deepen divisions within the family.

The great majority of informants, themselves members of one nuclear family or another, welcomed the new law. Several spoke optimistically about having been given the mechanism, at last, to compel autocratic heads of their own extended families to provide answers to long-standing questions about the state of family lands, houses and investments. However, none of the respondent heads of families had as yet prepared any inventories of lands under his or her control.

Family headship is often described as an elective office;[81] women are

[81]Accession to the office of the head of family is however, often by popular acclamation. It is only when a particular holder's right to the office is disputed by a faction or branch of the family that elections are held. Many people could not recollect any instances of election in their family history. Women heads tend to be assertive, successful types with considerable influence, e.g., reflected in the education, wealth or authority of their own children.

eligible for election at a meeting at which all the leading members must be present.[82] The wilful refusal of a leading member to attend such a meeting does not, however, invalidate the result. The head of family sits in judgment both over disputes between members of his or her own extended family and those involving members of other extended families that are referred to him or her. But where the dispute with a member of another extended family does not involve extended family property or the reputation of the extended family or any of its branches, he or she may do so only at the express wish of the extended family member involved. In a case in the state court, he or she may not represent an extended family member at all, although he or she may appear as the next of kin of an infant.

Turning now to the question of the head of family and the sale of land, it must be recognised that considerable controversy exists on the subject. Much of the controversy is the direct result of the effect of legislation on the institution of the family, particularly the equation of family lands with stool lands. A question of some importance is whether it is really desirable to include family lands and stool lands within the same classification.

Woodman argued the case for the exclusion of some family lands from the new definition of "stool lands" under the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential

[82]There is considerable case-law on the subject of the family meeting. See e.g. G.R. Woodman, "Judicial Control of the Family Meeting", Review of Ghana Law, Vols. 13-14, (1981-82), pp. 222-226 where he reviews the case of Allotey v. Quarcoo, unreported judgment of the Court of Appeal, 21 January 1981; digested in (1981) G.L.R.D. 14 and considers the question of judicial interference with the procedure of the family meeting.

Provisions) Law (P.N.D.C.L. 42), 1982.[83] In his opinion, since the legislation makes provision for "stool lands" and not "stool and family lands" it cannot have been intended to include all family lands within stool lands. The contrary view, he argued, "would involve artificiality in the use of the term "stool" and would produce impracticable results."[84] He therefore went on to suggest that just as the term "stool" has been held to mean "public stool" and thereby exclude private stools, so too the term "family" must be restricted to the "family community" or the "clan". This, he said, would extend the state's control over communal lands analogous to stool lands in those parts of the country where stool lands do not exist. The logic involved in this argument seems flawless for such places as the Northern part of the Volta region where the clan rather than the stool appears to have the allodial ownership over land. Further, Woodman's argument draws a critical distinction between the nuclear and consanguine families, and suggests that lands owned by the former be excluded from the definition of "family lands". But in such places as Old Dansoman and Domiabra, where the sizes and resources of consanguine families are infinitely varied, Woodman's suggestion would result in the payment into government funds of the proceeds of the sale of lands of even the smallest land-owning consanguine families and the consequent control of the budgets of those families.[85] The blanket equation of family lands with stool lands for the whole of Ghana is clearly ill-advised.

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[83]G.R. Woodman, "Family Lands As Stool Lands". Review of Ghana Law, Vol. 13-14, (1981-82), pp. 187-190.

[84]Ibid. p. 190.

[85]This issue is discussed in more detail below, chapter 6.

The areas of marriage and land sales offer good examples of the head of family at work. As we have already seen, a valid sale of family land can only be effected through the head of family acting with the consent of family elders[86] but his or her participation is almost equally important in validating a contract of marriage which is, in the eyes of the customary law, as much a union between the two parties as between their respective extended families. The marriage is often negotiated with his or her authority.

At funerals, the role of the head of family is even more important. The head is like the impresario, mobilising resources and assigning roles to key family members, co-ordinating the activities of all the branch-families and occupying pride of place at the funeral.[87] In other words, the concept of head of family is a major device whereby traditional society perpetuates itself, and hands down its cultural values to succeeding generations. The role of the head of family is, therefore, the direct antithesis of the role of the heads of nuclear families who preoccupy themselves with the welfare and development of their own immediate family.

When a family member, especially one who has emigrated to another community, wishes to exercise his right to a grant of stool land, he often does so through his head of family who introduces him to the chief and stool elders, and proves his right to the land by tracing his ancestral connections to the stool. In

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[86]See Ollennu 1962, p. 129. See also, Allotey v. Abrahams (1957) 3 W.A.L.R. 280.

[87]J. Zimmermann, A Grammatical Sketch of the Akra or Ga-Language, Stuttgart 1858, p. 351 describes him or her as the "yanotse": "person leading a funeral." Today he or she usually sits behind a table ("ketle") from which the funeral is administered. But see Tagoe v. Idun, Court of Appeal judgment, 21 November 1987, unreported; digested in (1987-88) G.L.R.D. 55, 121 where plaintiff's contention that the defendant had put himself forward as head of family by sitting at the head of the table at a funeral was rejected "since it was not unusual that persons other than the head of family acted at wake-keepings and memorial services to give prestige to the occasion".

effect, the member claims his right to the land by asserting his recognition of the head of family. Without that, he may have to obtain his land by contract, as might a stranger.

The gradual disintegration of the extended family as a property-owning unit and the consequent detachment of many of the new heads of family from stool affairs has meant that members of many indigenous communities, particularly in the urban areas, have to purchase their own (stool) lands. The function of the extended family as an important element in the distribution of land has declined appreciably in many towns and villages where the demand for land has overtaken its supply. In such places, the head and other leading members of the family tend to behave as a nuclear unit and claim family property as their personal property. For instance, several leading Jamestown individuals have successfully staked out claims to extensive parcels of land in the fashionable McCarthy Hill area and elsewhere as "family property", then sold it at exhorbitant prices to outsiders while their own kith and kin in the old quarter of Jamestown remain landless. The picture is not very different in Domiabra. Here too, leading stool elders have laid claims to vast tracts of land and many of the younger farmers are already beginning to experience the shortage of farming land and the consequent decline of productivity. The result, inevitably, has been a marked increase in the rate of migration to the city. At the same time, many of the lands in question have been sold to speculators from the city who have left the land undeveloped in the hope that they will make large profits on their investments when the spatial expansion of the city towards the village naturally raises the value of rural land.

The foregoing discussion has concentrated on the role of the head of the extended family and the effect of the Head of Family (Accountability) Law, 1985 on his position. We noted the traditional functions of the head of the extended family and showed the limitation of his authority over nuclear families living in widely dispersed households. Also, we outlined the main provisions of the Head of Family (Accountability) Law, 1985 and pointed out the changes that it makes in the old customary law. Altogether, the obligation to draw up an inventory of extended family property under the control of the head of family and for him or her to render account of them is a useful intervention by the state and should arrest one of the main causes of litigation in this area of the customary law.

However, the Head of Family (Accountability) Law, 1985 does not interfere substantially with the customary system; it only provides redress when the traditional system has failed. Its main purpose seems to be to curb misappropriation or misuse of family funds by heads of extended families.

4.2 Marriage and divorce in urban Ghana

The discussion in this section is structured around marriage and divorce under both customary law and statutory law in Ghana and the effects of legislation upon them. The main purpose of the discussion here is to show the extent of the impact of legislation in cases where the state makes no conscious use of incentives and penalty provisions. This entails a detailed examination of the laws of marriage and divorce and the impact of a succession of statutes upon them.

The laws of marriage and divorce in Ghana are considered in the light of

the different types of family that exist in Ghanaian society (see above section 4.1) and the increasing relevance of the concept of the "active family". Also, we will show how any new marriage creates a sociological new nuclear family, which remains linked to various levels of extended family.

4.2.1 Types of marriage

The following sub-section examines some relevant rules on marriage law in Ghana and contrasts customary law marriage with marriage under the Marriage Ordinance, 1884.[88] While it does not form a major part of the thesis, its purpose is briefly to examine the statutory and customary laws of marriage in Ghana, showing the impact of legislative intervention on customary law. It will be argued that customary law marriage does not offer a strong enough framework for the stabilisation of society or the development of the personalities of children.

The Ghanaian law of marriage is pluralistic. The main forms of marriage are customary marriages and statutory marriages. The latter are still governed by the two main colonial Ordinances on marriage.[89] Customary marriage covers

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[88]Useful works on marriage law in Ghana include K. Opoku, The Law of Marriage in Ghana: A Study in Legal Pluralism, Frankfurt 1976; W.C. Ekow Daniels, "Marital Family Law and Social Policy", in W. C. Ekow Daniels and G. R. Woodman (eds.), Essays in Ghanaian Law, Legon 1976, pp. 92-117; and K.O. Adinkrah, "The Essentials of a Customary Marriage: A New Approach, Review of Ghana Law, Vol. 12 (1980), pp. 40-52.

[89]Statutory marriage is regulated by the Marriage Ordinance, 1884, Cap. 127 (1951 Rev.) and the Marriage of Mohammedans Ordinance, 1905, Cap 129 (1951 Rev.). The Marriage Ordinance, 1884 was passedy the colonial authorities to encourage Africans who had converted to Christianity and the emerging urban elite to legalise their marriages in a way regulated by English law. On the whole, it has been of limited relevance to Ghanaian society. For interesting background material on the Marriage Ordinance, 1884 see e.g., H. Morris, "The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa", Journal of African Law, Vol. 23 (1979), 37-64, esp. at 62-63 discussing the abortive 1962 Ghana Marriage, Divorce and Inheritance Bill which would have repealed the Marriage Ordinance 1884 and provided for a common system of registration of marriages. Useful material on the Marriage of Mohammedans Ordinance 1905 can be obtained in M. Hiskett, "Commissioner of Police v. Musa Kommanda and Aspects of the Working of the Gold Coast Marriage of Mohammedans Ordinance", Journal of African Law, Vol. 20 (1976), pp. 127-146; J.N.D. Anderson, "Customary Law and Islamic Law in British African Territories", in The Future of Customary Law in

many forms of marriage and marriage-like associations, details of which are not relevant here.

We must note straightaway that the extended family, even in the case of marriages under the Marriage Ordinance of 1884, is the social matrix into which the new relationship is set. The nuclear family formed by the new marriage, therefore, becomes a mere off-shoot of an existing extended family whose council governs relevant aspects of the new family's life like funerals and the position of the children from this new marriage. Thus any new marriage creates a sociological new nuclear family, which remains linked in with the extended families of the parties.

A statutory marriage does not exist in a social vacuum. Its social condition is strongly influenced by attitudes about marriage long developed around the more traditional forms of marriage. Customary marriage is by far the most common form of marriage. Not a single case of statutory marriage was recorded in the rural areas of the study. Generally speaking, the average person has stayed more or less within the traditional marriage regime. Indeed, because of its prestige value and the enormous amounts of money spent on its celebration, statutory marriage is still largely confined to the affluent, the educated and some zealous Christians. These usually belong to the social elite who have availed themselves of the facilities for statutory marriage to more or less reduce their connections with their extended families.

Africa: Symposium organised by the Afrika Institute, Leiden 1956, pp. 70-87, esp. at pp. 76-77; and Ollennu 1966, pp. 259-269.

Marriage under the Marriage Ordinance, 1884[90] is based on English notions of monogamy enunciated by Lord Penzance in the celebrated case of Hyde v. Hyde which defined marriage as "the voluntary union for life of one man and one woman to the exclusion of all others."[91]

This contrasts sharply with customary marriage which, as we saw, allows polygamy and is based on the involvement of the extended family. Statutory marriage emphasises the notion of individualism. The passage of the Ordinance in 1884 marked a sea-change in African marriage laws in a formal sense.[92] In social reality, though, it has failed to achieve the sort of cultural engineering that might have been expected, particularly as most Ordinance marriages are still preceded by customary marriages and the majority of couples do not marry under the Ordinance. Marriage under the Ordinance may be celebrated in any licensed place of worship or in a Registrar's office. It may also be celebrated in any other place, provided a special licence is obtained from the Registrar to that effect.

In each of the three districts under consideration, Ordinance marriage appears to be the exception rather than the rule. Altogether, 11 informants in Jamestown, 26 in Mamprobi/Old Dansoman and only 1 in Domiabra had contracted Ordinance marriages. These figures were dominated by educated

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[90]Due to the parlous state of the Records Office at the Registrar-General's Department, we were unable to gather any systematic information on statutory marriage.

[91](1886) L.R. 1 P&D 130, 133.

[92]See S. Zabel, "Legislative History of the Gold Coast and Lagos Marriage Ordinance," Journal of African Law, Vol. 23, No. 1, (1979), pp. 10-38 where she traced the origin of the 1884 Ordinance from St. Helena through Ceylon to Hong Kong. The Ordinance marked a new beginnning for Commonwealth Africa as it became the prototype for its marriage laws.

nominal Christians who saw themselves as being in one way or the other socially distinct from their neighbours. It is tempting to see a link between Ordinance marriage and the level of "active Christianity" in each area. This is not entirely borne out by the figures recorded for the districts. Within the field-areas themselves, there is much variation between districts as regards the incidence of Ordinance marriage. For instance, 10 Ordinance marriages were recorded in the Girls' School area of the West Korle-Gonno Estate/Old Dansoman which is served by a single church, the Ebenezer Methodist Church. This is in sharp contrast to figures for the Zion School district of the same field-area were only 3 such marriages were recorded despite the presence in the district of a large number of churches, including the Martyrs of Uganda Catholic Church, the Zion Church and the Church of Pentecost. Instead, figures for the Girls' School district compare well with figures for Old Dansoman (13) which has no major church. Most of the parties to Ordinance marriages were not committed Christians, and indeed the association between Christianity and marriage under the Ordinance seems very slender. The majority of the married laity in Jamestown had contracted their marriages under customary law. Of course, the orthodox churches, with varying degrees of success, like to insist on some form of "church blessing" of customary marriage. The countless number of evangelical churches, however, do not seem particularly concerned with the form of marriage of their members.

Having examined the nature of statutory marriage under the Marriage Ordinance, 1884, we can now undertake a detailed consideration of the changing nature of customary marriage among the Gá. The Gá recognise two

forms of customary marriage as lawful, namely six-cloth marriage and informal marriage. Sarbah refers to a third form of marriage among the Gá, the two-cloth marriage.[93] A six-cloth marriage involves elaborate ceremony and enormous expense. In former times it was considered necessary to bestow greater rights of inheritance on children.[94] This is no longer the case. Today, children of an informal marriage are entitled to the same rights of support out of the deceased mother's or father's estate as children of a six-cloth marriage.

Customary marriages occur among all social classes in each of the three field-areas.[95] Nevertheless, there are marked differences between the various forms of customary marriage contracted by the different social classes. This is sharply reflected in the differences between urban and rural marriages. In particular, most statutory marriages contracted in urban areas are preceded by six-cloth marriages. Two-cloth marriages have entirely lost their accompanying ceremonies and have become completely informal. On the West Korle-Gonno Estates, as in Jamestown and Old Dansoman, most of the informal customary marriages investigated had been simple, low-key affairs with very minimal involvement of the extended families of the two parties. Many simply involved the giving of drinks and a small sum of money by the man's relatives to the

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[93]Sarbah 1968, pp. 108-113 where he cites replies given in 1891 by one Edmund Bannerman of Accra to questions put by Chief Justice Hutchinson seeking information on certain points of Accra customary law.

[94]Ibid. p. 109-112. See also Ollennu 1966, pp. 193-194.

[95]Among the poorer people, all it may take to contract a marriage may be some drink, a token sum of money and an acknowledgement of co-habitation. There may be no social gathering at all. It is often the well-to-do who prefer to go through "engagement" ceremonies involving expensive gifts and large social gatherings. People in all three field-areas tended to marry more frequently from the following categories: old school friends, neighbours, work-mates, and members of their church or other organisation.

woman's parents or, less often, relatives.[96] Although it was considered the parents' duty to inform their own relatives of the marriage, in practice only a handful of influential relatives (constituting the active family) are informed, sometimes long after the marriage. This is in contrast to Domiabra where a marriage is still a big social event and where most members of the extended family are still involved in its celebration. No six-cloth marriages were, however, found in Domiabra.

Thus, the influence of the extended family tends to diminish in marriages contracted in urban areas where the parties are more likely to live in a different locality from most members of the extended family. However, both six-cloth and informal customary marriages have retained essential features best encapsulated in the dictum of Ollennu J., as he then was, in Yaotey v. Quaye[97]:

> "Now, one peculiar characteristic of our system of marriage which distinguishes it from the system of marriage in Europe, and other places is that it is not just a union of "this man" and "this woman": it is a union of the family of "this man" and the family of "this woman." That union carries with it certain incidents. For a example, it confers upon the family of the man, a right to call upon the wife or her family, in certain eventualities, to

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[96]The "Ga six-cloth marriage" is also being increasingly contracted by many young people. Essentially, it involves a higher expenditure of cash by the groom. Expensive gifts are made, a Bible, hymn book and gold ring being obligatory; and the extended families of both parties are more closely involved in the procedures and formalities.

[97](1961) G.L.R. 573 at 579. But a difference of opinion exists on the definition of customary marriage. See Ekow Daniels 1976, p. 94 where he says of the principle in Yaotey v. Quaye: "Ollennu J., on the other hand, views the agreement of the parties to a customary marriage as the essential prerequisite to its validity. With the greatest respect, it is submitted that he goes a bit far when he seemingly implies that a customary marriage confers certain enforceable legal rights on the respective families of the parties." He continues to suggest that "a marriage under customary law should be considered as a contract which primarily exists between a man and a woman to live as man and wife during which period there arises an alliance between the two family groups based on a common interest in the marriage and its continuance." On the same subject, see by the same author, "Towards the Integration of the Laws Relating to Husband and Wife in Ghana," 1965, University of Ghana Law Journal, p. 20 at 22. Cf. Adinkrah 1980 where he challenges the so-called essentials of a customary marriage and suggests that the question whether a marriage exists or otherwise is a matter of evidence including the declarations and conduct of the parties and such other circumstances as usually accompany the marriage relation.

perform certain customary rights; and vice versa."

Customary marriage thus emphasises both the parties and their respective families. The extended family's involvement in customary marriage is all-pervasive. Their consent is needed at the inception of the marriage. At the birth of each child, they must play a part in the consequent "outdooring" ceremony. They must attend the funeral of each member, and they also have a role in divorce proceedings. Indeed, customary marriage is governed entirely by the two extended families concerned. Even now, most customary marriages and divorces go unregistered,[98] and the state is excluded from the domain of such marriages. In a significant minority of cases marriage itself, and disputes arising therefrom, divorce, and the care and custody of children, are largely in the hands of the respective extended families.

As we have seen already (see the case-study above, pp. 200-206), a major difficulty with customary marriage arises from its polygamous nature. Polygyny, although on the decline,[99] has always been a feature of customary marriage. Every new customary marriage is potentially polygamous, and every male party is permitted to marry several women. In practice this may often mean the non-existence of a matrimonial home for junior wives as the polygamous male either stays in a single quarter and draws up a nightly rota for his wives, or

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[98]The register of customary marriages which was opened in 1985 revealed, for instance, that as of May, 1989, only three cases of actually polygamous marriages had been registered out of a total registration figure of 2,600 for the Accra Metropolitan Area; all three involved husbands of over 70 years of age keen to make provision for their junior wives in case of intestacy.

[99]The decline of polygamy has been influenced by such factors as Christianity, the changing economic milieu, and modern architecture which often makes provision for a single nuclear family under one roof. In the traditional household, although co-wives may share the same compound, they tend to live under different roofs and use separate facilities.

he divides his time between their homes. Polygamy could lead to the possible fragmentation of property under the provisions of the Intestate Succession Law.[100] A minority of polygamous males expressed satisfaction at their marital status but a majority of land-holding polygamist males expressed alarm and concern about the manner of the future distribution of their estates, citing in particular the jealousy and fondness of many wives to claims of having provided the economic backing to their husband's immovable acquisitions to the exclusion of their co-wives, leading to considerable disharmony between step-children.

Though in specific detail, there are many differences between the forms of customary marriage investigated, there are clearly recognisable principles discernible in them all. Firstly, the consent of either party must be obtained. Previously, when child betrothal was common, consent could be given by the parent. Though child betrothal is still quite common in Northern Ghana, it is rarely seen in the South,[101] except among migrant communities from the North. Today, however, parental consent to child betrothal is liable to be held by the courts as repugnant to natural justice, equity and good conscience. Secondly, the consent of the extended families of both parties must be obtained, but this is normally waived where the parties are of fairly advanced age.[102] As Sarbah wrote, "He who desires a woman, whether maid or widow, in marriage, must

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[100]P.N.D.C.L. 111. See in detail below, chapter 8.

[101]We did not come across a single case of infant betrothal, not even in the rural sector of our study. Cf. K. Opoku 1976, p. 14 where he observed: "Daniels and Ollennu...give the general impression that marriages are seldom preceded by betrothal, or at any rate that the institution is of no significance."

[102]Nii-Aponsah 1978, p. 35.

apply to her (extended) family or persons in loco parentis for consent."[103] Today, such consent is often given ex post.

In all the cases examined, this second form of consent followed the first form, i.e. between the parties themselves. Also, parental consent tends to supersede the consent of the extended family. This was particularly so in Districts A-C and D-F, (see p. 224-225 above) where greater social interaction has broken down the bulwarks of the extended family to a significant degree. In fact, it is only where either parent is deceased that the surviving parent deems it obligatory to seek the deceased partner's family's consent to the daughter or son's marriage. Otherwise, the parents merely inform the extended family both as a formality and as a way of publicising the child's new status as well as to seek their attendance at any social gathering in connection with the marriage. This is because it is the immediate or active family rather than the extended family which has the opportunity to scrutinise a particular relationship and to give it their blessing. The extended family therefore only becomes involved at the point of the marriage ceremony.

However, more and more, particularly outside Domiabra, the only consent that seems to matter is the consent of the parties themselves and the inescapable fact of the existence of a union between them, albeit initially unrecognised by the families. It is therefore contended that the assertion that

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[103]Sarbah 1968, p. 46. Cf. Bosman 1967 p. 197: "But if a Negroe fixes his Eye upon a young Woman (Virgin, I scarce dare say) nothing is more requisite than to apply to her Father, Mother or nearest Relations, and ask her of them..." It is important to note that the essential validity and form of customary marriage varies from one ethnic group to the other. For the Akim, see, Danquah 1928a; for the Ashanti, see Rattray 1929; on the Fanti, see Sarbah 1968; see also, Manoukian 1952 on the Ewe; finally, the Ga position is succintly set out in the cases of Engman v. Engman (1911) D&F '11-'16, 1; Quaye v. Kuevi (1834) D.Ct. '31-'37, 69; and Asumah v. Khair infra note 108.

customary law involves a union of the extended families of the parties is now no longer supported by social fact. This is in spite of the initial assent or consent of the extended families of the parties which we have shown to be largely ceremonial, and which is often given ex post.

There must be capacity to marry on the part of both spouses. Girls may be given in marriage on attainment of puberty; and boys as soon as they achieve enough financial capacity to maintain their new families.[104] However, the majority of people tend to marry much later in life.

The lack of documentation allows many merely marriage-like associations to pass off as valid marriages. This would seem to be mainly due to the flexibility of the requirements for a valid marriage. As Sarbah observed,

> "Where the caprice, avarice or ambition of a parent has not been excited to force on a marriage, it will be found by careful study of the people, and the examination of the local marriage institution that marriage entirely rests on the voluntary consent of a man and woman to live together as man and wife, which intention, desire, consent or agreement is further evidenced by their living together as man and wife."[105]

The principle was given a further enunciation in the case of Quaye v. Kuevi[106]. In that case, a young girl became pregnant by D,whose family sent drinks to admit responsibility and to acknowledge that the parties were living together as man and wife. Later, D took a marriage licence with a view to marrying one K under the Marriage Ordinance, 1884. A, D's wife under

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[104]The majority of informants indicated that in general most females marry between the ages of 17 and 25, while males tend to marry a little bit later.

[105]Sarbah 1968, p. 49.

[106](1934) D. Ct. '31-'37, 69.

customary law caveated. In the course of his judgment, Dean C.J. said:

> "The only valid requisites to a marriage so far as I can judge from the evidence that has been placed before the Court, are the consent of the girl's parents and also of the parties to marry coupled with the giving of the girl to the man. Such consent is generally signified by the accepting of rum; the other ceremonies act in the same way, and are for the same purpose; they advertise to the world the fact that the two parties have agreed to live together as man and wife which is really the one thing that mattters...Yet the inability to show that such a ceremony has taken place would not in my view of itself be sufficient to invalidate a marriage if the consent of the parties to the marriage were proved by other means and if it were also proved that the parties had lived together in the sight of the world as man and wife."

Thirdly, to be valid, the marriage must not breach any of the rules of exogamy. In the days of yore, this was rigidly enforced. A man could not marry a woman from the same weku, however remote the relationship between them. Today in both Jamestown and the West Korle-Gonno Estates/Old Dansoman, these rules are generally ignored and marriages between distant relations are quite common. This appears to have resulted largely from the incipient breakdown of the Gá tribal structure in these areas.

Customary law prescribes certain degrees of consanguinity within which a marriage is prohibited. Marriage to close in-laws is also prohibited by customary law. Among matrilineal peoples, though, for purposes of inheritance, cross-cousin marriages are encouraged.[107] Such arrangements ensure the retention of land and other property within the same extended family.

The customary marriage contract assumes many forms. In Asumah v.

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[107]This strengthens the hand of the uncle and father-in-law whose property the nephew or son-in-law stands to inherit.

Khair,[108] the Court of Appeal said:

> "But there are other forms of marriage. Thus a girl becomes pregnant, and her family, upon discovering her condition, ascertain from her who was responsible. They send to the man to enquire from him. If the man sends some drink admitting liability, and sends a further drink or present (however small the drink or present may be - perhaps a small token of money), and if the girl's family accepts the present in addition to the fee on admitting liability, a valid marriage is thereby concluded. By custom, the sending of the additional drink or present amounts to a request by the man for the hand of the girl, and the acceptance of additional drink amounts to consent by the family."

In short, the essentials for a valid marriage under customary law may be stated as follows:

> a) agreement by the parties to live together as man and wife,
> b)the consent of both families; the consent of the girl's family being indicated by the acceptance of drink from the man's family; and,
> c) consummation of the marriage i.e. by the man and woman living together in the sight of the whole world as man and wife.[109]

The emphasis, therefore, is on the social fact of the parties living together as man and wife, and being recognised as such by the community. The emphasis on social reality, and the absence of documentation, implies minimal legal regulation of matrimony by the state. Indeed, in a sense, customary law marriage defies the Austinian model of law as comprising norms or commands backed by sanctions, issued by the state. Sanctions are particularly absent in the customary law conception of marriage.

The nature of customary law marriage continues to add to the uncertainty of titles to land. The lack of registration of customary law marriage together with

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[108](1959) G.L.R. 353.

[109]See Yaotey v. Quaye, above note 97

the absence of private records tends to complicate the conveyancer's task in tracing a root of title embedded in the ancestral past. This has been complicated by the mass migration to urban areas and the contracting of inter-tribal marriages and subsequent socialisation and acculturation of migrant peoples in the urban setting. On the other hand, every new marital union forms the basis of a nuclear family which, under the pressures and values of modern society, tends to organise its own affairs quite independently of the extended family.

The following tables present some information regarding the relationship between forms of marriage and the number of years married for respondents drawn from all three field-areas. Customary law marriage remains by far the commonest form of marriage. "None" comprises cases in which couples have a child between them but have made no attempt at all to enter the formality of marriage. It is interesting to see from all three tables that in almost all the areas, such relationships do not survive for a long time. This is probably due to the fact that strong social disapproval results in the separation of the parties or that the conversion of the relationship into a customary law marriage can be achieved at very little cost to the parties. Table 6 throws some light on the activities of Christian churches in Jamestown since the middle of this century. It will be seen that marriages under the Ordinance have declined in the area over the last 20 years. On the other hand, the figures for customary law marriage have remained constant over the years. Of 12 respondents who had contracted Ordinance marriages in Jamestown, 7 or 58 per cent had remained married for more than 31 years. Comparable figures for Districts D-F show that of 26 Ordinance marriages recorded, exactly half had been married for more than 31 years. As

the tables are not primarily concerned with rates of divorce, there is little evidence in them to suggest that customary law marriages, on the whole, tend to be short-lived. Since customary marriage is practically the only form of marriage known in Domiabra, detailed conclusions cannot be drawn from the figures for that area, as very little comparability exists between the figures for that area and those for the other two areas.

TABLE 6

RELATIONSHIP BETWEEN FORM OF MARRIAGE AND YEARS MARRIED (JAMESTOWN)			
	Form of marriage		
Years Married	Under the Ordinance	Customary	None
1 - 10	1	7	8
11 - 20	-	4	1
21 - 30	4	13	-
31 - 40	3	7	-
40+	4	8	-

TABLE 7

RELATIONSHIP BETWEEN FORM OF MARRIAGE AND YEARS MARRIED (MAMPROBI/OLD DANSOMAN)			
	Form of marriage		
Years married	Under the Ordinance	Customary	None
1 - 10	6	4	4
11 - 20	4	6	2
21 - 30	3	7	-
31 - 40	7	10	-
40+	6	1	-

TABLE 8

RELATIONSHIP BETWEEN FORM OF MARRIAGE AND YEARS MARRIED (DOMIABRA)			
	Form of Marriage		
Years married	Under the Ordinance	Customary	None
1 - 10	1	6	19
11 - 20	-	3	-
21 - 30	-	3	-
31 - 40	-	3	-
40+	-	5	-

Tables 6, 7 and 8 show the relationship between forms of marriage and the number of years married by respondents. Customary marriage is the commonest form of marriage in all field-areas, with the majority of parties to customary law marriage being drawn from districts in Jamestown and Domiabra. Another way of putting these figures is to note that the take-up of state-law on marriage shows a large gap between urban districts, where thirty-eight informants had contracted statutory marriages, and rural districts where only one informant had contracted a marriage under the Marriage Ordinance 1884, (Cap. 127).

This leads to the question of the possible relationship between form and length of marriage and ownership of landed property. Nineteen or approximately half of respondents who had contracted marriages under the Ordinance owned at least two plots of land. On the other hand, only a fifth of parties to customary marriages owned more than one plot of land; a significant proportion of them being rural people who have never had to buy their lands. But this is probably due to the fact that parties to Ordinance marriages tend to be better educated and have higher incomes. Besides, as tables 6 and 7 show, proportionately

more Ordinance marriages have survived the twentieth anniversary than customary marriages. It is arguable that since parties to Ordinance marriages on the whole tend to be less polygamous, there is a greater concentration of income and other economic resources in their hands to use in the purchase of land, adding to the stability of marriages.

So far, the legislative changes of 1985/86 seem to have had limited impact upon customary law. This raises the issue of what has to be done to make the Customary Marriage and Divorce (Registration) Law, 1985 more effectual. One answer would be to target customary law marriages within specific communities in the city for registration. For instance, awareness of Law 112 is highest within communities with high rates of emigration to Europe and North America. In such communities, relatives and friends often undertake the registration of the customary marriages of people living abroad. By targetting such communities, those relatives can be persuaded to register their own marriages with relatively little inducement.

4.2.2 Legal changes in Ghanaian divorce law

It is probably in the area of divorce that the instability of customary law marriage is most obvious. In practice, most customary law marriages are hardly dissolved in a systematic way. The parties drift apart, the polygamous husband stops visiting his wife, the wife finds a new partner, etc. It is often only in the case of expensive "engagements" that there may be a need for the formal return of gifts and for divorce. Money problems, the hostility of a relative and the appearance of a new wife can all result in the parties drifting apart.

The statistical evidence on divorce from the field is presented below. It is necessary to say that because of the general diffidence of informants on matters of divorce, the figures may possibly conceal many of the true reasons for divorce, particularly among women. Often, when ex-spouses were interviewed separately they gave remarkably different versions of the "grounds" of divorce. The figures also exclude those informants who, perhaps, out of feelings of guilt or regret, had "forgotten" what exactly led to the divorce.

TABLE 9

GROUNDS OF DIVORCE UNDER CUSTOMARY LAW			
	District		
Ground	A - C	D - F	G - H
Adultery	7	9	2
Witchcraft	1	-	2
Desertion of Spouse	8	10	-
Incompatibility	13	15	10
Lack of maintenance (by husband)	5	5	1
Others	5	-	-
Total	39	39	15

Table 9 gives an indication of the frequency of the various grounds of divorce in all districts. Incompatibility and desertion of spouse are by far the commonest grounds of divorce. Most respondents cited economic reasons for deserting their spouses. In the case of Domiabra not a single informant cited desertion as a ground of divorce and only one informant gave lack of maintenance by the husband as a ground of divorce. This shows how in a compact, simple society some of the usual grounds for divorce can be minimised by societal pressures. But Domiabra has the demographic advantage of a small population, not much exposed to the same levels of socially turbulent factors that

operate in the other field-areas, and detailed conclusions cannot be drawn from the figures. A small proportion of respondents cited witchcraft as a ground of divorce. All of those informants were male. Two of them gave as evidence of the ex-wife's alleged witchcraft the unusually high rate of mortality of the children to the marriage. Young females tend to re-marry quickly; men, once divorced, tend to wait for longer periods before marrying again.

Data from Old Dansoman (districts E and F), in particular, present a glum picture: fifty-five per cent of respondent women who had been divorced cited money problems as one of the causes of divorce from their former husbands. But many twice- or three times-married women only found more disillusionment with each new marriage, as they discovered every subsequent marriage meant more step-children and other financial commitments for their new husbands and themselves. For many, every new divorce has meant yet further descent into poverty and want to which the children are most vulnerable. While marriage under the Ordinance is no guarantee against divorce and hardship, it is clear that the frequency and ease of divorce under customary law has aggravated the plight of these women.

The majority of these women had married under the informal form of customary marriage. Making an assessment of whether the ease of divorce under informal customary marriage is to be preferred to the more costly breakup of the expensive six-cloth marriage is complicated by the wide disparity of average incomes between parties to the two forms of customary marriage which masks the deterioration in the financial positions of parties who had been married under the six-cloth form of customary marriage.

It is difficult to speak of grounds in customary divorce. Kasunmu and Salacuse[110] wrote,

> "Unlike the law governing the dissolution of statutory marriage, customary law, generally speaking, does not contain a set of grounds which must be proved."

Customary law does recognise, however, that in certain cases a party to a marriage may be entitled to divorce. In certain cases such as witchcraft, murder, etc, the fault is considered so horrendous that the injured party is deemed not to be expected to continue to live together with the offending party as man or wife. Though we came across many allegations of witchcraft, there were only three cases of divorce on grounds of witchcraft. This might be because the accused always proclaimed their innocence. Witchcraft therefore, does not in practice seem a significant ground of divorce.

Just as customary marriage is based primarily on social fact, so too is divorce, and the grounds therefore are rooted in social fact. While the traditional grounds of divorce in English law were based on faults within marriage, grounds of divorce in customary law primarily concern social faults, and attitudes and acts of third parties.

The grounds for divorce are infinite.[111] They may even concern such refractory behaviour as disrespect to elders, disobedience to mothers-in-law, quarrelsomeness, jealousy, bad housewifery, habitual gossiping, laziness, etc. Generally speaking, isolated instances of refractoriness are not regarded as

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[110]A.B. Kasunmu and J.W. Salacuse, Nigerian Family Law, London 1966, p. 175.

[111]See e.g. W.C. Ekow Daniels, Common Law in West Africa, London 1964, p. 47 where he notes that the grounds of divorce in customary law are limitless.

constituting sufficient ground of divorce. To amount to a ground of divorce, refractory behaviour must be persistent and of such an intolerable nature as to result in the couple's inability to live together as man and wife. What constitutes an intolerable level of refractory behaviour is a question of fact to be established before a joint forum of representatives of the families of the parties.

All respondents agreed that in the process of reconciliation before the family forum, the grounds are investigated and remedies suggested. The hearing before the family forum is held in private in order to encourage the parties to ventilate their grievances fully by discouraging the guardedness that often characterises public discussion of marital matters. These usually have a cumulative effect which leaves the marriage in a very unstable state. It is only when reconciliation fails that the two families may consent to divorce. This, however, does not prevent some parties from acting against the wishes of their families.

Divorce cases are mainly heard by chiefs or heads of families in private. No opportunity arose for the writer to witness a divorce proceeding and informants were, as a rule, not generally eager to discuss the details of their own divorce proceedings. Only two informants in all three field-areas were prepared to discuss their divorce in some detail. In each case, the case had been heard before the respondent's head of extended family. Neither respondent considered the head of family's handling of the case satisfactory. But a different reason was given in each case. One thought the head of family was biased; while the other, though thinking the hearing was fair, was nevertheless unhappy about what he thought was the unnecessary opportunity given to his ex-wife to

disgrace him. The issue of the relatively higher rate of divorce among parties to customary law marriage was raised in interviews with chiefs and heads of families. Opinions differed. Two out of three chiefs in the sample were of the firm view that dissolution of customary marriage often involves far less social pressures and expense than the dissolution of marriage under the Ordinance.

Divorce in customary marriage may be obtained through the courts or through inter-family adjudications. The two methods of obtaining divorce involve sharply contrasting procedures. Family arbitration is always consensual, and emphasises reconciliation,[112] while the adversarial style of the courts pitches petitioner against respondent with an eye on punitive financial relief. While the courts are keen to make clear-cut arrangements on such matters as custody, access, maintenance, education, etc. of the children, customary law tends to leave this to either matrilineal or patrilineal principles. Where the practical effect of such principles might leave the less capable party with custody and education of the children, matters are left to consensus.

According to section 1(1) of the Matrimonial Causes Act,[113] 1971 (Act 367), either party to a marriage, including customary marriage, may petition for divorce. Under section 2 of the 1971 Act, the sole ground for divorce is that the marriage has broken down beyond reconciliation. On the other hand, divorce proceedings may start before family forums.[114] Such proceedings are

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[112]Many customary divorces we came across simply involved the sending of messages through emissaries to the girl's parents or head of family with instructions to collect the marriage gifts and involved no attempt at reconciliation at all. But in the majority of such cases, the two families were already aware of the relationship's sordid or violent history and were resigned to its failure.

[113]On the Matrimonial Causes Act, 1971 see generally H. Morris, "Matrimonial Causes Act, 1971", Journal of African Law, Vol. 16 (1972), pp. 71-80.

commenced by one party requesting a meeting of the joint families. Such meetings must, as far as possible, involve persons who had witnessed the initial marriage ceremony. The case for each party is then heard and considered. Except where there is considerable acrimony between the two families, the parties are advised to strive to resolve their differences, and the meeting is adjourned. It is usually at the second or third meeting that a separation of the parties may be decided upon; and this only when, by conduct or otherwise, it is clear that the parties cannot be made to resolve their differences. It is often a board of arbitrators that pronounces divorce after accounts have been gone into, and claims against each other have been settled. Final divorce is signified by the return of the gifts and drinks given to the wife on marriage.

However, the process of divorce may also be informal, almost casual. Danquah said: "It cannot be exaggerated how easily and rapidly marriages can be dissolved with little trouble."[115] According to Danquah, if a man is offended by his wife's conduct, he simply calls her before his friends for a settlement of differences. If this fails, he calls her before a representative group of their respective families. These arbitrators deliver their findings. If they are unable to reconcile the parties, the marriage is then brought to an end. This illustrates the great shortcoming of the system of customary divorce, namely, the absence of clear-cut post-divorce arrangements to safeguard the welfare of children, and

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[114]Here, any of the infinite grounds of divorce under customary law may be canvassed. However, the husband's "adultery" with an unmarried woman is in fact no adultery at all in customary law. If, on the other hand, the man's extra-marital associations are too many, that may constitute a ground for divorce: see W.C. Ekow Daniels, "Towards the Integration of the Laws Relating to Husband and Wife," University of Ghana Law Journal, Vol. 12 (1965), pp. 20-60 at 46.

[115]Danquah 1928a, p. 156.

the casual nature of the divorce process itself. It is submitted that if marriage is to function properly as a stabilising mechanism in society, it must be protected from disintegration, literally at the whim of one party. It was clear from observation that most of the efforts at reconciliation amounted to no more than pleas of sympathy and understanding to the petitioning party. The majority of petitions are brought by men, many of whom often do not even bother to attend the hearing. There is an urgent need for the tighter regulation of customary divorces by statute. The social consequences of divorce are far too destabilising on society for this important area to be left unregulated.

A customary marriage may formally be dissolved in any one of three ways:

a) by proceedings before a forum of the extended family,[116]
b) by divorce proceedings before the regular courts under the Matrimonial Causes Act, 1971 (Act 367); or,
c) by the death of one of the parties.

All respondents agreed that proceedings before extended family forums remain the commonest method of divorce. The formal requirement that the extended family should be involved in issues of divorce obscures the fact that in reality many decisions about divorce are taken at the nuclear family level. In fact, most respondents stated that formal divorce proceedings before forums of the extended family are often influenced by the decisions of the nuclear family.

Many respondents referred to the increasing practice of uncontested

[116]The family forum considers all aspects of the breakdown of the marriage including desertion and the mutual consent of the parties to divorce. In the case of repudiation or desertion of one party by the other, the family forum simply accepts the act of repudiation or desertion as a fait accompli and accordingly releases the repudiated or deserted party from the bonds of marriage.

divorces. These usually occur in cases that constitute constructive desertion. In such cases, the family of the deserted party simply inform the family of the deserting spouse of their decision to terminate the marriage. This is often accompanied by the return of gifts and other property of the deserting spouse. The marriage is considered terminated if the desertion continues.

Divorce, however, may not be a clear-cut process, particularly since many failed and failing marriages go through what may aptly be described as a crumbling process, and reconciliation is always urged. Because customary law places a strong emphasis on reconciliation (especially as the man could always take a new wife) de facto[117] divorce followed by a family decision recognising the actual breakdown of the marriage is the usual method. This is usually indicated by either party, especially the woman, taking another partner or moving out of the matrimonial home. The process of customary law divorce up until the family decision could be a long, painful and imprecise process for the woman. It seems this because customary law, in its pristine form, looked on marriage as indissoluble.[118]

In urban society, the disorderly nature of customary law divorce and the general absence of wives' names on title deeds meant that they lost all claims to real property acquired by the nuclear family during the marriage.

As a result, section 41 of the Matrimonial Causes Act, 1971 was made applicable to customary marriage as follows:

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[117]See p. 235 above showing some of the instances of de facto divorce.

[118]See e.g. T.O. Elias, Groundwork of Nigerian Law, London 1954, p. 288.

"s.41(2) On application by a party to a marriage other than a monogamous marriage, the court shall apply the provisions of this Act to that marriage and in so doing, subject to the requirements of justice, equity and good conscience, the court may-
a) have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision, and child custody arrangements;
b) grant any form of relief recognized by the personal law of the parties to the proceedings, either in addition to, or in substitution for the matrimonial reliefs afforded by this Act."

Section 41 sought to address the perceived inadequacies of customary divorce in modern economic and social circumstances. It opened up the whole range of reliefs available under English law to the customary law. The subsequent failure of norm-addressees to take advantage of English-type reliefs was due, in large part, to the continued rootedness of customary marriage in the wider family as well as ignorance and the continued use of family forums to settle matrimonial disputes.

The first trickle of cases brought under the Matrimonial Causes Act, 1971 has been welcomed enthusiastically.[119] In Adjei v. Foriwaa,[120] the court had occasion to apply section 41 of the Matrimonial Causes Act, 1971 to a customary marriage. The defendant had petitioned the court for a dissolution of his customary law marriage and sought an order to evict his former wife and children from the matrimonial home. The court took the view that since the customary procedures for the dissolution of marriage did not include a court action, he must be deemed to have made an application under section 41. It was held, inter alia,

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[119]See e.g., G.R. Woodman, "Adaptation of Customary Law to the Matrimonial Causes Act, 1971", Review of Ghana Law, (1981-82), pp. 218-222.

[120]Supreme Court, 9 March, 1981, unreported; digested in (1981) G.L.R.D. 2. Also see, Mensah v. Bekoe (1975) 2 G.L.R. 347.

that customary law knew no personal right of occupation of the matrimonial home by an ex-wife and her children and that since the children in this case belonged to their mother's family, they had even less right to occupy the matrimonial home. In so doing, the court took account of the peculiar incidents of the particular customary marriage before it in determining the appropriate relief under section 41 and granted a form of relief recognised by the personal law of the parties. It, however, cited no authority for its view of the customary position on the issue.

The application of section 41 of the Matrimonial Causes Act, 1971 to customary law divorce carries a number of property implications. Theoretically, it opens up a range of reliefs and rights to divorced customary law spouses, including rights in property created and affected by the relationship of spouses.[121] Throughout the three field-areas, it is male customary law marriage divorcees who tend to continue in exclusive occupation of the matrimonial home after divorce proceedings before the family forum. Under section 41 of the Matrimonial Causes Act, 1971 it should be possible for female customary law marriage divorcees to enforce their own rights of occupation of the matrimonial home or to realise their investment upon sale of the matrimonial home.[122] Indeed the courts appear to be moving steadily in this direction.

In Anang v. Tagoe[123] a wife who contributed substantially to the construction of her deceased husband's house was held to be entitled to a

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[121]Bromley and Lowe 1992, pp. 555-584.

[122]Ibid. pp. 585-641.

[123]High Court judgment, 2 November 1988, unreported; digested in (1989-90) G.L.R.D. 68.

declaration that she was a joint-owner of the house, particularly as the husband had given her the impression that the house was for themselves and the children. In Ribeiro v. Ribeiro[124] the Court of Appeal had to consider a wife's application for maintenance and accommodation by her former husband after the dissolution of her marriage of thirty-four years. The trial judge had found that while the application was pending the former husband had transferred two of ten houses he had acquired during his marriage to the applicant to his new wife to whom he had already given another house. The trial judge therefore rescinded the disposition of one of the houses on the ground that it was made in bad faith to defeat the ends of justice, and ordered it to be given to the applicant by way of settlement.

On appeal, the former husband argued inter alia that the new wife had given valuable consideration for the houses transferred to her. On the evidence, the court found that the former husband did not even own a single plot of land at the beginning of his marriage to the applicant; and though the applicant had never worked during the marriage her devotion to duty as a housewife, which involved looking after the house and her children and step-children enabled the former husband to acquire substantial wealth, including the ten houses. Dismissing the appeal, the court held that the Matrimonial Causes Act, 1971 empowered the court to rescind the disposition of assets or property of either spouse to a marriage if it had been made with the intention of defeating the financial provision or property settlement of the other party.

Finally, the death of either spouse effectively dissolves a customary

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[124]Court of Appeal judgment, 28 July 1988, unreported; digested in (1987-88) G.L.R.D. 94.

marriage. Though customary marriage has been described as effectively a union of families rather than merely a union of man and wife, the death of either party effectively releases the surviving partner from the contract of marriage. In former times, the practice of levirate was widespread. Today it is no longer an option, and death effectively terminates a marriage. Only one 65 year old woman in Old Dansoman confessed to having been involved in a levirate relationship with her brother-in-law upon her husband's death in the late 1960s. Her reason was that the man came from a good home, and the brother-in-law was a good family man who guaranteed her children continued good education. The decline of the practice of levirate provides further evidence of the diminishing role of the extended family in the affairs of the nuclear family.

The final part of this section briefly examines divorce after statutory marriage. The law governing the dissolution of statutory marriages is to be found in the Matrimonial Causes Act, 1971 (Act 367). Its most important provision is to be found in section 2(1) which lays down a sole ground of divorce; namely, that the marriage has broken down beyond reconciliation. This replaced the previous principle of divorce based on fault evidenced by a matrimonial offence. The breakdown of marriage beyond reconciliation may be proved by any of the following: the commission of adultery, unreasonable behaviour of the respondent, desertion of at least two years, separation of the parties as man and wife for a continuous period for at least five years, that the parties have not lived as man and wife for a continuous period of at least two years and the respondent consents or unreasonably refuses consent to a grant of a decree of divorce, and the inability of the parties to reconcile their differences after diligent

effort. Indeed, so extensive is the ground covered by section 2(1) that it is arguable that some of the more controversial grounds of divorce in customary law, such as witchcraft, laziness, sterility, or impotence may be subsumed under its rubric. Traditional grounds of divorce, such as adultery and cruelty are given a new interpretation. Under the present legislation, adultery per se does not constitute proof of breakdown beyond reconciliation. The petitioner must in addition, by reason of the adultery, have found it intolerable to live with the respondent.[125] And to prove cruelty, the petitioner no longer has to prove that the respondent has injured or threatened to injure his or her mental or physical health.[126]

The Matrimonial Causes Act, 1971 introduces the concept of reconciliation, long known to the customary law, into statutory divorce. The court will not grant a decree of divorce simply because sufficient evidence of breakdown of marriage beyond reconciliation has been adduced. Under section 8, the court must encourage the process of reconciliation of the parties.[127] If, during the pendency of the proceedings, it appears to the court that there is a reasonable possibility of reconciliation, it may adjourn proceedings for a reasonable length of time to enable attempts to be made to effect such reconciliation. The court may even appoint a conciliator to join with the families in attempting the reconciliation of the

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[125]Bromley and Lowe 1992, pp. 190-191.

[126]The test of cruelty was developed in the English cases of Gollins v. Gollins (1964) A.C. 644 and Williams v. William (1964) A.C. 689; (1963) 3 W.L.R. 832; (1963) 2 All E.R. 526.

[127]This idea had been first mooted in a 1960 White Paper on Marriage, Divorce and Inheritance which had, inter alia, contained proposals for the reform of the law of divorce in Ghana. The White Paper, however, failed to be tranformed into legislation.

parties.

4.2.3 Customary marriage and divorce registration

This section considers the legislative facilities for the registration of customary marriage and divorce. Its main object is to assess the impact of legislative intervention upon customary law by employing the sorts of data (mainly statistics of administrative bodies charged with the registration of marriages and divorces) from which the take-up of state-law can be measured. This leads us to a rather different point: the strategic goals of family law legislation in Ghana.

We have seen that the family law of Ghana is based on the assumption of the primacy of the extended family. However, as has been shown above, social enquiry discloses that the nuclear family is gaining increasing importance. This leads to a need to renegotiate the relationship between the extended and nuclear families through legislative intervention. This is a task that bristles with difficulties, particularly as the nuclear family appears to be of considerably less importance in the rural areas than in the cities. Evidence or lack of evidence of registration of customary marriages will be discussed here as proof of the effectiveness or ineffectiveness of state law in effecting changes in the customary law.

4.2.3.1 Registration of customary marriage

Pressure for the regulation of customary marriage has been of long standing.[128] But legislation for customary marriages was only introduced in 1985 in the form of the Customary Marriage and Divorce (Registration) Law, 1985 (P.N.D.C.L. 112). Even then this was done as part of a raft of legislation[129]that seemed more designed to give effect to the Intestate Succession Law, 1985. As a result, the statute makes no attempt to change the essential character of customary marriage and divorce.

Divided into two parts, it provides for the registration of customary marriage and divorce according to a prescribed form. It does not regulate the marriage itself or the manner of its celebration; nor does it even change its essential validity. It simply provides a mechanism for the registration of customary marriage and divorce as an essential part of the reform of the law of intestate succession in Ghana (see below, p. 257). Either party to a customary marriage is entitled to apply in writing to the registrar of the district in which the marriage was contracted for its registration in the register of marriages. The contract of marriage and its celebration are still left in the hands of the parties, and their respective families. Having completed the contract of marriage at home, an application is then made to the Registrar for its registration, and the

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[128]In the early 1960's pressure from various quarters resulted in the Marriage, Divorce and Inheritance Bill which was published by the Government Printer in Accra on 9 May, 1962 but failed to be enacted into law. N. A. Ollennu, "Law of Succession in Ghana", University of Ghana Law Journal , Vol. 2, (1965), pp. 4-19 has documented some of the reasons for the failure of early attempts to reform the customary law of Ghana (including the reform of marriage, divorce and succession) through legislative intervention.

[129]Under section 19, Law 112 is "deemed to have come into force on the same day as the Intestate Succession Law, 1985 (P.N.D.C.L. 111)."

issuance of the certificate of customary marriage. Law 112 begins as follows:

> "On the commencement of this Law any marriage contracted under customary law before or after such commencement shall be registered in accordance with the following provisions..."

Section 2 sets a time limit of three months within which registration should be effected. Section 2(2) further provides for the registration of all previously existing customary law marriages within three months of the commencement of the statute. This time-limit is generally ignored by the Registrar who continues to register old marriages at the rate of about 10 a day, the only condition being that the parties must be normally resident in Accra. Persons resident outside Ghana can still register if their families are resident in the district.

Under section 3(1) of the Customary Marriage and Divorce (Registration) Law, 1985 the parties attach to their application for registration a statutory declaration setting out the following:

> a) names of the parties,
> b) their place of residence at the time of marriage, and;
> c) that the conditions essential to the validity of the marriage under customary law have been met.[130]

The effect of the last requirement is to preserve the form of customary marriage as it existed before the legislation. This effectively preserves the role of the extended family, and limits state intrusion into customary marriages. This is curious as the new intestacy law (P.N.D.C.L. 111) passed simultaneously with the current law on marriage registration seems to diminish the role of the

[130]These conditions are remarkably similar to the requirements for statutory marriage under the Registrar's certificate.

extended family (see in detail below, pp. 503-504). It appears to show that the state is more interested in property matters than in the regulation of marriages. In fact, section 15 of the Customary Marriage and Divorce (Registration) Law, 1985 may be interpreted as making the application of the Intestate Succession Law, 1985 to the estate of a deceased person married under customary law conditional on the registration of that marriage under the 1985 law.[130a] Section further provides that,

> "The statutory declaration shall be supported by the parents of the spouses or persons standing in loco parentis to the spouses except where there are no such persons living at the time of the application for registration."

In effect, then, two statutory declarations must accompany the application for registration:

> a) to meet the requirements of section 3(1); and,
> b) to prove the consent of the parents or of other persons standing in loco parentis to the parties.

Persons in loco parentis could be construed either restrictively to include members of the wider family or literally to include such persons as guardians, and even persons quite unrelated to the parties. In the social and ethnic mix of urban areas, it is likely the latter view will prevail in the long run, but the more restrictive interpretation should hold in the rural areas.

Upon receipt of the necessary documentation, the Registrar enters the marriage in the register of marriages in accordance with section 4(1) of the Customary Marriage and Divorce (Registration) Law, 1985 and, by a notice in prescribed form, notifies the public of its registration. Section 4(2) provides for the display of the notice on a notice board in the office of the Registrar within 28

130a According to section 15 "The provisions of the Intestate Succession Law, 1985 252 (P.N.D.C.L.111) shall apply to any spouse of a customary law marriage registered under this Law."

days of the application for registration.

Section 5 makes provision for any objections to the registration of customary marriages to be held in the District Court. This is an altogether new provision, as hitherto all disputes relating to customary marriage have remained within the family context. Now, however, the courts will encroach boldly upon the preserves of the extended family. Considering that objections under section 5 are most likely to be filed by disaffected spouses, the further provision of section 6(3) relating to divorce is likely to make the remarriage of divorcees very difficult. Sections 6(2) and 6(3) provide as follows:

> "6(2) The parties, in notifying the Registrar (of divorce) shall make a statutory declaration stating that the marriage has been dissolved in accordance with the applicable customary law.
> 6(3) The statutory declaration shall be supported by the parents of the spouses or persons standing in loco parentis living at the time of application."

Section 6(3) thus presumes a formal inter-family divorce settlement. But divorce is often a bitter process and, without collusion, it is easy to foresee situations where the parents of the injured party will refuse to grant the statutory declarations required by under section 6(2) to a divorce they object to. This provision would, on the other hand, tend to make divorce in a customary marriage registered under the Customary Marriage and Divorce (Registration) Law, 1985 more difficult. Since customary marriages are potentially polygamous, the refusal of parental or familial consent to divorce will be no bar to the contracting of a new marriage by the man. There may, however, be enormous consequences in the event of death intestate where old marriages remain in the register of marriages for refusal of parental consent. It is to be hoped that the courts will be quick to clarify problem areas of the new law.

Since commencement of the registration system in 1985, registration figures in Accra have slowly increased from 7 in 1985, 286 in 1986, 981 in 1987 to 1330 in 1988.[131] These figures indicate the hitherto very limited effectiveness of customary marriage registration. But while this may in part be attributed to the poor nature of national communication networks and the underdeveloped administrative infrastructure on which the registration exercise is based, the overwhelming lack of response from the norm-addressees also plays a crucial part. On the basis of the response of informants, it can be concluded that the efficacy of the Customary Marriage and Divorce (Registration) Law, 1985, is reduced because far too many of the addressees (parties to customary marriages) do not know of its existence. Too few of those who are aware of its existence understand its relevance to their marital status. It was clear from interviews with parties waiting in the reception area of the Registration offices of the Accra Metropolitan Authority that much of the pressure to register comes ironically from churches who want to satisfy themselves of the monogamous nature of a member's marriage by the absence of entries in the sections of the marriage certificate provided for particulars of other wives. Also, a large number of the certificates were needed for transactions outside the country, particularly for immigration purposes in Europe and North America.

To be more effective, the application of the statute would probably have to be combined with some economic penalty or incentive like a short term tax rebate or, in the rural areas, a year's exemption from the payment of hospital

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[131]These figures were obtained from Mr E.A. Tettey, the Registrar of Marriages at the offices of the Accra Metropolitan Authority.

fees. Of the informants interviewed, only four (three males and one female) in Districts D-F had registered their marriages under the new law. Of the men, all three had been the party that took the initiative to register the marriage. But none of them seemed to have been influenced by any perceived advantage to be gained in registering the marriage. All four informants had difficulty in pinpointing the crucial factor that led to the registration of the marriage. Upon close questioning they were all found to have the following in common: education, knowledge of the existence of the new system, had heard from friends, relatives or the media of the desirability of registration, and the males also appeared not to have the remotest wish of converting their new relationship into an actually polygamous marriage. A considerable number of other respondents also possess these characteristics and yet they have not registered their marriages under the new system. However, the majority of the latter group of informants are over the age of fifty-five. On the other hand, the ages of the four informants who had registered their marriages were evenly distributed across the range from twenty-three to forty-one.

Finally, the new legislation is more likely to give customary marriage a sharper definition. For instance, since traditional grounds of divorce in customary law have included such things as barrenness, witchcraft, quarrelsomeness, impotence etc., it will be interesting to see the court's attitude where a party divorced on any of those grounds objects at the District Court to the remarriage of the other party, canvassing the invalidity of the grounds for his or her own divorce. It is also possible that the requirement of registration may introduce the concepts of void and voidable marriages into customary marriage.

The Customary Marriage and Divorce (Registration) Law, 1985 was not the first statute to intervene in customary marriages and divorces. In a sense, the effect of this law can best be judged in combination with the effect of the Matrimonial Causes Act, 1971 which had previously sought to regulate customary divorce as follows:

> "S.41(3) In the application of section 2(1) of this Act to a marriage other than a monogamous marriage, the court shall have regard to any facts recognized by the personal law of the parties as sufficient to a divorce, including in the case of a customary law marriage (but without prejudice to the foregoing) the following-
> a)wilful neglect to maintain a wife or child;
> b)impotence;
> c)barrenness or sterility;
> d)intercourse prohibited under that personal law on account of consanguinity, affinity or other relationship;
> e)persistent false allegations of infidelity by one spouse against another: Provided that this subsection shall have effect subject to the requirements of justice, equity and good conscience."

The combined effect of this section and the relevant sections of the Customary Marriage and Divorce (Registration) Law, 1985 (Law 112), preserving the extended family's authority over customary marriages, is to introduce new norms affecting customary marriage and divorce into the legal system and yet to leave customary marriage and divorce unreformed. The Matrimonial Causes Act, 1971, (Act 367) introduced English matrimonial reliefs into customary law subject to the provisions of the Act being invoked by petitioners. Yet they were not normally invoked. The Customary Marriage and Divorce (Registration) Law, 1985 provided for the registration of all customary marriages but left the formation of those marriages entirely in the hands of the families of the parties. Official figures so far show a poor take-up of Law 112. Perhaps this is to be expected in the light of evidence about the take-up of Act 367. The rather limited

impact of both laws suggests the need for better planning and implementation of legislative intervention in customary law than has hitherto been the case.

The final point on the registration of customary marriages under the Customary Marriage and Divorce (Registration) Law, 1985 must concern the question of the validity of customary marriages that have remained unregistered since Law 112 came into force. The principal intention of the legislature in enacting Laws 111 and 112 simultaneously seems to be encapsulated in two provisions. Section 1 of Law 112 provides that any marriage contracted under customary law before or after the commencement of Law 112 should be registered in accordance with the provisions of Law 112. On the other hand, section 15 of the same statute provides that the provisions of the Intestate Succession Law, 1985 (Law 111) shall apply to any spouse of a customary marriage registered under Law 112. It appears from the above provisions that the legislature sought to use the rights conferred under Law 111 to a surviving spouse and his or her children as an inducement to secure the registration of customary marriages and divorces.

There appears to have been no anticipation of widespread non-registration of marriages and divorces under Law 112. The weakness in the combined effects of sections 1 and 15 of Law 112 is clear: customary marriages and divorces which remained unregistered would be invalid. The majority of Ghanaians, however, contract customary law marriages. Since the majority of customary law marriages remained unregistered it meant the denial of the rights conferred upon intestacy by the provisions of Law 111 to the majority of Ghanaians. This was a nightmare scenario which was averted by the enactment

of the Customary Law and Divorce (Registration) (Amendment) Law, 1991 (P.N.D.C.L. 263) which provides (ss. 1 and 2) for the application of the provisions of Law 111 to the estate of a deceased spouse of an unregistered customary law marriage where a court or tribunal is satisfied by oral or documentary evidence before it that a customary law marriage had been validly contracted between a deceased and a surviving spouse. This illustrates the pressure on the state to devise legislative mechanisms which take into account the existence of customary law with a view to protecting the rights of citizens.

4.2.3.2 Registration of customary divorce

Registration of customary divorce was introduced by sections 6-8 of the Customary Marriage and Divorce (Registration) Law, 1985 (Law 112). As the title suggests, the legislation is concerned solely with the registration of customary marriages and divorces. It is not a statute to reform the customary law of divorce. According to section 6(2) the provisions of Part Two apply only to customary divorces not regulated by section 41 of the Matrimonial Causes Act, 1971. Under section 6(1), all other customary divorces may be registered in a form set out in the Third Schedule of the enactment.

According to section 7(1), registration must be effected within three months of the divorce. To do this, section 7(2) provides that the parties must serve notification of the divorce, supported by relevant statutory declarations, on the Registrar. Under section 7(3) these must be further supported by declarations of parents or other persons standing in loco parentis to the parties. Section 8(1) provides for objections to the registration of any divorce to be heard

before a district court judge. Therefore, though basically procedural, the new legislation has made two important inroads into the practice of customary divorce. First, the requirement of the statutory declaration of the parents or of persons in loco parentis introduces a parental check on arbitrary divorces, and would further accentuate the importance of the reconciliation process. Second, the provision that objections to the registration of divorces may be heard before a district court judge, does widen the area of judicial encroachment into customary family law. Such judicial activity could continually create a considerable body of case law to strengthen the nuclear family as the crucial institution for the socialisation and stabilisation of the family. But there is as yet no evidence of any such hearing before a district court. Also, the present writer found no record of any divorce registered under Law 112 at the offices of the Accra Metropolitan Authority during fieldwork.

4.3 Conclusion

This chapter has examined various aspects of the nature of the extended family in Ghana, indicating the complexity in the law defining the Ghanaian family and suggesting ways of avoiding the confusion that has been noted here through clearer distinctions between various types of family. It has also considered the two main forms of marriage in Ghana and assessed the extent to which recent statutory developments in Ghanaian law have strengthened the nuclear family vis-a-vis the extended family.

A peculiar feature of the customary family is its emphasis on the position and importance of the extended family and its head, in contrast to the head of

the immediate or nuclear family. Inevitably, then, while customary law is full of rules, well articulated by the courts, regulating the extended family and the position of its head, there is a corresponding dearth of rules relating to the head of the nuclear family, and his or her duties to the immediate family. But as the nuclear family-based household becomes more prominent, the need to introduce reforms emphasising the duties of the parents has become more urgent, particularly as much of what used to be family property has now been transferred into individual ownership.

Besides, from a national standpoint, reforms to improve the wife's position[132] of inferiority within the nuclear family, and thus to equalise the affiliation of the children with the families of both parents should result in a genuine detribalisation of the family, particularly in inter-ethnic unions. Again, from a national viewpoint, it might be argued that extended families operate within the context of ethnicity and indeed, reinforce it whatever its own advantages might be. The extended family constitutes the basis of the extensive private dispute settlement mechanism which is antithetical to the modern, bureaucratic, record-keeping approach. Further, it provides a useful source of social and economic support for the less affluent. This should incline legislators to caution about assumptions regarding the decline and even demise of the extended family and, consequently, about the extent to which future legislation seeks to entrench the nuclear family.

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[132]Legislation to regulate economic transactions within matrimony date back to the Married Women's Property Ordinance (1890) described as an Ordinance to confer power on married women to make contracts, and to hold and deal with property. See Cap. 131 (1951 Rev.). The economic independence of Southern Ghanaian women, their control over commerce, and their property holding capacity, has however, never been in dispute.

The state needs statistics for the formulation of its economic and social policies. The collection of statistics can be aided by a greater enforcement of the rules on registration of marriages and divorces. Customary marriage remains largely outside the scope of government regulation and, in that sense, has perpetuated the extended family principle in Ghana. Its flexible rules accommodate all manner of relationships in a "marriage-like" condition. The findings on the take-up of the Customary Marriage and Divorce (Registration) Law, 1985 presented in this chapter suggest that state interference with customary law in Ghana has not been entirely effectual.

Though, as we have seen, there has been some legislative intervention in the area of marriage, traditional rules still regulate much of matrimony. There are clearly problems with the method of transmission of legislation to regulate marital contracts into society. So far, the method has been to introduce the legislation, and to leave private persons entirely to their choice. The result has been widespread disregard of the statutory rules of family law. It would seem that a firmer approach combining clear benefits and sanctions to norm-addressees may be a viable method of breaking the inveterate habits of people about marriage handed down through countless generations.

As both the Customary Marriage and Divorce (Registration) Law, 1985 and the Marriage Ordinance, 1884 were, in part, designed to regulate succession to the estates of parties thereto, it follows that low take-up of these statutes by norm-addresses must impact negatively on the succession law of Ghana.

On the whole, customary law marriage offers a less stable framework for the stabilisation of society. As marriage is a pivotal institution in customary society, its instability inevitably affects other aspects of customary law. Nowhere is this more vividly portrayed than in the area of succession. Inevitably, this often leads to the fragmentation or sale of properties. Also, the creation of divergent interests by different sets of children in the property of a deceased polygamist complicates the nature of the usufruct, making its transfer risky; and effectively curbs the marketisation of land and its use as collateral. Clearly, legal confusion and insecurity about family status has impacted negatively on the regulation of property and succession laws in Ghana resulting in the diminution of the rights of individual members of society, particularly to shares in the estates of deceased relatives.

Consequently, the most important conclusion to be drawn from the foregoing discussion is that state interference with customary law has so far had limited impact. Further reforms of customary marriage and divorce should address the reasons for this phenomenon. Such reforms ought to proceed from the premise that the customary system, by perpetuating the role of the extended family, impedes individual freedom and prevents the nuclear family from developing its potential.

CHAPTER 5

TYPES OF LAND HOLDING AND THE EMERGENCE OF INDIVIDUALISM IN GHANAIAN LAND LAW

This chapter begins our study of land law of Ghana by critically tracing the main principles and concepts upon which the customary land law has been developed. The traditional land law of Ghana has been written about and commented on from many angles by various writers who have appeared to endorse its essentially tribal character.[1] In this chapter attention will be focused on the character of traditional land law with a view to testing the validity of the accepted principles of customary land law. As in the case of family law, present-day social practice often contradicts these principles, and the picture that emerges from a close and careful re-examination of the cases on which the official principles are based is also far from clear. These principles, particularly those relating to the paramount and sub-paramount titles, appear to be a rather poor attempt to keep land tenure within a skewed tribal hierarchy. The main purpose of this chapter, therefore, is to re-examine the major principles of the customary land law in the light of fresh evidence gathered in the field. We will also examine and criticise the dicta upon which the general principles underlying the law of property in Ghana have been based and seek to suggest a new role

[1]The most comprehensive works on the land law of Ghana are to be found in Bentsi-Enchill 1964; Ollennu 1962; Ollennu and Woodman 1985; and S.K.B Asante, Property Law and Social Goals in Ghana, Accra 1975. All these writers build on the foundations laid by Sarbah 1968. But see Kludze 1973, who vigorously asserts the non-applicability of the main doctrines established by the earlier writers to the Northern Ewe Peoples of Ghana.

of property law that would enhance the economic return from land. The chapter will trace the development of the Ghanaian usufruct and consider the nature of customary tenancies and of the pledge.

The evolution of the concepts and practices relating to land tenure in urban Ghana stem principally from the rapid pace of urbanisation that Accra has witnessed in the last hundred years or so. We have already seen in chapter 3 that this has tended to weaken and even destroy the traditional character of customary land law. It is argued here firstly, that recent developments have diminished the authority of the stool and the consanguine family, leaving the nuclear family as a more efficient economic unit with an easily identifiable goal of self-improvement in the urban environment. A second argument revolves around the theme that in the rural areas and less developed parts of urban areas it is imperative to reserve a residual role for the extended family to provide support and encouragement to nuclear family-based production.

5.1 Interests in land

The customary law concept of land reflected a bundle of economic, social and religious notions within traditional society, which in turn supported a basically subsistence structure of production.[2] The rules of customary land law were considered to be contained within the wider matrix of a political framework in which the classification of interests in land was closely modelled on the

[2]See in detail Asante 1975, pp. 1-26. See further S.K.B. Asante, "Interests in Land in the Customary Law of Ghana - A New Appraisal", Yale Law Journal, (1964), pp. 36-76.

constitutional and political hierarchy of each given polity.[3] In spite of this clear-cut scheme of interests in land, property transactions in customary law do lead to considerable uncertainty and ambiguity.[4] Land, in customary law, was defined by Ollennu as follows:

> "The term "land" as understood in customary law has a wide application. It includes the land itself, i.e., the surface soil; it includes things on the soil which are enjoyed with it as being part of the land by nature, e.g., rivers, streams, lakes, lagoons, creeks, growing trees like palm trees and dawadawa trees, or as being artificially fixed to it like houses, buildings and any structures whatsoever; it also includes any estate, interest or right in, to, or over the land or over any of the other things which land denotes, e.g. the right to collect snails or herbs, or to hunt on land."[5]

It has however, been noted that traditional thinking drew a sharp distinction between the soil or earth, and the tangible fruits of man's labour thereon.[6] Among the people of Accra, too, land was generally conceived of as belonging to the ancestors, and this religious connotation served to strengthen the claims of the group over the individual. Group land belonged to the ancestors whose remains lay interred in the bowels of the earth. In a regime of

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[3]Id. But see Kludze 1973, p. 154 where he contends that title to stool lands among the Northern Ewe bears no relationship to the political hierarchy of stools.

[4]For a contrary emphasis on interests in land rather than the land itself, see e.g. P.N. Balchin and J.K. Kieve, Urban Land Economics, London 1985, p. 68 where it is stated, "Fundamentally, the subject of real property transactions are not the land and buildings themselves but interests over land, which in aggregate, are known to English Law as property. Land is simply the medium in which property rights subsist."

[5]Ollennu 1962, p. 1. Also, see Dadzie v. Kokofu (1961) 1 G.L.R. 90 where it was held than the ownership of cocoa farms must be distinguished from the land on which they were situated. However, the Interpretation Act, 1960, states, "Land includes land covered by water, any house, buildings or structures whatsoever, and any estate, interest, right in, to, or over land and water. See further, G.R. Woodman, "Rights to Fixtures in Customary Law", University of Ghana Law Journal, Vol. 7 (1970), pp. 70-76. The rights in land that Ollennu refers to here were regarded by most respondents as being particularly exercisable over land abutting the sea coast (nsho-gonno), open plains (nná-no) and river banks (faa-nah) where coconuts may be plucked, birds and animals trapped or medicinal herbs picked, and fiddler crabs and other crustaceans caught.

[6]Asante 1975, p. 2.

ancestor worship, the resting place of the ancestors could never be sold off completely. As Danquah noted in relation to the Akim,

> "An absolute sale of land was, therefore, not simply a question of alienation of realty; notoriously, it was a case of selling a spiritual heritage for a mess of pottage, a veritable betrayal of ancestral trust, an undoing of the hope of posterity."[7]

Even today, when the law of property has lost much of its religious flavour, land sales are regularly marked by prayers and the pouring of libations to seek the blessings of the ancestors. In the rural areas, lakes, lagoons, groves, rivers are still regarded as invested with the spirits of the gods.[8] In places like Jamestown and Old Dansoman, however, land is viewed by both the buying public and the stool authorities more as a commodity to be bought and sold.

The central challenge of the property law, ever since Sarbah's first attempts to systematise the rules of customary land law in 1897, has been the need to create an effective machinery to ensure the absolute indefeasibility of the purchaser's title. This is because until recently the commoditisation of land and the creation of secondary titles out of group-held land was never accompanied by the establishment of an effective machinery for the registration of titles. In Accra, rapid urbanisation and the widespread development of

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[7]Danquah 1928a, p. 212. See similarly, Busia 1963, pp. 40-42; and R.S. Rattray, Ashanti Law and Constitution, London 1956, chapter XXI.

[8]The Gá idea of a god is to be distinguished from that of a fetish. Field (1937) has stated (p. 4): "Another idea common in West Africa but foreign to Gá worship is that of a fetish." Central to the long-running land dispute between the Sempe and Alata quarters of Jamestown has been the Sempe stool's claim to be the owners of the god, Oyeni, which is located within the walls of James Fort. The Sempe claim that when their ancestors ceded the land to the British for the construction of the Fort they also obtained an annual right of access for the purpose of performing certain rituals for their god. The Sempe therefore argue that all lands claimed by the Alata, who were initially brought to Accra as fort-servants, are indeed Sempe lands.

residential properties resulted not only in the emergence of a brisk land market, but also in a sharp increase in the number of frauds perpetrated on unwary purchasers. As Bentsi-Enchill put it,

> "Do you want to buy land? How do you ensure that the title to the land you buy is a reliable one that will keep you free from lawsuits or prevail when challenged or such that a bank will accept it with confidence as security for a loan you seek?"[9]

Thus, the shortcomings of the traditional system of land tenure are such that a purchaser of land can still acquire a defective title. To understand why this is the case we will in the next few sections briefly outline the main interests that may be held in land under customary law. The basic principle relating to land under customary law was stated by Rayner, C.J., in Amodu Tijani v. Secretary, Southern Nigeria[10] as follows:

> "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have equal right to the land but in every case the Chief or Headman of the community or village or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the sue of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make an important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find individual owners, this is again due to the introduction of English ideas."

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[9]Bentsi-Enchill 1964, p. 4.

[10](1921) 2 A.C. 399.

The urbanisation of Accra and the consequent settling in the city of vast numbers of people from other places has been accompanied by a rapid individualisation of land rights. We may identify six different forms of interests capable of being held in land by four main classes of holders - the state, the stool, the family and the individual. In other words, the holder of the allodial or ultimate interest in a parcel of land may create five other interests of diminishing value in the same piece of land in favour of other persons while retaining his ultimate interest, at least, in theory.

Leaving aside the state for a moment, the main forms of interests in customary law, in order of magnitude are:

a)The paramount or allodial title,
b)the sub-paramount title,
c)the determinable or usufructuary title, also called the customary law freehold,
d)tenancies, e.g., abusa, abunu, and annual crop tenancies, and,
e)pledge or hypothecation.[11]

The result of intense legislative activity in the post-independence era has been the development from this structure of ownership of a sixth category of interest in land, namely, state lands. The foregoing analytical structure is based on the premise that there is no land without an owner.[12]

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[11]This scheme of customary interests in land has been described and analysed extensively in Ollennu 1962; Ollennu and Woodman, 1985; Bentsi-Enchill 1964; and Asante 1975, all of which describe and analyse the pre-1970 property law of Ghana, and telegraph the urgent need to reform the existing scheme.

[12]The reasons for this have never been clearly articulated in the land law of Ghana. It was certainly one of the main policy positions of the lawyer-dominated Aborigines' Rights Protection Society which at the end of the nineteenth century fought against the vesting of native lands in the British Crown. J.E. Casely-Hayford, The Truth about the West African Land Question, London 1913, (1971 edition) esp. pp. 36-51 gives a somewhat polemical explanation of the ARPS's position in relation to the Colonial Government's attempts to vest lands in the Gold Coast in the Crown.

The ultimate title to all lands, wherever situated in Ghana, is vested in some stool, sub-stool or family which in turn grants lesser interests to third parties.

5.1.1 The paramount and sub-paramount titles

In this part, we challenge the distinction that has been made, particularly in the works of Ollennu,[13] between the paramount and sub-paramount interests and show that this distinction has, in practice, tended to complicate the problems that are inherent in the customary scheme of land tenure. Our starting point will be an examination of the character of both interests as it emerges from the analysis of the orthodox writers. This will necessarily involve a point by point examination, in a new light, of the decided cases on which the distinction between the two titles is based, together with a study of the exercise of the "sub-paramount title" in the western part of Accra.

Throughout Accra, ultimate authority for the control and administration of land in the traditional scheme is vested in the polity, which might be a village or a town. The polity itself was and is still represented and symbolised by a stool which is occupied by its political head, the chief. The chief is assisted in the day to day discharge of duties, including land transactions, by a court of stool elders. The paramount or allodial title is the highest interest in land known to customary law. This interest is normally

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[13]Sarbah 1968, pays only superficial attention to the question of land tenure, restricting himself to a mere 9 pages of description of the various forms of land tenure prevailing in his part of the Gold Coast. He noted (p. 66), however, that as far as the Gold Coast was concerned that part of the English law of property that vested the whole soil in the king of England was not applicable. Land in the Gold Coast was according to him vested in various stools and families who had well-defined methods of alienating it (pp. 66-67).

vested in the stool itself, which symbolises the people, and not in its occupant, the chief. It expresses the aggregate of the people's rights over their own land. They or their ancestors may have fought wars to defend it and expended effort to improve it. Therefore, under customary law, each subject of the stool has a right to any unoccupied portion of stool land for the purpose of residence or economic activity.

5.1.1.1 Social change and the paramount title

The paramount title differs from the modern usufruct which is simply an exchange of the purchaser's economic power for the right to occupy and use a piece of land to which he would otherwise have no right whatsoever. In modern usage, however, the paramount title may also be held by a quarter of a town or even by a family. The general consensus among informants is that this resulted from two developments. Firstly, as a result of the general absence of boundaries and the lack of any real exercise of jurisdiction by traditional authorities over remote and uninhabited parts of their territories, individuals and families who first settled and developed these parts started to alienate such lands as their own. Secondly, in attempts by jurists to systematise the traditional system of land tenure, rather than noting that the actions of such individuals and families offended against the general traditional scheme, they tended to recognise such claims and thus supported the view that the paramount title can also be held both by a quarter of a town and by families. This, a majority of informants insisted, is against the traditional philosophic base on which the very concept of the stool was

developed, i.e. that the paramount stool, by definition, has ultimate authority over the lands and other assets of subordinate stools and families. Thus many informants were of the opinion that the juridical basis of the present system of land tenure is somewhat flawed.

If the above is assumed, the question arises whether a strictly hierarchical system of traditional control over stool lands would result in greater accountability of traditional authorities, making chiefship more responsive to the changing needs of society. It can be argued that the legal system ought to be based on an underlying social and political pattern, and that on the basis of the hierarchical system of interests in land suggested above, a system of land law can be constructed which would create greater certainty in the land law by reflecting the basic social pattern. When the enquiry is framed this way, it becomes clear that with well-designed legislative intervention, many of the problems that continue to bedevil the system of land tenure can be resolved. As we will show, the extended family and the quarter are ill-adapted to functioning as effective distributive mechanisms in the overall allocation of land in an urban environment. The result, in many cases, has been the needless creation of landlessness among many urban and semi-urban people as many leading families have laid exclusive claim to much of what still remains of undeveloped stool lands. What is more, many such families have not been able to devise ways of generating income from such lands..

Steadily, more and more non-members of the community are also beginning to acquire ever more economic power than stool subjects whose

traditional rights to land are rapidly becoming more and more theoretical.[14] The paramount title, as formulated by the orthodox writers, remains, by its very nature, dormant.[15] The role of the holder of the paramount title in the introduction of policy initiatives and development strategies on the basis of a steady flow of revenue from stool lands is therefore quite limited. Even where the paramount title is vested in the paramount stool, the existence of this title depends, according to some text-writers, on the assertion of the sub-paramount title by various quarters or sub-stools of the polity. Therefore, though a tract of land may be described as belonging to a particular people as a whole, individuals within the polity can only assert their claims to land through sub-groups or sub-stools with which they are affiliated. Naturally, this would require an extremely high degree of homogeneity of the original community as well as a fair degree of acquaintance with the leaders of one's sub-group. However, the increase in urban population, both through natural increase in the indigenous population and the high and rising number of rural-urban migrants, has brought two results in its train - pressure on available land and the weakening of the bonds between members of the indigenous population and their leaders. In the result, the authority of the paramount chief, in particular, is now more or less confined to the town centre while outlying towns and villages do not necessarily recognise any rights which their town-based kinsmen might claim in their lands.

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[14]In Jamestown, in particular, many of the descendants of the earliest inhabitants and arguably the people with the greatest right to the enjoyment of the stool lands of Jamestown have now literally lost even access to those lands.

[15]Bentsi-Enchill 1964, pp. 87-89.

Nearly all the respondents representing sub-stools, families and quarters stated that a large part of the income from the sale of lands was spent on litigation over rights to various traditional offices. Since the decisions of the courts and of the National House of Chiefs as well as the central government over recognition of office holders tend to oscillate continually between the various factions,[16] land purchasers are constantly faced with uncertainty.

The juridical basis for the distinction between the paramount and sub-paramount titles can now be considered. The most elaborate model of the present interpretation of Ghanaian land tenure is found in the approach of Ollennu. Of the paramount interest, he stated:

> "The "Stool" or "skin" in which that ownership is vested, may be a paramount stool or a paramount skin, in the constitutional sense, e.g., Akim Abuakwa, Kwahu, Wassaw, Akim Kotoku, New Juaben, Mamprusi, Builsa; it may be a divisional stool, e.g., the divisional stools of the Gà State such as Gbese, Asere, Osu, La; or the stools of the Akwapim State, e.g., Mamfe, Larteh; or it may be a tribal or family stool, e.g. tribal or family stools in the Anlo area, and in some Fanti areas such as Adjumako. Thus the status of the stool or skin for constitutional or chieftaincy purposes may be different from its status for the purpose of land law."[17]

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[16]The last two chiefs of Jamestown, Nii Kofi Akrashie II and Nii Adja Kwao II were both destooled. Their immediate predecessor, Nii Ahuma Kofi II had to contend with the machinations of various factions within the leading Jamestown families. See e.g. Republic v. Commissioner for Chieftaincy Affairs; Ex Parte Nii Adja Kwao II, Court of Appeal judgment, 13 April 1981, unreported; digested in (1981) G.L.R.D. 19; In re Kwao (Decd.); Nartey v. Okpe, Supreme Court judgment, 16 May (1989), unreported; digested in (1989-90) G.L.R.D. 25; In re Kwao (Decd.); Nartey v. Armah, Supreme Court judgment, 13 February 1990, unreported; digested in 1989-90 G.L.R.D. 126; and In re Kwao (Decd.); Sampah v. Okpe, Supreme Court judgment, 26 October 1988, unreported. Hill 1937, (p. 85) observed that chiefs in Accra were often mere political puppets pushed into office by some unsavoury party and remaining there only till another party was clever enough to think of a means of dislodging them in favour of other puppets.

[17]Ollennu and Woodman 1985, p. 11.

He went on to distinguish between the paramount and sub-paramount titles thus:

> "When the paramount, ultimate or absolute ownership is vested in a "stool" or "skin" having other stools or skins, tribes, wards, quarters or sections subordinate to it, the absolute ownership by the principal stool is dependent upon sub-paramount ownership by the subordinate stool, skin, tribe, ward, quarter, or section has a very real existence, and is sine qua non to the paramount ownership by the head stool, skin. Unless a piece of land in a state can be shown to be attached to a subordinate stool, skin, ward or quarter, the absolute ownership in that land cannot, by customary law, be said to be vested in the paramount stool or skin."[18]

There are several weaknesses in this argument and it is necessary to distinguish between the several different elements upon which it is based in order to pinpoint its basic unsoundness. According to the above analysis by Ollennu, the paramount stool (which as a rule has several subordinate stools of different ranks under it), divisional stool, the tribal stool and the family stool may all own the paramount title. Also, unless a subordinate stool can be shown to hold a prior title in land belonging to the paramount stool, the title to such land cannot be said to be vested in the paramount stool. It is quite hard to follow the reasoning set out by Ollennu. It means, for instance, that of land in a given polity, the paramount title to one part may be vested in the paramount stool; the quarter, the ward and other sub-stools may also hold the paramount title to other parts; and the paramount title to yet other parts may be vested in families. And yet, the absolute ownership of the paramount title by the paramount stool is dependent on the prior ownership of the

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[18]Ibid. p.12. Cf. G.R. Woodman, "The Allodial Title to Land," University of Ghana Law Journal, Vol. 5 (1968), pp. 79-114.

sub-paramount title to the same piece of land by subordinate stools.

It is, however, possible that difficulties shown to exist in Ollennu's analysis can be explained if it is considered that the paramount title may be vested simultaneously in more than one stool of different rank. Indeed, Woodman has stated that:

> "The allodial title is frequently vested in both a head stool and its sub-stools or constituent families. In such circumstances rights may be exercisable variously by the head stool, by the appropriate sub-stool or family, or by both either jointly or in the alternative".

Woodman's view may easily explain the notion of co-ownership enunciated in Golightly v. Ashrifi[19], but it leaves unanswered difficulties about the concept of sub-paramount title upon which Ollennu says ownership of the allodial title by the principal stool is based. Ollennu's approach to cases where a principal and subordinate stool have co-existent title to the same tract of land, appears to be to classify the principal stool's title as the allodial title and the subordinate stool's title as the sub-paramount title. Such an approach is quite different from cases where the allodial title is vested simultaneously in a head stool and its subordinate stools or constituent families.

But even if it is argued that under the official customary law a head stool and subordinate stool may jointly own the allodial title and exercise rights to the same tract of land either jointly or in the alternative, there would be practical difficulties regarding the circumstances in which either stool may solely, and in alternative to the other stool, exercise rights to the land. It

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[19]Kokomlemle Consolidated Cases, (1951) D.C. (Land) '48-'51, 312; (1955) 14 W.A.C.A. 676; (1961) 1 G.L.R. 28, P.C.

appears that in practice, this is determined by the question of which stool actually has subjects in occupation of the land. This, as we have shown, frequently leads to a scramble by competing stools of similar or different ranks to assert ownership of land, increasing the difficulties that surround the transfer of interests in land in Ghana.

Matters are complicated by the tendency of government, particularly since Independence, to vary the status of stools, sometimes for political reasons. Thus a stool of inferior rank may find itself elevated to the rank of paramount stool or vice-versa, without a corresponding change in land tenure. Where a sub-stool owning the allodial title[20] is elevated to paramount status with subordinate stools under it, but without a corresponding change in land tenure, Ollennu's argument about the ownership of the allodial title by a stool having sub-stools under it becomes hardly tenable especially as he insists that unless a piece of land in a state can be shown to be attached to a subordinate stool, etc. that land cannot, by customary law, be said to be vested in the paramount stool or skin.[21] Conversely, the nature of interests in land held by former paramount stools often remain unchanged. As a result, the formal political rank of a stool often has little connection with the interest in land known in the Ghanaian customary law as the paramount or allodial title.

The structure of ownership described by Ollennu can be questioned on several other grounds. Firstly, it leads to considerable uncertainty over

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[20]See note 17 above.

[21]See note 18 above.

the ownership of land. This is because as paramount stools normally have sub-stools, wards and quarters under them, the contention that the ownership of the paramount stool must be based on the prior ownership of a sub-stool, ward, quarter or even a family tends to validate the claims and activities of various groups and individuals who are often the first to begin to sell lands at various locations. Secondly, it does not make for efficient development of the stool's resources as reckless sales of land by sub-stools, wards and families deprive the paramount stool of the necessary capital base for the implementation of its own policies. Besides, we have already noted that a large proportion of the incomes and receipts from the sale of land by the chiefs and heads and leading members of families are channelled into litigation and other non-productive activities.

If we abandon the premise that the paramount stool's ownership of the allodial title is based on prior ownership by a subordinate stool or quarter, it becomes easy to argue that a system of land tenure based more accurately on the political/constitutional structure of the traditional state would considerably improve the administration of land. Reverting to our earlier argument that the system of land tenure in Ghana ought to be based on an underlying social and political pattern, it may further be submitted that a reformed system of land tenure based more accurately on the traditional political structure would not only clarify the present system of ownership but could also contribute to an increase in the level of accountability within the structure of traditional authority and lead to greater certainty of titles. It will, for instance, reduce the incidence of double sales through competing

sub-stools and families.

It was clear from the findings in all three field-areas that the generality of Jamestown citizens themselves do not make any distinction between the various Jamestown lands. For instance, both Old Dansoman and Domiabra were regarded as Jamestown lands of the same status as lands within the old Jamestown quarter itself. Of the seventy respondents who stated an opinion (the rest of the 208 informants ventured no opinion) on this point, sixty-five felt that the Jamestown authorities should take steps to assert the stool's authority, including rights of sale, over undeveloped lands in such places as Domiabra. But when questioned closely, the majority of respondents readily admitted that by virtue of their actual occupation of such inhospitable places as Domiabra the occupants of subordinate stools should have some role in the alienation of lands. It was generally considered that such powers of alienation should be exercised in conjunction with the occupant of the paramount stool. In Domiabra itself, the traditional authorities freely admit their subservience to the Jamestown stool, even though they do not take any steps to involve the latter stool in the sale of land. In this, they merely seem to be taking advantage of the lack of actual control of Domiabra lands by the Jamestown stool rather than the exercise of their own right of alienation.

There still remains the question as to whether Ollennu's exposition has any basis in the decisions of the courts. In order to answer this question satisfactorily, it is necessary to analyse the cases that Ollennu cites in

support of his position. Golightly v. Ashrifi[22] was one of the first cases in which the issue of the relationship between a major stool and several of its subordinate stools and families, with regard to the same piece of land, was brought to a head. That was a case in which lands to the north of Accra suddenly appreciated in value as a suburb started to develop and a scramble to buy and sell ensued. The land had previously been open country of little value, with a few mud huts and patches of farms. Even though in origin the land belonged to the Korle House (family), the Gbese and Gà stools also put in claims to the land. The Korle Family is a part of the Gbese Stool which in turn, is a sub-stool of the Gà state. The principal issue was which of those three could alienate land within the area in question and in what circumstances, with regard to the nature of the land, as well as the rights of families or members in occupation, some of whom had also claimed rights of absolute ownership. The trial judge found inter alia that any member of the Gbese stool, apart from members of Korle House, could farm a portion of the land; that the Korle priest or head could make grants of land not so used to members of the (Gbese) stool for residence or trade; but that mortgages or outright sales in English form needed the consent of both the Gbese Manche (chief) and the Gà Manche as well as the Korle Priest. The trial judge then held inter alia that the Korle House were co-owners with the Gà and Gbese stools, and that the prior consent of all three was needed for outright

[22]See note 19 above.

alienation,[23] which also needed publicity. Quite clearly, this judgment does not support the distinction between the paramount and sub-paramount titles, and particularly, the notion that a subordinate stool or family can alienate land in its own right without reference to the major stool. This is all the more significant as the West African Court of Appeal had earlier found that,

> "From the evidence and the history of the Gà people it would appear that the Paramount Gà Stool has no private or family land of its own, but as overlord, it has by usage, the reversion and ultimate control of all Gà lands. As the family of Onomrokor or Korle We (House), the original owners of the land, are subjects of the Gbese Stool, that Stool and all its subjects, by usage and consent, acquired a usufructuary right in the lands. These interests of the Gà and Gbese Stools carrying with them incidents of protection and control, become a burden on the absolute ownership formerly enjoyed by the Korle We family." [24]

On subsequent appeal to the Privy Council, Lord Denning agreed with the views of the trial judge who had stated:

> "Today they are described as being the "caretakers" of these lands for the Gà, Gbese and Korle Stools. But it must be clearly understood that the word "caretaker" does not mean simply one who looks after land for another, but connotes one who has an interest in the land."[25]

Quite clearly, the customary model of law constructed on the basis of

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[23]See also, Axim Concession Enquiry, (1903) Ren. 284, where it was held that the consent of the paramount chief is requisite in the granting of concession of stool land under the control of a subordinate stool. See further, Nii Adjei Onano v. Mensah and Nii Ankamafio, (1948) D.C. (Land) '48-'51 where the plaintiff, the chief of Labadi sued the first defendant for trespass on the ground that he had not been informed of a grant of stool land made to the first defendant by the second defendant who was the head of Abafum quarter of Labadi which had immediate control of the land in question. Both the Native Court and the Land Court held that by customary law, the occupant of the Labadi stool should have been informed of the grant.

[24](1955) 14 W.A.C.A. 676, 679.

[25](1961) 1 G.L.R. 28, 32.

the distinction between the paramount and the sub-paramount titles is a model in need of re-clarification. But to achieve a more direct refutation of the basis on which this model was constructed, we will refer specifically to the cases Ollennu cites in support of his theory.

To begin with, it would be useful to point out the fact that most of these cases involved conflicting claims to compensation moneys following government acquisition of lands. It would also not be out of place to suggest that the colonial government was pursuing its usual policy of indirect rule through chiefs whom it recognised as the sole agents of the people. As Ollennu himself recognises, these compulsory acquisitions were made under the Public Lands Ordinance, 1951 (Rev.)[26] under which the state took an absolute and indefeasible title to the land free from all encumbrances and adverse claims. The paramount stool was therefore the only person competent to make the transfer of that form of title which the statute stipulated was the community as a whole, represented by the occupant of the stool or skin, who was a trustee acting with the consent and concurrence of the elders of the stool.

Under section 3 of the Public Lands Ordinance, 1951 (Rev.) "The minister is required to agree with the owners of any lands required for the service of the Colony and Ashanti and with all parties having any estate or interest in such lands for the absolute purchase for a consideration in money of such lands or such parts thereof as he shall think proper, and of all estates

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[26] Cap. 134 (1951) Rev.

and interests in such lands of what kind soever."

Furthermore, under section 4 of the Public Lands Ordinance, 1951 (Rev.),

> "It shall be lawful for all parties being seized, possessed of, or entitled to any such lands or any estate or interests therein, to sell and grant and convey such lands and estate or interests to the minister, and the power so to sell and convey may be exercised by such parties not only on behalf of themselves and their respective heirs, executors, administrators, and successors, but also for and on behalf of every person entitled in reversion, remainder, or expectancy after them or in defeasance of the estates of such parties, and by persons seized or possessed of such lands upon any species of trust..."

As a result, most of the claims to compensation under the Public Lands Ordinance, 1951 (Rev.) were made by paramount chiefs, with claims by lesser chiefs and village heads being defeated or withdrawn. In University College Acquisition,[27] the court determined the merits of the rival claims by finding which paramount stool's subjects occupied the land in question. Thus Foster-Sutton, P. found,

> "It seems to me to have been proved beyond doubt that at the time of the acquisition the majority of the land in question was in the possession of, and being farmed by, subjects of the Labadi Stool, and the trial judge so found. The remainder, a comparatively small area in the north-western corner, was in the possession of the subjects of the Osu Stool."

Significantly, the court seemed to have disregarded the fact that the land in question was dotted with several villages which had their own stools, and that the farmers themselves belonged to distinct quarters, families and

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[27](1954) 14 W.A.C.A. esp. 474.

divisions of the paramount stool.

The Coconut Plantation Acquisition[28] case was decided by a similar principle of determining the subjects of which paramount stool were in occupation at the time of acquisition, with the added significance that when a particular quarter was found to have been absorbed from one of the rival paramount stools by the other, compensation for land occupied by that quarter was paid to the new paramount stool which had absorbed the quarter.

Ollennu's conclusion that, a head stool or skin cannot acquire an absolute title to land unless that land belongs to, or is vested in a sub-stool or sub-skin under the head stool or head skin[29] must be open to some doubt. Rather, it is obvious that the principles in the above cases do not conform to any one theory. In Wiapa v. Solomon[30] W. Brandford Griffith, C.J, found,

> "Though the principle obtains that all owned land under the authority of a paramount stool belongs to such stool, in practice this is much modified, at any rate in the Eastern parts of the colony. In these parts each subordinate stool has attached to it, large portions of land, apparently carved out of the territory originally belonging to the paramount stool; similarly families have large tracts of land carved out of subordinate stool lands, and finally, we get down to individuals with private worship (sic) of particular parts of family land; or private individuals may have part of stool land not being family land. Any unoccupied land within the recognised boundaries of the subordinate stool land or the family land or private land would, of course belong to the subordinate stool, or the family or the private individual as the case might be; but any unoccupied land not being a part of the land of a subordinate stool or family, or a private person would be attached to

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[28]Divisional Court, 3 June 1902, unreported.

[29]Ollennu and Woodman, 1985, p. 15.

[30] (1905) Ren. 410, F.C.

the paramount stool."

Yet, the picture is far from clear. The principle in the Coconut Plantation Acquisition[31] case was overturned in the case of Akue v. Ababio,[32] where on appeal from the Supreme Court of the Gold Coast Colony to the Privy Council, Lord Warrington of Clyffe held that:

> "By the custom of the Gà tribe land which had been exclusively used by the inhabitants of a particular quarter of James Town belonged exclusively to that quarter."

The case involved rival claims by the three quarters of Jamestown for compensation money paid by the colonial government for the acquisition of the land for the Accra Waterworks. According to the traditions of the people, the people represented by the respondent manche or chief arrived in Accra from Lagos in 1642 as total strangers who, as skilled workers, helped in the construction of the James Fort. They also assisted the other quarters in their wars against neighbouring tribes. As a result, the lands of the appellant stools were placed under the respondent stool whose occupant became not only manche of his own quarter but also manche of Jamestown. In the instant case, it was found that the land in question was occupied exclusively by people under the respondent stool. The case of Akue v. Ababio[33] also

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[31]See note 28 above.

[32]Accra Waterworks Acquisition, (1927) P.C. '74-'28.

[33]Id. See also, Kwaku v. Brown, unreported Divisional Court judgment, 21 February 1910; Hammond v. Ababio, unreported Divisional Court judgment, 25 April 1912; and Crabbe v. Quaye unreported High Court judgment, 10 May 1963, upheld recently by the Supreme Court in Crabbe v. Quaye, unreported Supreme Court judgment, 31 July 1990 in all of which the test of "predominance of subjects" was held to be the criterion for determining a quarter's title to outskirt land.

suggests that under customary law, a totally alien people can, by establishing de facto and exclusive occupation of the land, oust the claims of the original and indigenous owners. This is supported by the dictum of Jackson J in the Coconut Plantation Acquisition case: "So much unappropriated land as the Osus occupied by the tacit permission of the Gàs -so that land tended to be regarded as the property of the Osu Stool."[34]

However, the picture becomes much greyer when we consider the position of outlying village stools which fall outside the minor stools of the traditional quarter where the paramount stool is based. Owusu v. Manche of Labadi[35] is a case in point. In that case, the appellant sub-stool proved that they and their ancestors had been in possession of land acquired by the colonial government for at least four generations, and that their ancestors had found the land unoccupied. But when the respondent paramount stool, on the other hand, proved that they had acquired the land in question originally by conquest, and permitted the appellants to settle on it, it was held that long and uninterrupted use by the appellants was not sufficient to oust the title of the stool.

The large number of rival claims suggests the degree to which, in practice, questions of ownership and land tenure are far from settled. Of course, not all the disputes end up in court. As a result, the system of land tenure is hardly a mirror-image of the constitutional hierarchy. Even where

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[34](1951) D.C. (Land) '48-'51, 312 at p. 338.

[35](1933) 1 W.A.C.A. 278.

the political and constitutional relationship between a major and lesser stool is clear, it is seldom expressed in the contract of sale; all that each minor chief needs to convey land under his authority is the consent of his own elders. Certainly, nowhere in the decisions of the courts nor in standard Ghanaian conveyancing is the term "sub-paramount title" used. Ollennu's effort to present a tidy hierarchy of interests in land in Ghana obviously stems from his attempt to fulfil the task he set himself in producing his work:

> "Although decisions of the courts, of course, provide the authority essential to any legal system, a scholarly work is needed to pull together into a coherent pattern all the separate little pieces of authority in the cases. The author can build up a clear picture from a confused mass of dicta so that the law is seen as a consistent whole, and the fundamental and essential rules emerge."[36]

As a result, the different fact situations obtaining throughout Ghana are compressed, incongruously, into a single scheme of land tenure which masks the inescapable conflict which necessarily emerges in the absence of clear-cut boundaries[37] by asserting that there are no ownerless lands in Ghana.

5.1.1.2 The position regarding title to outskirt lands

In the following discussion the conclusions reached by Ollennu will be left to

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[36]See statement by Professor J.H.A. Lang, former Head of the Department (now faculty) of Law of the University of Ghana quoted in the preface, Ollennu and Woodman 1985, p. 5.

[37]This is further complicated by the concept of abandonment in customary law, See e.g. Ollennu and Woodman 1985, p. 66: "where an individual or family fails to use or otherwise exercise rights of ownership of land over which he or they have possessed a determinable title for upwards of ten years, he or they are deemed to have abandoned the land. The land then reverts to the status of unoccupied stool land, and any other subject of the stool may occupy it with or without express grant by the stool or the village headman, or the nearest stool may grant it to another subject or to a stranger."

one side and the "living law" relating to titles in Accra will be examined principally through an investigation into the acquisition of the title to Old Dansoman lands. Before entering into a discussion of how the Jamestown stool has in fact established and exercised its title at Old Dansoman it will be useful to briefly examine the judicial customary law establishing the proposition that in ascertaining the derivative or sub-paramount title to Accra lands the courts need not concern themselves with the antiquity of the claim. This principle was established in the case of Kwaku v. Brown.[38] In that case, the paramount chief of Accra, on behalf of six of the seven quarters of Accra, granted permission to the plaintiff to build a house on outskirt land. The Jamestown quarter, which claimed exclusive possession of the land in question, objected and razed the building to the ground. Dismissing an action for trespass brought by the plaintiff against agents of the Jamestown stool, Griffith C.J. stated:

> "Until comparatively recently all the land around and about Accra and the other towns was waste land. People dare not live outside towns in unprotected villages as they would have been in great danger of capture by marauding natives. Questions of ownership of land were probably never raised unless some European wanted a piece of land where on to build a fort or factory...there was no need to claim any land, it was all common property."

The above principle was upheld in the case of Hammond v. Ababio[39] where it was emphasised that ownership of Accra lands outside the original settlements in Central Accra has to be determined not by alleged historical

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[38]See above note 33.

[39]Id.

title, but by proof that the land was in the use and occupation of the subjects of a particular quarter. It does not require much imagination to see that this principle can in a rapidly urbanising environment lead to much confusion and the loss of land rights by those sections of the indigenous population who do not assert active control over outskirt land. Also, it has led to competition for outskirt lands as rival stools, each claiming the sub-paramount title, seek to assert the predominance of their subjects in each locality, making the sale of land a nightmare for the transferee as he often does not know if the vendor's title is indefeasible.

A different body of case law which offers, in our opinion, a more useful approach to outskirt land in a rapidly urbanising environment is sketched out below in relation to Osu or Christiansborg, probably the most developed part of Accra, where extensive acquisitions of stool lands by government created a relative shortage of land much earlier than in the rest of the capital. In a series of decisions relating to Osu lands the courts established a three-tiered approach to customary land law, distinguishing sharply between "quarter land", which is land within the quarter of the town; "unalienated or undeveloped outskirt land" which refers to land immediately adjacent or contiguous to a quarter; and "rural" land which refers to all other Osu stool lands which are neither quarter nor outskirts land; and requiring that different customary procedures involving various classes of chiefs and elders be observed in each case.

In Kwami v. Quaynor[40] the elders of Osu Alata quarter made a grant

[40](1959) G.L.R. 269.

of land falling within the Osu Alata quarter to one William Addo Quaynor in 1897. Upon the grantee's death he was succeeded by his sons who erected a house on part of the land. In 1933 the Osu Manche made an oral grant of part of the same piece of land, later confirmed by deed of conveyance, to Nii Noye Kwami. When Kwami's attempts to commence building operations on the land were opposed by Quaynor's sons, he brought an action for declaration of title, damages for trespass and an injunction. For his part, the defendant-respondent challenged the right of the Osu Manche to grant the disputed land to the plaintiff-appellant. In the course of his judgment van Lare, Ag. C.J. said (at p. 273):

> "On the authorities, it is clear that the Osu Mantse is the proper authority to grant Osu stool lands; that is to say, land that is not a Quarter Stool land nor a Quarter "outskirt" land...It is a well established principle of law that the head and elders of a Quarter Stool in Osu constitute the proper authority to grant a Quarter land. On the other hand, where unalienated "outskirt" land is in the charge of the head and elders of a Quarter, the final decision whether or not to make a grant of such land rests in the Osu Mantse. But, although the Osu Mantse may reject the advice of such head and elders of a Quarter, he cannot himself make a valid grant without prior consultation with them."

It was held that the plaintiff-appellant had failed to establish his title as the Osu Mantse had acted without prior consultation with the head and elders of Osu Alata Quarter.

In the case of Akwei v. Awuletey,[41] the Supreme Court had to consider the validity of a sale of Osu rural land. The plaintiff relied on a deed of gift executed by the acting Osu Manche which he claimed confirmed a customary grant made to him in 1948 by the then Osu Manche. The

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[41](1960) G.L.R. 231.

defendant claimed ownership of the same piece of land by virtue of a customary grant made to him in 1954 by the Osu mankralo. The Manche and mankralo were joined as co-plaintiff and co-respondent respectively. The Manche claimed that the land in dispute was part of Osu stool lands and that the plaintiff had acquired a good title. The mankralo, on the other hand, claimed that the land in dispute belonged to the Osu mankralo stool, having been settled upon exclusively by people of the Ashanti Blohum quarter (the quarter under the Osu mankralo stool) of Osu. In the course of the trial in the Land Court, Accra the plaintiff withdrew his claim. The co-plaintiff continued the action and when judgment was given in favour of the defendant, appealed to the Supreme Court. It was held inter alia that as the land in question was neither quarter land nor outskirt land adjacent or contiguous to the Ashanti blohum quarter but Osu rural land, the Osu Manche and his elders including the quarter headmen were the rightful authorities to make a grant.

The principle stated in the above cases had previously been established in the cases of Aryee v. Adofoley[42] and Nii Bonne III v. Hammond.[43] In Nii Bonne v. Hammond the court raised and answered the related question of how far quarter land could extend. Windsor-Aubrey, J., said (at p. 494):

> "This court pointed out to counsel that if his contention was correct there were no limits whatsoever to the distance Northwards to which a Quarter could extend its area and that a Quarter could acquire land which was not contiguous to the area occupied by it.

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[42](1951) 13 W.A.C.A. 11 .

[43](1954) 14 W.A.C.A. 492. See also, Sampson v. Lutterodt, (1946) D.C. (Land) '38-'47, 195.

> Counsel could not refute this suggestion. The learned trial Judge dealt very fully with this aspect of the case, and I am of opinion that he correctly held that there was sufficient evidence of custom to support his findings:- (1) that until land is allotted to a Quarter by the Osu stool it remains the property of the Osu stool; (2) that members of a Quarter may, however, extend their Quarter by building on the land adjacent to or attached to a Quarter up to a distance of about 80-100 feet of existing buildings. Such land the learned trial Judge described as outskirt land".

It is submitted that the principle enunciated in the above cases could be further developed to constitute the basis for a satisfactory system of land tenure that recognises differences in the rate of development of various sectors of stool land; and consequently fashions different legal regimes for each sector which give effect to McAuslan's model (see pp. 332-333 below). It is contended that this approach will further reduce the possibility of litigation by clarifying titles to land.

The issues raised in the above cases were again put before the Supreme Court in Nartey v. Mechanical Lloyd Assembly Plant Ltd.[44] which dealt with important aspects of the relationship between traditional stools of various rank, including the question of alienation of land. It concerned land in the village of Frafraha which formed part of La[45] rural land acquired by the La stool through conquest. The village was subsequently settled by members of the Agbawe quarter of La. In 1976 the manche of Frafraha with the purported consent and concurrence of his elders granted a plot of land to the appellant for which a document was executed and registered.

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[44]Supreme Court, 19 May 1988, unreported; digested in (1987/88) G.L.R.D. 86. For commentary on this case, see G.R. Woodman, "La Stool Land Dispute", Review of Ghana Law, Vol. 17 (1989-90b), pp. 338-348.

[45]La is the traditional name of Labadi, and the name by which its chiefs and elders now wish the town to be known. It was held in the case of Adoaku v. Nyamalor (1963) G.L.R. 279 S.C. that it was correct to rely on Osu cases in deciding La cases because the customary laws of the two towns were similar.

Subsequently, the La stool granted a lease of a larger plot of land at Frafraha to the executive chairman of the respondent-company including appellant's land. A document executed between the La stool and the respondent-company was, however, not registered. Upon hearing that Frafraha lands were owned by the Agbawe quarter and not the La stool, the respondent-company obtained another grant of the same land from both the head of Agbawe quarter and the Frafraha chief who jointly executed the document. When the company registered the document and went into occupation of the land the appellant brought action against them for declaration of title and damages for trespass.

The company contended, firstly, that since Frafraha was La rural land, it was not only the La stool which could make a valid grant of the land in the dispute. They contended in the alternative that if the land was Agbawe quarter land then since Frafraha lands were jointly owned by the Agbawe families of La and Frafraha of which there were two heads, the grant by the Frafraha chief alone was null and void. Thr trial judge gave judgment for the appellant on the ground that the Agbawe family had always had the right to alienate land at Frafraha, and that although the La stool had been adjudged the owner of the land the stool had never exercised that right.

The trial court's ruling was overturned by the Court of Appeal on the grounds, inter alia, that occupation of Frafraha by the Agbawe family was occupation of stool land by stool subjects of stool land and was therefore not adverse to the title of the La stool. On further appeal to the Supreme Court it was held, allowing the appeal, that the fact that the La Manche was the

proper authority to alienate portions of La stool land could not be disputed save that the general proposition was qualified. However, on the evidence neither of the contesting parties had a better or a proper grant from the La stool. Consequently, the issue for resolution was which of the parties had a better claim to possession against the whole world except the true owner. Since the plaintiff's grant from the Frafraha Manche was first in time and he had duly registered it, the defendants who had no better grant than the plaintiff from the La Manche could not claim to dispossess the plaintiff simply on the ground that the plaintiff never had a grant from the La Manche. Regarding the law on the alienation of rural land in Accra, Amua-Sekyi, J.S.C. said (at p. 204) that "the law on the alienation of rural land in the Gá State ought not now to be in doubt...there is direct persuasive authority that as with Osu, La rural lands are stool lands."

The foregoing Osu and La cases appear to establish the principle that the principal stool alone is competent to grant rural lands. However, they also show the degree to which in practice, stools and traditional office-holders of various rank constantly challenge that principle.

We will now examine the nature of the sub-paramount title that sub-stools assert by reference to the development of a piece of land to the west of the West Korle-Gonno Estates, otherwise known as Old Dansoman for which a scramble to buy and sell ensued in the 1960s.[46] Previously undeveloped, it was up to the late 1950s covered with dense bush with

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[46]The information that follows is based on the replies of the 60 respondents within the Old Dansoman/West Korle-Gonno Estates field-area as well as the account of the Old Dansoman chief and two of his elders.

scattered patches of maize and cassava. The allodial ownership was disputed by two of the quarters of Jamestown. With the development of the West Korle-Gonno Estates, and the consequent availability of transport, water and electricity, there was a rush by people from the old quarter of Accra as well as migrants from other parts of the country to settle on this piece of land. Initially, various men held themselves out as the lawful representatives of the paramount stool. In the end, one ex-public servant with access to the court of the chief of Jamestown was installed chief where none had existed before. He was himself clearly of non-Jamestown origin[47] (being the grandson of Akwapim immigrants), but he gave his name to the township, Dansoman, which means "Danso's town" and proceeded to sell land to all comers. It was a purely commercial enterprise, with the chief organising a syndicate of powerful persons in the locality to control the market in land, organising the buying and selling from his house. They assumed expensive lifestyles to match their new-found status. But the land was limited in supply, and the demand high; and the sellers who were quite familiar with the ways of the law courts and the slow workings of government machinery were able, in many cases, to sell the same parcel of land many times over to different purchasers, many of whom were advised to commence building operations as quickly as possible. Though the political alliance of these men with the Jamestown stool gave them the authority to sell lands in the locality, a piercing of the veil reveals the non-chiefly origins

[47]According to the chief, Nii Kojo Danso himself, his enstoolment as chief of Old Dansoman was in consideration of the fact that his mother originated from the ruling house of Jamestown (Adjumaku).

of Nii Kojo Danso, the commercial nature of his pursuits, and the purely political character of the whole enterprise. Though the syndicate conveyed land in its own capacity as "chiefs and elders of Old Dansoman," it was quite clear they did not have the "sub-paramount title" and were conveying as agents of the Jamestown stool, being no more than caretakers of the land. From the Jamestown stool's point of view, the "chief" was exercising jurisdiction over a piece of land which another stool might have tried to annex. This pattern was repeated all over the Western part of Accra, the main purchasers being middle-aged persons anxious to get out of overcrowded family houses in the old quarter of Accra, migrants from outside Accra, and pensioners looking to invest their superannuation benefits in a piece of real estate. Many were disappointed. In one case, a man who has now became so sceptical of the actions of chiefs that he maintains he would not believe any form of information emanating from a chief, much less to buy land, recounted how land for which he had handed his life's savings as well as pension, was sold to three other people, even after he had erected a makeshift building on it to secure it. In another, the chief refused to sign the title deeds to a piece of land for which the full purchase price had been paid, and on which a house had been erected; and in a third, a close relative of the chief recounted how land he had bought was subsequently sold to another man who quickly proceeded to build on it.

Old Dansoman illustrates how difficult it is in practice to apply the text-writers' theories of land tenure to specific communities. By the middle 1950s, Old Dansoman was generally acknowledged as falling within outskirt

lands in the west of Accra belonging either to the Sempe or Jamestown stools. Neither stool had established a village there, though the Sempe had an old royal cemetery beyond the Mampon stream which lies to the west of present day Old Dansoman. Each of the two competing stools therefore needed the establishment of some form of jurisdictional power within the area in question in order to prove that it owned the allodial title. In a classical case of coincidence of wants, several men, including the present chief of Old Dansoman, also realised the possibility of ample financial returns to themselves from the sale of Old Dansoman lands while at the same time helping to stake the sponsoring stool's claim to the allodial title.

Today Old Dansoman is a dusty suburb of Accra, criss-crossed by drooping overhead cables. There is no land left to sell, and the chief and elders are quite irrelevant to the needs of the heterogenous community. It is likely that chiefship in Old Dansoman would prove a one- or two-generation phenomenon. This contrasts sharply with the picture at Domiabra where the land market is not as developed, and the economic, social and political lives of the people still revolve around the concept of chiefship. Stool subjects obtain grants of land for farming and residential purposes as of right, whereas in old Dansoman, which is barely three miles from Jamestown, subjects of the Jamestown stool who attempt to obtain land are treated as any other purchaser and are required to provide the appropriate consideration. In fact, Jamestown stool subjects have less than two per cent of the holdings at Old Dansoman. For all practical purposes, inhabitants of the old Jamestown quarter have lost all their customary claims to lands in the

new suburbs, and with that, all the rights which are claimed for them. Equally, the Jamestown stool does not exercise any form of control or authority over the place. In every respect, the "sub-paramount" title has assumed a nominal character.

The conclusion from our brief excursus is that the category of ownership known as the "sub-paramount title" only seems to exist temporarily while an area is undeveloped, but rapidly vanishes once development has been achieved and local chiefship has become redundant. It is contended here that the factual situations on the ground tend not to conform to the principles stated by the major text-writers. It has been shown in the second half of this section that the distinction between the paramount and the sub-paramount titles is far from clear, the latter being largely a legal fiction that facilitates the sale of outlying lands to the detriment of the subjects of the paramount stool. The section has also sketched out a picture of a confused mass of dicta relating to land tenure.

In the next section, this picture will be filled out by describing and analysing the nature of lesser interests in land - usufructs, pledges and tenancies. In the case of pledges and tenancies, their essentially rural and subsistence character will be brought to light. The state of land tenure in Ghana calls for reform, involving particularly a strong emphasis on the principle of caretakership enunciated in Golightly v. Ashirifi,[48] as that would introduce a check on the activities of suburban and rural chiefs and introduce

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[48]Kokomlemle Consolidated Cases (1951) D.C. (Land) '48-'51, 312; (1955) W.A.C.A. 676; (1961) 1 G.L.R. 28, P.C.

the element of accountability into their activities in relation to land. Once they are seen as mere caretakers, and not holders of the "sub-"paramount title" who may convey it in their own right, much of the confusion with regard to title will be solved. A significant proportion of property disputes today seem to arise wholly or in part from transaction costs arising from the acquisition of land and does not often involve questions relating to fundamental principles of customary land law.

5.1.2 The determinable or usufructuary title

The previous section dealt with a topic that related mainly to group interests in land and how those interests are alienated to the general public. The present heading focuses upon the nature of the interest that an individual holds in group-held land. That interest, which has come to be known as the determinable title, is a relatively new development in Ghanaian land law, marking the first adaptation of the traditional model of land ownership to modern conditions. In the western parts of Accra, the creation of determinable interests out of stool and other group-held lands on a regular basis appears to have been a direct response to the growth of the city and the realisation among traditional office-holders that land could be bought and sold like any other article of commerce. Many of the early acquisitions of land by individuals appear to have been done with little regard for accurate boundaries. The majority of those acquisitions involved little or no consideration and any disputes that arose from the acquisitions seem to have been handled competently by the traditional authorities.

However, once a system of courts had been established in the country and a large number of people had acquired title to land on a contractual basis it became possible to define the legal characteristics of the interest that the usufructuary acquired under customary law and to differentiate it from the allodial title which the original land-owning group held. Thus the determinable is defined as the highest interest that an individual (stool subject or stranger) can hold in stool or family land.[49] In fact, "usufruct" is an imprecise and misleading way of describing the nature of the individual's highest interest in land, and in recent years "proprietary occupancy" and "customary law freehold"[50] have been suggested as more acceptable terms. The Roman ususfructus, to which the term owes its origin, entailed more limitations than the determinable title in Ghana. The holder of the Ghanaian usufruct can sell, mortgage or lease such property. He holds it in perpetuity, and it is both heritable and alienable. It was held in the case of Awuah v. Adututu,[51] that the subject of the stool or stranger/grantee of the stool can maintain an action against even the stool in defence of the usufructuary title and might impeach any disposition of such interest effected without his consent in favour of a third party.

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[49]But see dicta in Afuah v. Sarbah, (1974) 1 G.L.R. 47 and Nasali v. Addy Supreme Court judgment, 7 April 1987, unreported; digested in (1987-1988) G.L.R.D. 17 which suggest that the interest that the extended families involved in both cases held in the lands in question was a usufruct. On the principle that the usufruct co-exists with the allodial title, see Awuah v. Adututu, Court of Appeal judgment, 28 July 1988, unreported; digested in (1987-1988) G.L.R.D. 73.

[50]Bentsi-Enchill 1964, p. 230. See also, K. Bentsi-Enchill, "Do African Systems of Land Tenure require a Special Terminology?", Journal of African Law, Vol. 9 (1965), pp. 114-139, esp. pp. 120-129 which puts forward similar views.

[51]Court of Appeal judgment, 28 July 1988, unreported; digested in (1987-1988) G.L.R.D. 73.

Theoretically, the usufruct may be lost upon abandonment; undeveloped land of which the usufruct may already have been transferred may even be legitimately re-allocated by the stool or family. It is, therefore, not indefeasible. In Domiabra, several cases were recorded of the allodial title of the stool reasserting itself upon abandonment, but the situation was different in the centre of Accra where the high demand for land makes abandonment virtually impossible. The usufruct is by far the commonest interest in land today, and the basis on which modern individualism has been founded. But if our conclusions concerning the distinction between the paramount and sub-paramount titles are valid, many usufructuaries, such as those at Old Dansoman, may well have to re-negotiate their interests with the paramount authorities.

The concept of the usufruct has received its most extensive working out in relation to urban (particularly outskirt) lands and in rural sectors affected by the encroachment of agribusiness and cash crop farming. A quick glance at the way in which the sale of land to individuals and the clarification of titles to land proceeded in Accra should throw some light on why the opening up of Accra outskirt lands played such a critical role in the emergence of the usufruct. As urbanisation increased the volume of land sales and the expansion of the frontiers of the city in a series of localised sales across the city, each spate of land sales was normally followed by a wave of litigation in the courts through which the titles of both the sellers and the buyers were established. In other places where no such litigation occurred, especially over the vendor-stool's title, uncertainty loomed.

The pace and pattern of land sales can be traced through a number of key-dates. The most important of these is 1939, which marked the commencement of the post-earthquake period. The earthquake of that year generated unprecedented levels of construction activity, including the construction of extensive housing estates by the colonial authorities in the suburbs to re-house victims of the disaster. The second most important key-date is 1962 when the Land Registry Act, 1962 was passed (on this see in detail chapter 6.3.2.2 below). The post-earthquake period saw the consolidation of landed interests and the beginning of landlessness among many indigenous people. It also saw the opening up of rural areas to development. The appearance of private transport operators using "tro-tro" mini-buses and "mummy trucks" to ply the new motor-roads helped to create a vast land market in rural and outskirt lands and transformed many of the new suburbs into dormitory towns. At the same time, several landmark decisions by the Land Court as well as a number of acquisitions of tracts of land by central government provided the legal bases for the exploitation of these markets by traditional authorities. By the end of the time-periods described above the usufruct had, in Accra, largely taken the form of a building right.

Various reasons account for the evolution of the individually owned usufruct into freehold. The introduction of an increasingly capitalistic mode of production into the country, together with the establishment of an English-type system of courts and the adoption of the English law of property and conveyancing aided the evolution of the individual's title into a genuine

freehold. The development of the usufruct started slowly with a presumption in favour of family or communal lands, even in the face of evidence that the individual had expended labour and capital on a distinctive portion of the land. But soon the nuclear family came to be recognised more and more as a distinct unit whose unique interests in land often have nothing to do with the contribution of the consanguine family.

In Jamestown, an interesting pattern seems to have developed with regard to the origin of the determinable title. In Districts A and B, where practically all lands were acquired in the pre-earthquake era, the majority of informants stated that the original acquisition was done by entire families or that, in cases where the acquisition had been effected by an individual, members of the extended family had either helped substantially in the consequent development of the land or had been allowed to occupy houses without let. Over a few generations such lands acquired a communal character. This was contradictory to the ethos of self-improvement and the principles of individualism on which the new legal dispensation was based.

Both District C (in Jamestown) and Old Dansoman present a different picture altogether. These places were developed largely in the post-earthquake era and in both it was more usual to set down transactions in relation to land in documents. Lands in these places were often originally acquired for building purposes by men and women who frequently acquired their money independently of their extended families. They often laid out large sums of money in buying and developing their lands which they treated to all intents and purposes as distinct from ancestral property. As a result,

a cleavage started to develop between communal and individual ownership.

It would appear from recent trends that the usufruct is still in a state of development, particularly to accommodate new concepts of land use.[52] In evaluating the evolution of the usufruct, it is important to seek answers to the questions of certainty, defeasibility, efficiency, heritability and alienability of title.

Turning again to the theme of the subject's interest in stool land, the following data were recorded at Old Dansoman. One informant close to the chief said the clearing and occupation of unallocated land by a subject would be regarded as an unlawful act. All twelve Jamestown stool-subjects interviewed in Old Dansoman who were among the first purchasers to move into the township acquired their holdings through the payment of valuable consideration to the chief, and did not for a moment consider acquisition of the usufruct simply by clearing the land and occupying it. Yet, in Domiabra, the family, like the individual, may acquire the determinable title by clearing virgin bush, and there is no limit on the amount of land one may thus acquire in the outskirts of the village. This is, however, not true of land in the immediate vicinity of the village which is increasingly subject to the pressures of intense cultivation and population as well as sale to absentee farmers from the city. Where a family acquires the determinable title by the joint efforts of its members, the property so acquired is presumed to be family property.[53]

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[52]See e.g. Amatei v. Hammond High Court judgment, 26 February 1979, unreported; digested in (1981) G.L.R.D. 23.

[53]See Tsetsewa v Acquah 7 W.A.C.A 216. See also Nugent v Narteh 3 W.A.L.R. 537; and Ansah v Sackey (1958) 3 W.A.L.R. 325

Moreover, Mensah v. SCOA[54] is authority for holding that where an individual purchases property with his own money, and other members of his family help substantially in its development, it assumes the character of family property. This is a logical application of Deane CJ's dictum in United Products v. Afari[55]: "The presumption with regard to land in this country is that it is family land." This is so, especially where the land in question does not appear to have been reduced to the exclusive occupation of the individual. In such cases, there appears to be a co-existence of the individual's and the family's interests, the latter surviving the extinction of the former. Individual ownership is restricted to properties acquired by the individual's own unaided effort. Thus it was especially in the area of contract, aided by the legal terminology and draftsmanship of the early lawyers, that the Ghanaian freehold was most vigorously developed. Its final enunciation, in a long line of cases, was left to the courts.

It has more recently been argued that the process of the individualisation of interests under the customary law of Ghana was the deliberate policy of a movement in the courts around the turn of the century which sought to encourage and promote English legal concepts into the indigenous law.[56] According to this view, the adjudicative processes of the

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[54](1958) 3 W.A.L.R. 336.

[55](1929) D.C. '29-'31, 11 See also Welbeck v. Brown (Sarbah) F.C.L. 185; Halmond v. Daniel (Sarbah) F.C.L. 182.

[56]L.K. Agbosu, "Individualisation of Interests under the Customary Law of Ghana," Review of Ghana Law, Vol. 13-14 (1981-82), pp. 35-50. Cf. Bentsi-Enchill 1964, p. 226 where he characterises the indigenous system of land tenure as an attempt to reflect in Ghanaian law the "wonderful calculus of estates" that exists under English law.

courts were deliberately used by a number of Ghanaian and British judges to establish the freehold title in Ghanaian law without seriously considering the likely effect such changes in the tenure system would have on the socio-economic and political value systems of the indigenous communities.

Several leading cases in Ghanaian land law bear testimony to the impact of the adjudicative processes of the courts on the development of the usufruct. In Owoo v. Owoo[57] it was held that a structure which an individual erected out of his own private means on family land is family property and is not heritable, the builder having only a life interest in it. In Santeng v. Darkwa,[58] the court held that a house built on what appeared to be the ruins of an abandoned family house was individual property, even though the family retained its interest in the land on which the house stood. The apparent inconsistency in the two cases was finally settled in Larbi v. Cato[59] which unequivocally resolved the conflict in favour of the individual. In that case the courts gave recognition to the rise of individualism, and the reception of new economic ideas within a national macro-economic framework by endorsing the primacy of individualism over communalism. Therefore, where a family member was sponsored abroad for professional training, and other members of the family made token contributions to a

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[57]11 W.A.C.A. 81. See also Tetteh v. Anang, Land Court judgment, 11 December 1957, unreported where the court said: "The land is an ancestral property, therefore a member of the family who builds on it with his own money will have only a life interest and nothing more... and he cannot devise it under his will."

[58](1940) 6 W.A.C.A. 52.

[59](1959) G.L.R. 59.

house he eventually built, the property did not acquire a communal character.

Though Larbi v. Cato[60] constituted a distinct landmark in the evolution of the Ghanaian usufruct, the character of the resulting title was still marked by an element of imprecision. This, as we have already observed, was partly the result of the vagueness and artificiality of the distinction between the paramount and sub-paramount titles. But it is also due to the archaic and inefficient nature of the land market organised around local chiefs as well as the absence of a system of title registration. In several cases at Old Dansoman, once the purchasers had completed their buildings, they never bothered to obtain conveyances from the chiefs. In one case, the chief's receipt had been written on the page of an exercise book with part of the exercises still on the side. In the rural areas, the title situation is confused by the fact that individuals could occupy and obtain title to communal land without a clear demarcation of the boundaries.[61] The lack of an efficient system of birth and marriage registration also aggravated the above problems because even where the prospective purchaser was able to trace a good root of title to a particular past holder, he was often unable to obtain satisfactory documentary evidence as to which of the acquirer's descendants and relations could alienate the land validly. The "public memory" has not

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[60]Id.

[61]Concerning the rural areas of Ghana, Ollennu stated (1962, p. 34): "Since it is by the subject's occupation of land that the land becomes stool land, since it is by the subject's exertion of energy and skill, i.e. farming, hunting, etc. that a stool acquires land, every subject has an inherent right to occupy a portion of any vacant stool land, i.e, land not in the occupation of another subject or of a grantee of the stool. His occupation is presumed to be upon grant though at times it is upon actual grant...The subject is not rationed in the amount of agricultural land over which he may acquire a determinable title."

always proved a reliable system of recording grants of land where an extensive market develops for lands in a locality.

The usufruct provides a fine example of judge-made law in aid of social change and development. As we have seen, the usufructuary interest was the basis of cash crop agriculture, enabling "strangers" to participate in the national economy and thereby raising the standard of living of large sections of the population. In urban areas, it aided the process of settlement and integration of newcomers and created greater national cohesion.

The usufruct is most developed in urban areas where the boundaries of the land are well demarcated and where abandonment hardly occurs. Where the "stranger" acquired land by grant, he was like the stool subject, capable of enjoying the whole range of interests in land except the allodial title (see above, p. 179). The quantum of interest alienated to him had to be defined in elaborate and careful legal terminology. Though the "stranger" was capable of being the beneficiary of a gift inter vivos of stool land, the commonest form of acquisition was by purchase or contract evidenced by deeds drawn up by English-trained lawyers. In the agricultural areas in particular, the usufruct has been the main link through which enterprising farmers and small-scale agricultural entrepreneurs have contributed towards economic productivity. It can be argued that the usufructuary's initial investment, in the form of the purchase price, ensures that he takes steps to secure a decent return from the land. Thus, land and capital were the most important factors in the development of the usufruct. Once land had been purchased on a usufructuary basis, it was relatively free from uncertainty and

the initial capital investment in the form of the purchase price induced further capital investments in the land. Moreover, the relative freedom from the necessity of further expenditure in uncertainty reduction provided the holder of the usufruct with a further incentive for investment in the land he had acquired.

If, we turn to an examination of recent developments in the nature of the usufruct, the cases of Amatei v. Hammond[62] and Afuah v. Sarbah[63] are particularly significant. Amatei v. Hammond involved conflicting claims over land at Osu. The plaintiff, who was a stool subject, had farmed on the land before the stool decided to divide it into building plots. After this division, the plaintiff obtained an express grant of a portion of it from the acting mankralo or deputy chief. But after he had built on it, the defendant challenged his title, claiming an earlier grant of the same land to him by a previous mankralo who had had differences with one of the stool elders and had consequently been destooled. On these facts, it was held, inter alia, that the interest that the plaintiff had earlier held in the land through his farming activities was lost when the land was divided into building plots for the entire community.[64] The principle in Amatei's case should raise serious new questions about the indefeasibility of the subject's usufruct. It constitutes a divestiture of one of the most fundamental principles on which the relationship between stool and subject is based.

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[62]High Court judgment, 26 February 1979, unreported; digested in (1981) G.L.R.D. 23.

[63]See above note 49.

[64]This appeared to overturn the principle in Ashiemoa v. Bani (1959) G.L.R. 147.

Woodman has, however, suggested that the decision in Amatei's case can be justified on policy grounds.[65] In his opinion, the principle in Amatei's case involves a conflict between two objectives, namely the enhancement and protection of private property rights, and the distribution of land in such a way as to promote intensive use by as many persons as possible. Against the obvious injustice of depriving an individual of his land and denying him the benefits of any developments he may have made on it, Woodman opines that it may be equally unjust to allow an individual to enjoy the enhancement in value of his land which he has not himself produced. It is hard to see how such a policy, operated by stools, could work in practice without the element of compensation and without raising fresh questions of the security of tenure of usufructuaries. Yet the question of equity in the distribution of stool land is one that is becoming more and more relevant as urban lands become scarcer. It is easy to see cases in which the redistribution of land by government, rather than the stool, would be justified.

An obvious instance is where the stool subject, in exercise of his customary right, acquires the usufructuary title to an extensive tract of stool land to the detriment of other members of the community. The case of Afuah v. Sarbah[66] is in point. It concerned a dispute about the usufructuary right to 180 acres of land at Odumtia, near Amasaman. The land was part of lands acquired by the Asere stool after the defeat of the Akwamus. Abban J. found

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[65]G.R. Woodman, "Land Use Policy and the Extent of the Usufruct," Review of Ghana Law, Vols. 13-14 (1981-82), pp. 200-204.

[66]See above note 49.

that even though the Asere stool held the absolute title to the land, the plaintiff's father, an Asere man, had found the land vacant and had acquired the usufructuary title. In their counterclaim the defendants stated that after the defeat of the Akwamus the Asere stool granted a usufructuary interest in the land to their ancestor, Nii Arday Sarbah, who was one of the warlords of the Asere stool. Neither party claimed the sub-paramount title. The effect of the decision in Afuah v. Sarbah was to deny the descendants of one of the men who fought in the Akwamu wars a share in the enjoyment of one of the main benefits that fell to the stool's lot as a result of their ancestor's efforts. Certainly, in Afuah's case, the view can be argued that it is manifestly unfair for an individual to acquire the title to 180 acres of stool land without the payment of valuable consideration, while his fellow subjects remain landless simply because he was the first to lay claim to it. Policy considerations ought to have been relevant here.

5.1.3 Tenancies

Tenancies within our field-area are mainly agricultural in character. The lack of relevant data in the other field-areas has made it necessary to anchor the discussion in this section in practices that prevail at Domiabra. The development of the usufruct in the urban areas and in cash crop-growing areas of the rural sector makes it possible to advocate the adoption of market-orientated strategies of development in those areas. But there is a consensus of opinion that in isolated rural communities and in the poorer areas of the cash crop belt, there is a need to adopt a basic human needs

approach to development as the slowly changing framework of rural society cannot possibly support the rapid rate of social change involved in the implementation of market-orientated strategies. It is urged that in such areas land is basically part of the social relations between people and society rather than part of the economic relations between persons in society.[67] Tenancies probably provide the best example of the accuracy of this statement.

The main forms of tenancies appear to have been developed in response to the advent of commercial agriculture and the influx of poorer strangers. The two main forms of tenancies that were identified at Domiabra were free or gratuitous tenancies and periodic tenancies. Both are normally associated with shifting cultivation and the subsistence economy, but have through the mlidzaa and adode systems, to be discussed below, been adapted to meet the demands and vagaries of small-scale agriculture. Remarkably, there was no incidence of the abunu and abusa systems of tenancy in Domiabra.

TABLE 10

AGRICULTURAL TENANCIES AT DOMIABRA

Tenancy	No. of years	Strangers	Subjects
Periodic tenancy	3 - 7	-	5
Free tenancy	1 - 4	6	2
Abusa	-	-	-
Abunu	-	-	-
Other tenancies	1 - 3	-	7

[67]See P. McAuslan, "Land Policy: A Framework for Analysis and Action", Journal of African Law, Vol. 31 1987, pp. 185-206 at pp. 186-187 and references there cited.

In Table 10 above we have described the incidence of the various tenancies in Domiabra, the only rural community within the field-area. The absence of abusa and abunu forms of tenancy (see below, pp. 314-315) testify to the lack of cash crop farming within the community. Periodic and free tenancies, though less sophisticated than other forms of tenancies, occur fairly frequently. But they are characterised by low levels of investment in farming activities.

Free tenancies or tenancies at will or bare licences are tenancies for no valuable consideration. These forms of tenancy were widely practised on hitherto unutilised family lands by a handful of aliens and a couple of stool subjects. All the tenants were involved in food-crop farming, but did not seem to have the financial and capital resources that the typical small-scale farmer needs to start-up.

In the main, the tenancy comes about in the following way. As a token of friendship or kinship, the grantor permits a landless or impecunious tenant to exploit a piece of land for which he has the determinable title. No rent is payable, and the grantor does not exercise a right to a fixed share of the crop. Free tenancies are usually associated with the most irregular forms of agriculture and characteristically involve very little legal formality. They are usually the result of oral agreements with little or no specific obligations and are not assignable to third parties. Though it might be reasonably argued that such tenancies soften the burden of poverty in Domiabra and extend a means of livelihood to those who might otherwise starve, free tenancies are associated with the most inefficient and haphazard forms of production. Most

of the tenants seen in Domiabra showed little interest in the preservation of the soil and the use of effective farming methods. Most of the tenants we came across employed the most primitive means of production, and did not arrange their economic activities in terms of investment and return to capital. Without a proper contract with its attendant security of tenure and lacking the provision of even the most elementary capital structures in his farming activities, the "free tenant" is perpetually caught in the poverty-creating cycle of subsistence farming.

Periodic tenancies may be annual, seasonal or for a few months. The majority of periodic tenants were also engaged in food-crop farming. In practice, periodic tenancies involve the granting of fallow or overgrown farms to tenants who work them for a fixed period, usually a season. The so-called corn tenure is a good example; but it equally applies to shallots, cassava, millets, pineapples, etc. The tenant, usually a young man looking for seed money to start his own farming operations, tills the soil, takes advantage of favourable climatic conditions, and plants the crop. Once the crop is reaped, the tenancy determines, and the land reverts to the owner of the determinable title. Periodic tenancies are fairly common in Domiabra during the rainy season when school-boys, farm labourers and part-time workers rush to cultivate the soil. Many have no plans to become full-time farmers, simply regarding the favourable weather conditions of the rainy season as an opportunity to earn an extra income.

We consider finally two important forms of tenancies which, though important elsewhere in Ghana, do not occur within the field-area. These are

the abunu[68] and abusa tenancies. They are the most important forms of agricultural tenancies in rural Ghana and may cover any form of agricultural activity. They are especially employed in farming but may also cover the gathering of snails, mushrooms, firewood or the felling of timber.[69] Under the abusa system of tenancy, the ratio of sharing of the proceeds of the tenant's activities on the farm is 2:1. The Twi word abusa, literally means division into three,[70] and under it, the grantor takes one-third of the proceeds of the farm.

The main difference between abusa and abunu tenancies is that the former involves the granting of uncultivated land. Abunu tenancy, on the other hand, involves either the granting by the owner of an already cultivated farm to another or the financial assistance to the tenant by the owner.[71] A tenant gets a bigger share of the crop under the abusa system of tenancy. The Court of Appeal held in the case of Fanyie v. Lamptey[72] that in a dispute as to whether a particular transaction constitutes an abusa rather than an abunu tenancy the burden of proof is on the party who alleges that it is an abusa tenancy. In that case the plaintiff-tenants sued the defendant in the High Court for a declaration that they were abusa tenants and for an order compelling the defendant to enter into a written agreement to that effect. It was contended on behalf of the defendant that the plaintiff-tenants had

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[68]See Sarbah 1968, p. 70 where he describes a Fanti form of abusa tenancy, abehem which he associated with the cultivation of palm land. See also, Danquah 1928a, pp. 220-221.

[69]Ollennu and Woodman 1985, p. 88.

[70]Danquah 1928, p. 220.

[71]Ollennu and Woodman 1985, p. 89.

[72]Court of Appeal judgment, 4 February 1988, unreported; digested in (1987-88) G.L.R.D. 79.

agreed to hold the land as abunu tenants and were bound by that agreement. The trial judge found for the defendant. On appeal, it was held inter alia that a plaintiff who alleged that he was an abusa tenant had the burden of persuasion with regard to the fact that the land was uncultivated and that he made the farm with his own funds and labour. The court further held that the plaintiffs were relieved of that burden by the admission made by the defendant on the pleadings and in his evidence.

Under the abusa and abunu systems of tenancy the tenant actually runs the farm on a day-to-day basis, and works the land on his own from the period of clearing and sowing to harvest time. He is solely responsible for the provision of all capital, labour and entrepreneurial skills as well as the care and maintenance of the farm. The grantor's position smacks of landlordism - he makes his land available under the system, and simply collects his profits at the end of the season. But he must take every step to protect the tenant against third parties who might either assert an adverse title or encroach on the land.

But the abunu and abusa tenants have no security of tenure, and cannot use the land as collateral to raise funds to improve agricultural activity. All physical improvements to the land, especially in the case of perennial crops, will ultimately benefit the grantor. Also, the grantor, at all times, has a right to any naturally-growing trees on the land like cola trees, timber and oil palm. However, where the crops planted are perennial, the tenant's successors are entitled to enjoy his interests in the land. The tenant could also transfer his interests to a third party after due notice to the

landlord. For an agricultural country, the consequences of widespread economic activity on the basis of these unsecured forms of tenancies could be enormous. By their temporary nature, they do not permit much scope for long-term agricultural planning. They act as a restraint on the efficiency and maximisation of production, and consequently, of wealth. It is probably significant that the large-scale migration of Southern Ghanaian farmers into the cocoa-growing belt of the Eastern Region, described as "one of the great events of the recent economic history of Africa south of the Sahara,"[73] almost always involved the outright purchases of land by the farmers. Security of tenure, and a high capital outlay on farms, rather than temporary share-cropping arrangements must be the objective of future rural agricultural policy.

"Other tenancies" (see Table 10) refers to forms of tenancies discovered at Domiabra which do not fall into any of the above categories and which have so far escaped the attention of the text-writers. The most outstanding characteristic of these tenancies is their flexibility. It was observed at Domiabra that there are occasions on which a tenant takes over the operation of a farm and agrees to share the proceeds of his labours with the grantor using a flexible system of division or mlidzaa of the proceeds. Thus the proceeds may be divided into three mlidzaa ete or four mlidzaa edzwe. The mlidzaa system of tenancy enables farmers who are disabled from continuing farming activities by various reasons including illness,

[73]See Hill 1963, p. 1.

bereavement and temporary absence from the village to continue to have a source of income. The tenant, on his part, may use the grantor's tools and inputs. Such tenancies terminate as soon as the grantor is able to resume his farming activities. The mlidzaa system of tenancy appears to be an adaptation of the older adode [74] system of tenancy to suit the changing economic conditions of the Accra plains.[75] Under the adode system of tenancy, the tenant is allowed the occupation and use of the land on condition that he pays a variable sum of money to the landlord every year. Even though the sum is not fixed, the payment is usually in direct proportion to the value of the harvest; in particularly bad years the tenant may pay nothing at all. An adode tenancy is usually limited to the cultivation of annual and seasonal crops. Either party may terminate the tenancy at any time after the service of reasonable notice.

On the whole, the customary law of tenancies is marked by a conspicuous lack of judicial authority on the subject. Most disputes arising out of tenancy arrangements are settled by the parties themselves or by elders within their communities. Tenancies have therefore not been exposed to the same degree of criticism and analysis which so critically resulted in the development of the usufruct as the main form of interest in land in the economically advanced areas of the country. However, this need not

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[74]Pogucki 1955, p. 33. The information that follows on the general characteristics of the adode system of tenancy represents the views of all 48 elite informants in the sample. It was confirmed by the majority of respondents at Domiabra. However, four of the fifteen lawyers interviewed had no knowledge of its existence.

[75]The data which follows is based on information provided initially by the chief of Kwei Kuma We, Jamestown; it was subsequently confirmed by all the chiefs and stool elders who were interviewed.

necessarily imply that the law of tenancies operates less efficiently than other aspects of the Ghanaian customary law of property. As we have shown, practically all tenancy transactions occur in rural societies where, has Allott has suggested, an efficient system of communication and reception of laws generally prevails.[76] Allott has also noted that compared to modern societies, traditional African societies have much tighter and more numerous linkages with feedback loops attaching the commander to his commands.[77] Disputes arising out of tenancy transactions in Domiabra seemed to have been subjected to the most rigorous scrutiny, not least because witnesses frequently appeared to have an intimate knowledge of the land in question, and of past disputes and verdicts affecting it. Also, most elders seemed to know the social history of the families of the parties concerned. Adjudicating elders considered it their duty not only to administer the law but also to achieve a fair resolution of the dispute in a way that does not endanger social harmony. Their verdict is therefore often widely communicated to members of the public, particularly to members of the extended families of the disputants.

The case of adode and its adaptation into a mlidzaa system of tenancy appears to illustrate the existence of mechanisms in traditional African societies for the feeding in of the popular view of the law so as to modify its operation in practice.[78]

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[76]Allott 1980, p. 73.
[77]Ibid. p. 69.
[78]Id.

5.1.4 Pledge or hypothecation

This section considers the nature of the customary law of pledges and the effect of legislative intervention upon it. It is not intended here to make an exhaustive survey of the customary law of pledges in Ghana but rather to focus on the effects of legislation upon the old customary law.[79] It is now over three decades since Bentsi-Enchill wrote despairingly about the lack of legislative and judicial activity on the customary law.[80] The evolution of the law of the pledge is a striking example of the progress that has since been made in the indigenous law. A customary pledge is "the delivery of possession and custody of property, real or personal, by a person to his creditor to hold and use until the debt is paid, an article borrowed is returned or replaced, or an obligation is discharged."[81] Sarbah defines it as "the delivery of a thing or chattel to a creditor as security for money advanced or due, on condition of his restoring it to the owner after payment of the debt, and subject to a conditional power of sale if the loan or debt be not paid at a certain specified time."[82] For a transaction to constitute a pledge, the pledgee must be placed in possession, occupation and control of the pledged land.[83] The pledging of chattels was effectively abolished by the 1940

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[79]G.R. Woodman, "Development in Pledges of Land in Ghanaian Customary Law"Journal of African Law, Vol. II (1967), pp. 8-26 contains a good review of the the most significant cases in the customary law of pledges.

[80]Bentsi-Enchill 1964, p. 1.

[81]Ollennu 1962, p. 82; see also, Ollennu and Woodman 1985, p. 219; Rattray 1956, pp. 357 et. seq.; and P. Hill, The Gold Coast Cocoa Farmer, London 1956.

[82]Sarbah 1968, p. 82. See also, Danquah 1928a, p. 219.

[83]Ollennu and Woodman 1985, p. 105.

Pawnbrokers' Ordinance.[84] The effect of the Ordinance was to provide a commercial basis[85] for the pledging of movables which could not be met by the largely illiterate and poorer sections of the population who were the most frequent users of the pledge in non-agricultural areas. The present customary law of pledges, then, relates only to land, and the circumstances in which the owner of an interest therein may use it as a security. Moreover, the nature of the pledge transaction has been altered by the enactment of the Mortgages (Amendment) Decree, 1979 (A.F.R.C.D. 37).[86]

Together with the customary system of tenancies, several strictures have been made against the pledge, particularly on the basis that it represents exploitation of proprietors who find themselves in financial difficulties.[87] This is because the pledgee in possession is permitted the use of the pledge property without any liability to account for depreciation and wear and tear. Moneylenders often demand high interests in addition to their enjoyment of the profit. Besides, because the property actually passes into the pledgee's hands, the pledgor is unable to use the capital raised on the security of the property to improve his farm. The capital often ends up dissipated on uneconomic pursuits or extravagant social activities, and the pledgor is, in the end, unable to redeem his property. The pledgee's right to

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[84]Cap. 189. That the pledging of movables or ahoba is still prevalent is one point on which there was unanimous agreement among all 208 informants who considered the pledging of movables a useful mechanism for tiding oneself over through financial crisis.

[85]This included the requirement that pledgees should satisfy conditions relating to registration and recording of transactions.

[86]The effect of this statute on pledge transactions is considered below.

[87]See e.g. Asante 1975, p. 213.

beneficial enjoyment of the property is quite apart from his right to the repayment of the principal borrowed, which in turn may be payable with interest.[88]

Asante asserts that moneylenders/pledgees invariably demand interest notwithstanding their enjoyment of the profits.[89] He goes on to argue that the pledge therefore offends the rules of "production economics", and brings untold hardship on the borrower who may not be able to redeem his property at all. This, he says, is especially the case where farms with perennial crops are pledged. The pledgee tends to strip the land of its yield, exploits it of its future sustenance of crops, uses the most reckless methods of cultivation, and abandons it in the long run. Indeed, the pledgee may not even be a farmer at all and may consequently not be conversant with the best methods of maximising his output from the land; yet his right to beneficial enjoyment is limitless. Ollennu said:

> "Its purpose, essentially, is not so much to hold the pledge property as security, as to have its use as interest on the amount borrowed or as mesne profit upon the article or goods lent or given on credit. Therefore, when land or other property is pledged, the legal implication is that the pledgee may use it, and that he is not answerable for any deterioration which is the natural consequence of such user."[90]

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[88]Id.

[89]But see section 3(1) of the Loans Recovery Ordinance 1918 (Cap. 175) which provides that if in an action for the recovery of money there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive or that the transaction is harsh or unconscionable or such that a court of equity would give relief, the Court may re-open the transaction and inter alia create a new obligation or relieve the person sued from payment of any sum in excess of any sum adjudged by the Court to be fairly due. See G.R. Woodman, "Developments in Pledges of Land in Ghanaian Customary Law", Journal of African Law, Vol. 2 (1967), pp. 8-26, esp. pp. 15-18 which consider, inter alia, the effects of the Loans Recovery Ordinance, 1918.

[90]Ollennu 1962, p. 95.

But a pledge is not always to the advantage of the pledgee in possession, especially where he is not a farmer. In Domiabra, several non-farmer informants who advanced moneys on the strength of a pledge transaction recounted how they found the land exhausted, the farm overgrown with weeds, and how they had found themselves unable to cope with the demands of farm management.[91] It is therefore equally to the point to argue that the pledge transaction does not always necessarily work to the disadvantage of the pledgor. Many pledgees at Domiabra were irked by the fact that the pledgors seemed to suffer no real hardship at all as they simply transferred their activities to new farm patches in exercise of their right as stool subjects.

Any interest in land, except an annual tenancy, may be pledged.[92] Where the determinable title is pledged, customary law has devised ingenious means of protecting the interests of the holders of the allodial title. In such cases, the pledgee is obliged to perform customary services to the stool or family in which the allodial title is vested.

In order to maximise his returns from the pledged property, the pledgee in possession may take steps to improve it.[93] In such an event, customary law bars the pledgor from redeeming his property too soon. He has either to grant the pledgee an extension of time to enjoy the fruits of the

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[91]But see P. Hill The Gold Coast Cocoa Farmer, London 1956, p. 57: "As most creditors are cocoa farmers, they know how to supervise the labourer in charge of the pledged farm. They are farmers who, through good fortune, hard work, frugality, inheritance, or the eye for an economic opportunity, have saved some money which they are desirous of lending fruitfully."

[92]Ollennu 1962, p. 99.

[93]Ollennu and Woodman 1985, p. 107.

improved land or compensate him for the financial loss incurred by the early redemption of the land. The pledgee, in turn, is under an obligation not to permit the land to deteriorate. The case of Dabla v. Ativor[94] is as good an illustration as any of the rules relating to the redemption of pledge property. In that case, P's father pledged a piece of land bearing a few coconut trees to D. D developed the land into a coconut plantation. P, as his father's heir, served D a notice of redemption. D claimed the transaction between him and P's father was a sale, and not a pledge as by customary law a pledgee is not permitted to improve pledged property, and that in any case, P and his father were estopped from disputing his title as they had sat by while he improved the land. There was compelling evidence, however, that the transaction was a pledge. The trial native court's verdict that the transaction was a pledge, and that the pledgee who improves the land does so at his own cost and expense, was subsequently confirmed by the West African Court of Appeal.[95]

Upon payment of the sum borrowed, the pledgor has unfettered right to redeem his property at any time subject to any compensation that he may have to pay if his bid for redemption is calculated to deny the pledgee the enjoyment of any improvements he may have made to the land. It is well settled that pledged property can be redeemed after any length of time; there is no time bar.[96] In Agbo Kofi v. Addo Kofi,[97] lands pledged in 1869 were

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[94]Land Court judgment, 5 March 1949, unreported.

[95]W.A.C.A., 7 February 1951, unreported.

[96]Cf. Bentsi-Enchill 1964, p. 383: "The principle that once a mortgage always a mortgage is cardinal to the indigenous law, and it is settled law that the pledgor or mortgagor can redeem his property at any time no matter how remote, provided he repays all moneys due on the property - and provided no

successfully redeemed in 1926. Again, in Kuma v. Kofi,[98] land was successfully redeemed by successors of the pledgor after several generations. As soon as the debt is paid, the pledgee must either vacate the land or be ejected.[99] But the pledgee need not surrender possession of the property directly to the pledgor; he could also deliver to an assignee or the person who pays the loan on behalf of the pledgor. Either of these persons simply steps into the shoes of the pledgee and, like the pledgee, does not acquire title to the property; he has merely a possessory right to its use and enjoyment of profits. A member of the pledgor's family qua family cannot interfere with the transaction. He can only step in as a third party, namely, as an assignee or in order to pay off the debt. On the other hand, the pledgee cannot exercise a right of sale of the property unless he obtains an order to that effect from a court of competent jurisdiction.

The pledging of land must be given wide publicity because of the length of time it may take to redeem it. Again, the property involved (land, farm or creek) must be clearly demarcated in the presence of witnesses. The putting of the pledgee in possession of the land in question is an essential part of the pledge. The payment of fees for demarcation as well as the provision of ceremonial drinks are the responsibility of the pledgor.

In addition to the main elements of the customary law pledge

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proceedings to realise the security are taken in the meantime.

[97](1933) 1 W.A.C.A. 284.

[98](1956) 1 W.A.L.R. 128.

[99]See Ebiassah v. Ababio (1946) 12 W.A.C.A. 106.

discussed above, instances have also been documented of self-liquidating pledges where it is normally agreed by the parties that the debt is to be discharged by the pledgee's having the use of the land for a certain period.[100] As it has long been possible for parties to a transaction in Ghana to agree that common law should regulate their rights and duties, it has been argued that it was possible for mortgages to be created out of pre-1979 pledges to be regulated by the common law in the narrow sense, equity and statutes of general application in force in England in 1874.[101]

The nature of the pledge, as outlined above, has been radically altered by the enactment of the Mortgages (Amendment) Decree, 1979.[102] This transformed customary law pledges into statutory mortgages. According to section 1(1) of this Decree, "Every customary loan transaction in respect of which any farm land is given as security for a loan shall be made in accordance with the Mortgages Decree, 1972."

From this, the conclusion has been drawn that "the customary law of pledges continues to exist only for land other than farmland."[103] While section 1 of A.F.R.C.D. 37 provides that all future loan transactions relating to farmlands shall be regulated by the Mortgages Decree, 1972, section 2

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[100]Woodman 1967, p. 13. See e.g. Darko v. Abore; Attoh, unreported judgment of the High Court, Accra, 12 April 1961.

[101]Woodman 1967, p. 19. See section 19 of the Supreme Court Ordinance, 1876 re-enacted several times, and finally incorporated in section 49 of the Courts Act, 1971, esp. Rule 1 which provides that "an issue arising out of a transaction shall be determined according to the system of law intended by the parties to the transaction to govern the issue." As noted earlier in chapter three, the Courts Act, 1971 further provided a list of English statutes that were to continue to apply in Ghana as statutes of general application, instead of all statutes of general application in force in England in 1874. On the possibility of "mixed" transactions incorporating aspects of a pledge and a mortgage, see Woodman 1967, p. 23.

[102]Armed Forces Revolutionary Council Decree 37.

[103]Ollennu and Woodman 1985, p. 102.

converted all past transactions in relation to the same into mortgages. This, it has been argued, may mean the end of pledges in Ghana.[104] This is because all pledges involving farmland will now be subject to statutory regulation under the Mortgages Decree, 1972, (N.R.C.D. 96) section 1 of which provides that,

> "A mortgage shall be an encumbrance on the property charged, and shall not, except as provided by this Decree, operate so as to change the ownership, right to possession or other interest (whether present or future) in the property charged."

It follows, therefore, that the "pledge" (if we may still speak of such)[105] is now only an encumbrance or charge on property, and does not involve, as under the old law, a change in the possession of such property from the pledgor to the pledgee. The pledgor remains in possession while the pledgee only expects the repayment of his loan and interests thereon. Further, the pledgor can raise several loans on the security of the same property. While this was not possible under the old law where the pledgee normally went into possession as part of the loan arrangement, it could also lead to new difficulties. First, it would be difficult for illiterate creditors to determine how many prior charges exist on a particular property which is offered as a pledge; and therefore the advancing of credit on the security of pledged properties would become correspondingly riskier.

Second, there is evidence that loans raised by farmers are mainly

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[104]See E.V.O. Dankwa, "The End of Pledges in Ghana?", Journal of African Law, Vol. 33 1989, p. 185-191.

[105]Section 2 of A.F.R.C.D. 37 specifically converts all past loans relating to farmlands into mortgages and section 1(1) provides that all future customary loan transactions involving the use of farmland as security shall be made in accordance with the Mortgages Decree, 1972 (N.R.C.D. 96).

used for unproductive, non-agricultural purposes.[106] Third, we noted above (p. 323) that even though the pledgee normally entered into possession of pledged property the pledgor always had a right of redemption under customary law, and the pledgor could not enter into multiple loan transactions on the security using the same property, minimising the risk of long-term landlessness through inability to repay his creditors. It is arguable that multiple debts can lead to greater demands by creditors for judicial sale of the land as a way of liquidating the asset pledged and meeting each debt proportionally. If this view is correct, it is probable that A.F.R.C.D. 37 could inaugurate an era of long-term landlessness among farmers who might have been tempted to enter into multiple loan transactions on the security of their farms and then defaulted on repayment, prompting the courts to order a judicial sale under section 18(9) of the Mortgages Decree, 1972.

The pledgee's right to possession is regulated by section 17(1) of the Mortgages Decree, 1972, which stipulates that the mortgagee can go into possession upon the failure of performance of an act or acts secured by the mortgage. However, he may only exercise his right to possession after 30 days notice in writing to the mortgagor "or such longer period as the mortgage may provide."

It has been argued that since by applying the provisions of the Mortgages Decree to pledges, the pledgee's right to possession is no longer

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[106]Many loans go into educational expenditure, including expenditure on uniforms, fees and books. Of farm incomes generally, Hill 1956, p. 102 noted, "The wealthier a farmer becomes the greater the demands made on him by an ever-widening family circle. Medical and funeral expenses, accidents, litigation, the obligations of inheritance - all these loom very large in a society where social services, especially services involving any kind of cash payment, are necessarily rudimentary or non-existent."

crucial to the creation of a pledge, this might affect the incidence of pledges in the farming communities and thereby the availability of credit to those communities.[107] "In that case," says Dankwa, "A.F.R.C.D. 37 would have sounded the death knell on pledges in Ghana with (probably) dire consequences for the national economy." But the same writer concedes immediately afterwards, "the effect on farming of credit from the pledge transaction is not clear."[108] Dankwa's view might be correct if loans raised from pledged properties were the principal means of agricultural finance in Ghana. The evidence is that they are not. On the contrary, the pledge under the old law exposed the borrower to untold hardship. He might lose possession of the very property into which he might invest the capital raised through the pledge transaction. Though not previously prevented from taking mortgages, many financial institutions showed a general reluctance to take mortgages in the agricultural sector. It is therefore probable that by bringing the old pledge into line with the statutory mortgage, A.F.R.C.D. 37 would facilitate the mortgaging of land, providing rural banks and other financial institutions with a more acceptable form of security for their loans to farmers. This would, however, depend in no small way on the manner in which the full effect of A.F.R.C.D. 37 is transmitted into society and the consequent response of the norm-addressees, particularly farmers and bank officials. If this is not properly achieved, then the scenario portrayed by Dankwa might well arise. The effect of (statutory) legal rules on economic behaviour in rural

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[107]Dankwa 1989, p. 188.

[108]Id.

Ghana is far from clear, but if A.F.R.C.D. 37 is effectively implemented in the farming communities, then the concept of the English mortgage would have been successfully transmitted into Ghanaian agriculture with probable beneficial affect.

By virtue of section 18(9) of the Mortgages Decree, 1972,[109] the courts now have supervisory authority over pledges. Under the supervisory power of the court, a judge may order the sale of only part of the mortgaged/pledged property to satisfy the pledgee's loan. This is a welcome development since it has the advantage of ensuring that the pledgor is not disadvantaged by the loss of his entire property for what may only be a small loan. Also, the considerable length of time taken by judicial proceedings should afford the pledgor ample opportunity to seek alternate means of satisfying the debt, and thereby save his property. As an alternative to judicial sale, a pledgee might exercise his right to possession of the pledged property under section 17(1) of the Mortgages Decree, 1972.[110] This, however, entails onerous responsibilities including the duty to account to the pledgor "for any income, whether cash or in kind, derived from the mortgaged property which he has received or without wilful default might have received from the time of taking possession and to pay over to the mortgagor any excess on the amounts due on the mortgage."[111]

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[109]N.R.C.D. 96.

[110]Id.

[111]Ibid. s. 17(3).

The law of pledges is further complicated by the necessity of cross-reference to the Limitation Decree, 1972 (N.R.C.D. 54); for by making the Mortgages Decree govern pledges, pledges have now been brought directly under section 12(3) of the Limitation Decree, 1972[112].

According to this provision, 12 years after a mortgagee/pledgee has been in possession of pledged property, the pledgor loses his right to redeem his land, and his title to it is extinguished. Allott has put forward the proposition that unknown law is ineffective law. He argued that if one does not know that a law exists one cannot voluntarily comply with it. Such a law, he maintains, may be complied with accidentally if it is consistent with norms with which recipients are familiar.[113] On the basis of this argument it is unlikely that A.F.R.C.D. 37, which has never been given particularly wide publicity in rural Ghana, would be complied with on a large scale. Further, as A.F.R.C.D. 37 also cuts across existing mores and expectations by introducing the English law of mortgages into rural Ghana, it may not achieve accidental compliance in the majority of cases.

This will probably lead to considerable hardship to simple, rural people who hitherto have only been familiar with notions of pledgees being in possession of pledge property for long periods. Such hardship will probably be widespread since the legislative effect of A.F.R.C.D. 37[114] is not even direct, but as we have seen, is achieved through a somewhat complicated

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[112]Id.

[113]Allott 1980, pp. 73 and 81.

[114]Mortgages (Amendment) Decree, 1979.

linkage with two other statutes; namely, the Limitation Decree, 1972 and the Mortgages Decree, 1972. This is likely to complicate the problem of the transmission of A.F.R.C.D. 37 into rural society. At the rural level, the confusion that this is likely to produce is well illustrated by some of the long-standing practices of the leaders of rural communities. In Domiabra it is common for stool elders to raise large amounts of cash from big farmers, ranchers or even squatters from time to time to meet costs for some outstanding royal funeral or traditional rites associated with the stool. It is common, in raising such cash, to allow the "benefactor" the use of some farmland. Because of the advanced age of elders, it is probable that within the 12 years set by the Limitation Decree, 1972 many of the witnesses to the original transaction would be infirm, senile, or even dead. In that circumstance, the community would be hard put to disproving any case of a pledge that the benefactor might make, and the provision of the Limitation Decree, 1972 would have been to the detriment of the community.

Land is central to the workings of rural society, and it is in the rural sector that the lesser forms of interest in land (pledge, tenancies, etc.) are most developed. The result of the slower pace of social change in the rural areas and the lower incidence of court-room litigation has been that the lesser forms of interest in land have not been exposed to the same intensity of judicial analysis that ensured the rapid evolution of the usufruct. Therefore their major characteristics still show the flexibility and relative informality that are consistent with the less adversarial "living law" of the rural areas.

A crucial question that emerges from our extensive survey in this chapter is what can be done to improve the certainty of title and possibly increase agricultural productivity. Various answers suggest themselves but it is beyond the scope of the present work to go into detail. One possibility is a modified policy of enclosure of land,[115] appropriately tailored to suit Ghanaian conditions, and radically altering the system of land tenure. It may be said in favour of this approach that it would create an altogether new system of land tenure bereft of the old problems. But the arguments against the enclosure of lands are equally to the point: the enclosure of lands would entail immense financial costs and, at any rate, it is totally uncalled for in the Ghanaian situation. Professor McAuslan has suggested an alternative model which involves the creation/recognition of three broad regimes or circuits of land ownership.[116] According to him, the recognition of the multi-dimensional nature of land, rather than ignoring the existence of different systems of land ownership is the key to effective land policy in the Third World. He has therefore suggested that in systems of law where customary land law exists alongside statutory land law, some recognition be given to both approaches to land instead of the tendency among many developing countries to totally

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[115]On enclosure of lands generally, see F.A. Sharman, " An Introduction to the Enclosure Acts," Journal of Legal History, Vol. 10 No. 1, (1989), p. 46 where he describes it as "Enclosure was the abolition of the open field system of agriculture. The ownership of, and rights over, every strip of land in the open fields and meadows, over the commons and wastes, was taken from the Lord and the villagers and abolished. The old boundaries of the fields, the strips, the baulks and the roadways, might be ignored and the slate wiped clean. Then the land was re-allocated. New or additional roads might be set out, new fields were designed and allocated to Lord and villager, each taking a compact area of a recognisably modern size and shape. The size and quality of these fields depended on the value of the claimant's previous rights... These enclosures were carried out in order to increase the efficiency of farming, to increase the agricultural productivity of land and thus to increase profits." See further p. 61 where he notes that every allotment had to be enclosed with a ring fence and each allottee had to make a public acceptance of his allotment.

[116]McAuslan 1987, pp. 185-206.

reform the customary land law. Since these sectors sometimes overlap, he has further suggested that recognition must also be given to a third sector of land ownership that exists unofficially between the two major systems of ownership and combines aspects of both systems of ownership. Finally, has he suggested that for effective land policy, different approaches will have to be pursued in each circuit that takes account of the needs of the circuit.

5.2 Conclusion

In describing and analysing the nature of traditional land tenure, this chapter has outlined the main themes from which the major arguments in Ghanaian customary law are drawn. These include the inadequacy of customary norms in modern situations, incursions by the state into the traditional scheme of ownership, the advocacy of a system of title registration, succession to property and the emerging role of the nuclear family as well as the function of the legal profession within the Ghanaian legal system.

The rise of the individual's interest in land has partly been a court-engineered process to reflect in African law the primacy of the individual that underlies Western legal and economic philosophy. It is arguable whether the appropriate balance between communal and individual interests has yet been fully struck. While the emergence of the determinable title has secured individual interests in residential property, the control and management of rural lands is still very much in the hands of the representatives of the group. This is reinforced by the largely tribal character of the system of land tenure described in the foregoing pages, especially, as

expressed through the paramount and the sub-paramount titles. That system depends on a simple, communal society based on subsistence agriculture. But the development of the usufruct or customary freehold has enabled it to accommodate the demands of the new "frontier spirit", as non-stool subjects moved into the farming belts to take up large-scale farming.

The chapter has also shown that the "sub-paramount title", far from being a species of title on a par with the paramount and usufructuary titles, is a customary law device to facilitate the sale of undeveloped land, the urban sub-chief and his councillors being no more than a commercial syndicate that may quickly fritter away the proceeds of land sales. One possible method of reform of traditional land tenure, as we have suggested, would be to remould the existing structure to reflect more accurately the underlying social pattern and political structure of the traditional states. It is this writer's opinion that in the alternative, the revival of the concept of co-ownership of suburban and rural lands would also be an effective check on reckless land sales by sub-chiefs, who, ever threatened with destoolment, often do their utmost to realise as much money as possible from land sales. The better solution should be one that involves some form of legislative intervention based on criteria of economic efficiency, equity, certainty and accountability.

At the same time, the traditional tenancies formulated to meet the needs of migrant farmers have developed obvious drawbacks. Nor has the emergence of the nuclear family as an economic unit been reflected in the system of tenure. The best approach would seem to develop the

determinable title in such a way as to link the potential economic importance of the nuclear family to a diminished and yet supportive role of the extended family - a theme that will be explored in its various aspects in chapters 7 and 8 and below. This would best be done by guaranteeing the indefeasibility of the interest that an individual and his family acquire in stool or group-held land. The focus of future development in the land law ought to shift increasingly in favour of the individual. With much of the religious connotations of land already disappearing, the best economic returns from land are likely to be achieved by motivated individuals, assisted by members of their immediate family, planning their farm operations in a rational and cost-efficient manner.

The pursuit of these goals would not necessarily jeopardise the social function of property as the basis of the stabilisation of the family and a means of group cohesion. It would merely shift the emphasis onto the nuclear family, and might well offer an alternative means of group cohesion independent of tribal affiliation in rural areas. Considering that it has been observed that "Land is to the agrarian Akan what cattle are to East African pastoralists," it is baffling that the concept of land as an investment/ production resource has not been more imaginatively employed in Ghana.[117]

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[117]Ibid. p. 185.

CHAPTER 6

LAND AND THE STATE

As we saw in chapter five, the present system of interests in land depends largely on customary law, and is based on the conventional analytical framework constructed by Sarbah and the early writers on indigenous Ghanaian law. The schema so produced has remained a juridical model, a prototype that has been reproduced and refined by subsequent writers. This model is now badly in need of modification to meet the demands of privatisation and marketisation of property. More and more, it is being defied by new social phenomena powered mainly by individualism and the state. The courts have also not hesitated stridently to assert the changing order.[1] In the days when Sarbah wrote, the state had made very little encroachment on the powers of traditional authorities and, indeed, had left traditional land tenure wholly untouched. The chief and his elders or the family head and principal elders were the final arbiters in property matters. According to customary law orthodoxy, their consent or concurrence, without more, validated a property transaction. The unanimity that this usually required was often obtained as a matter of course. Nowadays, with the commercialisation of land, and its subsequent appreciation in value, unanimity is becoming more and more a thing of the past. This is due, as we will see shortly, to all kinds of human and financial reasons. It is from this simple source,

[1]See e.g. Re Appiah (Decd.); Yeboah v. Appiah (1975) 1 G.L.R. 465.

rather than the scientific inaccuracy of boundary-fixing, that many of today's lawsuits spring.[2] Today, in addition to the concurrence of the traditional authorities, the concurrence of the state minister responsible for lands and natural resources is necessary for a valid transfer of land.

This chapter examines, in turn, traditional control of land use, alienation of land, deeds registration, conveyancing and various forms of statutory intervention in the land law of Ghana. The effects of state intervention in the property law of Ghana are set in the context of the general weakening of the basis of land control by traditional authorities. This entails a brief enquiry into abuses of the traditional system, especially as belief in traditional religion has also declined along with the widely-held notion of nemesis for those who wrongfully dispossess others of their land. Consequently, the case for state regulation and control over property could not be stronger.[3]

6.1 Public control of land in traditional society

It is appropriate to preface the examination of state control of land in Ghana with an assessment of the nature of public control of land in traditional Ghanaian society. The purpose of this section is to consider the main forms of public control of land within traditional society and to show how traditional authorities

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[2]Bentsi-Enchill 1964, p. 325.

[3]Belief in traditional religion and the superintendence of human affairs by departed ancestors is strongest in our rural field of study. Taboos and the fear of the swift vengeance of the supernatural is a powerful means of social control among these people. However, though results in our two other areas of study indicate some belief in traditional religion, it is seen as only remotely relevant to human action.

have come to be deprived of their traditional powers of control over the use of land. This approach has the advantage of putting the activities of the state in the control of land use in perspective and enhancing our understanding of the subsequent displacement of the stool's power by statutes authorising the taking of stool lands [4]

In chapter five, the allodial or ultimate title to land in Ghana was shown to be vested in the stool which exercises it through the chief and his elders. Even when stool land is alienated the stool still retains a reversionary interest in such land. The traditional power of expropriation of land originates in the power of the stool occupant over his subjects and lands. The allodial title to land is never completely divested by the stool. Stool subjects or manbii are enjoined by the principle of buleh (respect or discipline) to defer to the authority of the chief. On his part, the chief is obliged by the equally important principle of dzaleh (fairness or the obligation to rule justly) not to deprive his subjects of their property without just cause.

As a result, the action of the chief in taking property for the benefit of the stool is rarely exercised. Where it is exercised the stool may extinguish lesser interests in land and re-establish its original unencumbered title for the public benefit. This is normally accompanied by the compensation of the deprived person. Until recently lands re-acquired by the stool in this way were used for public wells and markets and schools in the rural parts of Accra.

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[4]The information that follows is based on the replies of my informants and is limited to the traditional taking of land in the Greater Accra area of Ghana.

Traditional control over the actual use of land was minimal. The chief and head of family, as trustees and protectors of the lands in their care, allocated land to members of the community for residential and farming purposes. Though their consent was a sine qua non for the allocation of land, the elders formulated very little policy for the control of land development in the modern sense.

It is a matter of trite observation that many of the prohibitions of the traditional system were sanctioned by religion rather than law: particular bushes were set aside as fetish groves; fishing, farming, and hunting could not be undertaken on particular days. Boundary-fixing and regulations on building and rebuilding operations were haphazard. Indeed, close-cluster housing with narrow and winding alleys was deemed a necessity against the dangers that lurked in the forest beyond.

The typical home was an enclosed, compound, family house, seldom sold or let (leases being unknown) and available for the beneficial use of all family members. There was no need for an independent system for the proof of title of original and subsequent holders. In any case, land was plentiful and building cheap.

Over the course of time as more and more people spilled out of the traditional quarters and elsewhere into adjoining provinces, the traditional mechanism with its emphasis on affiliation to one or other of several distinctive lineages and respect for traditional authority waned. In Accra, this meant greater

interaction with persons from other parts of the country.[5] But more significantly, the stool subject's relationship with the chiefs has become less personal. While older citizens often have personal knowledge of chiefs and stool elders, the younger generation, brought up in entirely different circumstances, normally do not.

In many places, both stool subjects and strangers acquire their interests in land by the payment of valuable consideration. In exchange, as we saw in the previous chapter, the stool draws up a title deed vesting the usufruct in the purchaser. Over 95 per cent of lands owned by all persons in the newest suburbs of Accra are acquired by purchase. The remaining 5 per cent are acquired by status almost entirely in the surrounding villages and other less developed parts of the capital.

Today the power of expropriation is, at least officially, solely vested in the state and is exercised through the legislature. Since independence there has been a steady increase in the landholding capacity of the state, and the abridgement of the stool's own powers of alienation over its own lands. This has been achieved through a succession of legislative acts promulgated by post-independence governments to regulate land use by concentrating the

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[5]Some 43 per cent of all respondents (the rural sector aside) had no affiliation to any of the stools in Accra, and owned their lands purely through purchase. Of this group, 99.5 per cent had never been called upon to perform any customary duties to the stools holding the allodial title; their dealings with the stools effectively ended upon the payment of the final instalment of the purchase price. Nearly all the stool occupants spoken to have no comprehensive records of previous land sales. Records available are patchy and generally commence from the post-1964 period. It is clear that the stools simply do not have the administrative capability and know-how to manage what might otherwise be a valuable resource properly. Records for the post-1979 period (nearly all covering leaseholds only) are, on the other hand, meticulous and well kept. The incentive seems to be the ground rent which the chiefs insist they must collect "to maintain the stool. "

ultimate control of land in state-based structures, particularly through the introduction of deeds and titles registration mechanisms. Deeds registration has not been entirely effective, particularly as oral transfers of land have not been registered under the special facilities provided by the deeds registration system. A major burden is imposed by the demands of the rules of evidence. These constitute a crucial fault-line between customary society and state-based structures. Customary society was based on a system that was diametrically different from the modern state. It depended on the smallness of the village or town, and knowledge of most individuals by their fellow townsmen or neighbours.[6] But above all, it was also based mainly on the evidence of the stool-occupant and his elders. But memory is evanescent, witnesses die, contemporaneous evidence evaporates, witnesses perjure themselves, and the consensual and inquisitorial approach to dispute settlement is no longer relevant in an adversarial court system. Many of today's crippling land disputes are rooted in the uncertainties of the customary law scheme of ownership. At Old Dansoman many parcels of land have been bought and developed, and yet are not covered by any documents, as we found in our fieldwork.

The class of beneficiaries of interests in land is always expanding as the stool acquires new subjects, and the descendants of an intestate multiply. Many disputes are still settled in traditional forums, but while their decisions are

[6]Cf. Allott 1980, pp. 68-69, suggesting that in developing ambitions that take him beyond the limits set by the nature of Law in earlier societies the modern legislator weakens the agreement between law-maker and society. Allott also maintains (p. 69) that compared to traditional African society, feedback in modern (Western) society is indirect, low-geared and ineffective.

binding, they keep no records of proceedings which can be relied upon at subsequent hearings. The result has been the emergence of factions with competing interests, forever engaged in internecine litigation, each holding itself out as the legitimate authority to alienate land.[7] Chieftaincy is wracked with similar problems. All these have been complicated by the emergence of professional charlatans and fraudsters operating in the new property markets in the suburbs, often in alliance with disaffected family members and stool elders, and depending on either newly-qualified surveyors or draftsmen. Thus the clamour for a safe and secure system of transfer of title has attained a new urgency. The state's response has been to enact more legislation to control property transactions.

6.2 *Alienation of interests in land*

Before examining the subject of state control of land ownership it is appropriate to analyse closely the nature of alienation of land. This will lay bare the problems of uncertainty of title under customary law and pave the way for a discussion of deeds registration and conveyancing in Ghana. In discussing the alienation of interests in land in Ghana it is worth bearing in mind that it has long been possible in Ghana for the parties to a transaction to agree that their rights

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[7]Cf. Bentsi-Enchill 1964, p. 310: "A satisfactory system of land administration should give to ordinary people a sense of security concerning the lands they hold and freedom from fraudulent claims; it should provide a man who lays out good money, whether as purchaser of land or as a lender against the security of a mortgage of land, with some independent means of assuring himself that he is obtaining a good title and not buying a lawsuit. The ideal solution would seem to lie in the direction of arranging things in such a way that an official record is available for inspection, a record which shows the title situation concerning any given piece of land".

and obligations under the transaction should be regulated by common law.[8] It must be made clear that the present discussion focuses on the transfer of interests under customary law.

By the process of alienation, the group or individual in whom the relevant title is vested conveys it to another person, usually for valuable consideration. As concurrent interests may exist in any piece of land, and several parties may, at least in theory, be competent to alienate their interests, customary law has developed elaborate rules which emphasise the communal character of property, and restrict the right to alienate to the head and leading persons in the group. The traditional procedures for the alienation of land were fashioned in pre-literate society where the emphasis was on communalism. The modern conveyancer's quest for a good title to confer security of tenure on his client therefore tends to make him proceed with extreme caution as, instead of private and public records, he must rely on memory and publicity. This is particularly so with the paramount and the determinable titles which may not be evidenced by records, and which might be vested in a collective body on whose behalf the act of alienation must be effected by a set of representatives acting together with their appointed head of the collective body. The title to such property is "vested in the

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[8]This was initially provided for by section 19 of the Supreme Court Ordinance, 1876. It has been re-enacted several times, notably as section 87 of the Courts Ordinance, 1951 Rev., and is to be found in section 49 of the Courts Act, 1971 (Act 372). F.A.R. Bennion, The Constitutional Law of Ghana, London 1962, esp. p. 436; and K. Bentsi-Enchill, "Choice of Law in Ghana since1960", University of Ghana Law Journal, Vol. 8 (1971), pp. 59-75 have essayed useful evaluations of this provision. See also, Koney v. United Trading Company (1934) 2 W.A.C.A. 188 and Nelson v. Nelson (1951) 13 W.A.C.A 248. Where the parties to a transaction agree that it shall be regulated by English law they need not comply with any of the requirements of customary law.

corporation and not the corporators."[9] Because of the notion of collective ownership, in all instances of alienation by the stool or family, the consent of all relevant persons must be obtained.[10] Neither the head nor the other members of the class of persons whose agreement must be obtained can, by acting alone[11] and without the consent of the others, effect a valid sale. Where land is sold to a stranger, there is usually an oral contract, often preceded by a pre-contract stage where the purchaser presents himself to the vendors with a view to inspecting the land and ascertaining the proper formalities of the particular community.

Many chiefs have up to date plans and other drawings of stool lands under their control in which all lands available for sale as well as lands earmarked for roads, parks and public amenities are neatly set out. On an appointed day, the prospective purchaser is taken to the land in the company of a surveyor. After ensuring that the land in question is not in the occupation of another person,[12] it is then carefully delineated for identification. The purchaser may himself erect corner posts on the land, often bearing his initials as a sign of ownership. But since the majority of land sales are of undeveloped plots, the

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[9]See Bentsi-Enchill 1964, p. 41. See also, Coussey J., as he then was, in Vanderpuye v. Botchwey (1951) 13 W.A.C.A. 164 at 168.

[10]See Agbloe v. Sappor (1947) 12 W.A.C.A. 187; and Nelson v. Nelson (1951) 13 W.A.C.A. 248.

[11]Sarbah (1968, p. 78) notes that the head of family has greater powers of alienation over movables.

[12]Today it is common, in the rural areas, for a stool subject who pursues such irregular economic activities as charcoal-burning, wood cutting or occasional farming on a chosen plot to accept financial compensation or an alternative plot.

purchaser may have no way of knowing if the plot has already been sold to another person. In places where the demand for land is very high (usually the suburbs and the outskirts of the city), the purchaser often tries to secure his hold on the land by erecting a makeshift structure on it. Indeed, quite a few of the less fashionable suburbs of the city have taken on the appearance of a collection of makeshift structures as price inflation and changing economic circumstances make many a housebuilder's dream impossible to realise. In some cases, title deeds are never drawn up and registered at the registry even after a structure is erected and a plot secured. But between the passing of the ownership of the determinable title and actual physical occupation by the purchaser, maximum publicity and notification must be given to members of the locality, particularly the holders of adjoining plots. Often, the parties to the sale of land and their witnesses go to the land itself to perform the relevant ceremonies; but the crucial acts of bargaining and final agreement are performed in retirement in the chief's house.

Bargaining over land is becoming a thing of the past,[13] especially where, as in a majority of cases today, the stool's lands have been carefully surveyed and plans indicating the various plots drawn up. In the majority of cases, the plots are offered for sale at a uniform price. Once the price is paid, the

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[13]Cf. Bentsi-Enchill 1964, pp. 348-349; "An important change in customary practice which has forced itself on the attention of the courts has been the use of written memoranda in regard to customary dealings in land. There is in fact in many places a widespread supercession of the ceremonial acts of title transfer (substantially equivalent to livery of seisin under English law) by the indenture of conveyance. This, when properly drafted in the light of court decisions, carefully recites the due performance of the ceremony of transfer, whether performed or not."

preparation of the conveyance is left to the purchaser.[13a] Up to that point, solicitors are usually not involved in the sale process, and may be excluded altogether if the purchaser chooses to employ agents at the land registry or undertakes the drawing up and registration of the deed himself. Although there is strong awareness on the part of that section of the public which is able to buy land that the process is often fraught with deception, very few are prepared to take the precaution of employing solicitors to look after their interests. In the eyes of many purchasers, the inducement to do so is weak as registration agents often perform the same service for a fraction of the cost and time.

Table 11 below shows the annual sale of land at Old Dansoman between 1958 and 1969 when the majority of Old Dansoman stool lands were sold. It shows the pattern of land sales and the volume of sales in each year as the pressure for land increased over the years. "Prime lands" refer to lands in the area around the chief's residence with its supplies of potable water and electricity. These lands were much sought after. "Outer lands", referring to lands near the periphery of the town were considered less attractive; but as the supply of "prime lands" diminished the sale of "outer lands" accelerated. By 1965, the peak year for land sales in Dansoman, more "outer lands" were being sold than "prime lands". Informal discussions with informants revealed that the "active family" frequently played a major role in the development of all types of lands at Dansoman for purchasers who were resident outside the city. In such cases, members of the "active family" usually negotiated the purchase of lands, secured the execution and registration of documents and supervised building operations

13a While there is a trend towards documentary conveyance, it remains a fact that a customary law conveyance need not involve writing.

for absent relatives.

TABLE 11

ANNUAL SALE OF LAND AT OLD DANSOMAN BETWEEN 1958-69[14]				
Year	Prime Lands	Outer lands	Other lands	Total Sales
1958	19	4	5	28
1959	35	10	4	49
1960	65	12	20	97
1961	78	24	21	123
1962	120	35	7	162
1963	135	37	13	185
1964	93	78	9	180
1965	84	120	19	223
1966	54	134	14	202
1967	33	130	6	169
1968	37	125	8	170
1969	31	145	17	193

Asked to explain why fewer and fewer Jamestown citizens bought Old Dansoman lands over the years, the chief simply stated that as the price of land appreciated, it went beyond the means of people in the poorer sections of Jamestown, while richer people from Jamestown preferred to buy lands in more fashionable parts of the city. It can be seen from the table that demand for prime lands was highest in the early years of development at Old Dansoman. Between 1958 and 1964, the demand for prime land outstripped the demand for all other lands. From 1965 onwards land disputes spilled over to outer lands as land shortage in Old Dansoman started to be felt. It was mainly from claims over such lands that many of the most avidly fought land disputes in Old Dansoman arose. The majority of such claims, which were settled by the chief, reinforced

[14]Source: Data obtained from the chief of Old Dansoman.

his own jurisdictional authority. The issue of the allodial title to West Accra lands was raised with the chief of Old Dansoman. When asked whether the Sempe could have successfully claimed ownership of Old Dansoman lands if they had installed a rival chief, he said it was all a matter of who was actually selling the lands and settling disputes arising from such sales. The studied refusal of the Sempe authorities to discuss matters relating to their lands has made it impossible to put their view here. "Other" lands include bits and pieces of lands between Sempe lands and Jamestown lands.

Before 1939, the main purchasers of land in Accra included civil servants and traders whose activities were based largely on the old Jamestown harbour. Women rarely bought lands though many obtained lands as gifts. Since 1939 a good proportion of purchasers of land have been women. These are often market traders[15] who go on to build ornate structures several storeys high. They constitute a peculiar class of land developers. It is clear from inquiries that many of these women, some with smart business acumen, consider the properties as investments and would often go on to let them out to tenants at huge rentals. Since the destruction of the large Makola Market at the heart of the city in 1979, the activities of the women have declined somewhat. Also fascinating was the

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[15]In Ghana, as indeed in most West African countries, commerce has traditionally been dominated by women. The most successful women traders do not seem to consider their capital as a fund to be used in trading only. Investment in land and buildings was often seen as a natural extension of trading activities. At the famous Makola Market no woman would consider herself a truly successful trader until she owned a number of houses. Most of them become apprenticed to established traders in their adolescence and by the time they start trading on their own account they have acquired an enormous range of financial and business skills. Much of it gained from their experience of the "passbook system" of trading on which the operations of the large European trading houses, including the United Africa Company (UAC), Lever Brothers, Patterson Zochonis (PZ) and Leventis were based. Others monopolise the trade in foodstuffs between the city markets and the villages.

fact that the women were among the keenest purchasers to employ solicitors and to ensure that their deeds are properly registered.

Table 12 shows the methods of finance in the acquisition of Old Dansoman lands in the post-earthquake period. Due to the unreliability of information obtained it was not possible to compile similar statistics for Jamestown and Domiabra. "Others" include bank and benevolent society loans. The table shows that monies used in the acquisition of land are normally raised by individuals.

TABLE 12

THE METHODS OF FINANCE IN THE ACQUISITION OF LAND AT OLD DANSOMAN	
Method of finance	No. of respondents
Savings	2
Pensions	15
Close relatives	4
Wages	19
Others	32

In Domiabra, the completion of sale is still accompanied by relevant publicity but this is restricted to influential members of the community.[16] An informant described how the purchase of his land in the deep north of Domiabra had been completed only with the knowledge of the four principal stool elders. Even in the central areas of Accra, publicity tends to be restricted to the notification of the major factions surrounding the stool who might be provoked

[16]But see, Kwakwuah v. Nayenna (1938) 4 W.A.C.A. 165 where it is stated that without the relevant publicity, alerting the community, the sale will be invalid.

by clandestine sales into launching destoolment charges against the incumbent.

The sale of land involves the unqualified transfer of the whole of the vendor's (determinable) title to the purchaser; this, in the urban areas, the purchaser holds literally in perpetuity. In particular, once a sale has been effected, the customary law purchaser has few or no obligations to the vendor-community. There are few covenants to restrict and control his use of the land.

The main defects of the traditional system of land sales was the lack of an adequate system of surveying, conveyancing and a public policy on land use. On the one hand, it led to a fair distribution of land (every individual and section of the society by and large had access to land); but on the other hand, it resulted in great uncertainty about the limits of parcels of land.[17] This in turn led to a number of problems as far as the administrative and legal aspects of land were concerned: the considerable uncertainty of titles being one of these. The result of the rudimentary system of land demarcation was the haphazard and irregular manner in which countless towns and villages were laid out. Since the enactment of the Land Registry Act, 1962, however, there have been greater efforts towards a more scientific demarcation of boundaries. This is because of the requirement that all deeds deposited for registration must be accompanied by relevant plans. This has made the services of surveyors indispensable in the land sale process. It is the opinion of the present writer that a similar provision

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[17]But see Allott 1980, p. 55.

making the services of solicitors mandatory would immeasurably improve the quality of titles and reduce frauds.

We now turn to consider the individual, the family and the stool, the main vendors of land. The classic statement of the position of the individual with regard to the sale of land was laid down by Ollennu J, as he then was, in Adjabeng v. Kwabla:[18]

> "By customary law a person is entitled to alienate self-acquired property by way of sale or gift without the necessity of members of his family concurring in it...All that customary law requires to make alienation of self-acquired property valid is publicity."

All the evidence today suggests that a person may validly effect the sale of his self-acquired property without even the necessity of publicity. Certainly, it will be absurd to set aside a sale of self-acquired property solely on the ground that the vendor has failed to inform his family if his title to it is beyond dispute. While the individual may not hold the paramount or sub-paramount interests, he may alienate the usufruct, pledge or create tenancies or licences in a piece of land. Individual ownership is however a relatively new phenomenon.[19] Individualism and the drive for individual wealth do not seem to have counted for much in traditional society. The old society and its values conditioned the individual to see himself in terms of the family. Most of his endeavours were to

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[18](1960) G.L.R. 37. But see also, Ollennu J, as he then was, in Ohimen v. Adjei (1957) 2 W.A.L.R. 275: "The individual of family may assign or dispose of his interest in the land to another subject of the stool, and the land may be sold in execution of a decree against the individual or the family, as the case may be, without the consent of the stool. But he may not dispose of the stool's absolute ownership in it to strangers without the consent and concurrence of the stool."

[19]See e.g. Amodu Tijani v. Secretary of Southern Nigeria, (1921) 2 A.C. 399.

augment the family stock over which he had no powers of alienation. As Redwar noted, "even the slightest contribution of labour or materials in building a house...gives these relatives a vested joint interest in the house as Family House."[20]

It is often in individual to individual land transactions that the parties seem to go to the most extraordinary lengths to satisfy themselves about title. One interviewee attributes this to the lurking belief that an individual could always be an imposter who could vanish without a trace, whereas the chief and his elders can always be located within the community. During fieldwork, this writer was frequently regaled with stories of various dishonest individuals who had devised strategems to gull prospective purchasers. Particularly in the austere economic climate of the early seventies, various groups of young men set themselves up as "estate agents", adopted flamboyant lifestyles, took large deposits from unsuspecting purchasers, and almost all at once vanished without a trace, fleeing to various destinations in Europe and West Africa. As a result, over 90 per cent of individual to individual sales that we came across both in the West Korle Gonno Estates and at Old Dansoman had been handled by solicitors right from the commencement of the transaction. Of the remaining 10 per cent or so many are in various stages of litigation over the validity of the sale either from the relatives of the vendor (who often claim to have a better title than the vendor) or from the vendor himself who may now dispute the nature of the transaction.

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[20]H. W. Redwar, Comments on Some Ordinances of the Gold Coast Colony, London 1909. See also, Larbi v Cato, (1959) G.L.R. 35 and Adjuah v. Schandorf, (1948) D.C. (Land) '48-'51, 9.

It is not difficult to understand why more individual to individual sales are handled by solicitors. Developed lands sold by individuals are unique, whereas one undeveloped plot sold by a chief is as good as the next. As a result, chiefs who find themselves in similar disputes often hasten to offer the purchaser another plot of land. Another reason for the greater incidence of disputes in individual to individual sales of developed land is the lingering disapproval that society still seems to attach to the sale of houses: houses are the outward signs of the builder's success and social status; sale of houses therefore inevitably invites the inference of a decline in status and wealth.

The title to family-held property is held collectively by the family qua family; it is not vested in any one individual, not even the head of family.[21] As a result, a valid alienation of family land is only achieved when the head of family and the leading members act together. However, there is authority to suggest that where a family sleeps on its right, such an alienation is valid. Mallet v. Attuquaye[22] was an action to recover property sold under a mortgage executed by three members of the family. It was held that even if the property in question was family property, the family had, by its conduct, disentitled itself from regaining it. Also, in Russell v. Martin[23] it was held that where an individual holds

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[21]See G.R.Woodman, "The Alienation of Family Land in Ghana," University of Ghana Law Journal, Vol. 1 (1964), p. 23. See also Sarbah 1968, p. 170; and Redwar 1909, who indicated at p. 24 that the family may normally give consent to alienation by signing the conveyance or by being present at the guaha ceremony.

[22](1929) F.C. 1926/29, 359.

[23](1900) Ren. 193.

himself out as the owner of a family house, and the family so allows him, strong evidence is required to prove that the house is not his individual property. The usual presumption of the courts in favour of family property has since been considerably relaxed.[24] As a result, many dominant individuals sometimes successfully lay claim to undeveloped family property, particularly, where the other members of the family do not quickly institute proceedings to assert the family's interest. This unfortunate development has been aided to a great degree by the general absence of documents of title.

The stool is the most important owner of land in Ghana. As a collectivity, its position in relation to the alienation of land is not dissimilar to that of the extended family. Concerning the requisites for a valid alienation of land under customary law Ollennu stated:

> "For the purposes of alienation, family, tribal, stool or skin lands are in one category, governed by one set of principles. In the case of those lands, no single individual can make a valid alienation of any interest in them. Two or more persons may make a valid alienation of an interest in it, depending upon the circumstances."[25]

In the olden days most lands belonged to the stool, and the proposition has often been made that individual ownership is foreign to traditional society. Today, with the enlargement of the individual's capacity to hold land, the stool's authority over land is rapidly diminishing to the mere ownership of the nominal

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[24]See e.g. Santeng v. Darkwa, (1940) 6 W.A.C.A. 52; Owoo v. Owoo, (1945) 11 W.A.C.A. 81; and Larbi v. Cato, (1960) G.L.R. 146.

[25]Ollennu and Woodman 1985, p. 135.

allodial title. It is now settled law, according to the principle in Lokko v. Konklofi[26] that the special interest of a stool subject in buildings or farms made on stool land is distinctive property which can be attached in satisfaction of a judgment debt. Of course we have already seen that the highest interest that a stool subject can hold in stool land is a determinable title: it is only this title which can be attached in satisfaction of a judgment debt. This principle was further worked out by the courts in the case of Sasraku v. David[27] where it was held that upon the sale of stool land the estate which passes is "not an unqualified ownership but a possessory right to enjoy the land and usufruct thereof." But as long as the purchaser's family does not become extinct, they are entitled to remain on the land, for as we have seen the usufruct is both heritable and alienable. The true nature of the usufruct which the purchaser acquires of the stool was stated by Lord Denning in Kotei v. Asere Stool.[28]

> "Native law or custom in Ghana has progressed so far as to transform the usufructuary right, once it has been reduced into possession, into an estate or interest in the land which the subject can use and deal with as his own, so long as he does not prejudice the right of the paramount stool to its customary services. He can alienate it to a fellow-subject without obtaining the consent of the paramount stool; for the fellow-subject will perform the customary services. He can alienate it to a stranger so long as proper provision is made for commuting the customary services."

Lord Denning's statement about the nature of the usufruct is a correct

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[26](1907) Ren. 450.

[27](1959) G.L.R. 7.

[28](1961) 1 G.L.R. 492, P.C.

description of the nature of the determinable title; however, his emphasis on the performance of customary rites seems to be misplaced. It certainly bears no resemblance to current social practice. Land sales are today stripped of customary and ceremonial frills, emphasising the essentially commercial character of the transaction.[29] The performance of customary services has ceased to be a sine qua non for the continued occupation of stool land by individuals. Recognising this development, Ollennu has suggested that services due to the stool may be "commuted to regular annual payments and enforced, albeit mere peppercorn."[30] Stools notoriously lack the management skills to undertake the systematic collection of such payments. In a sense, Ollennu's suggestion has found its way into "official" policy with the Lands Commission now insisting that the highest alienable interest in stool land is the leasehold which reserves a ground rent to the stool. Sarbah listed the following requirements for a valid sale of land:

> "(1) competent contracting parties,
> (2) mutual assent of such parties,
> (3) the fixing of boundaries,
> (4) valuable consideration,
> (5) the payment of trama (earnest money) to the vendor or its representatives in the presence of some members of his family and witnesses."[31]

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[29]In Domiabra, this writer observed the performance of a particular "service" to the stool by the strangers who run the ranches. Significantly, this was in the form of cash contributed by the ranchers towards the cost of the funeral of a former chief. But since these ranchers were licensees they had every reason to perform such services as would ensure their continued occupation of the land.

[30] Ollennu and Woodman 1985, p. 65.

[31]Sarbah 1968, p. 86.

The principle of caveat emptor is of particular importance here. The most important principles in the valid alienation of group-held land were laid down in the case of Allotey v. Abrahams.[32] First, the chief or occupant of the stool or head of a family is indispensable in dealings with stool or family land, and there can be no valid alienation of such land without his consent. A conveyance of stool or family land which, on the face of it, was not made with the consent and concurrence of the stool occupant is therefore prima facie without effect; but this defect can be cured if it is established aliunde that the stool occupant had consented or concurred in the transaction, and had authorised the conveyance to be executed in the form in which it appears. Secondly, a conveyance executed by a stool occupant or the head of a family and the linguist or some other principal elders of the stool or family is effective if it purports to be executed with the concurrence and consent of those members of the stool or family whose consent is, by custom, required. Such a conveyance may be avoided if the purported consents and concurrences had not been obtained.

Thus, in the case of Mensah v. Ghana Commercial Bank,[33] it was held that a deed of conveyance executed by the chief of Teshie and containing a recital that the necessary consent of the principal elders of the Teshie stool had been obtained (though that was, in fact, not the case) was void ab initio. In U.A.C. v. Apau,[34] where a chief signed a lease without reference to his elders,

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[32](1957) 3 W.A.L.R. 280.

[33](1957) 3 W.A.L.R. 123.

[34](1936) 3 W.A.C.A. 114.

it was held that the lease neither conferred any rights upon nor bound the stool.

The payment of trama (earnest money), the cutting of guaha[35] or shikpon yibaafo, (known as zigba yibapom in Adangme) depending on the community[36] often followed the alienation of land under customary law and sealed the transaction.[37] According to Sarbah, until the trama or earnest money was paid, there was no building contract and either party could withdraw.[38] The trama or cowries were sometimes shared among the witnesses to the transaction as a token of their presence at the making of the contract. According to Danquah, the payment of trama occurred only in the sale of movables.[39] This, however, seems to be a practice that is limited to the Akim area of the Eastern Region. The payment of trama, whether for land or movables, has today ceased altogether in Accra; and according to the majority of informants shikpon yibaafo is observed only in isolated pockets of the Greater Accra Region and in parts of the Eastern

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[35]See note 41 below.

[36]See Ollennu and Woodman, pp. 123-124. And cf. Pogucki 1955, p. 31 which describes the customary procedure of shikpon yibaafo as follows: "The seller and the buyer meet on the land in the presence of at least two witnesses, who are usually neighbours of the seller. Both parties kneel on the land on their right knees. Each of the parties pass their left hands under their left knees, extending the thumb and the next finger, on which they place a shilling coin. Both coins are covered by a small dry palm leaf. A libation of rum is poured. The leaf is cut into two pieces by the parties, who then throw their shillings in front of each other. The slaughter of a sheep completes the procedure."

[37]See G.R. Woodman, "The Formalities and Incidents of Conveyances in Ghana", University of Ghana Law Journal, Vol. 4 (1967), pp. 1-27 esp. at pp. 2-4 contains a useful discussion of the payment of trama and the cutting of guaha.

[38]Sarbah 1968, p. 93. However, as noted above at p. 343, the parties to a transaction in Ghana may agree under section 49 of the Courts Act, 1971 that the transaction be regulated by English law, in which case they need not comply with any of the requirements of customary law, and need only execute the document as required under English law.

[39]See Danquah 1928, 217 where he says that the fixing of boundaries is completed by the slaughter of sheep, and the boundaries themselves are marked by such things as ntomie trees, and stones and bottles are fixed on all four corners.

and Central Regions settled predominantly by migrant Gá-Adangme farmers.[40]

The modern sale, as we have already pointed out, is a purely commercial bargain. The payment of the final instalment of the purchase price is the factor that seals the contract; until then, the vendors may withdraw from the transaction at any time. Where the purchaser hesitates between the payment of instalments, he may lose his deposit and the land may be sold to another.

Equally, the cutting of guaha[41] has declined. Not a single case of the cutting of guaha was discovered in the entire field-area. Like the payment of trama and shikpon yibaafo, the cutting of guaha is designed to seal the contract, making the sale final and irreversible. The ceremony itself takes place after the inspection of the land to be sold; the two parties and their respective witnesses return to the vendor's house and retire indoors. After guaha has been cut, the purchaser provides a drink to be shared by all present. Sarbah, however, says that the drinking of palm wine is not an essential part of the contract of sale.[42]

The publicity value of the trama, guaha and shikpon yibaafo ceremonies has now been lost and sales are today more or less a private matter between the

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[40]Several informants also indicated that zigba yibapom is widely practised among the Adangme of Dodowa, and those of Agotime in the Volta Region. Cf. R.G.S. Sprigge, "Eweland's Adangbe: An Enquiry into an Oral Tradition", Transactions of the Historical Society of Ghana, Vol. X (1969), pp. 87-123 esp. at 91-95; Nukunya 1992, p. 232and L.E Wilson, The Krobo People of Ghana to 1892, Athens (Ohio) 1991, esp. pp. 72-87 for evidence of the expansion of the Adangme across Southern Ghana and their employment of distinctive farming and land-acquisition techniques.

[41]See Allott 1959, pp. 345 et seq. The normal method is for each party to provide a lad to cut guaha and the vendor provides a thread of six cowrie shells or trama. In the sitting position, each lad puts his left hand under his right leg taking one end of the string, and grasping three of the cowrie shells. The string is then broken in the middle so that each lad retains three shells to be subsequently used as evidence should any dispute concerning the sale of the land arise in future. See note 35 above.

[42]Sarbah 1968, p. 94.

vendor and the purchaser. Even in the case of stool or family land, the stool subjects or family members are hardly informed. Even in Domiabra, word of a sale hardly ever reaches the public ear, it all being restricted to the stool occupant and leading members on the one hand and the purchaser and his witnesses on the other.

Today, after the sale of unoccupied land, the emphasis is on the legal and bureaucratic procedures at solicitors' offices and the Lands Department. The various rituals and ceremonies that in the past served to etch the new contract indelibly on the public memory have given way to the conveyance. The transfer of the usufruct between individuals, especially where a house is involved, is even less ritualistic, and more a matter for solicitors. The emphasis is on the payment of valuable consideration and the execution of the relevant document in the purchaser's favour.

It ought to be observed finally that the judicial law-making process illustrated by the foregoing cases occurs entirely in the courtroom through counsel, and the law reports in which selected cases are published are not generally available to the general public.[43] For the average citizen, therefore, the body of official customary laws developed by the courts are frequently in competition with various other normative systems, including practised customary law and social mores. It will be shown in the following sections that, for similar reasons, statutory intervention in Ghanaian land law has not been entirely

[43]Cf. Allott 1980, p. 75.

successful.

6.3 State control of ownership

6.3.1 *The State Lands Act, 1962 and The Administration of Lands Act, 1962*[44]

The most rigorous assertion of the principle of eminent domain,[45] the right to take private property for public purposes, is to be found in the State Lands Act, 1962 and the Administration of Lands Act, 1962. The Administration of Lands Act, 1962, described in the long title as "an Act to consolidate with amendments the enactments relating to the administration of Stool and other lands", had two main effects on the structure of land ownership in Ghana. Aside from the direct assumption of management powers over stool land, it also made far-reaching curtailments of the quantum of transferable rights in concessions. The Act declares (s. 1) that "management of stool lands shall be exercised by the minister." Further, under section 2, the President may direct the institution or

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[44]Act 123, The Administration of Lands Act repealed both the Stool Lands Control Act, 1959 (No. 79) and the Stool Lands Act, 1960 (Act 27).

[45]Expropriation by the state in exercise of the power of eminent domain has in recent times been the only method of extinguishing the allodial title. In the main, expropriation has resulted in the physical taking of stool and family lands and the vesting of such property in the state. Expropriation has been mainly directed at creating a national socio-economic infrastructure: dams, reservoirs, forest reserves, parks, schools, housing estates,industrial areas and the like. See Nichols on Eminent Domain, New York 1990, pp. 7-8 where the principle is alternately described as "the power of the sovereign to take property for public use without the owner's consent" and "the superior right of property subsisting in a sovereignty by which private property may in certain cases be taken or its use controlled for the public benefit, without regard to the wishes of the owner." It is a principle that originated outside the common law in continental Europe. The character and major legal elements of the power of expropriation are exhaustively considered in J.L. Sax, "Takings and the Police Power", Yale Law Journal, (1964), pp. 36-76. See also per Strong J. in Kohl v. United States (1876) 91 US 449, 451, quoted in F.A. Mann, "Outlines of a History of Expropriation," Law Quarterly Review Vol. 75 (1959) pp. 188-219: The power of expropriation "is the offspring of political necessity, and it is inseparable from sovereignty, unless denied to it by its fundamental law." The power of eminent domain has also been traced to Aristotle and Grotius. See J.A.C. Grant, "The "Higher Law" Background of the Law of Eminent Domain", Wisconsin Law Review, Vol. 6 (1930-32) pp. 67-85, esp. at p. 68.

defence of proceedings relating to any stool land to the exclusion of the stool concerned. The principle of eminent domain is laid down in section 7:

> "Where it appears to the President that it is in the public interest so to do, he may, by executive instrument, declare any stool land to be vested in him in trust and accordingly it shall be lawful for the President, on the publication of the instrument, to execute any deed or do any act as a trustee in respect of the land specified in the instrument."[46]

This provision constitutes an important power of divestiture of chiefly authority. Together with section 1 of the State Lands Act of 1962 under which the President may by executive instrument declare any land required in the public interest and accordingly vest such land in the President on behalf of the public, it provided a legal basis for the taking of stool property and the extinguishment of the stool's allodial interest.

The consequences of this were, of course, far reaching. First, the State Lands Act, 1962 and the Administration of Lands Act, 1962 provided the first major intervention by the state in the customary scheme of interests in land outlined in chapter five. They thereby set in motion a process of change in the land law of Ghana which has been driven largely by governmental assumptions about the weaknesses of the traditional system of land law. Secondly, by

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[46]In practice, the expropriation of lands by state as well as the taking of land under the Town and Country Planning Ordinance (1945) has only increased the incidence of fraudulent land sales, as owners persist in selling plots already taken out of their control by the government. The purchaser is not helped by government's propensity to frequently overlook the sale of "expropriated" lands. But governmental inaction seems to stem from it's inability to provide the amenities (parks, toilets, etc.) that it so grandly sets out in its plans. It is estimated that 35 per cent of all lands expropriated in Accra's suburbs have now been developed by private holders.

section 17 of the Administration of Lands Act, 1962 revenue accruing from lands subject to the Act, including fees, royalties, levies, tributes, etc. but excluding revenue from forest products (s. 17(3)) shall be collected by the Minister. The Administration of Lands Act further sought to ensure the financial control of stools by the central government through the provision that moneys accruing from such lands after governmental appropriation should be paid into "an appropriate account."[47]

Regarding uses to which income received from the government in regard to stool lands, are put Woodman has found, on the basis of what he considered to be evidence of uncertain reliability, that the bulk of sums paid over to stools from the Stool Lands Account are consumed unproductively on such activities as mounting durbars and maintaining chiefs' retinues.[48] Our findings in Old Dansoman and Domiabra suggest that this is indeed the case. However, even though the proceeds of land sales and other income from stool lands were always stated in both places to have been spent on activities relating to chiefship and local development it was always found upon further enquiries that substantial portions of such moneys could not be accounted for properly. Also, in both Domiabra and Old Dansoman, stool authorities avoid governmental control of the proceeds of the sale of stool lands by designating the real purchase price as "drink". This is payable in the form of cash which represents

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[47]Section 18 creates a Stool Lands Account into which such moneys should be paid.

[48]G.R. Woodman, "Land Law and the Distribution of Wealth", in W.C. Ekow Daniels and G.R. Woodman (eds.), Essays in Ghanaian Law, Legon 1976, pp. 158-176 at pp. 166-167.

the prevailing market price for a plot of land in each community.[49] When the deed of conveyance is drawn up, a fraction of the real purchase price is then indicated as consideration, which is duly paid into the Stool Lands Account. Thus government control of the financial resources of stools through the Stool Land Account does not significantly reduce the level of funds which stools receive from the sale of their lands.

The impact of the foregoing factors on the customary scheme of land law has more recently been widened by section 63(1) of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1981 (P.N.D.C.L. 42) which defines "stool land" to include family lands.[50] The Administration of Lands Act, 1962 further ordained (section 8(1)) that any disposal of land involving the payment of valuable consideration which is made by a stool or other customary law functionaries should be subject to the concurrence of the minister.

Making an assessment of the effects of the Act on the communities under investigation was relatively simple in the case of Domiabra. Lands to the east of the village, including the entire site of the old settlement, were acquired by government in the early 1970s as part of the Weija Irrigation Project. This entailed the movement of the entire village to a new site and a complete re-allocation of remaining communal lands to members of the community. This

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[49]It was clear from the replies of respondents that this practice is widespread in Accra.

[50]Cf. article 213 of the 1979 Constitution which defined stool land to include "any land or interest in, or right over, any land controlled by a stool, the head of a particular community or a family for the benefit of subjects of that stool or the members of that community or family."

gave rise to three consequences. First, there was a drastic reduction in the total acreage of land that was available to the community. Another result was that pressure immediately started to build up for some form of collective compensation for those who had lost farm-lands to the government. This pressure was made particularly acute by the fact that every family in the village had been allotted a house in the government scheme to re-house the village. As a result of the first two factors and the general re-allocation of farm-land that they entailed, the old customary system of freeholds was re-shuffled in a way that evened out inequalities in land ownership. Further, all three factors combined to create a land market by clarifying the system of land titles and attracting a number of commercial farmers and ranchers to the village.

It is tempting to see the case of Domiabra as suggesting that when land is taken by government and re-distributed, the act of seizure may not only be expropriatory but also redistributory of rights in land in a manner that ensures greater fairness to the stool subject and certainty of title. But Domiabra is an exception.

The picture is not so clear in the other field-areas. In spite of the countless chieftaincy disputes, and the obvious infrastructural needs of the other communities within the field-area, the taking of property by the state under provisions of the Administration of Lands Act, 1962 has generally failed to take place. Chief after chief has sold lands on a vast scale to the detriment of his own people. But the state has so far not taken any step to institute or defend any proceeding in relation to any of the stool lands in the area under

investigation.

According to section 12(1) of the Administration of Lands Act, 1962 the granting of mining or timber rights is even more severely curtailed to a period not exceeding a term of sixty years for mining, and thirty years for timber. It is further provided in section 14 that the government shall have custody of all deeds, records, registers and accounts relating to lands affected by the Act.

We have already indicated that the provisions of section 8 on the need for ministerial concurrence constitute a major curtailment of the powers of stools and families. But the provisions of section 8 are still wide enough to cover the citizen's usufruct which he acquires by customary grant by reason of being a stool subject or family member. According to section 8 a disposal of land which involves the payment of valuable consideration by any person who, by reason of his being so entitled under customary law, has acquired possession of such land either without payment of any consideration or in exchange for a nominal consideration would also be subject to ministerial concurrence. The effect of this provision has been to subject the citizen's grant of an acquired usufruct to the consent of the state. Section 8 of the Administration of Lands Act, 1962 thus constitutes a new restriction of the citizen's estate for, as we have seen, a stool subject is not rationed in his allocation of land. However, under the Administration of Lands Act, every subsequent alienation of his estate is now subject to ministerial concurrence. In a sense, this is a welcome development since in the process of obtaining ministerial concurrence, title-deeds would have to be drawn up and registered. The stool subject may find himself in a situation

where the lands that he retains are not covered by deeds, while newcomers all around him have documentary proof of ownership. This trend is strongly in evidence with the gentrification of the suburbs of Accra.

The principle of eminent domain, enshrined in the provisions of the Act as well as the State Lands Act, 1962[51] was elevated into a constitutional principle by both the 1969 and 1979 constitutions and is now found in sections 45 and 47 of the Provisional National Defence Council (Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982.[52] Section 45 of Law 42 proclaims that all public lands in Ghana shall be vested in the government in trust for the people of Ghana, and their communities, and that the benefits of land as a national resource are to be enjoyed by the people of Ghana as a whole. Furthermore, under section 45(3) the government may authorise the occupation and use of any land, especially, where such land is the subject matter of "unproductive dispute." "Public land" is defined by section 63 of P.N.D.C. Law 42 as land over which the government, an agency or organ of the government exercises total or partial of the power of disposition. With the appointment of an Administrator of Stool Lands under section 48(1) of P.N.D.C. Law 42, stool land revenue is more tightly controlled. The Administrator of Stool Lands is responsible for the management and disbursement of all existing funds held on account of stools by government, the establishment of a stool land

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[51]Act 125.

[52]See article 164(3) of the 1969 Constitution, and article 188(5) of the 1979 Constitution.

account for each stool into which shall be paid all rents, dues royalties, etc. and the collection of such rents, dues and royalties. It is, however, doubtful that the Administrator of Stool Lands as constituted under P.N.D.C. Law 42 also exercises powers under the Administration of Lands Act, 1962 which provided similarly for the establishment of stool land accounts to be administered by an Administrator of Stool Lands.

Under section 48(1) of the Administration of Lands Act, 1962 provision is made for the establishment of a stool lands account for each stool into which all incomes accruing from its lands are paid after collection by the Administrator of Stool Lands. Further, under section 48(2), payments out of the stool lands account are determined by the minister in appropriate proportions to the stool concerned, the traditional council, House of Chiefs, and the local government councils of each area. Under section 48(3), the Administrator of Stool Lands has the power to withhold the payment of such moneys.

As argued above, the whole regime of state control of lands, and the expropriation of stool lands is further strengthened by the State Lands Act, 1962.[53] Under it, a mere declaration through the publication of an instrument designating a piece of land as required in the public interest automatically vests ownership in the state. As originally enacted, section 1(1) of the State Lands

[53]Hand in hand with the assumption of state control over stool lands came the legislative control of chiefship itself by the Chieftaincy Act, 1971, Act 370. This Act repealed the Chieftaincy Act, 1961 (Act 81) and established a national House of Chiefs as well as regional House of Chiefs and traditional councils. It defined the manner of destoolment of a chief, and under section 53(1) made it unlawful for a chief to sell or pledge movable property without the consent of the traditional council, and the approval of the minister.

Act, 1962 excluded the operation of this Act, from land subject to the Administration of Lands Act, 1962. This limitation was however, removed by the State Lands Act, 1962 (Amendment) Decree, 1968. Provision is made under the State Lands Act, 1962 for the compensation of affected parties. Further, the Land Title Registration Law, 1986 (P.N.D.C.L. 152) provides under section 19(2)(c) for the state to be registered as proprietor of all lands not held by any other proprietor.

Under 23(4)(c) and (d) of the Land Title Registration Law, 1986, if as a result of the examination of the contending parties' instruments during the process of adjudication of title the Land Registrar is satisfied that there is no person entitled to be registered as proprietor, he may record such land or interest in land as being held by the state in trust for the eventual proprietor. However, according to section 49, if no successful claim is made "to the land or interest therein within twelve years after the time at which it was so recorded," the state becomes the beneficial proprietor of such land, and the Land Registrar amends the register accordingly.

State incursion into, and control of private lands has, on the whole, met with very little resistance from the courts. However, it appears that where the state does not use a "vested" land in the public interest, the original owner of the land, in exercise of his constitutional rights, may acquire it back. Armah v. Lands Commission[54] is a rare judicial incursion into the area of eminent domain. That

[54](1979) G.L.R. 79.

case concerned the acquisition by the government of certain pieces of land, including the applicant's for the purpose of a new cemetery. The land was not used for the intended purpose. Instead a portion of it, including the applicant's, was leased to the second and third respondents who started building operations on the land. There was no evidence that the land so leased was being used in the public interest. Contending that the grant to the respondents was in breach of her fundamental rights, the applicant brought an application for an interim injunction to restrain the respondents from entering her land and from continuing with their building operations. She also contended that since the land was not used for the purpose for which it was acquired, she should have been given the first option to re-acquire it. It was contended on behalf of the respondents that the right of the applicant in the land in question was extinguished when the land became vested in the state, and that she was only entitled to compensation. Ampiah J. found that the land had not been used for the purpose for which it was originally acquired and held that to deprive the applicant of her land would be unjust and would amount to a wanton disregard of her constitutional rights.

The foregoing discussion has attempted to show the extent to which the creation of state-based structures and the incursions by the state into the traditional system of land tenure have led to the weakening of the traditional powers of chiefs.[55] The traditional system of landholding left much to be desired,

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[55]These incursions have not, however, touched the heart of chiefship (the central organ of the tribal form of social organisation) The chief and his elders, installed in many towns and villages, are "enstooled", maintained and perpetuated in power by time-honoured ethnic precepts which run counter to modern notions of nationhood. Significantly, suburbs of Accra which did not develop out of old villages, particularly where the original housing estate was developed out of expropriated lands, have no chiefs at all. In fact, it seems that the more backward an area the more likely it is to have a chief.

and it was particularly unsuitable to notions of equal citizenship. It discriminated against the non-stool subject in the allocation of land. Chiefship itself has become the ossified remain of a bygone era, and there was a dire need for a fresh mechanism for channelling the proceeds of stool property into the community for the benefit of its membership. Unfortunately, the failure of government in many areas of public life has left this task undone. The chief no longer exercises a political function, a duty now vested in local authorities designated by the central government. Sadly, many of these are crippled by bureaucracy and failure of management.

6.3.2 The state and the security of the individual owner

The principal purpose of this section is to examine closely the various forms of statutory controls over land use in Ghana. An essential preliminary is to understand that the major objective that the legislature has pursued with regard to assurance of land title in Ghana is deeds registration rather than title registration. Deeds registration, we hardly need to emphasise, was not primarily concerned with the certainty of title to land. Its main purpose was the determination of priorities between deeds. This is not to argue that duly registered deeds may not be used in proof of title to a parcel of land, but to point out that it does not resolve the problem of uncertainty of title to land. The second purpose of this section is to assess the effectiveness of statutory rules

that regulate deeds registration and land development in Ghana. As deeds need to be properly executed to be of any validity, we shall also examine the related matter of conveyancing in Ghana. Analysing the strengths and weaknesses of deeds registration, in particular, will throw light on pitfalls that await the unwary legislator who sets about introducing a system of titles registration in Ghana.

6.3.2.1 History of land registration in Ghana

Except in the Northern Territories where all land was vested in the Crown,[56] the traditional system of land tenure was largely unaffected by colonial rule in the erstwhile Gold Coast. Continued stool and family ownership of land was the direct result of the widespread resistance to the Public Lands Bill of 1897. As a result of protests spearheaded by the Aborigines' Rights Protection Society (ARPS), the Bill was dropped. Thus the main immovable properties of the Crown remained the forts and castles owned by the British, from which the Gold Coast was administered and some of which were acquired indirectly through ageements of 1850 and 1868 under which Danish and Dutch fortified posts on the coast were transferred to the British. In addition, the rights of the Crown were regarded as extending to such land in the immediate vicinity of the

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[56]The Administration (Northern Territories) Ordinance, 1902 Cap. 111 (1951) Rev., ss. 5 and 7; the Land and Native Rights Ordinance, No 1 of 1927, and the Land and Native Rights Ordinance, 1931, Cap 147 (1951) Rev. all had the effect of vesting the lands of Northern Ghana in the Crown. However, article 188(1) of the 1979 Constitution divested the state's interest in the lands of the former Northern Territories of Ghana in favour of traditional "skins" which originally controlled such lands. See N.A. Ollennu, "The Changing Law and Law Reform in Ghana", Journal of African Law, Vol. 15 (1971), pp. 132-181, esp. at pp. 163-164 which discusses inter alia the effects of the Land and Native Rights (Northern Territories) Ordinance, Cap. 147.

ramparts as could be protected by artillery from the forts. Otherwise, the Crown acquired all interests in land either by lease[57] or purchase preceded by negotiations or compulsory acquisition under the Public Lands Ordinance, 1876 Cap. 134.[58] After the conquest of Ashanti, section 4(1) of the Administration (Ashanti) Ordinance, 1902 (Cap. 110) vested some three miles radius of Kumasi Town lands in the Crown.

The need for registration of documents relating to land was recognised as early as 1883 with the enactment of the Registration Ordinance, 1883 (No.12 of 1883).[59] This was re-enacted as the Land Registry Ordinance, 1895, Cap. 133 (1951 Rev.) which applied to all parts of the country except the Northern and Upper Regions. Since independence, the Land Registry Ordinance has been replaced by the Land Registry Act, 1962. The Land Registry Ordinance provided facilities for the optional registration of instruments affecting land. These included a judge's certificate and a memorandum of deposit of title deeds. Under section 6, a description of the land affected was required but section 20 expressly declined to guarantee the validity of the instrument registered. Significantly, the 1895 Ordinance excluded from its purview oral transfers which were the main method of land transfer. It would appear that the Ordinance was

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[57]See the Public Lands (Leasehold) Ordinance, Cap 138 (1951) Rev. Ollennu contends that in spite of the enactment of the Public Lands Ordinance, Cap. 134. (1951) Rev. empowering the state to acquire land absolutely, the colonial authorities adopted a policy of taking leasehold interests in stool lands. According to Ollennu the Public Lands (Leasehold) Ordinance was passed in pursuance of that change of policy. See Ollennu 1971, p. 164.

[58]See also the Public Lands (Vesting and Transfer of Powers) Ordinance, Cap 135 (1951) Rev; and the Housing Schemes (Acquisition of Land) Ordinance, Cap. 85 (1951) Rev.

[59]On the history of registration of deeds in Ghana between 1880 and 1960 see in detail, L.K. Agbosu, Land Administration and Land Titles Registration in Ghana, London 1980, Unpublished Ph.D thesis, pp. 334-378.

designed to provide a record of land transactions of fledgling European companies and educated Africans as it merely provided for a register of deeds. It made no provision for the adjudication of competing claims. Soon the register of deeds became unreliable as changes in ownership occasioned by court judgments and customary intestacy went unrecorded. This was in addition to the general apathy or reluctance of the public to use the facilities of the Deeds Registry and the low standard of plans drawn by surveyors. The failure of the Land Registry Ordinance, 1895 had enormous consequences for the security of the individual's title to land, and may be the cause of the widespread belief, still held today, that the only way to ensure the security of one's ownership of land was to build a house on it. As we will see shortly, this belief has been strengthened by the Land Development (Protection of Purchasers) Act, 1960 (Act 2) which protects the land developer, and ensures that he keeps the land notwithstanding any defect in his title.

Since both Old Dansoman and the West Korle-Gonno Estates were only developed after 1948, and informants in Domiabra had no knowledge of the pre-1962 system of registration, our enquiries on the 1895 Ordinance were confined to Jamestown, where all lands were acquired long before 1962. Concerning lands that were purchased by the cluster of mainly British company buildings located in the Bible House area, including Elder Dempster Lines, A.J. Seward and Dizengoff, the Jamestown chief stated that his predecessors executed deeds in favour of the purchasers and that he believed the deeds were registered. Among Africans who bought their lands further to the north of Bible

House, there seemed a clear co-relation between the size of the house and the educational statuses of the original acquirers or their immediate descendants on the one hand, and the preparation and registration of a deed under the 1895 Ordinance. Of 40 houses in the area, 3 had been registered. In each case, the house was a massive two-storey mansion and either the original owner had been a merchant, an influential citizen or his immediate descendants had been members of the professional classes or businessmen. Further north still, in the London Market area which was mainly developed after 1910, the link between educational status and registration was even more obvious. Five houses had been registered, including the properties of the Chinerys and that of the late Heward Mills, a famous criminal lawyer and race-horse owner who also amassed a fortune and acquired and registered extensive landholdings in the Tesano area of Accra-North. Out of a total of 40 respondents in District B, from whom information was sought, 32 replied that they had not registered their houses under the 1895 Ordinance. As many as 28 of these lived in very modest houses. All the others lived in quite impressive, though old houses. In each case, the informant was satisfied with the original oral transfer of the land by the stool. They saw no advantage to be gained in having deeds drawn up and registered. The 3 respondents who lived in quite expensive but unregistered properties had not even registered their houses under the Land Registry Act, 1962.

6.3.2.2 The Land Registry Act, 1962

We have now seen both the expansion of the state's control over land and the earliest attempts at registration of instruments. It remains to be seen exactly what safeguards the title deeds a purchaser keeps in his safe confer on him. This involves an investigation into whether the mere registration of an instrument under the Act is a guarantee of his title and, therefore, secures his interest in the property.[60] These are the pressing issues to which we now turn in our examination of the Land Registry Act, 1962 (Act 122) which was enacted after a hiatus of 67 years in the development of a system of registration of deeds. Our attention will be focused on the consequences of registration and the question of title. Indeed, the title itself is misleading as the Act does not deal with the registration of land at all, but only continues the pre-independence system of deeds registration initiated in 1883. Under that system of registration, instruments submitted to the registry are recorded for their own sake without any reference to the validity of title of the land they purport to transfer. Mere registration of an instrument is no proof of the holder's title. Registration simply confers validity on an instrument and resolves the question of priority between two competing instruments.[61] The determination of priority between instruments is easiest where two or more purchasers obtained their property from a single vendor whose title to it is not in question. Where, however, different vendors

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[60]See E.S. Aidoo, "The Conveyancer's Confusion," Review of Ghana Law, Vol. 12 (1980), pp. 53-66.

[61]Asare v. Brobbey (1971) G.L.R. 331 and Ashanti Construction Corp. v. Bossman, (1962) 1 G.L.R. 435.

claim interests in a particular property, the instruments of their respective purchasers would be of no consequence in resolving the issue of title. This is particularly perplexing in view of the large number of persons who may claim interest in any piece of property. However, in reality, the possibility of such a conveyancer's nightmare has been mitigated by the effect of the Land Development (Protection of Purchasers) Act, 1960 which enables the subsequent purchaser of developed land to retain his property after compensation to the original purchaser. In practice, since a number of persons or stools or even families may hold themselves out as the rightful owners, purchasers sometimes have to treat with more than one party.[62] Nearly half of all purchasers admitted to having dealt with more than one party in the process of acquiring their interests in land. There is also widespread ignorance and misunderstanding of the real effect of the registration of instruments. Many assume that the mere registration of an instrument is the final proof of their ownership of a piece of land. The real effect of the registration of an instrument can be found in section 24(i) of the Act as follows:

> "(1) subject to subsection (2) of this section, an instrument other than
> (a) a will, or
> (b) a judge's certificate, first executed after the commencement[63]

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[62]See e.g. Nartey v. Mechanical Lloyd Assembly Plant Ltd., Supreme Court judgment, 19 May 1988, unreported; digested in (1987/88) G.L.R.D. 86, on appeal from Mechanical Lloyd Assembly Plant Ltd. v. Nartey, Court of Appeal judgment, 31 July 1985, unreported; digested in (1984-85) G.L.R.D. 49 .

[63]The Act commenced on 2 November 1962. See Asare v. Brobbey, above note 61 and Ashanti Construction Corp v. Bossman, (1962) 1 G.L.R. 435.

of this Act shall be of no effect until it is registered."[64]

However, the notion that an unregistered instrument, even though of no effect, is not void, as it can always be validated by registration, has been confirmed.[65] Since the Act only deals with instruments, it does not provide for the registration of oral grants. Yet, as we have seen, oral grants are not only valid, but are the main form of transfer in many communities.[66] It was held in Moubarak v. Jappour[67] and Crayem v. CAST[68] that in deciding the question of priority between an oral and a written grant, statute has no application. Thus the floodgates were opened to adverse claims not even based on a written instrument at all, but on word of mouth. In the case of Hammond v. Odoi,[69] it was held that where a prior and customary grant can be established, no amount of subsequent conveyances, registered or not, can defeat the customary title. Nevertheless, the Act determines priority between registered instruments, and the principle enunciated in Asare v. Brobbey that an unregistered instrument is

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[64]Asare v. Brobbey, see above, note 61.

[65]See Amefinu v. Odametey, (1977) 2 G.L.R. 135.

[66]Oral grants are by far, the most important form of transfer of land in the rural areas, particularly, to stool subjects. In our rural field of study, all grants of land to stool subjects for farming purposes, including the establishment of hamlets were oral. Again, in Jamestown, where very few lands are covered by title deeds, the oral grants of such lands (even though shrouded in the mists of antiquity) have never been denied.

[67](1944) 10 W.A.C.A. 102.

[68](1949) 12 W.A.C.A. 443.

[69]Supreme Court judgment, 20 December 1982, unreported; digested in (1982-83) G.L.R.D. 129. This confirmed the decision in the case of Sekyi v. Sasu, Court of Appeal judgment 28 November 1983, unreported; digested in (1982-83) G.L.R.D. 65 where it was held that priority did not depend on registration alone; a registered deed would not have priority over a earlier grant by customary law.

not void since it can always be validated by registration, has been rejected in a string of cases. In Amefinu v. Odametey,[70] the vendor first made a written grant to the plaintiff and, subsequently, another written grant to the defendant over the same piece of land. Unlike the defendant, the plaintiff failed to register her instrument, and yet claimed priority by order of grant. The court rejected her argument on the basis of section 24 of the Land Registry Act, 1962 and held that since her instrument was unregistered, it was ineffective. It followed that the vendor had not divested himself of title in favour of the plaintiff.[71] Indeed, the possibility of late registration under the principle in Asare v. Brobbey would have rendered section 24 ineffective.[72] However, it was held in Ntem v. Ankwandah[73] that if a party presented an instrument and it was refused registration in circumstances in which he could compel the registrar to register it, but was wrongly rejected, it must be regarded as registered.[74]

The case of Mechanical Lloyd Assembly Plant v. Nartey,[75] demonstrates most compellingly the uncertainties surrounding the issue of priorities in deeds registration. In that case, a document recited that a grant of land to the plaintiff was made with the consent and concurrence of the requisite elders, but it was

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[70](1977) 2 G.L.R. 135.

[71]See also the earlier case of Odoi v. Hammond, (1971) 1 G.L.R. 375 where the same principle was upheld.

[72]See Ussher v Darko (1977) 1 G.L.R. 476 where three parties were involved.

[73](1977) 2 G.L.R. 452.

[74]The registrar is granted power by s. 28 to refuse registration under certain circumstances.

[75]See above note 62.

in fact executed by the sub-chief acting alone. Later, the paramount stool granted the same piece of land to the defendants, who on hearing that the sub-stool actually owned the land, again obtained another grant of the same land from the sub-chief and his elders. Both plaintiff and defendant registered their instruments, plaintiff registering it first. Determining priority not by registration, but by validity of grant, the Court held that the document granting the land to the plaintiff was invalid as it was signed by the chief alone.[76] This case, together with recent decisions of the courts demonstrates that the purchaser's nightmare lies less in the system of priorities than in the unscrupulous activities of chiefs and other land owners who are prepared to sell the same piece of property several times over to different parties who are then left to fight it out in court. Usually, most sales of lands by stools are of virgin forest or undeveloped land, and the decision in Adjei v. Grumah[77] would only increase the sort of dubious land sales demonstrated in Mechanical Lloyd Assembly Plant v. Nartey. In Adjei v. Grumah it was held that the re-entry of virgin forest and stool lands by stool authorities was "a realistic customary approach to the development of land" as it ensured development within a reasonable period after the grant of land. This, in view of Mechanical Lloyd Assembly Plant v. Nartey, might prove a "fraudster's charter" if carried to its logical conclusion.

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[76]See also, Mensah v. SCOA, (1958) 3 W.A.L.R. 336.

[77]Court of Appeal judgment, 14 December 1982, unreported; digested in (1982-83) G.L.R.D. 99.

The initiation of the process of registration depends on the private individual who has custody of the instrument. Registration consists of filing a duplicate copy of a map or plan describing the property affected. The registrar has power to reject instruments which in his opinion have not been made on suitable paper. He may also refuse registration for instruments containing erasures, blanks, interlineations and unauthenticated erasures, or which are simply illegible. The registry keeps a book in which entries are made of particulars of each registration, numbered consecutively. The registrar sends to the Chief Registrar, within the first ten days of each month, a complete list of all instruments registered by him in the preceding month. Under sections 12, 16, 17 and 20 the Chief Registrar, in turn, compiles within 14 days a general list to be retained in his office, and subsequently published in the gazette.

The purchaser retains the original instrument as title-deed. But this, as we have seen, is no protection against the adverse claims of other purchasers, particularly those with oral grants. Even the creation of new offences by section 34 of the Land Registry Act, 1962 has not prevented the widespread practice of multiple sales of land. Section 34 provides as follows:

> "Any person who knowingly -
> (a) purports to make a grant of a piece of land to which he has no title; or
> (b) purports to make a grant of a piece of land without authority; or
> (c) makes conflicting grants in respect of the same piece of land to more than one person shall be guilty of an offence which shall be a second degree felony and may, in addition to any punishment that may be imposed upon him, be liable to pay an amount of twice the value of the aggregate consideration received by him".

This, however, is a rarely used provision as land disputes are usually settled by civil process. Indeed, its ineffectiveness is demonstrated by the continued spate of deception that characterises land transactions. It is doubly weakened by the fact that it overlooks the sheer size of the class of persons who may claim title to any one piece of land. The failure to enforce the provisions of section 34 of the Land Registry Act demonstrates the rather limited impact that state-based structures have so far made on the system of ownership of land. Consequently, the existence of those structures has only led to a modest degree of efficiency in the administration of land. The need for the continued existence of state-based structures in the administration of land is obvious, but there can be little doubt that for the state-based model to function effectively, it must vigorously apply and enforce the relevant statutory provisions.

The fact that large numbers of land holders in such places as Old Dansoman and Domiabra have as yet made no attempt to register their holdings illustrates the rather limited effect of the policies of the institutions charged with the administration of land and demonstrates the need for bolder and more imaginative policy initiatives. It also demonstrates the role of people as makers and unmakers of law, and shows the creation of frustrate norms where the people subject to a law habitually disregard it.[78]

It also illustrates the need for caution in the enactment of laws, which all too frequently seem to be made merely by a wave of the legislator's wand

[78]See Allott 1980, p. 30 developing the notion of frustrate norms as one species of norm, and defining it as a norm or law emitted in due form, a valid norm with zero or minimal compliance.

apparently without regard for possible ineffectiveness.[79] As we have shown above, such laws often become frustrate and lose their efficacy as limits stemming from the ambitions of legislators collide with even firmer limits in communication and in society.[80]

Like the statutes preceding it, the Land Registry Act, 1962, is silent on the question of a guaranteed title or even the validity of deeds registered under it. It simply says in section 24 that an instrument other than a will or judge's certificate which purports to transfer an interest in land is not valid if it is not registered under its provisions. All the same, the Registrar of Lands is empowered under section 20 to reject applications for registration if they are not in order.

Where concurrence is refused, a fresh application could be made to the Lands Commission. The case of Republic v. Lands Commission; Ex Parte Akainya,[81] however, suggests that the Lands Commission has no power to reject an application for registration simply because the acreage involved is too large. In that case, the applicant, a stool subject, sought an order of mandamus to compel the Land Commission to register a deed of gift under which he had been granted 320 acres of land in consideration of free legal services that he had rendered to the stool concerned. The gift was made by the chief who happened to be the cousin of the applicant. The Lands Commission refused to give their consent to the grant, contending in this regard that a grant of 320 acres was too large. It was

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[79]See Allott 1980, p. 67.
[80]Cf. ibid. pp. 49-97.
[81]1975 2 G.L.R. 487.

held inter alia that since the applicant was a stool subject and was by customary law entitled to a determinable estate in the stool land, the refusal of the Lands Commission was unreasonable and oppressive. The reasoning of the court was, however, influenced by the fact that the applicant had already utilised part of the land for a coconut farm and that there were well over 25,000 acres of uncultivated forest remaining. It may be questioned whether this approach, when pressed to its logical limits, particularly in an urban environment, will not result in an undesirable allocation of lands to one individual or groups of individuals much to the detriment of stool subjects and strangers alike. For instance, the allocation of 320 acres of land in Old Dansoman to a single individual would mean the sale of an entire suburb to just one person, creating a shortage of land for other citizens. It is submitted that the Lands Commission should have based its defence on section 18 of the Conveyancing Decree, 1973 (N.R.C.D. 175)[82] which empowers a court to set aside or modify an agreement to convey an interest in land on the grounds of unconscionability. The Lands Commission could then have argued that it was unconscionable for the applicant to have been granted freely such a vast acreage, since his blood relationship with the chief must have influenced the stool's bargaining position vis-a-vis the applicant; that the agreement was of little value to the community which the chief represented; and that in view of the prospective financial benefits to the applicant from the sale of the produce of his plantation the stool deserved payment for the

[82]See p. 397 below for a fuller consideration of section 18 of the Conveyancing Decree and the grounds on which an application can be made to the court thereunder.

land.

Table 13 below sums up the pattern of registration of deeds under Act 122 within the three areas of field-work.[83] In discussing the difference between the paramount and sub-paramount titles in chapter five, we briefly outlined the history of the acquisition of individual titles in the suburbs, and mentioned that a key-date in that history was 1962 when the Land Registry Act was passed.

The passage of the Act marked the start of a new era in the relationship between stool and subject. The concurrence of the minister responsible for lands became a sine qua non for the acquisition of a valid interest in land. That concurrence could only be granted when evidence of the alienation of the land in the form of a deed duly executed by a chief and his elders was presented to him. The chief or sub-chief, to satisfy the provisions of the Act, prepared a layout of lands under his stool and granted/sold them on his own terms. His subjects thus lost their ancient right to acquire title to land through the effective occupation of unoccupied land.

The table below indicates the overall pattern of registration of deeds in the three areas under consideration. It also shows the levels of involvement of lawyers and surveyors in the sale of land.

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[83]A little explanatory note is necessary here. The figures for Districts D-F and Districts G-H may be distorted for the following reasons. Research in this area in District D-F was restricted to the Old Dansoman area since all houses on the West Korle-Gonno Estate were automatically registered on completion. Equally, all bungalows on the new location of Domiabra were registered by the relevant authorities. In both districts, therefore, research was confined to a fraction of the field-area.

TABLE 13

REGISTRATION OF DEEDS UNDER THE LAND REGISTRY ACT, 1962			
Land	District		
	A - C	D - F	G - H
1. No. of lands occupied stool by subjects.	N/A	5	35
2. Whether lawyers were involved in the sale of land.	11	9	2
3. Parcels of land falling within a layout demarcated by a qualified surveyor.	23	111	40
4. No. of parcels registered under Act 122.	25	81	52

The table shows that, on the whole, the services of solicitors are seldom employed in the registration of deeds. However, in both the outskirts (Old Dansoman) and in the rural areas (Domiabra) stool authorities are increasingly resorting to the use of qualified surveyors in the sale of land. All three samples from the various districts show a comparable pattern which indicates a greater eagerness by "strangers" to register their deeds promptly. Over a quarter of respondents in Jamestown were compelled to execute and register deeds on their properties either as a result of negotiations with a lessee or as a result of conflict within the family.

Though fieldwork revealed a universal awareness of the existence of the Lands Registry, more than two-thirds of informants in Jamestown and Domiabra (indigenous occupants of farming plots) admitted they had no title-deeds on their properties. This contrasts sharply with Old Dansoman and the newly opened up part of Domiabra (District H) where purchasers are keen to register their deeds

as soon as they are executed by the vendors. "Strangers" dominated the number of respondents who saw the registration of deeds as the most essential part of the process of the sale of land. It is not only the absence of title-deeds on older properties, but also the lack of site plans in these areas that would have to be addressed if any system of land registration was to have its full impact.

It is one of the weaknesses of the Land Registry Act, 1962 that the Registrar of Lands has no power to refuse to register a deed, other than those concerning objections on account of blanks, erasures, etc. (see above, p. 381). On the other hand, under section 11 of the Act, he is obliged to register all instruments presented to him in the prescribed form. This has the ridiculous consequence of enabling all manner of people to pass themselves off as vendors and actually succeed in having the deeds they execute in purported conveyance of the land registered. The position of the Registrar of Lands in such a case was highlighted in the case of Republic v. Chief Lands Officer, Ex Parte Allotey & Others.[84] In that case, the caretaker of certain family lands in Accra submitted 164 conveyances to the Chief Lands Officer for registration.

Attached to the application for registration of the conveyances was a letter setting out the names of A and five others as signatories to the conveyances, but excluding the name of Q, a joint head of family. In 1974, there was an intra-family dispute which was settled by the Court designating Q and A as joint heads of family. The registrar refused to register the conveyances, and the

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[84]High Court judgment, 22 August 1980, unreported; digested in (1982-83) G.L.R.D. 97.

applicants sought an order of mandamus to compel him to register the conveyances under the Land Registry Act 1962 (Act 122). The registrar contended that by virtue of the consent judgment of 1974 the instruments ought to have been executed by the two joint heads of family, Q and A. Challenging the locus standi of the applicants, the registrar also contended that the instruments ought to have been presented by the grantees and not the grantors. It was held, granting the application, that since the applicant was the grantor who had executed the instruments, and had a duty to defend the title conveyed by those instruments, he had sufficient interest in seeing to it that all was done to give a perfect document to his grantees. It was further held that the Registrar of Lands had no power to refuse to register a deed, since section 20 (a) and (b) of the Land Registry Act which gave him power to refuse to register had been excepted from coming into operation by the Land Registry Act (Commencement) Instrument, 1965 (L.I. 450) and that section 11 of the 1962 Act imposed a duty on the registrar to register all instruments presented to him in the prescribed form.

6.3.2.3 Conveyancing and private ownership

The practice of reducing contracts relating to land into writing and drawing up conveyances has its origins in the introduction of English Law into the Gold Coast. Until then, the traditional system had depended entirely on witnesses and in some cases, the guaha, trama and shikpon yibaafo ceremonies which we outlined above (see pp. 358-359). Gradually, the growing class of lawyers

started to draw up conveyances of land transactions which clearly spelt out the nature of the vendor's title or interest, the capacity in which he consented, or concurred to some assurance of interest in the land in question, and undertook to enter into various duties and obligations enforceable at law. There soon developed a typically Ghanaian style of conveyancing, modelled closely after the English style.

A typical conveyance recited the names of the parties, their capacities and the nature of the title being conveyed, by way of introduction. The operative part of the conveyance then commenced generally as follows: "In pursuance of the said agreement, and in consideration of the payment of...the vendor hereby grants and conveys to the purchaser and his heirs personal representatives and assigns all...the vendor also divests himself of...together with all easements rights privileges right of ways appurtenances unto the purchaser to have and to hold the said piece of land...his heir personal representatives successors and assigns forever." Thus the transfer of the vendor's interest in the land was complete, and absolute and total. What is more, this style of conveyancing, with little or no variation, was used in the transfer of all manner of interests in land. Where the transferor was the family or the individual holding the usufruct, no reservations or rights were conferred on the holder of the allodial title. The purchaser and his heirs, assigns, personal representative and successors were granted rights of user, heritability and alienability in perpetuity. Their position was further strengthened by the fact that while the covenants of a typical conveyance put the vendor under closely prescribed obligations, there were no

restrictive covenants at all imposed on the purchaser. Describing the usufruct as "potentially perpetual", the court in the case of Mansu v. Abboye[85] said that apart from the state exercising its powers of expropriation under the State Lands Act, 1962 the purchaser's interest could only be determined by his own consent, abandonment or failure of successors.

The vendor, under the typical conveyance, covenanted to give good title to the purchaser. He also covenanted that the land was free from all encumbrances; that the purchaser and his heirs would for all time occupy and enjoy the land, and receive the rents and profits without eviction, interruption or claim by the vendors; and that the vendor would at all times, and at the request and cost of the purchaser and his heirs, execute all deeds to make the purchaser's title perfect. Finally, the deed was executed by the vendor, and attested. Where the interest was transferred by a community (stool) or a class of persons (extended family), the conveyance was also executed by the elders and principal members. This was to make the purchaser's title incontrovertible.

From the stool's point of view, such a conveyance was disadvantageous. Every new purchaser, especially a non-stool subject, is effectively ringfenced from the stool's jurisdiction. Particularly in the urban areas, he can seldom be called upon to make contributions to general development, the stool having effectively conveyed its rights away. Therefore, the great paradox for Ghanaian towns and villages is that as they expand, the stool's resources for development

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[85]Court of Appeal judgment, 10 June 1982, unreported; digested in (1982-83) G.L.R.D. 130.

diminish correspondingly. On the other hand, most stool subjects hardly enter into any documented contracts with their chiefs and elders. In Accra it was rare during the pre-earthquake period for records or documents to be drawn up in evidence of the sale of land.

Information on documentation of land sales for this period is available only for Jamestown. Only four informants[86] (all four of them in Districts B and C) stated that their title-deeds had been drawn up at the time of purchase. Many lands in Jamestown still have no form of documentation at all, but then the owners do not feel menaced by third parties. The grant of farming land to stool subjects in the old sector of Domiabra is still predominantly oral. Also, many of the people from the old quarters of Accra who settled in Old Dansoman continued the practice of non-documentation of their lands at the time of purchase, even though in almost all cases, they paid valuable consideration for those lands. It was the issue of receipts by the vendors in acknowledgement of the payment of the purchase price that was a more popular practice. For many purchasers then, the "receipt" became the only evidence of their titles. Some lost their receipts while many more failed to secure even this form of documentation, trusting in what they saw as the integrity of the chief and elders. While the "receipts" themselves are, no doubt, of some evidentiary value, they are not sufficient to pass title in the property to the purchasers. It is usually either through the influx of immigrants or the expansion of a town through natural

[86]This figure excludes the properties of European companies.

increase that bonds become more impersonal, so that purchasers feel a compulsive need to enter into formal agreements as a safeguard against fraud and double sales. In both Jamestown and the old sector of Domiabra, though all persons interviewed were fully aware of the existence of title-deeds, they hardly felt any need to have any drawn up on their properties. For them, it is just not the way things are; after all no-one was disputing their right to ownership.

The reasons for this attitude may well be found in the nature of the relationship between chiefs and heads of families on the one hand, and such professionals as lawyers and surveyors on the other.

TABLE 14

RELATIONSHIP BETWEEN THE ACTIVITIES OF CHIEFS, HEADS OF FAMILIES AND PROFESSIONALS			
Period	Professionals		
(years)	Lawyers	Surveyors	Secretaries
1 - 5	56	141	3
5 - 15	6	17	2
15 - 30	1	-	-
30+	-	-	-

Generally, the relationship of chiefs and heads of families to lawyers and surveyors tends to be impermanent and often specific to either particular land transactions or to the tenure of particular elders. Of the lawyers employed by chiefs and heads of families, the majority had been retained for periods between one and five years.[87] Of the remainder, six had been retained for up to fifteen

[87]These short retainer periods are, in part, due to the suspicion that some lawyers used their relationship with the stools to create debts which in the past the stools were sometimes forced to repay by granting extensive holdings to the lawyers. But today stools are more likely to change lawyers because of the inability to pay legal fees.

years, and only one lawyer had been employed for more than fifteen years. In many cases, payment of fees is dilatory and the lawyer continues to exercise a lien over the files of the stool or family. Some files are never recovered as the fees are never paid. In relation to "secretaries", only one was in the proper sense of the word a real secretary, taking notes of transactions and meticulously keeping records of all land transactions. The majority of records tend to go missing between successions to various traditional offices when one group or the other usually loses control of the right to sell lands and tries to obstruct the incoming office-holders. Needless to say, records of land transactions in the possession of traditional authorities are very patchy indeed.

We submit that it is from this lax attitude to record-keeping and registration that the officials of the new Land Titles Registry are bound to face their biggest problem. Ultimately, the resolution of the question of registered and unregistered land will turn on the question of valid documents on land. The existence of a twin regime of documented and "oral-granted" land has led to an endless spate of fraud and litigation. Yet a sudden change to a general system of English-style conveyancing would not cure the faults inherent in land tenure. A system designed for communalism and now converted to commercialism is likely to be fraught with problems. The basic problem is still the dearth of written and reliable information. There are no reliable boundaries in many places, and the oral system of transfers poses formidable problems of evidence. No records

are kept subsequent to transactions. Moreover, there are competing groups claiming title to most properties. In Accra, these problems are compounded by the practice of people arranging succession to property patrilineally while the courts may step in to arrange it matrilineally. All these problems have called for the introduction of some form of legislation.

6.3.2.4 The Conveyancing Decree, 1973 (N.R.C.D. 175)

The present law governing the transfer of land in Ghana is the Conveyancing Decree, 1973. The Conveyancing Decree, 1973 came into force on 1st January, 1974 and is basically a re-enactment with amendments and rephrasing of various sections of the English Law of Property Act, 1925.[88] Divided into four parts, it covers the mode of transfer of interests in land, the effect of conveyances, covenants, and miscellaneous matters. The main innovations of the legislation are in Part I, which lays down the mode of transfer of interest in land, and provides for a machinery for the recording of oral grants, the latter filling a lacuna left by the Land Registry Act, 1962 which excluded oral transfers from its purview.

Section 1 declares as follows:

> "1.(1) A transfer of an interest in land shall be by writing signed by the person making the transfer or by his agent duly authorised in writing, unless relieved against the need for such writing by the provisions of section 3.
> (2) A transfer of an interest in land made in a manner other than as provided in this part shall confer no interest on the transferee."

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[88]G.R. Woodman, "The Ghana Conveyancing Decree, 1973, and the Customary Law", Journal of African Law, Vol. 17 (1973), pp. 300-306 at p. 300.

Equally, section 2[89] provides that no contract for the transfer of an interest in land shall be enforceable unless it is in writing and signed by the party against whom the contract is to be proved. Section 3 makes extensive derogations from the need for writing. Transfers that occur by operation of law or of the rules of equity, by order of the court, by will or upon intestacy, by prescription, by leases not exceeding three years, by licence or profit other than a concession required to be in writing by section 3 of the Concessions Ordinance, 1939 (Cap. 136) and by oral grant under customary law are all excluded. The truth is that individual property is continually becoming family property, even under the regime of the new Intestate Succession Law, (P.N.D.C.L. 111) of 1985. The vesting of individual property in groups without the formality of a deed or some other form of writing has tended to perpetuate the problem of the uncertainty of ownership over long periods of time. Without proper genealogical and archival records, the problem of group ownership, and individual rights therein, is nowhere near solution.

Section 4 provides that an oral grant of an interest in land under customary law shall be recorded in the form contained in the First Schedule "or as close thereto as circumstances permit". Also, an adequate plan of the land being transferred shall, "if available", be incorporated in the record. Again, this tentative, optional provision tends to defeat the object of the legislation as the

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[89]Section 2 replaced section 4 of the Statute of Frauds, 1677 and applies to both sales by private treaty and by auction. See Djan v. Owoo (1976) 2 G.L.R. 401 and Sbaiti v. Samarasinghe (1976) 2 G.L.R. 361 for what the writing must contain.

location of parcels of land cannot be ascertained accurately without the aid of a plan.

The provision in section 6 for the setting up of a machinery for the recording of customary transfers has remained a dead letter. Nor has the transitional provision that until the setting up of such machinery by the Chief Justice, the registrar of every District Court should assume the responsibility for the recording of customary transfer been of much success. We discovered no case of customary recording at the initiative of individuals and, indeed, interviewees expressed total ignorance of any such facility. And though section 7 grandly declares that "an oral grant made under customary law shall be of no effect until it is recorded", the non-recording and non-registration of customary grants is the overwhelming practice among rural peoples. A striking exception is where they enter into contracts with commercial farmers or ranchers for the sale or lease of land. In almost all such cases, and at the expense of the purchaser, transfer is recorded. It is therefore not surprising that section 138 of the Land Title Registration Law, 1986 has repealed sections 4 to 11 of the Conveyancing Decree of 1973, which created the mechanism for the recording of customary transfers of land.

Part II deals with the effect of a conveyance. It creates a number of presumptions, including the presumption that the term "parties" includes both the parties to the transaction as well as their heirs, assigns, successors and personal representatives (section 12(1)). Also, under section 13(2) every conveyance is presumed to pass all the rights and interests of the vendor unless

a contrary intention is stated. However, the latter presumption must now be subject to the provisions of the 1979 constitution that no greater interests than leases can be granted of stool lands. Section 18 creates a new rule of unconscionability as follows:

> "18. The court shall have power to set aside or modify an agreement to convey or conveyance of an interest in land on the ground of unconscionability where it is satisfied after considering all the circumstances, including the bargaining positions, the value to each party of the agreement reached, and evidence as to the commercial setting, purpose and effect of the agreement, that the transaction is unconscionable."

This apparently paternalistic restraint on freedom of contract was designed to protect illiterate chiefs and other traditional authorities as well as ordinary farmers from contracting away their lands too cheaply. However, an unhappy purchaser can also take advantage of the provision where he feels he has either been misled or he has simply paid too much money for his property. No case law has as yet developed on this provision. Much of the rest of Part II is designed to check attempts by judgment-debtors and others to avoid the process of enforcement (see e.g. sections 18 and 19).

Part III deals with covenants. Today, with the leasehold as the highest interest that an individual can hold in stool and family property, this section may come to be of increasing significance. Section 22 sets up an array of implied covenants in conveyances for valuable consideration. These include the implied covenants of the right to convey, quiet enjoyment, freedom from encumbrances and further assurances, all of which give legislative authority to standard

conveyancing practice. Customary grants of land for valuable consideration are frequently evidenced subsequently by deed. Discussing the effects of implied terms under the Conveyancing Decree, of 1973, on customary grants Woodman has contended that in so far as customary law imposed lesser obligations than those implied by the Conveyancing Decree, 1973 the lesser terms of the customary grant have been abolished by the Conveyancing Decree, 1973.[90]

Unlike ordinary conveyances, leases are much more tightly regulated, and the lease would therefore seem to offer the best regime for the regulation of the user of the property. No longer are the lessee and his assigns conferred unfettered rights of use and alienation. Section 23(1) provides:

> "In a conveyance by way of lease for valuable consideration there shall be implied the covenants relating to payment of rent, repair to adjoining premises, alterations and additions, injury to walls, assignment and subletting, illegal and immoral user, nuisance or annoyance, and yielding up the premises..."

Provision is also made for the observance of the implied covenants of the head lease in conveyances by way of sub-lease. Under sections 25 and 26, implied covenants are enforceable by the heirs and successors of both covenantor and covenantee. Re-entry, forfeiture and reversion are governed by sections 27-30.

Finally, an omnibus Part IV covers such matters as the production and delivery of documents, statutory commencement of title, giving of notices, and the execution of conveyances. S.36(1) provides that "the period of

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[90]See Woodman 1973, pp. 304-306.

commencement of title, whether documentary or otherwise which a purchaser of land may require shall be thirty years." This clearly saves the problem of proof of an extended root of title in largely illiterate communities; but it could also provide the basis, in extreme cases, for the assertion of adverse titles by long- term squatter communities.

The Conveyancing Decree, then, has laid the foundation of a system of documentation of grants (including customary law grants), and in its provision on leases contains the machinery for regulation. The lease appears destined to be the predominant future mode of ownership, and the effective enforcement of the covenants of Part III of the Conveyancing Decree may at last usher in an era of effective control of the private user of land.

6.3.2.5 The Land Development (Protection of Purchasers) Act, 1960

The Land Development (Protection of Purchasers) Act, 1960 (Act 2) together with the Farm Lands (Protection) Act, 1962 constituted the first attempts to perfect the title of land developers and farmers who had invested in properties to which their titles were subsequently found to be defective. The two Acts were aimed at fostering development in the housing and farming sectors, especially in cases where substantial amounts of capital or labour had already been expended. Act 2 is described as "an Act to protect purchasers of land and their successors, whose titles are found to be defective after a building has been erected on the land." But the Act imposes several conditions on purchasers who seek its protection. First, the building in question must have been erected in a

"prescribed area", which is defined to mean "an area prescribed for the purposes of this Act by a Legislative Instrument of the Minister responsible for lands."[91] Further, section 4(2) defines "erected a building" in these terms: "A person shall be deemed to have erected a building if he has carried out the greater part of the work required for the erection thereof." Under section 1, the protection of the Act is only available to purchasers who had already taken a conveyance[92] of the land, and where injustice and hardship would result if the defect in the title is not cured. The court is empowered to make an order providing that the defective title taken by the purchaser shall be deemed for all purposes to have operated to confer on the purchaser the title of the land.[93] It has been pointed out that this has the same effect as estoppel by acquiescence.[94] The central question that arises for solution relates to the relative importance of the conditions under which the court would make an order under Act 2. Woodman has opined that "the Act applies only where a possession order would be given on the ground of the ineffectiveness of the conveyance."[95] This, he says, is the only defect for

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[91]To date, Accra and Takoradi remain the only "prescribed areas".

[92]Section 4 (1) defines "conveyance" to include a transfer of land by customary law. It has, however, been held in Golightly v. Vanderpuye (1961) G.L.R. 716 that a "conveyance of land" does not include a grant of a lease, since that merely involves the creation of an interest in land. It has further been held in Lartey v. Hausa (1961) G.L.R. 773 that a licence or tenancy determinable on notice are also excluded. However, the Act does not state whether the conveyance should have been for valuable consideration.

[93]The court's power is discretionary.

[94] G.R. Woodman, "Palliatives for Uncertainty of Title: The Land Development (Protection of Purchasers) Act, 1960 and the Farm Lands (Protection) Act, 1962", University of Ghana Law Journal, Vol. VI, 1969, pp. 146-158. Unlike acquiescence, however, the principle in Act 2 does not require that the true owner should have been guilty of deliberately misleading conduct.

[95]Woodman 1969, p. 150.

which the Act gives relief. On this interpretation, the requirement that the building must have been erected in a prescribed area" and that the purchaser must have acted in good faith are merely ancillary to the all-important requirement that the purchaser must also have taken out a conveyance on the land. The court may make a further order requiring the purchaser to pay compensation to the other party.

In practice, cases under Act 2 involve competing purchasers to whom the same land has been sold who then enter into a race to develop the land. Since most land sales are in the undeveloped suburbs of the city, it is quite common for a purchaser on visiting his property, after several months, to be confronted with building activities by another "purchaser" of the same land. To prevent abuse of the provisions of the Act, a purchaser may only avail himself of the protection of the Act if he can prove the building had been erected on the land in good faith.[96] In Ayitey v. Mantey,[97] the court held that the principle behind the Act was the abhorrence of unjustified enrichment, the desire to ameliorate undeserved hardship, and the removal of injustice; and that provided the suppliant can bring himself within the ambit of the protecting umbrella, he could retain his house despite the defects in title. In Dzade v. Aboagye,[98] the court reformulated the conditions which a purchaser must satisfy to bring himself

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[96]On this see Korley v. Bruce (1962) 1 G.L.R. 7 and Wuta-Ofei v. Dove (1966) C.C. 102 (S.C.). On the elements of a successful plea of acquiescence by a plaintiff see Fry J. in Willmott v. Barber (1880) 15 Ch.D 96.

[97]Court of Appeal judgment, 18 December 1982, unreported; digested in (1984-86) G.L.R.D. 65.

[98]Court of Appeal judgment, 17 May 1982, unreported; digested in (1982-83) G.L.R.D. 22.

under the protecting umbrella of Act 2. First, he must have taken a conveyance of the land on which he built, including a customary grant; and second, the construction of the building on the land must have been done in good faith. It was further held that good faith could not be imputed to a man who built on land when he had cause to believe that his title was not in order.

The position before 1960 was that where the owner of land was faced with the development of his land in good faith by another, he either recovered the land together with the developer's investment or, if the principle of estoppel by acquiescence was applicable, he lost his land altogether to the developer. Neither option led to much fairness as each operated on an "all or nothing" basis. The effect of Act 2 and Act 107 is that in certain circumstances, the court may validate the plaintiff's invalid title, but may order him to pay compensation, thus sharing the hardship between the parties.[99]

6.4 The Lands Commission

With increased governmental concern over land transactions came the recognition of the need to create a machinery to regulate such transactions. A realisation of this came with the establishment of the Lands Commission under article 163 of the 1969 Constitution. The present set up of the Lands Commission with the Lands Department as its implementing secretariat is provided for by section 36(2) of the Provisional National Defence Council

[99]Woodman 1969, p. 152.

(Establishment) Proclamation (Supplementary and Consequential Provisions) Law, 1982.[100] Under section 36 the Lands Commission is responsible for the formulation of recommendations of national policy of land use, and also monitors the operation of government policy on land. According to section 36(6) it has charge of all records relating to the grant of public lands. The Commission is under the authority of the Secretary of Lands and Natural Resources, and under section 36(11) the government retains a right to disallow grants of land made by the Commission to members of the public.

A more significant power of the Commission is its supervisory authority over assurances of stool land. Under section 47(1) of P.N.D.C. Law 42, every assurance of land granted by stools and persons deriving their interests through customary law for valuable consideration is invalid unless it was executed with the consent and concurrence of the Commission.[101] This is without doubt a major regulatory restraint on the disposition of stool lands. But section 47 retains the traditional discrimination in favour of stool-subjects, provided the assurance did not involve the payment of valuable consideration. Such criteria can today only be met in the more backward parts of the country. But such a concession to customary law is clearly necessary if subsistence agriculture, which provides the bulk of the country's agricultural output, is to continue. Over-all, a clear trend has emerged in the development of property law in the country. From a genesis

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[100]The Lands Commission was originally set up under the Lands Commission Act, 1971 (Act 362) in compliance with article 163 of the 1969 Constitution, and has been functioning actively since 1971.
[101]The requirement of State concurrence is traceable back to the Local Government Ordinance of 1952 (Cap 64); it was continued in section 8 of the Administration of Lands Act, 1962.

of absolutist traditional ownership of property, the aggregate impact of intense social and economic change has resulted in the introduction of the doctrine of eminent domain.[102]

The quantum of interest in land held by non-nationals has also been severely curtailed. The customary law freehold is no longer available to such persons, and under section 46(4) no interest can be created in land which vests in such persons a leasehold for more than fifty years. Moreover, according to section 46(3), all existing interests in land held by foreigners are deemed to have been converted into leasehold interests for a period of fifty years commencing from the twenty second day of August 1969 at peppercorn rent, with the reversionary interest vesting in the government in trust for the people of Ghana. Nor have the citizens themselves been saved from the unfettered powers of the state. Under article 190(4) of the 1979 constitution, no higher interest than the leasehold can be created in stool lands which, as we have seen, is interpreted to include "family lands." Though the 1979 constitution was suspended and later abrogated by the military, the Lands Commission, of its own volition, took a policy decision in 1981 not to grant its concurrence to alienation of freehold interests in stool lands.[103] The present position, therefore, is that no freehold interests in lands are granted to citizens out of stool and family lands. However, individual holders of existing freeholds can freely transfer their interests to

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[102]P.N.D.C. Law 42, s. 46(1).

[103]This is based on information provided by an official of the Lands Commission. It was confirmed by the actual practice of the Lands Commission.

purchasers. The standard assurance today is a leasehold for ninety nine years with an option of renewal. It must be stated, however, that the Lands Commission's position is not backed by law, and may well be illegal.

Besides, under section 50(1), no person may own more than one house built by the State Housing Corporation. It is, however, unclear if an existing owner of such a house may not succeed to another. Also, no person may own more than one plot of public land in the same town (section 45(6)). Under the Minerals Act, 1962, (Act 126) the entire property in, and control of all minerals in any Ghanaian lands, rivers, streams, water courses, territorial waters, continental shelf, vested the President in trust for the people of Ghana. This provision has been re-enacted in the Minerals and Mining Law, 1986 (P.N.D.C.L. 153). Also, under the Concessions Act, 1962,[104] no land owner can grant more than twenty two acres in concession unless a certificate of validity is obtained, and concessions for mining and timber can only be granted by the government. Under section 49 of Law 42, the grant, revocation, suspension and renewal of licences for the prospecting, exploration and mining of minerals are all tightly regulated by the government. Under section 2(1), the government may direct the use of property which it considers to be abandoned, out of use, or the subject-matter of investigations. As we have already seen, the stool had exclusive rights to minerals, and abandoned property reverted to the original owners of the land. These customary law rights have now been extinguished by

[104]See also the Concessions Ordinance, Cap 136 (1951 Rev.).

the state.

Thus the commendable efforts made by the classical customary law writers to systematise and telescope the more protean aspects of the traditional laws and customs of the various communities into a tidy national scheme of property ownership only paved the way for a system of state authority over land which, though it retains aspects of the traditional scheme of interests, drastically curtails it. Meanwhile, the absence of a well-articulated scheme of documentation has been the cause of widespread fraud perpetrated on purchasers of land. Both the new regime of minerals and of concessions are designed to ensure greater national participation in the sharing of revenue from foreign investments. But there is, so far, no clearly articulated government policy behind the curtailment of the quantum of the individual's interest in land. It is certainly in the area of agriculture that recent legislation on land is bound to have its most telling effect. But it seems appropriate to defer final conclusion on the impact of recent legislation on agriculture until sufficient enquiry has been undertaken.

6.5 Conclusion

We have seen in this chapter how governmental intervention has imposed a range of statutory controls over the customary law of property in the decades since independence. Where judge-made law and the actual practice of the various communities had constituted the essence of Ghanaian property law in the period up to independence, the state now attempted to assume wide powers over land. We have traced the course of that development, and sought to determine its importance in the emerging alignment of relationships between a weakened system of chieftaincy and a dominant state. The increasing imposition of central authority in the sphere of property has tended to foster the development of the usufructuary interest while policing the powers of chiefs. This chapter also prepares the ground for the examination of the new system of land title registration by throwing into sharp focus the impact of post-independence legislation on property. As we have shown, there is the need for some form of title registration in Ghana. By largely leaving the system of land tenure intact, chieftaincy and its related social and political institutions still remain the central stultifying factors in any reform of the land law of the country. Chiefship alone, of all the national institutions, is still based on tribal rights. In keeping with the long line of legislation creating the machinery and mechanisms for the registration of and state control over land, there is a need to reform chiefship and create corresponding (symmetrical) state-run institutions and offices that take account of the management of land as a national resource.

CHAPTER 7

LAND TITLES REGISTRATION

The conclusion that emerged from the last two chapters, which examined both the nature of traditional land tenure and the character of government's powers of expropriation, was that traditional land tenure substantially remains the basis of the Ghanaian law of real property, that legislative intervention has made some incursions into the traditional conception of property, but that major problems still exist with regard to the transfer of titles. This chapter looks in detail at the system of land title registration in Ghana,[1] analyses its mechanics and considers its strengths and weaknesses. As little has been written about the system of registration of title to land in Ghana, some stress will be laid here on describing and analysing the detailed provisions of the Land Title Registration Law, 1986.

The object of the law is "to provide a machinery for the registration of title

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[1]The statutory law on title registration in Ghana is to be found in the Land Title Registration Law, 1986, P.N.D.C.L. 152 and the Land Title Regulations, 1986, L.I. 1341. Useful background materials can also be found in S.B. Amissah (ed.) Papers Submitted at the Seminar on Land Resources Management and Land Use Policy, Kumasi 1980; and also A.K. Mensah-Brown (ed.), Land Ownership and Registration in Ghana, Kumasi 1978 and L.K. Agbosu, "Land Registration in Ghana: Past, Present and the Future", Journal of African Law, Vol. 34, No. 2 (1990), pp. 104-127. The system of title registration that has been adopted in Ghana derives its origins from the system of registration of title which was pioneered in Australia and is commonly known as the "Torrens system". See e.g. the Real Property Act, 1886 of South Australia and the Real Property Act, 1900 of New South Wales which consolidated previous Australian statutory enactments that originated the system of registration of title to land. The Torrens system has been widely adopted around the world in a variety of forms. See e.g. the English Land Registration Act, 1925. The Ghanaian system of registration is presently in operation in Accra Registration District 03, and useful information may be obtained in Circular No. 1/88, First Registration to Land and Interests in Land in Accra Registration District 03 issued by the office of the Chief Registrar of Lands in Accra. See also, Paper on the Land Title Registration Law, 1986, presented by the Chief Registrar of Lands, Mr C.B. Aryee, to the National House of Chiefs on Friday, 3rd June, 1988. Since the completion of the fieldwork on which the present thesis is based, most of Central and Western Accra, including Jamestown, West Korle-Gonno Estates (Mamprobi) and Old Dansoman have been declared a registration district known as Accra District 04. See Land and Concessions Bulletin, No. 8, 20 December 1991. Domiabra and other villages to the west of Accra have also been declared a registration district under the Land Title Registration - Declaration of Registration District (Accra District 10) Instrument, 1993 (L.I. 1568).

to land and interests in land." The purpose of the system thereby established is twofold: firstly, to give certainty[2] and to facilitate the proof of title; secondly, to render dealings in land safe, simple and cheap, and to prevent frauds on purchasers and mortgagees.[3] The present registration process is only part of a pilot scheme to be conducted in the Greater Accra Region and designated agricultural areas partly to train staff and develop expertise.[4]

By the time fieldwork was undertaken for the present study (between March and August of 1989), Law 152 had not yet been made applicable to any of the field-areas. As a result, this part of the thesis utilises a questionnaire that was largely hypothetical (see Appendix) but based as far as possible on data provided by those informants who had lands in areas where Law 152 had

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[2]On certainty in the English system of land title registration, see D. Jackson, "Registration of Land Interests - The English Version," The Law Quarterly Review, Vol. 88 (1972), pp. 93-137 : "A major claim made by supporters of registered title is that in large measure it destroys the uncertainties of the general law." See also, T. Key, "Registration of Title to Land,"The Law Quarterly Review, Vol.2 (1886), pp. 324-346. It is also felt that the advent of information technology would improve the certainty of titles immeasurably: see D.J. Whalan, "Electronic Computer Technology and the Torrens System," The Australian Law Journal, Vol. 40, (1966-67), pp. 413-424 where he said enthusiastically of the adoption of computerisation and information technology in the Torrens system of land registration, "all fee simple titles will be current to within a few millionths of a second, and completely accurate and free of the many doubts...this state has never been achieved in the history of registration of titles and has seldom been approached in the history of land law." Computerisation has other advantages. For instance, rapid computer access and retrieval of documents and other information held in the registry on a display screen or a print-out would among others, minimise time-consuming manual searches.

[3]See the Memorandum, Land Title Registration Law, 1986. The objects of a title registration statute are the basis on which the courts within each title registration system develop their own principles of title registration law. The objects of a title registration statute may, for instance, influence the narrowness or amplitude of judicial intervention in the activities of the Land Titles Registry. In Australia, where the original Torrens statute has been decribed as "a charter to the courts to make or mould as well as to apply the law, to determine the form of documents as well as to interpret the terms used therein, and then to determine the effect thereof" the objects of the title registration statute have been compared to the acorn from which the Torrens system has grown like a spreading oak. See R.C. Connell, A Comparison of Settlements of Registered Land in England and Australasia, London 1947, p. 5. Cf. Allott 1980, pp. 175-176 describing the purpose behind every attempt at social transformation through law as the "informing principle" or basic idea which the law-giver hopes eventually to realise.

4 At least this is what I was told by several officials of the Registry. Since I knew some of them quite well, I accepted their explanation.

already taken effect.

We have already observed how the steady increase in the government's powers of expropriation of land was achieved without a corresponding increase in the powers of the state to regulate the use of such land. We also saw the failure of existing legislation to grapple with the question of land titles. Again, we outlined how the net effect of government policy has been to superimpose a supervisory regime on the traditional system of land tenure while at the same time cutting back the powers of chiefship. Yet throughout, the problem of uncertainty of titles has remained the great will-o'-the wisp of the Ghanaian land law. As a result, the idea of a system of registration of titles gained widespread advocacy among many scholars.[5]

The aim of a system of title registration is to promote certainty of title by providing for a system of permanent recording in a central register which alone is regarded as conclusive evidence of ownership of a parcel of land. Title registration is commonly seen as representing the final stage of the privatisation and the marketisation of land,[6] the object being to guarantee an indefeasible title

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[5]See e.g., Bentsi-Enchill 1964, p. 310; G.R. Woodman, "The Registration of Instruments Affecting Land," Review of Ghana Law, Vol. 7 (1975), pp. 46-61; and by the same author, "The Land Registry Bites (Somewhat)," Review of Ghana Law, Vol. 11 (1979), pp. 31-39.

[6]But it is important to bear in mind the caveat of McAuslan 1987, p. 187, who noted: "The first lesson to be learned about land is that it cannot be treated in policy terms as if it had only one aspect or dimension. It is multi-dimensional. Too often, policy has focused on one aspect of land to the exclusion of other aspects and not surprisingly such a policy has failed to achieve its goals, because it failed to take account of the multi-dimensional nature of land. Consider the issue of title to and marketability of land, a policy much favoured by the World Bank and some governments who consider that modernisation involves a sweeping away of laws which prevent the operation of a market place for land, i.e. customary law. Marketability of land is however, only one aspect of land, an aspect moreover which is grounded in a particular theory or ideology about, or approach to society which may not accord with the approach to society adopted by others in that society. We can in fact isolate two broad approaches to land in society; one of which sees land as basically part of the social relations between people and society, the other of which sees land as basically part of the economic relations between persons and persons in society. The former in turn is based on an approach to society which does not differentiate between economic and social relations in society;...But the older approach cannot be abolished at the stroke of a pen, so a new statutory regime of land as commodity begins

for the purchaser. The scheme is based on the hierarchical structure of interests existing under customary law and it is likely that some of the old problems that bedevilled the property law will continue to exist under the new scheme: chiefs and heads of families will continue to play a dominant role, and with the highest transferable quantum of interest in land now being the leasehold, the allodial title and even the customary law freehold will continue to be exclusively reserved for such tribal institutions as the "stool" and the "sub-stool", the very cornerstones of much of the old system whose office-holders may now be transformed into a new rentier class. The reforming influence of the new legislation will probably be restricted to the provision of two functions - the framing of land policy and the provision of individual purchasers with an indefeasible title.[7] Ultimately, the effectiveness of the legislation will depend on the keenness of owners of land to register their interests promptly. This will require a particularly strong effort to get peasants to register, particularly, all subsequent transactions after a parcel of land has been placed on the register.[8] But while the possible ineffectiveness of the new system need not detain us at this stage, the new legislation does constitute the boldest attempt yet to grapple with the root of much that is wrong with the system of land tenure.

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after a time to be infiltrated by the older notion of land as an aspect of social relations with consequent difficulties for those administering or indeed learning the law."

[7]But see S.R. Simpson, Land Title and Registration, London 1976, esp. p. 3 where he maintains that land registration is not even a kind of land reform, merely a means to an end - the formulation of government policy.

[8]On this, see S.F.R. Coldham, "Land Control in Kenya," Journal of African Law, Vol. 22 (1978a), pp. 63-77 at 64 where he observed that many transactions involving property and their subsequent transmission went unrecorded. See also by the same author, "The Effect of Registration of Title upon Customary Land Rights in Kenya," Journal of African Law, Vol. 22 (1978b), pp. 91-111.

The principal purpose of this section is to discuss the functions of the registry after the lodging of an application for registration by the holder or prospective holder of an interest in land. It is argued that the mechanism for registration of titles, though technically perfect, may be flawed by the lack of enthusiasm on the part of landholders to have their interests registered, shifting the emphasis on the provision of incentives and the means to galvanise passive or reluctant landholders (especially subsequent purchasers and heirs) into registering their titles.

The system of land title registration is centred on the Land Titles Registry[9] at Victoriaborg in Accra, operating under a Chief Registrar of Lands. Provision is made under sections 1(1) and 11 of the Land Title Registration Law for the establishment of district registries throughout the country to operate under District Land Registrars under the general supervision of the Chief Registrar of Lands based in Accra. Under section 6(1) of the Land Title Registration Law, 1986 (P.N.D.C.L. 152), the Chief Registrar may further subdivide a registration district into registration sections. Land titles registration is centred on a system of entries, recordings, and authentications based on the Presentation or Daybook, the land register, the registry seal, and the registry maps and plans which together constitute a complete "information bank" of the title situation in every registration area. The system depends on vast quantities of information

[9]While the registry does contain the essential technical mechanisms (and procedures) necessary to ensure the effective working of a system of title registration, its efficiency would depend largely on managerial and technical expertise as well as an efficient administrative back-up. But apart from the Senior Lands Registrar himself, none of his colleagues appears to have had any prior experience in land titles registration. Equally, according to the Chief Registrar of lands 90 per cent of cartographers, surveyors, lawyers and draughtsmen were new to the job in 1989.

pertaining to land. To achieve its object of speed, cheapness, and certainty, the bulk of this information must be reduced, hence the exclusion of trusts (often evidenced by bulky instruments) from the register. The registry also keeps parcel files, filed plans and documents, powers of attorney, and a proprietors and parcels index on all registered parcels of land.

Under section 19 of the Land Title Registration Law, 1986, once a district has been declared a registration district, land owners may apply to the registrar for registration of the following: allodial titles, customary law freeholds,[10] concessions, leaseholds, mining leases, share-cropping tenancies, assents by personal representatives, caveats, orders of the High Court, restrictions, compulsory acquisitions by the government, transfers, etc.

All applications for registration initially go through a process of lodgement in the Presentation or Daybook where they are stamped, dated and given a serial number. Priority of instruments is determined by the order of entry of the application in the Presentation book, and the date of entry shown in the Presentation book is subsequently permanently entered in the land register as the date of registration of title. Once the process of registration of a particular parcel is complete, the application is cleared from the Daybook, while

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[10]In its consistent use of such terms as "allodial interest" and "customary freehold," Law 152 seems to have finally adopted the recommendations on the Report of the Law Reform Commission on Proposals for the Reform of Land Law, November 1973 on the need to resolve the inconsistencies in the terms used for the various interests held in land in Ghana. The report recommended that the word "interest" be used in place of "estate," "tenure," etc; that the term "allodial title" be adopted in place of "absolute title," "ultimate title," "radical title," and; that the words "possessory," "usufructuary" and "determinable" titles be replaced by "customary freehold." Cf. E.S. Aidoo, "The Land Title Registration Law: An Introduction", Review of Ghana Law, Vol. 15 (1983-86), pp. 112-128 at pp. 117-118. But it is difficult to understand why the drafters of Law 152 decided to adopt the term "customary law freehold" rather than the simpler, more suggestive and convenient "customary freehold" originally suggested by Bentsi-Enchill: "The Traditional Legal Systems of Africa", in F.H Lawson (Chief ed.) International Encyclopaedia of Comparative Law, Vol. 6, Tübingen, The Hague, Paris 1975, Chapter 2, pp. 68-101 at p. 90.

unsuccessful applications are cancelled in the Daybook. Indeed the Daybook contains records of all dealings and enquiries relating to registered land. Thus, in addition to documents deposited to await applications for entry, caveats and official searches of the land register and registry map are also entered in the Daybook. The case of documents deposited to await application for entry occurs where a proprietor of an extensive parcel of land for which he holds a single land certificate sells part of his land; he deposits his land certificate in the registry to await the purchaser's application for the removal of the alienated parcel of land from it.

The registry also holds a land register (sections 13-18), which is an official form containing a record of the key pieces of information relating to registered lands including the particulars of the proprietor, and all encumbrances affecting the land. It discloses all instruments affecting a parcel of land and, subject to overriding interests, limits a prospective purchaser's enquiry to the information disclosed therein. This system reflects the three principles needed for the effectiveness of a system of titles registration.[11] Firstly, the mirror principle, which involves the proposition that the register of title is a mirror which reflects accurately and completely, the current facts that are material to the title of a particular parcel of registered land. Secondly, the curtain principle, which provides that the register is the sole source of information for prospective purchasers who need not concern themselves with trusts and equities that lie

[11]See Simpson 1976, p. 22; and Jackson 1972, p. 93.

beyond the curtain.[12] Finally, the insurance principle, which is to the effect that if through some error or negligence (in the process of registration) the mirror fails to reflect the current title or a flaw appears, anyone who thereby suffers loss must be put in the same position as if the reflection were a true one.

The Land Title Registration Law, 1986 appears to combine the mirror and insurance principles to guarantee an indefeasible title for the proprietor of registered land. A "mirror of information" is created in the register, on the land certificate and in the registry files, and by focusing the prospective purchaser's attention on the critical pieces of information affecting the title, any defects are detected. Section 16 of the Land Title Registration Law, 1986 provides:

> "The register shall comprise a folio in respect of each parcel in every registration district, and each folio shall comprise -
> (a) An entry of the description of the parcel with reference to the Registry Map and a plan approved by the Director of Surveys under sections 15 and 34 of this Law;
> (b) An entry in respect of every proprietor of the parcel, stating the name of such proprietor and the nature of his proprietorship; and
> (c) An entry in respect of every interests held in the parcel by any person, stating the name of the proprietor of the interest and the nature of his interest."

Further, under section 17, the "Land Registrar may cancel any entry in the land register if he is satisfied that the entry has ceased to have any effect." Under section 65(2) a memorial of every lease is endorsed on the land certificate. Similarly, under section 72(2) instruments creating a mortgage are filed in the land registry, and a memorial of the discharge of a mortgage must be endorsed in the land

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[12] Id.

register and on the land certificate, noting if such mortgage is discharged wholly or partially (section 77(3)). According to section 84, restrictive agreements are ineffective unless entered in the folio. However, licences are not registrable. Also under section 19(4) interests terminating without a notice of termination within less than two years after the date of application for registration and overriding interests may not be registered.[13] Under section 46:

> "Unless the contrary is recorded in the land register any land or interest in land registered under this Law shall be subject to such of the following overriding interests whether or not they are entered in the land register as may for the time being subsist and affect that land or interest:
> (a) such rights of way, rights of water, profits or rights customarily exercised and enjoyed in relation to the parcel not being recognised interests in land under customary law, as were subsisting at the time of first registration under this Law."

Though all these overriding interests lie beyond the mirror of information in the register and on the land certificate, they are binding on the purchaser. But they do not affect his title which is guaranteed under the insurance principle enunciated in section 43. Under section 43, where a proprietor acquired his land for valuable consideration or by a court order, his title is indefeasible "and shall be held by the proprietor together with all privileges and appurtenances attaching thereto free from all other interests and claims whatsoever", except encumbrances and conditions shown in the register as well as overriding interests (see also

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[13]Overriding interests are interests which bind a registered proprietor and his purchaser irrespective of registration. The time for ascertaining the existence of an overriding interest is the date of registration of the instrument: see Re Boyle's Claim, (1961) 1 W.L.R. 339.

section 18(1)). Where, however, the land was acquired through a voluntary transfer not involving valuable consideration, it is held subject to any unregistered rights, interests or liabilities to which it was subject under the previous holder. Under section 48(1) it is also subject to the provisions of bankruptcy and the winding up provisions of the Companies Code, 1963, (Act 179). Further, under section 18(2), where title to registered land is acquired by prescription or under the Limitation Decree, 1972 (N.R.C.D. 54), the register continues to show the name of the previous proprietor who now holds the land upon trust for the person who claims to have acquired the title.

The register itself is in ledger form, divided into columns containing three distinctive parts, together giving a complete and precise bundle of information of interest affecting a particular parcel of registered land, including dates of past and current transactions, encumbrances, reservations, caveats, leases, charges, particulars of the proprietors, and any restrictions. Cancelled entries are ruled out in red ink and notes made in the column as to their cancellation.

Sections 34 and 35 provide for a map or collection of maps known as the Registry Map to be kept in the registry. Scientific accuracy of all maps and plans used in relation to registered lands is ensured by the requirement that all such maps and plans must be approved by the Director of Surveys, be noted in the appropriate folios and subsequently filed in the registry. In this way, the registry builds up a store of accurate technical information relating to the location of parcels of registered land,

their extent and the records from which they were prepared. However, unless a note is made on the folio of the register to that effect, the registry map and approved plans are not conclusive evidence of the boundaries of registered land. This rule is designed to avoid frivolous disputes over trifles which can lead to great delay and expense, and to strengthen the hands of the Adjudication Committees who have jurisdiction over boundary-fixing. The Registrar may also fix the boundaries of registered land by serving notice on the proprietor and adjoining owner; and the Director of Surveys may, from time to time, revise the registry maps and make new editions. Except where a previous plan, approved by the Director of Surveys, is still in the registrar's custody, no land may be registered without an attached plan. In the case of flats, the application must be accompanied by a strata plan approved by the Director of Surveys.

From the foregoing, it is clear that the operation of the registry is designed to ensure an effective system of land registration based on an accurate and precise definition of each parcel of land. In the previous chapter it was emphasised that oral transfers of land are still very common within the field-area. The register itself provides a compendious facility for the ascertainment of all relevant information affecting the proprietorship of a piece of land. It is a system that is eminently designed to protect the purchaser and facilitate the emergence of a reliable market in property. It is a bold and ambitious attempt, and borrows heavily from the English system of land titles registration in which ownership interests

are established and transferred pursuant to a governmental certification and registration process.[14] The essential difference between land titles registration and the old system of deeds registration is the guarantee of the registered proprietor's (indefeasible) title in the former case. In that sense, it constitutes a governmental interference (a welcome one though) in the process of private treaty for the sale of land and curtails the prospect of litigation resulting from a defect in title. The purpose is to simplify and improve the system of conveyancing while preserving the traditional system of land tenure through a centralised system of registration of title.[15] It is one of the weaknesses of the system of titles registration that there is no accompanying attempt to reform either the system of land tenure or re-demarcate existing boundaries.

The first problems of the title registration system in Ghana have, however, arisen from an unexpected source. It was reported in early 1990 that the system had been suspended as major administrative problems had emerged owing significantly to shortfalls in funding and

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[14]For an appreciation and comprehensive discussion of this system, see R.A. Woodman and P.J Grimes, Baalman: The Torrens System in New South Wales, Sydney 1974. See also D.J. Whalan, The Torrens System in Australia, Sydney 1982; E.A. Francis, Torrens Title in Australasia, (Vol. 2) Sydney 1973; and Simpson 1976. Each system of land title registration has its own unique features. It has, for instance, been observed perceptively that the English statute for title registration differs (in principle, form and detail) so fundamentally from the system conceived and implemented in Australia as to carry the possibility that the objects and principles of construction of the Australian Act may not be applicable to the English Act. This can be exacerbated by the divergence of legal thought, opinion and judicial decision in each country: Connell 1947, pp. 4-5.

[15]Coldham 1978b, p. 91 illustrates the problems inherent in substituting a completely new code of substantive law with detailed provisions regarding leases, charges, easements, etc. for a traditional system of land tenure under a system of registration of title.

bureaucratic bottlenecks.[16] The problems include inadequately trained staff, inadequate transport facilities, insufficient funds for the purchase of printing materials and the frequent breakdown of overage printing machines,[17] some of which are said to be over fifty years old. The result is reflected directly in the number of processed application to date. Of over 5000 applications for registration received between January 1988 and February 1990, only 148 had been dealt with and land certificates issued. This represents about 3 per cent of applications received. It also means that on average the registry issues just over one land certificate every seven days; hardly the work rate of an efficient administrative machinery.

Besides, 1,877 processed applications[18] were awaiting the production of maps and plans to facilitate registration. These problems stem from the fact that registration is taking place in a sporadic and unsystematic way, and from the ill-thought out implementation of the process. It is estimated that the 5,000 applications[19] handed in represent less than 2 per cent of lands in the areas so far declared registration districts. As has already been pointed out, the present process is part of a pilot scheme to develop the best way to implement the system of title

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[16] West Africa Magazine, 19-25 March, 1990, p. 469.

[17] Id.

[18] Id.

[19] Id.

registration in Ghana; and it is hoped that these statistics would be seen as negative feedback indicative of shortcomings in the system as presently implemented.

7.2 *the process of registration*

This section examines why registration often does not take place and considers various problems in the process of registration. Under sections 14-21 of the Land Title Registration Law, 1986, once an area is declared a registration district, holders of parcels of land may come forward and apply for their properties or interests in property to be placed on the register.[20] Section 139 of the 1986 Act defines "interests in land" as "any right or interest in land which is capable of registration under this law." Such interests include estates, charges, easements, profits, licences, options, and equities of redemption.

In sum, interests in land include every right in land in respect of which the holder is entitled to make use of the property in some way. It remains to be seen how enthusiastically such interests are likely to be registered in registration districts. Table 15 below indicates the likely pattern of titles in the areas under consideration.[21]

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[20]For a detailed description of types of interests in Ghanaian land law, see pp. 264-269 above.

[21]While the figures given in the table below indicate the likely pattern of registration by informants, no claims are made as to whether informants will in fact act in the way that they have indicated once the areas under consideration are declared registration areas.

TABLE 15

LIKELY PATTERN OF REGISTRATION OF TITLES.			
Districts	No. of Informants	% aware of Law 152	% likely to register
A-C	60	22% (13)	38% (5)
D-F	60	58% (35)	83% (29)
G-H	40	15% (6)	83% (5)

On the whole, the level of awareness of Law 152 is low. In Jamestown only 13 out of 60 respondents were aware of Law 152. Of the 13, only 6 appeared to have a clear understanding of the purpose of the new law. Five of those 6 informants stated that they would be prepared to register their interests under Law 152 once Jamestown is declared a registration area. Comparable results were obtained in the two other districts. In Domiabra, for instance, only 6 out of 40 informants were aware of Law 152, but 5 out of these 6 informants were likely to register. Opinions differed as to the reason for the very low level of awareness of the new legislation. The dominant view was that the government had not done enough to give publicity to the new system and to educate the public on the advantages of registration. A minority of informants, however, felt that the problem lies less in publicity and education than in the simple inability of government to fund the registration process.[22]

[22]Significantly, a number of commentators have also drawn attention to possible problems about cost. See e.g., J.C.D. Lawrance, "The Registration of Title", in S.B Amissah (ed.), Title Registration, Land Resource Management and Land Use Policy, Kumasi, 1980, pp. 3-17, esp. p. 4 where he identifies the initial cost of compiling the register, particularly in countries where there is an inadequate nation-wide survey control network and where existing cadastral surveys are scarce and unreliable, as one of the first obstacles to be tackled in Ghana. Once the register is established, however, it is mainly financed by revenue from fees on dealings. On the same subject, see also, Aidoo 1983-86, pp. 112-128; and S. Asante-Ansong, "Title Registration in Ghana", Review of Ghana Law, Vols. 13-14 (1981-1982), pp. 51-72.

The foregoing suggests the limits of communication and reception to which Law 156 has so far been subjected. In chapter 1 (pp. 51-59), we discussed Allott's conceptualisation of law as a communication system in which various obstacles may impose limitations on the effective transmission of norms from law-maker to recipient.[23] Though the registration exercise had been given maximum publicity through radio, television and the press media, the majority of landholders still had no immediate plans to apply for registration. Moreover, there was widespread confusion and misunderstanding of the real aims of the exercise. Even among those aware of the on-going exercise, many dismissed application for registration as an unnecessary waste of money.

In one instance, where it had come to the notice of the other members of the extended family that the acting head of family had applied to have family property registered in his own name, they were unaware that they could enter a caveat at the registry. The registration authorities would clearly have to develop better lines of communications into society in order to make the exercise more effective. At present, applications for registration are mainly advertised on television and adverse claims invited. This method would doubtlessly prove inadequate as registration is extended to other areas and the registry is inundated with applications for registration. A rather different point concerns the

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[23]See also Allott 1980, pp. 73-97, esp. pp. 76-77, showing the difficulty of understanding the law-making through newspaper reports. Hansard, he maintains, is little better as it is frequently written in too abstruse a language even for the expert.

rural areas which would pose their own peculiar problems. There, the battery-powered radio may prove an even less effective medium of communication than television and the print media. Thirty-seven out of forty informants in Domiabra, in a series of answers to hypothetical questions, made clear that they would make use of the scheme if the chief or a few trusted educated persons in their own community advised them to do so. The majority of informants in both Jamestown and Old Dansoman/Mamprobi expressed dissatisfaction with a system of title registration that makes information on the extent of their property holding available to the public through a system of searches at the Registry Office.

The two cases that follow illustrate the considerable difficulties which lie ahead.

X, a female head of family in Jamestown, shares an old family house with other members and non-members of her patrilineal family. Her own authority and rights are restricted to the specific areas of the "family house" which she occupies. Other members of her family are dispersed throughout the city but they also regard the Jamestown house as their family house and occasionally return to it, particularly for rites associated with the birth and death of members of the family. Several elderly persons in the house also regard themselves as heads of their own separate families. The family house was constructed a long time ago, just after the "Kaiser's War" (World War 1) by one of her ancestors who worked in the docks of Jamestown harbour with the Europeans.

Having made some money out of the construction of the Jamestown harbour, he then went to the forest area to plant cocoa. He was a generous man, and even in his own lifetime his brothers and cousins were allowed to occupy parts of the house. Though the family has now developed a number of branches, all of which have their own problems, every member is free to come and go as he pleases. Many have built their own houses but they still come. There seems to be a lot of friction in the family house and this particular respondent was unable to provide a specific answer as to who would be authorised by the various families to act on their behalf in having the family house registered.

Apathy is another problem: of the 45 property holders interviewed in the older sections of Registration District 03, 39 have so far not taken any steps to have their properties registered and all the remaining 6 had delegated the task of registration to an educated son or relative. In one extreme case, the property holder described the registration exercise as just another device by government and bureaucrats to squeeze even more revenue from the tax-payer since, in his opinion, the Lands Department is already performing the same duties.

The case of the Jamestown head of family contrasts sharply with that of Mr J., an educated man from Old Dansoman, who is the suburban holder of a customary law freehold. He had bought his land in 1972 and occupies his house with the nuclear family and two lodgers. His title-deeds are registered at the Lands Department in his own name, even though his brother had contributed quite substantially to the construction

of the building. He expressed scepticism about the motives behind the new system of registration, but conceded that in view of the high rate of deception involved in land sales, something ought to be done by government.

But a substantial number of purchasers of Old Dansoman lands acquired less secure titles than Mr J's. In many areas the land was divided into rough strips and sold to purchasers eager to erect simple structures to secure their holdings. George Danso, who bought his land around 1960, typifies this category of less circumspect landholders. He and three close relatives bought their lands along the main untarred road that crossed the Mampon stream and linked Old Dansoman to the fishing village of Grefe to the west. George and his relatives built on the lands and though the purchase price was fully paid, he has never taken any steps to have the land registered under Act 122. He is a half-brother of the chief and he seems to regard that fact as a sufficient guarantee of his title. One of George's relations acquired his land further to the south-west, where Old Dansoman lands merged into Sempe lands without any clear boundary. George undertook to take this writer to the place. The difficulty of ascertaining with any degree of accuracy the boundaries of individual holders was evident as unplanned housing after unplanned housing spilled across the terrain without interruption. The Old Dansoman chief later explained that many of the lands in that particular area were not covered by any form of documentation whatsoever.

TABLE 16

CURRENT DOCUMENTATION PATTERNS			
Land	Districts		
	A-C	D-F	G-H
1. Houses/lands registered under Act 122.	25	61	52
2. Houses/lands with deeds drawn but not registered.	0	15	6
3. Ancestral houses/lands with no single apparent owner.	89	14	19
4. Houses/lands covered only by receipts or other evidence of purchase.	2	23	2
5. Others	4	7	1
Total	120	120	80

Table 16 shows the present pattern of documentation of lands within the field-area. Ancestral or re-communalised[24] houses, in particular, seem to pose a peculiar problem. In Jamestown, where the traditional laws of intestate succession have operated unhampered for many generations, they have obscured the precise nature of the ownership of a large number of lands. Equally, all the 19 informants in Districts G and H who stated that there were no single apparent owners for the lands they were questioned about were from the old sector of Domiabra. Lands covered only by "receipts" should pose less of a problem. All the chiefs and family elders in the sample indicated their willingness, once the "receipts" are found to be genuine, to execute deeds for such purchasers. If the opinions of chiefs and heads of families are anything to go by, applications for some lands registered under Act 122

[24]On this see in detail chapter 8 below.

to be placed on the new register may not be free of disputes; for many chiefs and heads of families still question the competence of some of their "predecessors" to sell certain lands and refuse to recognise the usufructuary rights of the present owners.

In many rural areas as well as badly planned urban areas, whole livelihoods depend on informal arrangements about the use of land and facilities such as wells and creeks which the users do not own. It is possible such claims will be treated as overriding interests under the new law. As we have seen, registered lands continue to be subject to such easements, even if they are not entered in the register, but after an area has been declared a registration area, new easements may only be created by actual registration in the land register. It is likely that this provision on easements will be by and large effective in urban residential areas; it will largely be ineffective in rural areas. Under the statute, anyone who is capable of enjoying an interest in land may apply to be registered as proprietor. Individuals, heads of families and stool occupants may all apply to be registered as proprietors. In the case of northern Ghana where the occupant of the "skin" is different from the tindana or owner of the land, the latter or his agent may apply for registration.

The Land Title Registration Law, 1986 is essentially based on the assumption that Ollennu's analytical model of customary land tenure is valid (see p. 269 above). But as was shown in chapter five, the dichotomy between the paramount and sub-paramount titles as enunciated under Ollennu's theory rests on very shaky ground. Wisely,

P.N.D.C.L. 152 makes no provision for the registration of the sub-paramount title. It is therefore possible, though improbable, that purchasers from sub-paramount stools will be faced with new problems of the validity of their titles. It is probable that such problems will be resolved by registering their allodial titles to such lands under the paramount stool that exercises authority over the sub-paramount stool from whom the land was purchased. But even assuming a solution was found to the problem of sales by sub-paramount stools, the flood-gates would still be opened for sales made by self-styled sub-paramount chiefs (as is often the case) in disputed "no man's lands" between rival stools. Some nice boundary questions will also arise and vigorously test the effectiveness of the new system.

Some of the hardest tests will centre on the exercise of registrarial discretion in refusing applications. But such problems should not appreciably affect the implementation of the scheme. Of 40 respondents (holders) questioned in one such "no man's land" between Old Dansoman and the New Dansoman Estates, 30 per cent had purchased their lands from the Old Dansoman chief (and therefore from the Jamestown stool). Another 25 per cent had obtained their lands from a sub-chief of the Sempe stool. The rest had purchased their parcels of land from various agents of the two stools who cannot now be traced or are dead. What is more, in a handful of cases, lands bought from the Jamestown stool are located deeply in Sempe territory and vice versa. This situation will clearly exacerbate the ambiguities and uncertainties surrounding the

sub-paramount title.

The system makes a clear distinction between first registration and subsequent registration. First registration is the process whereby a hitherto unregistered land or land covered by a deed registered under the Land Registry Act, 1962 is brought on the register. Subsequent registration refers to the subsequent process of dealings involving a registered parcel of land. Under the system of titles registration, land is first placed in the register, after a thorough examination of the title deeds and other instruments, as a unit of property and the owner's title authoritatively declared and guaranteed. Consequently, the proprietor is issued with a land certificate, or in certain cases a provisional certificate. All original and subsequent transactions in relation to a parcel of land are registered by reference to the land itself, and not merely as deeds or instruments registered by the owner. The process of registration is initiated by the submission of an application in prescribed form containing a description of the land, the nature of the applicant's title, the name of the person currently in possession of the land, and a request to have the applicant registered as proprietor. The application is supported by a statutory declaration certifying its contents; and is accompanied by a list in triplicate of all deeds affecting the land; a plan in duplicate, approved by the Director of Surveys; and the registration fee.[25] Where a document is lost or cannot be traced, such loss must be supported by statutory declaration and

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[25]G. Battersby (ed.), Williams on Title, London 1975, p. 818 states that the documents which accompany an application for first registration must include as far as possible, opinions of counsel, abstracts of title, contracts for or conditions of sale, requisitions, replies, official certificates of search and similar documents.

other relevant evidence.

Clearly, this system of registration, based entirely on written evidence, signals the beginning of the end of oral modes of transfer of land and interests in land. In the rural areas it would require both a giant leap in comprehension and a total change in the existing mode of land transfer to be successful. Ninety-nine per cent of persons interviewed at Domiabra have never been parties to land transactions involving deeds. The chief and his elders were almost the only persons who have any familiarity with the nature of deeds. Problems involving illiteracy and bad record-keeping would also have to be addressed if the system were to have a smooth take-off. True, the employment of solicitors and conveyancing would solve many of the problems involved in deeds and the preparation of documents. But a fair proportion of people under the system of deeds registration prefer, after survey by competent persons, to handle matters themselves by relying on conveyancing forms and precedents bought from legal stationers and registered by agents at the Lands Department. They will now have to meet the higher standards set by the new system. The grant of an absolute guarantee of title by the registry depends on the quality of documentary evidence adduced in support of the application. This is to ensure that the register accurately mirrors the critical material facts about the ownership of each parcel of registered land. The applicant is strictly held to account for the unavailability of executed documents; and to reconstruct the past history of the title as far back as possible, accounting satisfactorily for gaps. This procedure is designed to ensure that over time the registry develops a critical

mass of relevant information so as to provide an accurate guide to the title and ownership situation of registered lands.

If standards of record-keeping were low among purchasers under the system of deeds registration, they were even lower among the vendors who tended not to keep any records at all of lands sold by them. Again, the persons a landowner originally dealt with may be unavailable or the successors may be unwilling to execute documents confirming the holder's customary law freehold, agreeing only to a leasehold, and thus effectively reducing the quantum of his interest in the land. Generally speaking, this is the attitude adopted in the urban areas whether the landowner is a "stranger" or a stool subject, and indicates a disturbing trend, whereby chiefs and heads of families and their elders arrogate to themselves the power to reduce the nature of the stool subject's rights in group-held land.

Concerning strangers, the Memorandum to the Land Title Registration Law, 1986 noted,

> "When the chief dies, the new chief may disclaim knowledge of the agreement and expenses, and new expenses may have to be paid by the stranger...Several occasions have also arisen where a farmer has bought land from a chief and elders, and after cultivating the land, has been confronted with documents of title to the same piece of land by another person who has not developed the land but who claims title to this land by virtue of an earlier grant to him by a former chief and his elders of the same stool."

In case of loss of a document, the applicant must adduce the best available evidence in proof of such loss. The best secondary evidence will consist of a complete draft of the conveyance or assignment to the applicant together with examined abstracts of as much of the earlier title as it is

possible to reconstruct, and supported by a statutory declaration of the solicitor who acted for the applicant during the purchase, proving that he investigated title in the normal way, and that a conveyance or assignment was duly executed. This is obviously a laborious process. A rigid adherence to such high standards of proof, though essential to ensure the vesting of an indefeasible title in proper persons, could lead to absurd results. As we have seen, few people use lawyers and fewer still keep their title deeds under lock and key.

Each case is different but two examples particularly illustrate the commonness of this problem and bring out the prospective applicant's predicament in sharp detail. House number X138 in the West Korle-Gonno Estates was allocated to Kailey Mensah. She died in or about 1959. In the confusion that followed the distribution of her movables to her near-relatives, the title deeds to the property were lost and have never been recovered. Nevertheless, her descendants continued to occupy the property without even bothering to obtain letters of administration. Today sharp divisions have emerged among her grandchildren, and the authority of the head of the family and son of Kailey Mensah, George Lawson, is openly disputed. George admits that the family is unlikely to reach a consensus over who should apply for registration. Though the property will probably be registered as family property, mere registration will not make subsequent sale or use as collateral any easier as the family is still deeply divided and the already high number of family members is still increasing.

In a slightly different case, Thomas Annan, 87, of Old Dansoman, claims that he purchased his property, on which he has now erected a single-storey house, from one of the headmen who initially disputed the stool of Old Dansoman with the present imcumbent. The title deeds (though of dubious validity) were lost in 1960 after a burglary on his property. He has never had new documents drawn up as he is anxious that the Old Dansoman chief who he seems to regard as a cut-throat would demand an extortionate fee. In the meantime his seven children have married and borne him thirteen grandchildren.

In these examples, the problem of documents is highlighted. It is probable that the appropriate answer to it will be determined by the overwhelming urgency to make the system of title registration effective. In the poorer suburbs of Accra, the picture is dimmer still, especially in the parts occupied by immigrants of Northern Nigerian and Northern Ghanaian extraction. Such people often founded their ill-planned districts in open defiance of the traditional authorities, and it was clear from the evidence of interviewees that many simply chose to squat on the land, obtaining no consent whatsoever from the stool.

In every case of loss this writer came across during field work, though chiefs and elders were not averse to executing fresh documents, they always insisted on converting customary law freeholds into leaseholds.

Under section 20 of the Land Title Registration Law, 1986 the registrar has extensive powers to reject applications for first registration. This section is designed to sieve out fraud, double sales and other questionable

applications. It provides:

> "Subject to the provisions of this Law and the Limitation Decree, 1972, (N.R.C.D. 54), the Land Registrar may reject an application for first registration by a person claiming to be a proprietor of land or an interest therein and basing his claim upon an instrument, if -
> (a) the instrument deals with the land or part of it in a manner inconsistent with an instrument previously executed whether by the same grantor or a predecessor-in-title or by any other person; or
> (b) on the face of the records, the grantor named in the instrument does not appear to him to have been entitled to deal with the land as the instrument purports to have done; or
> (c) the instrument was made in contravention of, or is null and void by virtue of any enactment; or
> (d) the instrument contains any interlineations, blank, erasure or alteration not verified by the signature or initials of the person executing such instrument."

A further point on section 20 is the exception which it makes for court orders made under the Land Development (Protection of Purchasers) Act, 1960 and the Farmlands (Protection) Act, 1962. In both cases, though another person may be registered as proprietor of a parcel of land, the court order will operate to vest title in the party who successfully sought protection under either Act, and the registrar will be obliged to register him as the new proprietor.

Aside from parcels of land, provision is also made under Regulation 12 of the Land Title Registration Regulations, 1986 (L.I. 1341) for owners of flats and other partitioned buildings to register their respective interests and be issued with a land certificate. This is a strange innovation and needs to be examined in some detail, the bald fact being that flats and partitioned buildings are still a rarity in the country. The idea of registration of stratum estates and strata title was part and parcel of the operation of the Torrens

system in Australia where the basic scheme was that a building could be subdivided into lots or units; a "service company" was then formed for the purpose of carrying out the common purposes of the proprietors of the lots which included the provision of such common services as maintenance, repair, insurance against fire, etc. The company then entered into a service agreement with the proprietors of the stratum estates for the maintenance of the various parts of the building.[26] For the purpose of registration, all appropriate easements in favour of the registered proprietors were shown in the plan of the subdivision. It seems a curious thing to transplant such an alien concept of property management into Ghana without ensuring the availability of service companies.

The majority of existing flats belong to corporate bodies who have no need for separate registration of subdivisions of the building. However, the provision for the partitioning and registration of flats does open the prospect of the partitioning and separate registration of estates that through the operation of the laws of succession come to be vested collectively in a number of persons. A search of the registry yielded no records of registered flats and strata plans, nor of mines and minerals severed from the land as well as of cellars, tunnels and other underground space for which applications may be made for first registration of title. There is a real possibility of the partitioning of family properties notwithstanding the provision of section 110 that the stool or family may be registered as a proprietor of

[26]Francis 1973, p. 95.

any land or interest in land. Section 110 (2) of the Land Title Registration Law, 1986 gives statutory authority to the obligation of the chief or head of family to "consult or secure the consent or concurrence of other members of the stool or family." It is probable that cases will arise where if the head of family is unable to secure the consent of other members of the family, partitioning of the property may be the only option left to the family; especially as under section 110(3) of the Land Title Registration Law, 1986 "no disposition of stool or family land or interest in land shall be registered by the Land Registrar unless it is proved to his satisfaction that any requisite consent and concurrence has been duly given."

Possessory titles[27] may also be registered by persons in possession of unregistered land in the assumed character of owner, and exercising the right of possession peaceably without permission. Such a person has a perfectly good title against the whole world, except the owner, and if the owner does not act quickly enough he may apply to be registered as owner of the land in exercise of his rights under the Limitation Decree. A possessory title by adverse possession may also be obtained in respect of

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[27]These rights are governed by the Limitation Decree, 1972, N.R.C.D. 54. On the effect of long possession of land in Ghanaian customary law, see A.N. Allott, Essays in African Law, London 1960, pp. 284 et. seq., esp. p. 285 where he stated: "In areas where the rights of stools are jurisdictional, families and individuals will rely on long possession to ground their claims to absolute title." Cf. Watson J. in Kojo v. Dadzie (1951) P.C. Appeal No. 61 of 1941: "It is absurd to suggest that if an individual scratches a farm on a piece of land and then abandons it, he or his descendants can return years afterwards and oust anyone who happens to have followed him." But see comments in Shai Hills Acquisition , Land Court, 3 June 1957, upheld by the Court of Appeal, 25 June 1959, C.A. 39/58, unreported: "...land, particularly land on the plains where farming is chiefly by shifting cultivation, is not necessarily abandoned by reason only of the fact that it was not being used at any particular point of time either for farming or residence. Abandonment consists not so much in allowing land to lie waste, but rather in the non-exercise of right to immediate control." Of prescription (acquisitive possession), Watson J. said in Agyeman v. Yarmoah (1913) D. & F. '11-'16, 56: "there is no such thing in native customary law as prescriptive title." But Allott 1960, p. 296, says it "applies where there has been undetected encroachment of forcible dispossession, as by conquest."

registered land.

Individuals, chiefs or occupants of stools (section 110), families, companies (section 106), and the state (section 19(2)) may all be registered as proprietors. But infants may not be registered as proprietors, and provision is also made for the registration of joint proprietors (section 97). Under section 98 instruments executed by agents acting under a power of attorney may also be registered, while under section 105(1) a trustee in bankruptcy or insolvency may be registered as the proprietor of any land or interest in land of which the bankrupt, insolvent or even a deceased (whose property is ordered by the court to be administered according to the law of bankruptcy or insolvency) is proprietor.

As a rule, instruments must be registered within three months of execution or they are liable to a penalty which may be waived at the registrar's discretion. Failure to register after service of notice by the registrar is a criminal offence. Once an application for registration is made, the registrar checks the description of the land, investigates the title offered to see if the applicant has a prima facie right to the land registered in his name. Notice of the application is then published and claims adverse to the applicant's title are invited, and if made, fought out before the Land Title Adjudication Committee.

7.3 The effects of registration

The following discussion focuses on the effect of registration of title and highlights the indefeasible nature of the title conferred on the holder of a title or interest in registered land. Many of the principles of land titles registration have been extensively worked out in the Torrens system and we will peer into the vast English and Australasian literature for fresh insights into the true nature of the "indefeasible" title, in particular, its vulnerability to rectification, overriding interests and the consequences of forgery. Some light, too, will be thrown on the determination of priorities between registered instruments. Finally, we will examine the possible effect, if any, which the legal rules embodied in P.N.D.C.L. 152 might have on the economic behaviour of landholders.

As we have seen, the final act of registration is the completion of the entry or recording of the instrument or dealing in the register (sections 43-50), and the consequent issue of the land certificate. Where the land is acquired for valuable consideration or by an order of the court, the registration of a person as a proprietor vests in him or her an indefeasible title together with all privileges and appurtenances legally appendant or appurtenant to the property subject to any interests and encumbrances shown in the register, overriding interests which may not appear on the register or any rights to minerals by the state. There is, however, a diversity of judicial and academic opinion as to the precise moment when the protective armour of indefeasibility is donned by the title. We must at the outset eliminate one clear case in which an indefeasible title would not be

conferred. Clearly, an instrument must be in order before it can be registered. As has been observed, "it would be an extraordinary result if a person could, by lodging a hopelessly unregistrable dealing, obtain priority which postponed dealings properly lodged during the period in which the first mentioned dealing was being made registrable."[28]

The question of indefeasibility of title occurs again in the guise of fraud. In Gibbs v. Messer,[29] a registered proprietor, Mrs Messer, gave her husband a power of attorney while the duplicate certificate of title and power of attorney were left with a solicitor who forged and registered a transfer of the lands by the husband to a fictitious person, arranged a loan, and created a memorandum or mortgage upon the land certificate. The mortgagees registered the mortgage in the meantime. Mrs Messer discovered the fraud and brought an action for the calling in and cancellation of the certificate of title, and the issue of new certificates of title free from the encumbrance of the mortgage. The Privy Council reversed the decision of the Supreme Court of Victoria and held that Mrs Messer's name must be restored to the register. It was further held that although the mortgagees had taken bona fide and for value, the mortgage did not constitute an encumbrance on her title, and that under the relevant Australian Act, it would have that effect in favour of a bona fide registered assignee.[30] It would appear therefore that in cases of fraud and

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[28]Quoted in Whalan 1982, p. 288.

[29](1891) A.C. 248. Cf. Att. Gen. v. Odell, below note 50.

[30]See the distinction between immediate indefeasibility and deferred indefeasibility which is discussed in note 32 below.

forgery a bona fide purchaser for value may well not acquire an indefeasible title to registered land. Moreover, under section 61, the land registrar has power, if he is satisfied that any person has wilfully failed to register any instrument, to compel him by notice in writing to present the instrument for registration.

The question to be posed is whether the system of titles registration is the ultimate solution to the problem of security of title for purchasers and acquirers of interest in land. The English system of title registration is open-ended; and title is subject to attack on a number of grounds. Ruoff, a former Chief Registrar of Lands of England and Wales, noted:

> "In England, registered titles are less rigidly sacrosanct than in countries where the courts, worshipping a false god named "Indefeasibility," refuse to rectify the register, even after illegalities have occurred. In England, in the interests of fair dealing, rectification may be ordered when it is wrong, or unjust, or impossible according to law to recognise the proprietor as the true owner."[31]

It may be objected that the views of Ruoff do not carry the authority of a legal principle; but this is no answer to the basic problems of indefeasibility of title of registered land which his comments raise. Fraud, forgery,[32] and

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[31]T.B.F. Ruoff, "The Protection of the Purchaser of Land under English Law," Modern Law Review, Vol. 32 (1969), pp. 121-141 at pp. 137-138.

[32] Under the Torrens system of title registration, forgeries are seen as raising the distinction between immediate indefeasibility and deferred indefeasibility. Proponents of immediate indefeasibility argue that in case of forgery, and the consequent registration of another person as the proprietor of a registered parcel of land, recognition should be given to that person as the proprietor since the act of registration cures any defects in title,and the recognition of a person whose name currently appears on the register as the proprietor boosts public confidence in the register. Critics, however, say that immediate indefeasibility threatens the security of all existing registered proprietors. Advocates of deferred indefeasibility, on the other hand, contend that the purpose of title registration is to cure defects in title rather than defects in conveyances. Therefore, it is only when a purchaser relies on a statement in the register that he receives statutory protection. On this analysis, a purchaser who relies on a wrongly executed transfer (involving a forged signature) is not entitled to any protection since nothing in the register has misled him. However, a chargee or subsequent purchaser from the

rectification of the register apart, the system can be said to be riddled with some of the pitfalls, doubts, delays and unknowns that so notoriously ruined the unwary purchaser under the old system.

Re Sea View Gardens[33] raised issues that are all too familiar to property lawyers in Ghana. In that case, the vendors, after selling their unregistered land to A, purported to sell part of the same land to the defendant who then registered it and was guaranteed an indefeasible title. In the meantime, A had conveyed one of his plots to C from whom the plaintiff derived her unregistered title. In an action inter alia for rectification of the proprietorship register, Pennycuick J. held that the court's power to order rectification was discretionary and exercisable in cases of a mistake if the registered proprietor had, by lodging a false document at the registry, substantially contributed to the mistake. But it would not be just to rectify the register in cases where the true owner, having learnt that the registered proprietor was developing the land, had stood by and allowed him to build on the site. Also, as we have seen, trusts and overriding interests are not disclosed by the register and this can be said to undermine the claim that the register and the system of search are appropriate guides to the title situation of a registered parcel of land. In addition the register cannot be relied upon by a donee of land or by a first purchaser who is beaten in the race to the registry by a subsequent purchaser.[34]

One major effect of registration is its role in determining priority of dealings. Basically, priority of dealings is determined by the order in which the applications are presented and recorded in the Daybook; as we have

transferee of the forged dealing is in a very different position since he has relied on the register which now showed a different person as the proprietor. Thus, statutory recognition is conferred on the next disposition after the forged transfer. This is referred to as deferred indefeasibility: See Smith 1985, pp. 87-88. The Privy Council, however, in Frazer v. Walker (1967) 1 A.C. 569 ruled in favour of immediate indefeasibility.

[33](1967) 1 W.L.R. 134.

[34]On the race to the registry see Jackson 1972, p. 119.

seen, the date of presentation ultimately becomes the date of registration. Presentation implies compliance with all laid down regulations in the registry, including the payment of fees. Dates borne by instruments are in themselves irrelevant in determining priority. Thus if A, a registered proprietor, sells his land to B, who delays in registering it, and in the meantime C recovers judgment against A and registers it ahead of B, C has priority against B irrespective of the fact that B is a bona fide purchaser for value, and a perusal of the register had disclosed no encumbrances on the property. Instruments sent by post are treated as presented immediately before the close of business of that working day. If they are received after normal office hours, they are presumed to have been presented after opening the next day. Where two conflicting instruments are presented on the same day within such a short space of time as to make it difficult to determine priority between them, the registrar may withhold registration until he has heard and determined the rights of the interested parties.

By section 63, where a prospective purchaser or mortgagee applied for an official search under section 56 and states in his application the particulars of the proposed dealing, the registration of any instruments affecting the land in question will be suspended for a period of 14 days from the lodgement of the application for the official search. But if within that period a properly executed instrument in relation to the same piece of land is lodged for registration, that instrument will have priority over any other dealing lodged for registration.

In the case of mortgages, the general rule is that they take priority in the order in which they are registered. However, where under a given mortgage instrument, provision is made for further advances on the same property as part of the original mortgage transaction, instruments evidencing such further advances take precedence over other charges. This is also the case where the obligation to make further advances is in the register, and therefore, the purchaser is presumed to have had notice of it. However, tacking or overstepping of earlier instruments by later instruments in order of priority is not permitted.

We have seen that the main advantage conferred by the system of land titles registration is an indefeasible title. This is the case whether or not the purchaser's right was acquired by first or subsequent registration, provided valuable consideration was given or the title was acquired by an order of the court. An indefeasible title is defined as a complete answer to all adverse claims on mere production of the land certificate, and a person acquiring title from a registered proprietor has, on being registered himself, a conclusive title.

The registration of a person with a provisional title and the issue of a provisional land certificate to such a person does have a different effect altogether. Such a title does not affect the enforcement of any right or interest in the land which is adverse to or in derogation of the proprietor's title. Again, we have seen that overriding interests may be enforced whether or not they are registered or notified in the register. Unregistered leases of less than two years may also be enforced, and a person who acquires his

title without valuable consideration holds it subject to any unregistered rights.

We can now step back briefly from the foregoing discussion and observe that the main advantage of an indefeasible title is subject to many conditions and qualifications. It is suggested that such conditions and qualifications would increase if the transmission of registered land to later generations is not reflected in the records. Such an outcome would render the registry records more and more misleading and unreliable as a complete and accurate source of information of titles. We have seen, too, that the estate to which an indefeasible title is acquired may have been acquired either by documentary or possessory title adverse even to the title of a registered proprietor. However, if the mirror, curtain and insurance principles[35] are used effectively, the system of land titles registration should provide an excellent medium whereby ownership of interests in land can be transferred from vendor to purchaser, and whereby subsidiary interests such as leases, charges, easements and mortgages can be recorded.

We must now consider briefly the possible effect of the legal rules embodied in the Land Title Registration Law, 1986 on the economic behaviour of landholders. One of the main arguments for title registration is that clarifying titles to land leads to a more efficient form of marketisation of land. The proponents of this view seem to think that contract is the key to national development; and that by ensuring the certainty of loan contracts and contracts for the sale of land through the indefeasibility of titles, legal

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[35]See Simpson 1976, p. 22 (above p. 414).

rules for the registration of titles secure full play for the economical forces through which national wealth is created.

There are as yet no clear answers to these questions in Ghana. As we saw earlier in chapter three, the phenomenal creation of the nation's wealth in the early half of this century was based on the endeavours of cocoa farmers who migrated and purchased their lands on a contractual basis from local chiefs and clan heads. Though there were other factors at play in the activities of those farmers, it is probably fair to say that a greater degree of certainty of title would have led to even greater efficiency in their performance. The cultural factors in Ghanaian society that militate against the creation of wealth were examined in chapter four and will again be looked at in chapter eight. Among landholders in the areas under investigation, the idea of land as a form of investment is generally lacking. Land purchase and development often involves the largest expenditure of cash in an individual's life but he seldom sees it as a form of investment. In Jamestown and Old Dansoman land was acquired mainly for its residential value. In the old sector of Domiabra it is mainly used as a factor in subsistence agriculture. The speculative value of land and its propensity to appreciate in value over time was appreciated by nearly all informants though, in fact, their own pressing cash and material needs often caused them to overlook the long-term value of their lands. It is probably correct to argue that by restricting inheritance largely to the nuclear family under P.N.D.C.L. 111 and ensuring indefeasibility of title (P.N.D.C.L. 152), larger and larger resources (usable as collateral) for the pursuit of economic activity might eventually be

concentrated in fewer and fewer hands.[36] This situation is clearly in evidence in the West Korle-Gonno Estates: nearly all properties on the estate which have been used as collateral are occupied by nuclear families.

Availability of capital (credit) is a major factor in economic development, and the argument for certainty of title and economic performance becomes all the more compelling when one considers the case of public lands. These are lands compulsorily acquired by the government and allocated to individuals. The title to such lands is usually free from uncertainty and the most spectacular real estate developments in the city have taken place on such lands. However, it is important to note that another factor might be at play; such lands are allocated to top civil servants, business executives and leading politicians. Bank records do indicate that most of such lands are charged against loans.

This is in sharp contrast to the picture in both Old Dansoman and Domiabra where many titles are not free from uncertainty. In both places, there is evidence to suggest that uncertainty may be responsible for the lack of investment incentives by its encouragement of current consumption. In the case of Domiabra, many family plots have passed down several generations and it is often difficult for the present holders to define their exact interests to the exclusion of other members of the family. It is therefore difficult for such holders to undertake major investments, particularly in the

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[36]But see Woodman 1976, esp. at p. 160 urging the view that ownership of the allodial or absolute title may amount to "no more than a questionable right to receive customary services of nominal value which are normally not in fact rendered, and a reversionary right on abandonment by the occupier, which almost never occurs." Woodman therefore argues that "if we are looking for the fact of wealth, this legal concept of "title" is of negligible importance. We should look instead for the enjoyment of material benefit from land."

form of irrigation infrastructure and farm mechanisation. Ownership insecurity causes lower farm productivity in another way: unlike the cattle ranchers who often obtain loans from the banks, it is virtually impossible for Domiabra peasants to obtain institutional credit. The high cost of non-institutional credit often worsens the peasant's financial position. On this basis, it can be safely hypothesised that the provision of secure titles under Law 152 should appreciably increase farm productivity in the rural sector and facilitate the mortgaging of land in the urban areas. But it is also likely to lead to a substantial appreciation in the value of lands in such places as Old Dansoman, as the expenses that individuals incur on uncertainty reduction are ultimately reflected in land prices.

The next few sections will consider caveats and adjudication of title, searches, rectifications, transmissions, dealings with registered land, trusts and indemnity. Stress will be laid on how these procedural aspects of title registration are designed to ensure accuracy of the register and the indefeasibility of registered titles.

7.4 Procedures

7.4.1 Caveats and adjudication of title

Caveats are provided for under sections 111-120 of the Land Title Registration Law, 1986. The general rule of caveats is that the caveator must have some right falling within the description, estate, interest, lien or charge that is not open to dispute. In the case of stool or family land only the occupant of the stool or a duly appointed member of the family may enter a

caveat (section 110(1)). Once locus standi is established, the caveator is entitled to call in question the applicant's right to have the land registered under his proprietorship. Upon receipt of a caveat, the registrar notifies the applicant who is given the opportunity to put his case. Until a decision is made on a caveat, or it lapses or is withdrawn, its effect is to suspend all further action on the application. The land registrar has power to refuse a caveat, and after the removal of an initial caveat, he may yet refuse to accept another caveat by the same caveator concerning the same parcel of land. Section 115 provides for the protection of proprietors against frivolous and vexatious caveats.

Disputes relating to title, including matters raised by caveats, are decided by adjudication committees set up under section 22, subject to appeal to the High Court (section 31(3)). Under section 23, the land registrar is empowered to undertake initial examination of all applications lodged for first registration, and to refer conflicting claims to the adjudication committee.[37] The committee follows an informal procedure, free from technicalities, but its proceedings are deemed under section 31(2) to be judicial proceedings. At the end of its hearing the committee prepares an adjudication record in prescribed form which is signed by its chairman (section 29), and together with a signed certificate and other relevant documents delivered to the land registrar. According to section 32(2)(a), before the land registrar enters the content of the adjudication report on the

[37]The procedure for adjudication is governed by sections 27-48 of the Land Titles Regulations, 1986, L.I. 1341 and sections 22-33 of Law 152.

land register, the committee may cause to be corrected any clerical errors and omissions that do not materially affect the interests of any party, and any party aggrieved by an order of the committee may, before the record becomes final, appeal to the High Court. Under section 29 the adjudication committee publishes its results in the gazette, inviting persons who have been affected by the record or demarcation map to inspect those documents and, within 30 days of the notice, lodge their objection to the committee which then hears and determines them. The system of adjudication is yet to commence but it is difficult to see how it can achieve its object of a speedy, inexpensive resolution of land disputes in the relatively complex area of conveyancing, especially when parties will be encouraged to dispense with counsel in order to promote an informal approach to dispute settlement. An efficient system of property dispute settlement is more likely to be achieved within a highly specialised adjudication system operating outside the constraints of an already over-burdened bureaucratic machinery. As Woodman has observed,[38] the success of the entire system of land titles registration would ultimately depend on how the various players see their roles, and on how willing they are to take advantage of its dispute settlement mechanism in particular.

[38]G.R. Woodman, " Land Title Registration without Prejudice: The Ghana Land Title Registration Law, 1986", Journal of African Law Vol. 31 (1987), p. 119-135.

7.4.2 Searches

The object of a search[39] in the registry is to enable the prospective purchaser to check on the entries subsisting in relation to a particular parcel of land, and thereby to determine the nature of the vendor's interests. Searches are essential for the efficient operation of the "mirror principle" of land title registration. It gives purchasers an accurate and full reflection of the title to a particular parcel of land and all charges affecting it, but it does not disclose any overriding interest. Anyone may request a search in the register, and of the registry maps and plans upon the payment of a prescribed fee. Certified copies of entries in the register may be made to applicants upon request. Except in cases of fraud, purchasers of registered land are deemed to have had notice of all entries in the register. There is some doubt as to whether an official certificate of search is conclusive as to matters stated therein. It was held in Du Sautoy v. Symes[40] that although an official certificate of search was duly obtained and was conclusive as to the matters stated therein, yet a purchaser was not protected unless the application for the search gave no reasonable scope for misunderstanding.

Except with leave of a High Court, no process for compelling the production of the register and the registry maps and plans will issue, and a court order will be ineffective if a certified copy or extract from the register will suffice. Searches are the registration system's safest mechanism for

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[39]For a broader discussion of searches, see Battersby 1975, p. 686. See also, ss. 51-56 of the Land Titles Registration Law, 1986.

[40](1967) 1 All E.R., 25.

ascertaining the true character of the proprietor's title and all encumbrances affecting it. By ensuring free and easy searches of vendor's title, prospective purchasers have finally been offered the mechanism to avoid rampant fraud and double sales provisions of Law 152.

7.4.3 Trusts, transmissions and dealings with registered land

Once a parcel of land has been brought under the system, all subsequent transfers can only be effected through the provisions of the law.[41] This is to ensure the continued accuracy of the register.

Connell has argued that stricter insistence upon and adherence to prescribed statutory forms in land title registration would facilitate, expedite and cheapen the service and work of the Registry Office.[42] This, according to him, would not only lead to greater simplicity of procedure and efficiency in title registration but would in turn be passed on to future registered proprietors in the form of cheaper costs of registration. Cheaper costs of registration, he continues, would in turn be an inducement to more owners to apply for initial registration of title.[43]

In the case of Ghana it is unlikely that strict adherence to prescribed

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[41]See Woodman and Grimes 1974, p. 234; see also, sections 58-82 of the Land Title Registration Law, 1986. Of the nature of the transfer deed Battersby 1975 has noted (p. 825) that it is not a deed inter partes. Rather, it is of a nature analogous to a deed-poll. Hence a person who is not party to the deed can take the benefit of a covenant contained in the transfer so long as it purports to be made in favour of that person.

[42]Connell 1947, p. 341.

[43]Id.

statutory forms would by itself lead to a significant reduction in the cost of registration of title to land. Conveyancing forms under the old system of deeds registration in Ghana were and still are largely standardised through the repeated use of more or less the same form of words by legal practitioners. What is more, the forms themselves do not appear to constitute a significant component of the Ghanaian solicitor's bill of costs. It is much more likely that major reductions in the cost of registration can be achieved through computerisation and a general lowering of overhead costs at the Registry Office as well as the introduction of a tariff of costs for land title registration work by solicitors. This should cast doubt on any expectation that the use of prescribed forms would lead to large reductions in the cost of registration of title to land in Ghana. No such shadow of doubt falls on the need for standardisation of trusts, transmissions and other dealings in land.

The information shown on the register and the land certificate is most likely to be distorted by trusts and transmissions. Trusts lie outside the register and are not revealed to a prospective purchaser; for while an instrument which declares a trust may be deposited with the land registrar for safe custody and reference, it does not constitute part of the register (section 108(2)). However, unlike overriding interests, trusts are not entirely hidden from the prospective purchaser/mortgagee. Under section 108,

> "A person acquiring land or interest in land in a fiduciary capacity and described by that capacity in the instrument of acquisition shall be registered with the addition of the words "as trustee" but the Land Registrar shall not enter particulars of any trust in the register."

The same principle is observed in the case of transmission of

registered land on the death of the proprietor. In such a case, upon production of the grant of probate or letters of administration together with the application, the personal representative is registered by transmission as proprietor in place of the deceased, with the description "as executor of the will of..." or "as administrator of the property of...", as the case may be (section 103(1)). In either case, the trust is envisaged to be for the benefit of minors who under section 108(2) may not be registered as proprietors until they have attained the age of majority.[44] Under section 97(1) any purported disposition in favour of a minor only operates as a declaration binding on the proprietor or his personal representatives that the land or interest therein is to be held on trust for the infant. Also, according to section 97(3), where an infant becomes entitled to the benefit of a mortgage, "the mortgage shall during the minority be registered in the names of the personal representatives or trustees." Again, if personal representatives fail to register transmissions, the information on the register would become misleading. This would defeat the declared purpose of the system of titles registration to give certainty and facilitate proof of title as well as to render dealings in land safe and to prevent frauds.

Dispositions under the system involve sales, gifts, leases, mortgages, exchanges, etc. Every disposition must be in a prescribed form peculiar to each transaction,[45] and every search instrument must contain a statement of

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[44]Upon attaining the age of majority, a beneficiary who is entitled to the entire beneficial interest can require the trustee to transfer the legal title to him - see Saunders v. Vautier (1841) Cr.& Ph. 240.

[45]On forms in general and commentary thereon see J.G. Maher, Jessups's Land Titles Office - Forms and Practice, Sydney 1982 and T.P.F. Rouff & E.J. Pryer (eds.), Rouff's Land Registration Handbook, London 1990.

the purchase price, loan, consideration, etc.[46] and an acknowledgement of receipt. The land registrar satisfies himself of the identity of the presenter of the transaction, and where necessary, a grant of probate or power of attorney must be produced as evidence of authority to act. As we saw in the preceding chapter, aliens may not hold freehold interests in land, and a transfer of the freehold to an alien is absolutely void. The transfer is lodged at the registry together with the land certificate, the official certificate of search and other relevant documents.

In the case of a lease, the proper person to grant the lease is the registered proprietor.[47] While leases for less than two years may not be registered, all other leases may be registered by the submission of the relevant forms. In the case of a lease of part of a building the application must be accompanied by a strata plan approved by the Director of Surveys. Once a lease is registered, a memorial of it is endorsed on the land certificate or provisional certificate. Separate land certificates may be issued to tenants in common showing each tenant's share of the whole.

By sections 72-78 of the Land Title Registration Law, 1986 a mortgage of registered land may be created either by an instrument in Form 40 or as an equitable mortgage protected by the deposit of the land certificate or provisional certificate. The form indicates the amounts to be paid, dates of repayments and the rate of interest. After execution, the document is

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[46]However, under s. 79 (1) a transfer may also be without consideration.

[47]On leases generally, see ss. 65-71 of Law 152.

immediately lodged for registration. Two or more persons may be registered as the proprietors of a mortgage, and a notice or memorandum of the deposit of the land certificate in respect of registered land to secure payment of a principal sum or interest creates an equitable charge on such land.

Transfer of a mortgage is effected by use of Form 43, accompanied by a land certificate and is ineffective until it is registered. The discharge of a mortgage must be attested by a witness. Upon the production of an instrument of discharge, it is registered by endorsing its memorial in the register, and on the land certificate, noting whether it is discharged wholly or partially. If it is a full discharge the mortgage is cancelled from the register. Though a proprietor may transfer his interests with or without consideration, he may not effect a transfer based on a future contingency. For instance, a transfer to a daughter effective on her marriage is ineffective under section 30.

Finally, according to section 58 any disposition of any interest in land otherwise than in accordance with Law 152 is ineffectual to create or extinguish, transfer, vary or affect any interest in land; and instruments must be presented for registration within sixty days of execution.

In the meantime, the system of deeds registration continues in parts of the country not yet declared registration areas. As a result, the old problems associated with deeds registration still persist. It is possible that certain aspects of the new system will introduce new problems of their own. For instance, while only a registered proprietor can effect a registrable dealing, the widespread reliance of the system on powers of attorney and

statutory declarations is apt to be open to abuse if the new registration mechanism is not effectively policed. But the machinery for dealing with land after it has been brought under the system is simple enough, given its heavy reliance on prescribed forms, and will certainly make the conveyancer's work easier.

Land certification,

7.4.4 Rectification and indemnity[48]

At the end of the process of registration, the proprietor of a parcel of land is issued with a land certificate as evidence of his ownership. If, however, upon going over the applicant's file the registrar has any reservations about the evidence adduced in support of the claim of ownership, he may issue a provisional land certificate only rather than reject the application altogether. In such cases the registrar may ask for a full copy of certain original statements, an affidavit of some dubious factual point or a survey of the parcel of land in question to fill in apparent gaps and deficiences in the facts adduced in support of the application. Of course, where the applicant fails to provide any evidence of title or his evidence is deemed insufficient, the application may be rejected.

Upon the loss of a land certificate, the proprietor, upon application, may be issued with a new one. In every dealing involving his parcel of land, the proprietor is obliged to produce his land certificate. The land certificate therefore replaces the old title deed and becomes the symbol of

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[48]Rectification and indemnity are governed by ss. 121-127 of Law 152, while land certificates are regulated by ss. 51-55 of the Law.

unimpeachable ownership, "a gilt-edged assurance of title" purchasers and investors can safely rely on in laying out their investments.

The land certificate almost certainly guarantees that investors in land are not purchasing a lawsuit. Under section 121, provision is made for circumstances in which the land registrar may rectify[49] the land register or an instrument presented. For instance he may rectify errors and omissions which materially affect the interests of the proprietor, including clerical errors. Rectification may also be effected with the consent of all parties. Also, where as a result of a survey, any dimension or area shown in the register is found to be inaccurate, the land registrar may order rectification. Section 122 empowers a court to order rectification upon being satisfied that registration has been achieved through fraud or mistake. Under section 123, any party who suffers loss through rectification of the records or because of an act or omission that cannot be rectified may be indemnified out of funds provided for the purpose, unless he himself is guilty of contributory negligence or fraud;[50] but the secretary responsible for lands is entitled to order recovery of the amount of indemnity from any person responsible for such injury, negligence or fraud. Indemnity constitutes the insurance principle in title

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[49] The statutory power of rectification is unrelated to the equitable remedy of rectification; and indeed, the same facts may give rise to both the equitable remedy and the statutory power. See R.J. Smith, "Forgeries and Land Registration," The Law Quarterly Review, Vol. 101 (1985), pp. 81-97.

[50] Law 152 is silent on the position of third party victims of fraud/forgery. There is however, authority to suggest that such a person may have to prove that the rectification of the register has caused him loss. See Att. Gen. v. Odell, (1906) 2 Ch. 47. In that case, the chargee's solicitor forged the transfer to Odell who was innocent of the forgery. After Odell had registered the transfer, the original chargee sought and obtained rectification. When Odell sought an indemnity it was held that he had to prove that the rectification caused him loss. Cf. D.L. McAllister, Registration of Title in Ireland, Dublin 1973, pp. 1-26 which contain a mass of other examples of the effect of fraud and the rectification of the land register in English and Irish law.

registration, however no claims for indemnity[51] on account of inaccurate survey or registry maps or other error lie against the government itself. While the concept of indemnity does derogate from indefeasibility of title, there is a need to address the hardship and injustice that may result from mistake, fraud and negligence. While fraud is in a category all of its own, the real issue remains that many transactions in illiterate or semi-literate communities might be adjudged a mistake or negligence because someone was, for example, not sure of the extent of his parcel of land or some rightful owner was, against the best efforts of the registry at notification, unaware that his parcel of land had been registered by another. These matters will obviously be worked out in time by the case law and it is quite clear that the ultimate efficiency of the system would also depend on the courts' attitude to it.

In summary, the foregoing discussion suggests that title registration should produce altogether more precise and accurate data on the ownership of land, and thereby eliminate the ambiguities surrounding the old system of land tenure in Ghana.

The possible economic effects of the rules of title registration under consideration are enormous. Perhaps the most important should be a reversal of the economic consequences which, as we argued in chapter five, were brought on by the customary system of land tenure, particularly the primacy of the extended family and the stool as the basis of ownership. By

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[51]Claims for indemnity are governed by section 135 of L. I. 1341.

guaranteeing the indefeasibility of the individual's title in group-held land, Law 152 should facilitate a greater concentration of land in the hands of individuals and their nuclear families, who, by using their assets as collateral, may be able to employ the best methods and technology to maximise returns from their resources. It is also probable that title registration would reduce the number of prospective vendors to a particular parcel of land, many of whom are often prepared to undercut each other and sometimes engage in double sales of the same parcel of land. One obvious result will be the sale of land at its true market value. In addition, the waste of enormous financial resources in property litigation should be curtailed, if not eliminated. Such resources may then become available for economic investment.

The registration of titles and interests in land should also aid the operation of the newly-enacted Head of Family (Accountability) Law, 1985 (P.N.D.C.L. 114) (see above, pp. 206-219) by drawing a sharper distinction between properties that are personally owned by the head of family and properties belonging to the family as a whole. As was shown in chapter four, the issue of head of family accountability is a major cause of family litigation in Ghana. The issue in such disputes often turns on the distinction between the property of the head of family and properties belonging to the extended family, especially of properties that came under his control through the operation of the rules of intestate succession. Although Law 114 imposes a duty on the head of family to draw up an inventory of such properties, a titles register should constitute an authoritative guide to ownership of properties

coming under the control of the head of family.

Also, as will be demonstrated in chapter eight below, the traditional rules of succession and, to a much lesser extent, the Intestate Succession Law, 1985 still result in the extended family acquiring interests in the properties of deceased persons. However, by effectively converting such properties into trust properties the Land Title Registration Law, 1986 should facilitate their transfer to purchasers should the trustees so require.

7.5 Conclusion

The Land Title Registration Law, 1986 constitutes the latest and most emphatic example of state intervention in the land law of Ghana. It comprehensively addresses the issue of land titles in Ghana and is inspired by the commercial imperative to create a reliable market in property.[52] But in enhancing the marketisation of land, there is an urgent need to ensure that the consequent reallocation of property through the Smithian invisible hand in a free market does not cause undue social dislocation. This is a particularly pressing issue since neither proper checks nor ameliorative measures have been instituted to prevent chiefs, heads of families and their elders from opting to continue to maximise their profits on the property market and thereby denying their subjects or fellow family members rights in land which they have enjoyed for countless generations. Such an outcome

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[52]It is worth noting that the system of title registration has not been universally successful. In parts of the United States, it was an abysmal failure, and voluntary landowner registration under the Torrens system was limited almost entirely to urban areas for purposes associated with the elimination of historical title defects. See, B.C. Shick & I.H. Plotkin, Torrens in the United States, Lexington (Massachusetts) 1978, p. 2.

would produce both a rentier class, and landlessness among the generality of the people, even while the government has proved utterly incapable of grasping the new nettle of the dispossessed in urban areas.

Moreover, the statutory system of conveyancing introduced by Law 152 does not take oral grants into consideration. Given this lacuna, if the system of registration does not ultimately extend to every part of the country as presently intended, three distinctive property regimes are likely to emerge: customary (unregistered) lands; lands covered by the Land Registry Act, 1962, and lands registered under Law 152. Such a situation would probably make land transactions more difficult and increase litigation costs. Delays will also be inevitable. But this must be balanced against the need for the bona fide purchaser to obtain an indefeasible title to a property, and to avoid wastefulness in investigations. Under the conventional system of conveyancing, a man might make a conveyance today, having investigated title to the last thirty years, yet if he sells tomorrow, the purchaser would have to conduct a separate and laborious investigation of title over the same period. A simple search of the registry under the system of land title registration would instantly yield complete and accurate information on the title to every parcel of registered land. Although a purchaser's title may be defeasible in certain circumstances, especially in cases of fraud or mistake when it would be unjust to dogmatically decline to rectify the register, the principle of guarantee of title is maintained by the right of the injured party to

indemnity.[53] However, in Re Chowood's Registered Land,[54] a squatter had, unknown to the purchaser, acquired a part of a registered land under a statute of limitation. Upon application, the register was rectified but the purchaser was held not to be entitled to indemnity because his loss did not arise from rectification of the register but from the fact that he paid for property which was not the vendor's to sell. This was so because the squatter had acquired an overriding interest which was not shown in the register. Thus both the doctrine of indefeasibility of title and the principle of indemnity can even after a search of the land register be defeated by the existence of overriding interests.

Interviews conducted in the registry indicated that the greatest problems of title registration are encountered in the oldest parts of the capital, especially in the heavily overcrowded and poorly zoned areas lying close to the old forts and castles. Such places have been occupied since time immemorial and the class of persons claiming beneficial interests in each property can be very wide indeed. Preliminary enquiries among residents indicated that a number of properties and interests may go unregistered for a number of reasons. First, it is widely suspected that the government, which claims to be revolutionary, may have an ulterior motive in trying to ascertain the title of every property. Secondly, many of the uneducated live their lives entirely beyond the sphere of modern governmental activity. Among such

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[53]Epps v. Esso Petroleum (1973), 2 All E.R. 465 and Re 139 Deptford High Street, (1951), Ch. 884.

[54](1933), Ch. 574.

persons, ignorance, apathy and misrepresentation of the purpose of the new legislation may lead to non-registration. Thirdly, the membership of many old families is far from clear. In many "old houses" there is a distinct "let sleeping dogs lie" attitude among residents who will prefer to see the property registered in the name of the original founder of the "house" rather than in some upstart head of family identified with a particular faction. Also, in many of these places, parcels of land do not even conform to regular geometric dimensions, making it difficult for properties to be demarcated scientifically.

On the other hand, the new suburbs of the city pose the least problems in title registration. Properties in such areas are usually well demarcated and are often owned by first-generation holders of the customary law freehold. Placing such parcels of land on the register in the process of first registration is relatively simple. The proprietor simply hands in his title deeds registered under the Land Registry Act, 1962, with his application for registration under Law 152. Indeed, such proprietors have been among the most eager to take advantage of the new system.

Interviews with solicitors confirmed that their dealings with the registry are almost entirely on behalf of educated clients (who had routinely preferred to use solicitors' services in other matters in the past) and stools. But by far the majority of applicants prefer to handle their own applications.

The complete institution of a system of land title registration in Ghana is basically an exercise in the management of change. Without the exercise of considerable skills of management the programme might not effect the necessary change in the attitude of those it is intended to affect. In

particular, it ought to be preceded by a meticulously planned overall strategy of implementation with well-defined midpoint goals. A stage by stage implementation of the system across the country would enable local problems to be identified and the result could be used in a feedback loop to improve the entire concept of land title registration in Ghana. The passive attitude of landholders is attributed both to the choice of publicity and ignorance, especially, the belief among landholders that registration of their conveyances at the deeds registry is sufficient. It is felt that the manner of publicity of land title registration (through radio and television) and the placing of the onus of first registrations on landholders would not produce the desired result. As with the electoral registers and population censuses, a powerful argument has been made for the government to take the initiative in ensuring first registration in house to house visits by officials. Even then, there would be many difficulties, especially in the overcrowded and more backward areas; but such issues as lost or inadequate deeds begin to be addressed by the registry. Unlike the Kenyan scheme,[55] the Ghanaian authorities seem to have put no programme in place to monitor and study the system of registration as it progresses. Of course, a nation-wide system of compulsory titles registration cannot be achieved on a shoestring budget and, if the programme is to succeed, the government would have to address the issue of funding.

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[55]See e.g., The Lawrance Mission Report, Report on the Mission on Land Consolidation and Registration in Kenya, 1965-66, Nairobi 1966. See also, Coldham 1978a and Coldham 1978b; and further comments on the shortcomings of the Kenyan system of land title registration in Allott 1980, p. 212.

If successfully implemented, title registration would probably have a profound long term effect on the alignment of customary interests in land which we examined in chapter five. For example, it is probable that in view of their lack of tenure and collateral, abunu and abusa farmers (see pp. 314-316 above) might be compelled to convert their tenancies into leaseholds or mortgages, particularly in the cash crop producing areas. It is also possible that in that circumstance, the enhanced value of land would restrict the grant of free tenancies. On the other hand, there would be a general disregard for title registration in parts of the agricultural sector where the peasants do not have the level of funds at the disposal of cash crop farmers.

Quite clearly, the realisation of the objectives of the safe, simple, speedy and "fail-proof" title registration system would require careful implementation and adequate funding; such a system might ultimately completely alter the present nature of interests in land. But it is also likely that the introduction of the new system for the registration of titles and interests in land would, in time, constitute the benchmark in juristic thinking when it came to be recognised that the problem of African land tenure lies less in the uncertainty of title than in the vastness of the class of persons who may hold themselves out to be the proper vendors. That realisation would, at least, propel the argument into new territory. Only then would the need for a refined system of trusts based on the conjugal family with a supportive role for the "active family" based on cousins, uncles and nieces and nephews be urgently addressed. Such a system would basically involve the fine-tuning of time-honoured social institutions in the light of modern developments. The

narrowness of such a group would preserve and harness the philoprogenitive instincts of a three-generational order while at the same time avoiding the uncertainty and inertia of large and unwieldy families of the old order. Clearly, by basing the new law on the old extended family system as well as chiefship, many of the old problems that the new law sets out to solve may persist.

CHAPTER 8

SUCCESSION TO PROPERTY

This chapter discusses the present law of succession to property in Ghana, particularly in the context of legislative changes introduced in 1985 by the Intestate Succession Law, 1985 (P.N.D.C.L. 111). It examines the role of succession law in the redistribution of property rights both within and between the extended and nuclear family units. We will seek to highlight both the contradictions in the new statute and its practical implications. Some attention, too, is paid to testate succession as well as the law relating to the administration of estates. A major burden of this chapter will be to discuss the function of the traditional system of succession[1] as the mainstay of tribal society, especially as the major means of sustaining communalism through the process of the re-communalisation of interests in land.

The traditional mechanism of succession is regulated by the consanguine family to the detriment of the conjugal or nuclear family;[2] there is an ever-burgeoning class of beneficiaries as the so-called concentric circles of the family expand down the generations.[3] For cultural reasons, it is considered

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[1]For a full description of the traditional system of succession in Ghana see generally, Ollennu 1966; and Ollennu and Woodman 1985. See also Kludze 1973; Kludze 1988a; Sarbah 1968 and Danquah 1928a.

[2]On the relationship between the consanguine and conjugal families in Ghanaian customary law, see in detail pp. 185-206 above.

[3]Ollennu 1966, p. 86.

imperative to give each person a dignified funeral befitting his or her status. Ollennu has observed that "the family are under obligation to give him a funeral befitting not only the status he attained in life but also a funeral compatible with the social standing and dignity of the family in the community".[4] Our field evidence, however, suggested that in today's circumstances it is the conjugal family and the "active" family rather than the consanguine family that has control of a funeral. Inevitably, lesser amounts of resources are devoted to the funeral itself, even though the overall objective is still to give the deceased a decent funeral. Ollennu further noted,

> "So religiously do members of a family take their obligation to give their deceased brother or sister a good funeral, that strangers are often surprised when they see funeral custom performed with great pomp including display of state umbrellas and all forms of paraphernalia even if the man or woman had been known in life as a simple fellow, almost begging his or her bread."[5]

Though many of the expensive customary rites that were observed on such occasions have now been abandoned, both marriage and death are still steeped in traditions that reinforce and perpetuate the tribal nature of the consanguine family. The deceased is often taken to his hometown to be interred in his own native soil, together with his ancestors; family bonds are renewed, and a successor appointed by a committee set up by the head of family. What is more, the high cost of the funeral as well as the subsequent diffusion of the

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[4] Ibid, p. 68. The type of family that Ollennu had in mind here was the consanguine family.

[5] Ibid p. 69. J. Zimmermann, A Grammatical Sketch of the Akra or Ga-Language, Stuttgart 1858, p. 351 defines "yara" or funeral custom as "consisting of burial, weeping, lamentation...drinking, gun-firing, etc., sometimes days and weeks together." The celebration of funeral custom with such pomp and pageantry is now largely restricted to royals. The majority of respondents in our elite informants sample did not entirely agree with Ollennu's statement. Thirty-two out of thirty-five such informants stated that today such funerals are more likely to be associated with the deaths of royals and commoners who played an important role in activities relating to the stool in their lifetime.

deceased's assets into the consanguine family can in many cases lead both to the dissipation of accumulated wealth and to hardship for the conjugal family.

In a sense, succession is essentially about the redistribution of wealth within society occasioned by an individual's death and to what extent such patterns have been influenced by recent legislative changes. Our primary concern here is whether the increasing importance of the conjugal family in modern society is reflected in patterns of redistribution of wealth after death. Though both the economic and socio-historical conditions that fostered and fashioned the traditional rules of succession of the various communities of Ghana favour the consanguine family, present day conditions make a telling argument in favour of the conjugal family.

As we discussed in detail in chapter 4, the conjugal family is small, compact, philoprogenitive, normally constitutes a residential unit and is, above all, self-interested and facilitates the concentration and management of wealth. The consanguine family, on the other hand, tends to be large, unwieldy, non-residential, and is often riven with disputes. In traditional society the consanguine family had ultimate control of the property of the deceased which it distributed or managed in accordance with the rules of traditional society. Those rules did not always recognise the interests of the conjugal family nor did they reflect changed social values.

However, new economic and ethical imperatives bequeathed by colonialism have loosened the ties of parents with the consanguine family, and emphasised their duties and obligations towards their own children. Indeed, the conjugal family may even operate as an economic unit in the organisation of

wealth. This often creates an expectation in the children, and a desire by the parent, to see the transmission of property to the children on his or her death. Asante has observed that the prospect of testamentary disposition is a powerful incentive for accumulating capital.[6]

Further, the process of urbanisation, together with waged income and other economic indicators of modern society has affected the ethnic homogeneity of the Gá and further loosened the hold of the consanguine family on the conjugal family. Many marriages are inter-tribal unions and many more parents have become almost entirely responsible for the upbringing, education and general well-being of the children. It is therefore doubtful if individuals raised within such families in an urban environment would feel the same sense of obligation to the consanguine family as their counterparts in the more conservative societies of rural Ghana.

8.1 Types of property

Our main concern is first to consider the main types of property that exist among the Gá today and the role of the consanguine family in the transmission of property under traditional rules of succession. Before discussing the main forms of modern property, it is necessary to outline the nature of traditional property among the Gá.[7] We will also examine the nature of self-acquisitions within the household which is often targeted as the point of vital social impact in legislative

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[6]Asante 1975, p. 79.

[7]The rest of the discussion in this section is based on information provided by chiefs, linguists, stool elders and elderly Gá informants drawn from all three field-areas.

reform.

Because of its strategic coastal location, Accra served as a focal point in the trade between Europeans and Africans in the pre-colonial period. This increased the wealth of Accra and ensured the availability of both European and African forms of property in the main Gá towns.[8] Gold dust, jewellery and expensive clothes[9] were used by rich merchants and chiefs, and were jealously guarded as treasure by those ordinary people who could afford them.[10] As a result of the maritime trade with the Europeans as well as long distance-trading, warfare[11] and looting in the hinterland, an extensive commodity exchange network developed, the popularity of gold ornaments increased and their ownership became an acknowledged symbol of wealth. Trading and the general influx of peoples[12] brought new articles of commerce and skills. By the first few decades of the twentieth century the bellows and blazing fires of the goldsmith

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[8]Cf. Meredith 1967, p. 190 which lists some of the products of Accra in the eighteenth century and adds that being the only town on the coast with a free trade with the tribes of the interior, money was diffused among every social class in Accra. See also Kilson 1971, p. 14: "By the mid-seventeenth century Accra had become the greatest gold market on the Gold Coast."

[9]Barbot 1992, p. 494 observed: "Nobles and merchants distinguish themselves from the common people by wearing larger and richer material, China satin, taffetas, or coloured Indian cloth worn as mantle."

[10]Id.: "They also take care of their clothes, changing them when they return home and storing them carefully in little deal chests we sell them."

[11]The defeat of the Ashantis at the Battle of Katamanso in particular increased the flow of wealth into Accra. See for instance, Reindorf 1966, p. 212: "Many grew very rich, and up to this day there are, in many families, remnants of the booty...After the battle of Katamanso, gold-dust became the principal currency of the country."

[12]For instance, by the middle of the nineteenth century significant numbers of ex-Brazilian slaves were settled along present-day Brazil Lane, off the High Street on the boundary between Jamestown and Ussher town. This was in addition to significant numbers of Denkyira, Akwamu and other Akan refugees who were absorbed into the Otublohum quarter. See Reindorf 1966 p. 39.

had become a familiar sight on the major streets of Ussher Town and Jamestown.[13] Silks, velvets, damasks, kente, adinkra, and expensive Dutch wax prints became regular commodities in the shops of clothiers. In addition to modern machinery,[14] industrial plant and electronic equipment, these have remained till this day the most valuable items of movable wealth and the most frequent subjects of testamentary disposition. Gold dust and cash were the main forms of monetary wealth. Bank accounts, bonds and shares were unknown.

Not much evidence exists on the acquisition of land as a form of wealth before the twentieth century. All informants agreed that apart from early settlements at Korle-Gonno and Adabraka, the acquisition of property in the form of a house and its appurtenant grounds by individuals was restricted to the settlements around the forts. Only in the nineteenth century did the ownership of land by individuals become seen as a major form of wealth-holding. To a good number of the informants ownership of houses is the only form of wealth that really matters. No man is considered truly rich until he owns his own house or houses. Rich men, especially those with a flirtatious disposition, who suffer a sudden reversal in fortune without building their own houses become the subject of public ridicule as well as an example to all of the folly of investing in anything other than a house.[15] Wealth was measured in terms of the things[16]-

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[13]The mastery of goldsmithery led to new techniques in gold leaf jewellery and in particular, the development of cuttlefish bone moulds in the manufacture of gold jewels by the process of negative casting increased the availability of gold ornaments.

[14]Motor-cars, mummy-trucks, flour-mills, corn-mills, and printing presses are all considered important items of movable wealth.

[15]As the Gá judge, any man fortunate enough to be in a position to secure his and his family's future should spurn the prudence of providing a home for his family for the sake of sensual pleasure.

jewellery, buildings, animals, canoe and associated fishing gear,[17] stock-in-trade etc.- that a man owned rather than his cash resources.[18] Until the beginning of the twentieth century a large volume of the trade that passed through Accra was based on barter. Due to the fear of theft and the machinations of others, much secrecy surrounded the true value of the wealth of an individual. Monetary wealth and bank deposits as well as the making of wills, indeed the whole practice of private and public recording of one's assets, were initially associated only with the educated elite.

Today all types of self-acquired property occur among the Gá. The commonest forms of wealth-holding by individuals include land, houses, motor-cars, canoes and accompanying fishing gear, stock-in trade, bank accounts, cash and clothing. More sophisticated people often own industrial plant, share certificates, debentures, treasury bills and bonds, insurance policies, etc.

It is interesting to observe in parenthesis that wulomei (traditional priests)[19] and craftsmen, especially goldsmiths and coffin-makers[20] as well as

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[16]The Gá word for a wealthy person, niatse, literally means "owner of things." The ownership of buildings rather than land is considered the true mark of wealth. While the sale of land per se is regarded as quite normal, the sale of a house is considered a sure sign of decline in the fortunes of the seller.

[17]In spite of the suitability of the Accra Plains to animal husbandry cattle never featured prominently in the economy of Accra.

[18]Prior to 1880 cowries were sometimes used as currency but the Demonetization Ordinance, 1880, restricted the Gold Coast currency to gold and silver sterling, American Double Eagles and Eagles, French 20-franc pieces, and gold dust and nuggets. Gold dust was, however, used more as an article of trade rather than as legal tender: see Hill 1963, p. 165.

[19]Each wulomo, upon ordination, undergoes a period of confinement during which his is tutored in, among other things, libation texts, the religious usages, ancestral lores and oral traditions of his people as well as the songs, poetry and sayings of his predecessors in office. On Gá libation texts generally see, J.A. Sackey, Gá Libation Texts: Their Structure and Function in Modern Ghana, Columbia 1982,

other custodians of traditional knowledge or special skills guard their knowledge and skills with a secrecy and jealousy that suggests the existence of intellectual property in such knowledge and skills.

Property among the Gá is classified into land and other property. Land is further subdivided into undeveloped land (shikpon) and things on the land which are the result of man's exertions. Thus property in buildings, unharvested crops and economic trees, even where they are self-sown, may be vested in persons other than the owner of the land on which they are located.[21]

To fully understand the classification of property in Gá customary law, it is worthwhile to trace the etymology of the term nibii (accumulated property or collection of articles) and explain its derivative forms on which the Gá conception of wealth is based. The term is derived from the words nin[22] (goods, chattels, possessions) and bii (units or collection of items). The root of the word nibii can be traced to the word niné (hand), indicating both possession and the fruits of

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Unpublished Ed.D thesis, esp. 12-100; and on the poetry of wulomei see e.g., N.O. Quarcoopome, "Thresholds and Thrones: Morphology and Symbolism of Dangme Public Altars", Journal of Religion in Africa, Vol. 24 (1994), pp. 339-357.

[20]Most master craftsmen shroud their methods and designs in secrecy. The secrets of their trade are only revealed to apprentices after formal contracts of apprenticeships have been concluded and the apprentices or their sponsors have paid certain prescribed sums of money. This normally involves much stylised and protracted negotiation. Coffin-makers in the east of Accra who pioneered the design and construction of coffins in a way that vividly and artistically portrays the social status and vocation or occupation of the deceased are particularly jealous of their designs. The designs utilise a central motif derived from the vocation or occupation of the deceased and are often appended and embellished with familiar symbols of the deceased's calling. Thus the coffin of a prominent fisherman or illustrious chief may be based on the basic design of a canoe or an eagle and adorned with ordinary symbols of occupation or office of the deceased. See T. Secretan, Going Into Darkness: Fantastic Coffins from Africa, London 1995, esp. pp. 16-126.

[21]Split ownership of this type usually arises where self-seeded plants of commercial value are nursed, tended and regularly harvested by a person who is not the owner of the land on which the plants grow.

[22]This is preferred here to the word nii which is sometimes used to describe goods and chattels.

man's labour or handiwork. In ordinary parlance nibii refer specifically to movable property. Its derivative forms, shia-nibii, gboshi-nin, niké-nin and weku-nibii denote household goods, legacies, gifts and movable properties of the extended family.

Movables are easily partible and are normally distributed among relatives upon death intestate. A small proportion of movables, especially those that are not easily partible or are of sentimental value, may be inherited jointly by members of the extended family as co-heirs.

By contrast land is not easily partible. Where land is inherited by the extended family upon the intestate extinction of a family member, a coparcenaryship is created between the different members of the extended family.[23] This means that there is community of interest and unity of possession between all the members of the extended family who are by customary law entitled to the property. In practice, this ensures that the property remains undivided notwithstanding the option of partition. It becomes the property of the extended family (wekunin).

The property of the extended family is normally managed by its head. Any income derived from such property is collected by the managing member or head of the extended family and distributed to his fellow coparceners. A respectable argument can be made that ultimately community of interest and

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[23]See Sarbah 1968, pp. 100-101. Ibid. (pp. 57-60 esp. p. 60) also draws a distinction between "ancestral property" or property inherited from an ancestor and "family property" which is acquired by the joint labour of two or more members of a family or by contributions from the members of a family. This distinction has not always been followed and the term "family property" continues to be generally used in Ghanaian customary law to refer to both ancestral property and property jointly acquired by members of the extended family. See e.g. Bentsi-Enchill 1964, pp. 184-187; and Danquah 1928a, pp. 204-205.

unity of possession between the various members of the extended family reduces extreme inequalities of wealth within the extended family and ensures that traditional society as a whole remains unlayered into social classes but interwoven. This promotes social harmony and minimises economic hardship.

Regarding self-acquired property or self-acquisitions, we may first consider land. Land on which a dwelling house has been erected is considered as quite distinct from farmland or uncultivated land. Homeless members of the extended family and descendants of the acquirer may seek accommodation there. Being the abode of members of the family as well as the visiting place of ancestral spirits,[24] such land is regarded as having been brought firmly within the sphere of influence of the extended family of the builder and owner of the land, and is not easily saleable. It forms the nucleus of property around which a new branch of the family flourishes and acquires additional property.

"Other property" include cash or money (shika), livestock, chattels and interests and rights in movable property owned by others. Of these money is considered the most important. It includes not only notes and coins in the actual possession of the holder, but also bank deposits and savings held by self-help (susu) groups.

Turning to self-acquisition of both land and movables within the household there appears, in modern times, to be considerable community of possession between husbands and wives and their children of majority. These often collaborate closely and pool financial resources and belongings, particularly in

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[24]See Field 1937, p. 203.

the acquisition of land. Members of the nuclear family, and to a lesser extent, close relatives sometimes sacrifice opportunities of personal enrichment to assist in the acquisition of property.[25] The official customary law diverges significantly from this sketch. It tends to regard all household property as being vested in either spouse and therefore heritable by the extended family.

In reality the ownership of household property is much more complex. Ante-nuptial property of the wife and property acquired by her during coverture as well as profits from trading activities[26] tend to merge with other self-acquisitions of the household, creating a community of property between husband and wife and their children.[27] Although there is co-enjoyment of such assets by members of the nuclear family, their management tends to be in the hands of the husband, leaving other members of the family with an ill-defined claim on such property. This is where arguments for the further reform of succession law in Ghana enter; for by normally presuming such property to be the self-acquired property of the husband, the wife and children are deprived of the ownership and enjoyment of property to the acquisition of which they may have contributed.

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[25]Cf. Sarbah 1968, pp. 36-37: "When we speak of a joint family as constituting a coparcenary, we refer, not to the entire number of persons who can trace descent from a common female person...we include only those persons who, by virtue of relationship, have the rights to enjoy and hold the joint property, to restrain the acts of each other in respect of it, and to burden it with their debts."

[26]Aside from interests in land, women's property consist mostly of ornaments, dresses, wax prints, livestock, furniture, domestic articles (including sewing machines and utensils), and tools of trade. Women's property is usually purchased with earnings from hawking, market trading, traditional weaving, traditional healing and pottery.

[27]Customary law recognised separate female property. See e.g. A. Kuenyehia, "Distribution of Matrimonial property on Dissolution of Marriage: A Reappraisal", University of Ghana Law Journal, Vol. 18 (1990 -1992) pp. 94-108, esp. at p. 95, noting: "Under Ghanaian customary law, a woman has the right to own property in her own name, and it is accepted that marriage as such has no effect on property which the parties own in their individual rights.

Casting the unofficial customary law with regard to self-acquisitions into a polished legal formula would require further reform of the law of succession in a way that recognises the above realities in the ownership of the wealth of the urban household. Future legislative reform should make it possible, in exceptional cases, to enquire into the contributions of members of the nuclear and "active" families into self-acquisitions. This would further strengthen the claims of the surviving spouse and children on the estate of a deceased person. It would also resolve conflicts between the competing claims of co-wives and different sets of children by enquiring into their respective contributions to the estate.

The point is often made that under the traditional scheme, there is no real succession but that the property remains within the extended family which merely re-arranges its enjoyment among the surviving family members. This argument fails to take account of the profound socio-economic change that the emergence of the modern state and urban living has wrought on traditional society: migration to urban areas, the growing economic independence of adult members of the family, increasing marriage to non-members of the ethnic group, and the dispersal of family members into a wider heterogenous community have all weakened the authority of the extended family.

It is stressed that chattels within the household that are acquired and exclusively enjoyed by individual members of the nuclear family are indelibly stamped with the mark of individual proprietorship and exempt from inclusion in the wealth of the family. This is strongly evidenced in the acquisition of landed property. Today an alienor from whom an enterprising family member acquires

his title to land normally executes transfer deeds in the name of the family member. Also, funds for the acquisition of land and the erection of buildings tend to come from bank loans, mortgage transactions and other credit facilities for the repayment of which the acquirer is personally liable. Put this way, it is hardly necessary to stress that the extended family ought to have no claims to such self-acquired property.

We may now shift our focus slightly and consider the basis of the extended family's traditional claim to the control of an individual's assets upon his death under the official customary law. Ollennu has written extensively on this aspect of Ghanaian customary law. Concerning the nature of the Ghanaian family he said:

> "The family, in Ghanaian conception, is the social group into which a person is born...That unit consists of all members of the social group lineally descended from one common ancestor...a group of people united together either by the possession of common blood...or united together by common controlling spirit or personality."[28]

The extended family is a hierarchical structure that is governed by the principles of buleh or respect (see in detail pp. 123-124 above) and seniority. The family itself consists of several generations usually made up of great grandparents, grandparents, parents (including uncles and aunts) and children. Besides, the social and personal milieu in which family life is organised is often influenced by the memory of ancestors or ancestresses who may have played a major role in the acquisition of property, resolution of intractable disputes, the consolidation of family solidarity or simply set a great moral example.

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[28]Ollennu 1966, p. 71.

For purposes of social organisation, grandparents and parents of advanced or middle age are considered the most important members of the Gá family. Household prayers and major forms of public speech are normally addressed in the first place to the old and the middle-aged and their peers or tupenfoi.[29] The generations of the Gá family are clearly demarcated by the principle of tupenfo (peerage) with the members of each generation, especially the children of a polygamous father enjoying roughly equal rights and privileges, and the older generations generally enjoying greater access to power and authority than younger members of the family. This last is reflected in the common Gá saying: Yitso tashi ni kanto abu fai, meaning "where there is a head, it is the head that wears the hat, not the (bent) knee". Seniority within each generation is denoted by the term serbii (junior siblings), often distinguished in a polygamous or large household by the addition of the suffix fio (junior) to the names of junior siblings; e.g. Amarfio, Tetteyfio or Sackeyfio.

Barring senility, authority usually resided in the oldest generation and percolated downwards. This form of social arrangement necessarily diminished the importance of the conjugal family and tended to overlook its needs upon intestacy.[30] Because intestacy is by definition occasioned by death, and because death is usually shrouded in religious rites, mystery and notions of pollution, it

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[29]Gá prayers and procedures, which are recited or led by word-perfect traditional remembrancers, usually begin with the formulaic awomei ke ataamei (mothers and fathers) signifying the importance of the older generations in Gá social activity.

[30]Succession to an adult under this system tended to distribute the estate on the basis of age and seniority. This meant that members of the deceased's age-group were the likeliest to succeed. This was borne out by the replies to the question, "How many persons outside the deceased (adult's) age-group succeeded to any of his properties?" Ninety-five per cent of respondents in rural areas replied: "Members of the family who grew up with him and were of about the same age as the deceased." While this was repeated in other replies from the urban areas, educated respondents generally replied that the beneficiaries were members of his conjugal family.

provides the opportunity for family elders, usually regarded as the repositories of traditional wisdom and usages, to assert their authority over both the deceased's body and earthly possessions. Again, Ollennu has observed:

> "Every Ghanaian, male or female, belongs to a family. By customary law his person as well as any property he may own as his individual estate belongs to his family, except that when he is of age and is compos mentis the family leaves him in complete dominion over his person and property...But as soon as anything happens which should make him incapable of properly exercising his said freedom, the family immediately set in and assert their inherent authority over his person and property."[31]

In short, upon death of a man or woman intestate, the consanguine, rather than the conjugal family, succeeds to his or her material possessions. In modern times the succession of the extended family relates largely to land and other impartible property (wekunin) of the deceased. Movable or partible property (gboshinin) are still generally distributed among a number of legatees.

The extended family must appoint one of its number to fill the vacuum created by the departure of the deceased. The member so chosen is called the successor, and the choice depends on such factors as ability, suitability, and character.[32] In appointing a successor, the family is not bound by any wish expressed by the deceased.[33] Indeed succession was not automatic but elective

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[31]Ollennu 1966, p. 67. Another occasion on which the family asserts this inherent authority is where the member becomes insane and therefore incapable of exercising control over his property.

[32]See Okoe v. Ankrah (1961) P.C.L.L.G. 245.

[33]See Ollennu 1966, p. 194. See also Akyeampong v. Marshall, Divisional Court judgment, 11 November, 1957, unreported.

with the deceased's family as the proper elective body.[34]

Under the official customary law once the self-acquired property of the deceased becomes extended family property, the whole of the extended family acquires an interest in it either as coparceners entitled to a portion of the property on partition or as dependents (children) who are only entitled to reside in the dwelling house for life subject to good conduct.[35] This was summed up in Quarcoopome v. Quarcoopome[36] thus:

> "The interest which members of a family have in family property is not a joint interest or the interest of tenants in common as known to English Law. It is a communal interest, a right to occupation of a portion of the property and to use thereof."

Unfortunately, the court did not go on to define the exact nature of the communal interest, a right to occupation of a portion of a property and to use thereof which members acquire in the undisposed of immovable property. In practice, it seemed clear that whatever interest members of the extended family might have in such property is not automatic, particularly as, in the majority of cases, rooms in such a house are hardly enough to accommodate even a fraction of the extended family.

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[34]See Allott 1954, p. 554.

[35]Sarbah 1968, p. 100.

[36]High Court judgment, 22 January 1962, unreported.

8.2 Intestate succession

It is the purpose of this section to examine the nature of the traditional system of intestate succession; to highlight the extent of the authority of the consanguine family over the estate of the deceased, which is often to the detriment of the nuclear family; and to make a case for the reform of the customary law. The customary law of intestate succession in Ghana, including the nature of the Gá family and the class of persons who succeed to the property of an individual in Gá society, has already been documented in detail by earlier studies and will not be repeated here.[37]

8.2.1 Intestate succession under customary law

The traditional concept of succession was largely restricted to the inheritance of things by a man's relatives.[38] Intestate succession under customary law is still marked by a sharp distinction between movable and immovable property. In all three field-areas chattels and other movables were normally distributed among members of both the extended and immediate families, but items of financial or sentimental value, such as gold trinkets, gold dust, gold nuggets, jewellery,[39] Aggrey beads, carvings, etc. were normally kept back as property for the extended family. Also, cultural items, antiques, artefacts (including items used

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[37]See note 1 above.

[38]The early historical records indicate that at Accra children inherited their parents property. See e.g. Bosman 1967, pp. 202-203: "...but all along the Gold Coast (children) never inherit their Parents Effects, except at Akra only"; and Barbot 1992, p. 509: "It is only at Akra that the law is less harsh towards the children, since they do enjoy the wealth of their deceased parents."

[39]But see Ollennu 1966, p. 82 where he maintains that trinkets, gold nuggets, gold dust, cattle, stock-in-trade, etc. are "regarded with special status as land."

in religious rites), special stools, umbrellas, sceptres, special sandals, and apparels such as kente and adinkra clothes were retained by the extended family.[40]

The main movables mentioned by informants in Domiabra largely reflected the subsistence nature of its economy - farming tools, firearms and other hunting gear, canoes, household livestock, etc. But there seem to be as yet no clear-cut rules relating to the distribution of legal and historical documents including deeds and private correspondence, old family photographs and other movables pre-dating the immediate or nuclear family. The immediate family retains such family records as marriage certificates, birth certificates and the deceased's tools of trade. The rule is that at the end of the funeral, all the deceased's movables were distributed among family and children, with some preferential treatment on the basis of an individual's closeness to the deceased or his share of the funeral expense.[41] Immovable property as well as jewellery, cattle and a man's library and family records were kept as extended family property. On the other hand, firearms, swords, etc, "being weapons for the exercise of brave and adventurous spirit"[42] went to his sons or, if they were unfit, other close male relations. But all this must not obscure the fact that under the

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[40]Such items are often distributed on the basis of gender. Thus clothes classified as numama or nubo (literally, man's clothes) and yomama or yobo (woman's clothes) go to male and female heirs respectively.

[41]Ibid. p. 82.

[42]Ibid. p. 83.

traditional system, it was the family that actually inherited the property.[43] Customary law recognised two types of families: the matrilineal and patrilineal systems of succession;[44] but for succession to self-acquired property, three types of families were recognised - matrilineal, patrilineal, and joint matrilineal and patrilineal.[45]

In the past family members often lived in a family house or on land allocated by the head of the family, in either case within easy access of the head of the extended family. Upon being informed of a member's death, the head of the extended family immediately took steps to collect his or her assets and direct their distribution. Also, the ceremonies and obsequies associated with the funeral tended to take a long time during which members of the extended family actually occupied the house of the deceased.

In modern urban conditions, however, the length of such obsequies has been shortened and the wife and children play a major role in the distribution of property, being the persons with the best knowledge of the extent and value of the deceased's property. Particularly as the majority of the deceased's movables are often kept within the matrimonial home, the wife's role has become all-important.

No situation on the ground observed during fieldwork was entirely typical

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[43]See for instance, Amarfio v. Ayorkor (1854) 14 W.A.C.A., 554-556; Fynn v. Gardiner (1953) 14 W.A.C.A. 260 -261; Pappoe v. Wingrove (1922) Divisional Court judgment '21-'25, 2; Acquaye v. Deidei (1957) 3 W.A.L.R. 3.

[44]Ollennu 1966, p. 72.

[45]Id.

of the emerging practice with regard to succession. But the overall pattern was one in which the lion's share goes to the wife and children, with "active" or important members of the deceased's extended family taking significant proportions. This was confirmed by the way in which the affairs of two people who had died intestate shortly before this writer proceeded on fieldwork were conducted. In one case, the nuclear family felt that it could not properly conduct the funeral of the deceased without the participation of his consanguine family. Senior members of the consanguine family had indeed planned and organised the main business of the funeral, relegating the wife and children to the background. However, in investigating the affairs of the deceased and tracing his properties and moneys owed to him, and distributing them, the wife and children still took the leading role.

In the second case, where the estate was much smaller, the nuclear family was largely left alone. Such cases are increasingly familiar. In a significant minority of cases, the end of the funeral and the consequent application for letters of administration mark the beginning of open conflict between the nuclear and consanguine families. But the present writer did not come across a single situation where there was even an attempt, in the manner of distribution, to reflect a desire to completely exclude the nuclear family in major decisions. Consequently, the claim that succession to property under the traditional scheme is entirely a function of the consanguine family must now be subject to considerable doubt.

According to those who maintain that the regulation of succession under the traditional system is a function of the consanguine family, the conjugal family

and its needs are completely subordinated to the authority of the consanguine family which is wholly responsible for the distribution of the estate. This argument springs from the traditional conception of the family as being basically the social group into which a person is born (see pp. 180-190 above).

According to the majority of respondents, the right to a share in an estate depends on the closeness of the family member's relationship to the deceased. They maintained that in the case of occupation in a dwelling house not even the head of family has an automatic right to such occupation. The patterns of occupation of dwelling houses show how in practice the rights of members of the extended family in the estate of a deceased member of their family may be circumscribed. Even though a family member's interest in such an estate is never called in question, occupation of a dwelling house by him or her depends on the availability of rooms and, in many cases, acceptance by other residents; particularly, in the suburbs where there is always a strong feeling both within the immediate family and among neighbours of the justness of the immediate family's claim to continued occupation of the house.

At the same time it is stressed that the family member's right to enjoyment of an estate is never called in question. In Jamestown where the ownership of houses is now shrouded in antiquity we recorded many instances of elderly persons moving into rooms in ancestral properties that were previously occupied by deceased relatives and, sometimes, even sharing those rooms with other welcoming relatives.

As the rights of the nuclear family are being increasingly recognised by the new moral order and reflected in social behaviour, it appears incorrect to

assert that the ownership of every usufruct or customary law freehold, or indeed, every self-acquired immovable property, upon intestacy, assumes a communal character, ousting whatever claim the conjugal family might make on it. Yet, the pre-1985 legal position remained that all claims of minor children of the deceased and of widows of repute who had effectively been the deceased's business partners in the acquisition of the property are subject to the discretion of the successor and the consanguine family. It is settled law that children can only reside in their deceased father's house "during good behaviour and while not disputing the rights of the family".[46]

Once appointed, the successor takes over the role of father or mother, as the case may be, of the children. He or she is expected to exercise authority over the children, discipline them, ensure their proper education, and afterwards, put them in a trade. Anecdotal evidence abounds of the importance of the successor, yet field research showed a wide chasm between customary theory and the harsh reality of the modern economy.[47]

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[46]Ibid. p. 90; and at p. 105 where he wrote: "When a person such as A dies, having his own acquired property, moveable and immoveable, he is not succeeded by his sons, freeborn or domestic, whose only right is that of a life interest in the dwelling house built by their father, the deceased, on a land not family property. For if the house be built on family land, the children have only right of occupation during good conduct". But see Bentsi-Enchill 1964, pp. 145-148, esp. p. 145 where he contends that "Children are not uniformly obedient to their father during his lifetime and cannot be expected to be so thereafter. It must always have required the gravest offences going beyond the reconciliatory powers of the abundant and resourceful machinery of familial and community arbitration to achieve the result of rightful expulsion of children by matrilineal successors".

[47]Field research here was based largely on personal interviews and questionnaires administered to successors, children and spouses. The most striking difference was between the ages of the successors (the winners) and the children (the losers). Most successors were over 50 years of age, sometimes with various sources of income of their own. The ages of children was anything up to 60 years. But while older children (between 30-60 years of age) had often successfully retained the deceased parent's property within the conjugal family through all manner of means, including expensive litigation, intimidation and self-help, children below the age of 30 had often been at the mercy of the consanguine family. Over 85 per cent of widows interviewed (ages 28-65) appeared to have been largely dependent on their deceased husbands economically. About 40 per cent of young widows interviewed (ages 28-48) stated that they did not think they and their children had obtained a fair share of the deceased husband's estate under the traditional system.

In all three field-areas, we found cases in which the education, discipline, and welfare of the children were in the hands of the surviving spouse, the children's quality of life being inextricably linked with that of the surviving parent. Several widows recounted how they and their children had been neglected for long periods by the families of their deceased husbands. Even the most conscientious successors seem to restrict themselves to counselling the children and offering them occasional gifts on festive occasions. A few more helped in finding them a trade upon completion of their formal education or by "adopting" them into their own households. Particularly in urban areas, the successor is hardly able to discharge any of the required duties while he has his own conjugal family to care for; not a single case was recorded of a successor physically moving into occupation of the deceased's house.

Some successors only feel a moral obligation to support the children of their deceased brothers; but many more choose to shirk even that moral duty. It is only in Domiabra and among people who have recently moved into the city that the old customary law obligations are observed. Elsewhere, the successor's role as parent to the children is largely ceremonial. For instance, he stands in for the deceased parent at marriages, funerals and other occasions. Particularly in financial matters, he keeps a discreet distance from the children. In several cases, where the deceased had been quite successful, and where the immediate family felt they had had a considerable hand in his achievements, some quite unedifying squabbles, and even litigation, have resulted. The courts have often

decided in favour of the consanguine family.[48]

But the result has often been that the "spoils" of such litigation are enjoyed by a few dominant and litigious members in alliance with the successor rather than by the entire consaguine family. Though in strict theory, the successor's interest in the estate is a qualified one (subject to the continued approval of the head of family), because it is immediate and exclusive, the family can only oust him from his position for particularly grave reasons. Thus, because the average estate is not big enough, the successor is usually left in peaceful enjoyment of it; but he was often kept within the acceptable limits of his powers by the head of family.

Among migrant communities in urban areas, the social imperative for some form of regulation of succession and general social celebrations has led to what may be called a "rent-a-family" phenomenon for occasions like marriages and funerals where the members of an individual's ethnic group, rather than his own proper family, play the family's role for him. On such occasions, the acknowledged head of a migrant or ethnic group stands in the shoes of the head of the extended family, and sees to the person's decent burial away from home. Williams v. National Insurance[49] demonstrates the strength of the social imperative for the nuclear family to ensure involvement of the extended family in the funeral and the subsequent distribution of the deceased's estate. In that

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[48]See, for instance, G.R. Woodman's article, "Two Problems in Matrilineal Succession", Review of Ghana Law, Vols. 1&2 (1969-70), pp. 6-30 where he not only discusses the rights of the immediate and wider families, the rights of matrilineal descendants of deceased females and the rights of the matrilineal descendants of her mother but also reviews the extensive body of case-law to which litigation over such rights has given rise.

[49]High Court judgment, April 24 1962, unreported.

case, a sole beneficiary and executrix of the will of an Ewe man who was alleged to have lived at Somanya brought action to recover the proceeds of a life policy, alleging that the policy holder had drowned at sea even though the body was never recovered. It was held that since there was no evidence that the head and members of the Ewe community at Somanya had performed nor been informed of any funeral ceremony, as custom demanded, the irresistible conclusion must be that the assured never lived at Somanya, and that his alleged death had never been proved.

Today, however, where most of the deceased's children have attained the age of majority and are in gainful employment, they are responsible for bearing the cost of his funeral, although others may contribute. Since the consanguine family's claim to succession is largely based on the maxim: "He who buries the leper, is the person who is entitled to have the leper's sandals,"[50] much of the ground for its role in succession upon intestacy has been removed by the shifting of the financial burden on to the children. Reinforced by a new moral and ethical environment that discourages undeserved gain, more and more conjugal families are left in peaceful enjoyment of the estate. However, the classical customary law position whereby the family succeeds and appoints one of its number as successor still prevails in the subsistence environment of the rural areas.

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[50]Ollennu 1966, p. 69.

8.2.2 Intestate succession under the Marriage Ordinance, 1884

Now repealed by section 19(a) of the Intestate Succession Law, 1985, section 48 of the Marriage Ordinance, 1884 was the first attempt by the legislature to reserve the bulk of an intestate's property for the conjugal family. The Marriage Ordinance provided Ghanaians with the facility for the contracting of monogamous marriages. It also provided expressly that succession to the properties of parties to such marriages and their issues should be regulated by its provisions.[51]

Sections 48(i) and (ii) set the conditions for the application of the Marriage Ordinance as follows:

> "(i) where the intestate:
> (a) was subject to native law and
> (b) had contracted marriage under the Marriage Ordinance, or any other enactment relating to marriage, and
> (c) is survived by a "widow or husband" or any issue of the marriage; and
> (ii) where:
> (a) the father (or mother) of the intestate was subject to native law or custom, and
> (b) the father and mother married under the Marriage Ordinance or any other enactment relating to marriage."

Under this system, while one-third of the estate of the deceased vested in the family and was distributed under customary law, two-thirds of the estate was regulated by the law of England relating to the distribution of the personal estate of intestates in force in England on 19 November, 1884. However, where

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[51]For detailed commentary on the effects of sections 48 (i) and (ii) of the Marriage Ordinance, 1884 see Ollennu 1966, pp. 243-245.

a party to an Ordinance marriage died intestate without leaving a child or a spouse of that marriage, succession to his estate was regulated by customary law.[52] Needless to say, the application of the Ordinance itself led to much absurdity and confusion initially. At one stage it was held in In re Anaman[53] that a Ghanaian who married under the Ordinance was incapable of making a customary law will. The deceased, who in 1887 had married in the Anomabo Wesleyan Church in accordance with the 1884 Marriage Ordinance, had made a customary law will disposing of his property. The Court's finding was that the making of a customary law will or samansiw was incompatible with marriage under the Ordinance. This was followed by the case of In re Otoo[54] where it was held that "when a person alters his legal status by contracting a marriage under the Marriage Ordinance, 1884, he is incapable of making such a will and this Court cannot give effect to a will so made by him."

The principle in In re Anaman[55] and In re Otoo[56] was, however, rejected

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[52]For the purposes of distribution of personal property under section 48 of the Marriage Ordinance, the applicable law of England on 19 November 1884 was made up of the common law, the Statute of Distribution, 1670, the Statute of Frauds, 1677, the Administration of Estates Act, 1685, the Statute of Distribution, 1685, and the Matrimonial Causes Act, 1857. However since under section 48 only two-thirds of the deceased's estate was available for distribution under English Law, these ancient statutes accordingly applied to only two-thirds of a deceased Ghanaian's estate. Thus, where under the Statute of Frauds it was provided that if a woman died intestate leaving a husband, the whole of her estate went to her husband (section 24) a Ghanaian husband whose wife died intestate took two-thirds rather than the whole of the estate (in combination with the other rules). For a full elaboration of the rules, see Ollennu 1966, pp. 247-252.

[53](1894) Sar. F.C.L. 221.

[54](1927) Div. Court, 1926-29, 84.

[55]See above note 53.

[56]See above note 54.

(obiter dictum) in Coleman v. Shang.[57] There, the deceased who had three issues by a customary law marriage, married under the Marriage Ordinance, having one issue by that marriage. All four children as well as ten children he had had by a concubine during the subsistence of the Ordinance Marriage survived him. Further, he had married the concubine under customary law after the death of his wife, married under the Ordinance. After the deceased's death intestate, the child by the Ordinance marriage claimed to be solely entitled to that portion of his estate (two-thirds) which devolved in accordance with English law under section 48 of the Marriage Ordinance. The third wife also claimed to be entitled to the wife's portion under section 48, while the rest of the deceased's children entered the fray claiming to be entitled to part of the children's portion under section 48 of the Marriage Ordinance. Basing itself on the Nigerian case of Bamgbose v. Daniel,[58] and applying the principle that the question of legitimacy of children was a matter for the lex domicilii, the Court of Appeal held that in deciding legitimacy of children for purposes of distribution of estate under section 48 of the Marriage Ordinance, the applicable law should be Ghanaian law, including its customary law. The Court upheld the Ghanaian customary rule that every child, however born, was legitimate once paternity was duly acknowledged, but held that the ten children born to the deceased during the subsistence of his marriage under the Marriage Ordinance, though legitimate under customary law, were illegitimate for the purposes of distribution of his

[57](1959) G.L.R., 390; (1961) A.C. 481.

[58](1954) 14 W.A.C.A., 116.

estate under section 48 of the Marriage Ordinance.[59] Further, the Court of Appeal held that "wife" under section 48 meant a wife lawfully married according to the laws of Ghana, therefore the third wife of the deceased, married in accordance with customary law after the death of the wife married under the Ordinance, was a lawful wife.

Again, in Yaotey v. Quaye[60] where the deceased had, twenty years after the dissolution of his marriage under the Marriage Ordinance, married the defendant under customary law, and had been survived by issues of both marriages, it was held that succession to him was regulated by section 48 of the Marriage Ordinance, and therefore the defendant widow was entitled to the widow's share while the children under both marriages were jointly entitled to the children's share.

Section 48 of the Marriage Ordinance, 1884 as a tool of social engineering aimed at saving the greater part of the estate for the conjugal family, but failed on several counts. Firstly, Western-style marriage under the Ordinance was limited to a very narrow stratum of society, and was hardly ever contracted in the rural areas. Therefore, even though section 48 generally worked satisfactorily for a small section of the society, it did not benefit the majority of Ghanaians. Indeed, findings during fieldwork yielded only one case of such marriage (by a village school teacher) in Domiabra . Secondly, men who had married under the Marriage Ordinance were not averse to keeping other

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[59]See In re Blankson-Hemans, (1973) 1 G.L.R. 464 where it was held that a son born to the deceased by a woman he never married (before he contracted a marriage under the Ordinance) was illegitimate.

[60](1961) G.L.R., 573.

"wives" during the subsistence of the marriage under the Marriage Ordinance. Thirdly, it was meant to introduce a new notion of monogamous marriage into the Ghanaian social environment; but it was little understood and accepted. Some of the cases decided under section 48 entailed lengthy litigation, both dissipating the estate and sowing the seeds of animosity between the deceased's conjugal and consanguine families and probably the various sets of "wives" and children.

It has been the object of this section and the previous section to examine the pre-1985 law of intestate succession in Ghana. It has been shown that the old law of intestate succession was far from uniform, and constituted a considerable source of confusion even in legal circles. It gave pre-eminence to the nuclear family only in few cases.

8.2.3 The Intestate Succession Law, 1985

We have already seen that the nuclear family has started to emerge as the basic unit of Ghanaian society, supplanting the consanguine family and thus calling into question the continued relevance of the old law of succession. It is against this background that the new law of intestate succession is now considered. Before beginning our analysis of the Intestate Succession Law, 1985 (P.N.D.C.L. 111) it is necessary first to define the aims of the new law, to consider changes that have occurred in urban perceptions of succession in Ghana and, finally, to discuss how those aims fit into the theoretical framework set out in The Limits of Law. This section therefore discusses the new law of intestate succession from various standpoints, arguing that even though its provisions are largely

untested, it will eventually provide the key to the institutionalisation of individualism in Ghanaian society.

The Intestate Succession Law came into force on 14 June 1985, and constitutes the most emphatic enunciation yet of the arrival of individualism and the centrality of the conjugal family in the new Ghanaian social scheme.[61] The Memorandum to Law 111 declares that the "present law on intestate succession appears to be overtaken by changes in the Ghanaian family law system. The nuclear family (i.e. husband, wife and children) is gaining an importance which is not reflected in the current laws of succession". The legislation therefore sets out to reform both the customary and statutory laws of intestate succession and to subordinate the interests of the consanguine family to that of the conjugal family. The Memorandum also states:

> "The customary law conception of marriage did not regard a wife as part of the husband's economic unit. Therefore the wife's claim on the husband's property was also limited. As part of the increasing importance of the nuclear family, there is a movement towards involving the wife into the man's economic activity. There is a corresponding weakness of the extended family".

It further stated that children in a matrilineal system have no more than a right to maintenance by their father's customary successor and a right to residence in their father's house subject to good behaviour.

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[61]Some writers have, however, attacked the view that there is a growing importance of the nuclear family in Ghanaian society. See, for instance, W.C. Ekow Daniels, "Recent Reforms in Ghana's Family Law", Journal of African Law, Vol. 31 (1990), pp. 93-106. In relation to Law 111, he stated (p. 97): "It needs to be said that the pious assumption by the draftsmen of the fact that there is a growing importance of the nuclear family in a society which is predominantly polygamous is a conclusion which is more imaginary than factual."

One of the principal aims of the Intestate Succession Law, 1985 is to provide a uniform system of succession for Ghanaians irrespective of community of origin, personal law, religion and marriage. It therefore supersedes the various customary laws of succession under the matrilineal and patrilineal systems, the Marriage Ordinance, 1884 (Cap. 127)[62] and under the Marriage of Mohammedans Ordinance, 1907 (Cap. 129). In that sense, it seeks to unify the Ghanaian law of intestacy, and make it relevant to the profound social changes that have occurred since the colonial days, in particular the rapid integration of peoples and the entrenched phenomenon of inter-tribal marriage.

Frequently, the parties to inter-tribal marriages, though they may reside in the urban areas, are themselves only two or three generations removed from the rural background of their forebears. Also, with higher education and increased incomes for educated women relative to their spouses, there has arisen a de facto renegotiation of the marriage contract away from customary law notions, with the wife contributing significantly to the purchase of both houses and chattels. More and more, therefore, the home and its contents reflect the joint efforts of the spouses. As a result, most members of the urban intellectual/commercial classes tend to view their future and their children's future in a modern context. The creation or acquisition of the necessary material conditions for themselves as well as their children and children's children forms an important part of their ethos. Besides, one notes a relative decline in traditionalism in the urban areas stemming largely from the post-independence

[62]However, under sections 5(d), 6(c), 7 and 8 small fractions of the estate will continue to devolve in accordance with customary law.

reshuffle of wealth and income away from chiefs and family heads.

Salutary though this process might be, in the sense that the pressures that it creates for individualism might well be the grit in the oyster to convert a subsistence agricultural system into a modern economy, it tends to focus policy making on the urban areas. The fact remains that the great majority of Ghanaians still live in rural and semi-rural areas where consanguine family systems are a way of life; it might well be argued that in the circumstances of rural life a strict application of the provisions of the law would lead to hardship for members of the consanguine family.

In discussing barriers to the effective implementation of law arising from the nature of society, Allott characterises application of legal theory to legal fact as "applied juristics", or the sociology of laws in operation.[63] This, he seems to suggest, ought to be the central arena of the study of law. In this section we will employ field data to assess the operation of Law 111 on the basis of Allott's views regarding limits on the operation of law arising from the nature of society and from the ambitions of the legislator.

The central objective of the 1985 law is to secure the bulk of an intestate estate for the surviving spouse and children. In the first place, both the household chattels and the matrimonial home pass to the conjugal family. Section 3 of the Intestate Succession Law, 1985 provides:

> "Where the intestate is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled absolutely to the household chattels of the intestate".

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[63]Allott 1980, pp. 45-72 at p. 45.

Under section 18 "household chattels" include clothes, jewellery, furniture, furnishings, televisions, radiograms, refrigerators, other electrical appliances, kitchen and laundry equipment, hunting equipment, simple agricultural equipment, books, household livestock, and private motor vehicles.

Under section 4(a), the conjugal family is entitled to a single house where the estate includes a house. Such a house devolves unto the surviving spouse and children as tenants-in-common. Section 4(b) provides that where the deceased died possessed of several houses, the surviving spouse and children have first choice of one of those houses, including the matrimonial home. In addition to a single house and chattels, the surviving spouse and children are under section 5 of the statute entitled to the majority of the residue. Section 5 further provides that where the intestate is survived by a spouse and child, 3/16 of the residue of the estate shall devolve to the surviving spouse, 9/16 to the surviving child, 1/8 to the surviving parent and 1/8 in accordance with customary law.

If the deceased is survived by a spouse but no children, section 5 further provides a different mode of distribution of the residue:

> "Where the intestate is survived by a spouse and not a child the residue of the estate shall devolve in the following manner:
> (a) one-half to the surviving spouse;
> (b) one-fourth to the surviving parent;
> (c) one-fourth in accordance with customary law".

Where there is no parent, one half of the residue devolves according to customary law. Finally, section 7 of the 1985 law provides that,

> "Where the intestate is survived by a child and not by a spouse the surviving child shall be entitled to three-fourths of the residue and of the remaining one-fourth, one-eighth shall devolve in accordance with

customary law: Provided that where there is no surviving parent the whole of the one-fourth shall devolve in accordance with customary law."

Altogether, the statutory right conferred on spouses and children to inherit property upon intestacy marks a sharp departure from the practice of both matrilineal and patrilineal communities under customary law. In matrilineal communities, the family which succeeds upon a man's intestacy is the uterine family, and the children do not belong to their father's family.[64] They only stayed in their deceased father's house subject to good behaviour; in patrilineal communities, even though children could inherit, widows were often excluded. Under the patrilineal system of inheritance, a man's children, male and female, his paternal brothers and sisters, children of his paternal brothers, his paternal grandfather, paternal brothers and sisters of the grandfather and the descendants of the paternal uncles in the direct male line, all belong to a man's family.[65] The principle is elaborated in the following cases: Dugbartey v. Narnor,[66]Re Estate of Lomotey Nukpa (deceased), Lomotey Abosei-

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[64] Ollennu 1966, p. 139. See also the following cases: Pappoe v. Wingrove (1922) Div. Ct., 1921-25, 2; Larkai v. Amorkor (1933) 1 W.A.C.A. 323; Edmund v. Ferguson (1939) 5 W.A.C.A. 113; Aryeh v. Dawuda (1944) 10 W.A.C.A. 188; Captan v. Ankrah (1951) 13 W.A.C.A. 151; Amarfio v. Ayorkor (1954) 14 W.A.C.A. 554; Arthur v. Ayensu (1957) 2 W.A.L.R. 357; Aryeh v. Ankrah (1954) 3 W.A.L.R. 104, P.C. and Laryea v. Abbey Court of Appeal judgment, 28 October 1958, unreported. It is clear that it would take a fundamental shift in the social practices of matrilineal peoples in Ghana to bring the provisions of the law in line with social reality. On the principle of matrilineal descent, see M. Fortes, "Kinship and Marriage among the Ashanti" in A. R. Radcliffe-Brown and D. Forde, (eds.), African Systems of Kinship and Marriage, London 1960, p. 254 where the writer noted that "The rule of matrilineal descent...is the key to Ashanti social organisation. This is due to the fact that matrilineal descent is the basis of a localized lineage organization which is generalized through the social system as a whole by an organization of dispersed clans. Further, the writer observed (p. 261) that "the rule of matrilineal descent governs the legal and moral relations of individuals as well as the structure and relations of politically significant groups". Cf. Rattray 1929, p. 62: "It is not easy to grasp what must have been the effect on West African psychology of untold generations of acting and thinking, not in terms of oneself, but in relation to one's group".

[65]Ollennu 1966, p. 171.

[66](1925) Div. Ct. 1921-25, 182.

Caveator,[67] Ambah v. Libra.[68]

The primary effect of Law 111 has been a change in the mode of enjoyment of estates after their devolution. It marks the end of the consanguine family's control over succession, and may in time even lead to the demise of the traditional successor who, as we have pointed out, steps into the shoes of the deceased under traditional rules of succession. Also, the surviving spouse who usually had no interest in the deceased partner's estate upon intestacy now has a fixed, guaranteed share in it.

Another effect of the Intestate Succession Law, 1985 has been a drastic reduction in the extended family's interest in an intestate's estate. As we have seen, under the old law upon a person's death intestate, the consanguine family assumed absolute and immediate control over his estate. Under Law 111, however, their interest has been reduced to a mere share in the residue. Under section 5, if the deceased is survived by a spouse and children, the consanguine family is entitled to one-eighth of the residue, but if he is survived by a spouse only, the family takes one-fourth of the residue. Quite distinct from the family's share is the portion reserved for surviving parents of the deceased. Under section 5 this amounts to one-eighth where the deceased was survived by a spouse and children and one-fourth where he is survived by a spouse only.

The distribution of the family's share of the residue continues to be governed by customary law and is not regulated by the 1985 law. Where the

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[67]Divisional Court judgment, 24 October 1908, unreported.

[68](1927) F. Ct. 1926-29, 241. See also, Kodadja v. Tekpo (1931) Div. Ct., 1929-31, 45; Afi v. Ayisi, Divisional Court judgment, 5 April 1943, unreported; Siaw v. Sorlor, Land Court judgment, 6 April 1960, unreported; Okaikor v. Opare (1956), 1 W.A.L.R. 275; and Re Ammetifi (1889), Ren. 157.

estate is particularly large and includes several houses, the family may well be entitled to a house as part of the residue which will then become family property. Section 10 of the 1985 law provides that:

> "Where the rules of succession under customary law applicable to any portion of the estate provided that the family of the intestate shall be entitled to a share of the estate:-
> (a) that family shall be the family to which the intestate belonged for the purposes of succession in accordance with the customary law of the community of which he was a member;
> (b) in the case of an intestate who, being a member of two communities belonged to two families for the purposes of succession, that family shall be the two families;
> (c) in the case of an intestate not being the member of any one family, that family shall be the family with which he was identified at the time of his death or, failing that, to the families of his parents, or failing that, to the Republic."

The majority of estates we came across during field-work were small, suggesting that the consanguine family would in such cases hardly get a share of the residue. The effect of the rules of customary law upon the distribution of the properties of intestates is, thus, likely to diminish rapidly in those sections of the society where Law 111 makes a full and immediate impact.

The fractional nature of the family's portion has led to speculation that the new statute would necessarily entail the fragmentation of estates,[69] making sale the most viable option for all interested parties. This fear was not borne out by our field research. The overall effect of the statute upon the surviving members, spouses and children has been to preserve the domestic life and surroundings of the spouse and children intact, thereby maintaining their economic and social circumstances. It largely promotes the transmission of property to the spouse

[69]See Kludze 1988a, pp. 170-171.

and children of the deceased and does reduce the flow of the property of deceased persons into the consanguine family. The restriction of the consanguine family's interest to a small share of the residue should be a welcome solution to the age-old problem of the dispersal of accumulated property. It remains to be seen if Law 111 will result in a better management by the spouse and children of the property which they inherit and if the effective disinheritance of the consanguine family will accelerate its decline.

It is likely that lands that devolve unto the nuclear family under the provisions of Law 111 may themselves come to be vested in a large number of persons as the descendants of the original acquirer increase in number. Woodman has suggested that this can lead to the accumulation of wealth in the hands of a relatively small proportion of people and hasten the emergence of inequalities and the development of a landlord class.[70] He noted, however, that the willingness of beneficiaries to sell the property and share the proceeds, and the availability of mortgage loans for property development would be necessary for such an outcome.[71] Clearly, this prophecy can only be tested after sufficient time has elapsed to enable descendants with interests in the estate to multiply in sufficient numbers for the necessary tensions that can give rise to the partition or sale of the property to emerge. At any rate, such a phenomenon is likely to arise initially in the urban areas which presently have the highest proportion of people taking advantage of Law 111 (see Table 17 below).

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[70]G.R. Woodman, "Ghana Reforms the Law of Intestate Succession", Journal of African Law, Vol. 29 (1985), pp. 118-128 at p. 127.

[71]Id.

Law 111 further provides for estates, where the residue does not exceed 50,000 cedis, to devolve absolutely to the spouse and children. In other words, in addition to a single house and chattels, the conjugal family alone takes all residues not in excess of 50,000 cedis. Section 12 of the Intestate Succession Law, 1985 provides as follows:

> "Notwithstanding the provisions of section 4 and 5 to 8 of this law (a) Where the total value of the residue does not exceed 50,000 cedis the residue shall devolve to any surviving spouse or child of the intestate or where both the spouse or child survive the intestate to both of them."

Where the deceased is not survived by a spouse or child, a small estate devolves unto a surviving parent, but the possibility is that legal and administrative costs would wipe out such estates, leaving dependants with virtually nothing. In practice, the effect of section 12 is likely to protect the estates of poor nuclear families from unnecessary subdivision and distribution. "Small estate" is defined by its value as not exceeding 50,000 cedis. In the rural areas where property is inexpensive, it may well include land and simple buildings. Section 13 provides for the maximum value of a "small estate" to be altered from time to time by legislative instrument.

Partial intestacy poses another problem in relation to small estates. As a result of a devisee or legatee predeceasing a testator, the invalidity of the residuary clause in a will or the vagueness of description or disposition in a will, a problem of partial intestacy may arise in relation to the gift concerned. The value of such gifts is likely to be small and, at first glance, it may be thought that they should constitute a "small estate". However, given the current inflationary trend in Ghana brought on by the massive devaluation of the cedi, even partial

intestacy in relation to a radiogram or a refrigerator, either of which is valued at current market prices far in excess of 50,000 cedis, would create a residue out of what would otherwise have been a straightforward distribution in favour of the conjugal family. It immediately activates the one-eighth claim of the parents and consanguine family. The result could be the loss of an indispensable chattel which would have been saved had the estate devolved in its entirety unto the conjugal family.

Section 17 of the Intestate Succession Law, 1985 creates new offences relating to interference with an estate prior to its distribution. This is obviously designed to protect the conjugal family from attempts by members of the consanguine family and other meddlers to "plunder" the estate and defeat the purpose of the statute. Section 17 provides that,

> "Whoever before the distribution of the estate of a deceased person whether testate or intestate,
> (a) unlawfully deprives the entitled person of the use of:
> (i) any part of the property of the entitled person; or
> (ii) any property shared by the entitled person with the deceased to which the law apply;
> (b) otherwise unlawfully interferes with the use by the entitled person of any property referred to in paragraph(a) of this subsection, shall be guilty of an offence and liable on summary conviction to a fine not exceeding 5,000 cedis or imprisonment not exceeding six months or to both."

While preserving the integrity of the estate, this provision strengthens the hands of the surviving spouse and children who would now have to be closely consulted even on the issues of customary rites, for which some of the deceased's personal possessions might be needed in the time leading up to the funeral. It will also check the dubious activities of unscrupulous persons who may pounce and plunder while more urgent and emotional matters occupy the

attention of the surviving spouse and children.

Having considered the most important provisions of Law 111, it is now necessary to assess its actual impact so far as the communities under review are concerned. Table 17 summarises the distribution of the property of intestates in the field-area since the enactment of Law 111. Of the entire sample of 208 informants, only 15 were in a position to describe the manner of distribution of the property of a relative or friend since Law 111 was enacted. As a result, the findings presented in Table 17 are perhaps of limited significance as they do not reveal how other intestacies recorded in the field but not described by respondents were dealt with. However, as it stands, the table shows no evidence of the application of the provisions of Law 111 in Domiabra. Old Dansoman/West Korle-Gonno Estates had the highest number of cases.

TABLE 17

DISTRIBUTION OF PROPERTY UNDER LAW 111			
District	No. of informants	No. of polygamists	Estates that included land
A - C	4	1	1
D - F	11	2	5
G - H	-	-	-

As we have indicated, the above figures are in themselves insignificant unless they are assessed against the total number of intestacies that, within the knowledge of all informants, have occurred in all three field-areas since the enactment of Law 111 in 1985. Counting only deceased friends and relatives above the age of twenty-eight,[72] a total of 43 intestacies were recorded. When

[72]The age of twenty-eight was chosen on the basis of the present writer's own knowledge of the people of Accra among whom he was born and grew up. It is the age around which most people start to acquire property of any significant value.

the number of estates distributed under Law 111 (15) is measured against the total number of intestacies recorded in the field-area, it shows a surprisingly strong impact of Law 111 upon the communities under review, save Domiabra. This may be partly explained by the almost complete incorporation of the urban communities in districts A-F into the formal economy. For instance, 10 out of the 11 intestates whose cases were investigated in districts D-F had at one time or other been engaged in salaried or waged employment. In almost all cases, this meant the necessity of applying for letters of administration in order to secure outstanding funds in the possession of employers.

Seven of the cases ended in contentious disputes. Of the seven, five involved estates that included several houses and two or more sets of children. The remaining nine estates were distributed by general agreement between the conjugal and consanguine families. Of the twelve heads of families who were asked whether the distribution formula laid down in Law 111 was strictly followed, three said they had modified the distribution mechanism of Law 111 with principles of fairness. In practice, this often meant that aside from the matrimonial home (if any) and its contents going to the surviving spouse and children, individual members of the family who had, say, spent their time or disproportionate sums caring for the deceased through his or her terminal illness, got a larger share of the residue than Law 111 prescribes. This is an indication of the flexible operation of the "active family" concept. Also, the needs of persons who had depended on the deceased during his lifetime, particularly any surviving parent or elderly relative were taken into consideration. Thus there seems to be developing a new form of unofficial urban customary

law, prompted in part by state intervention in customary law, that combines the individualistic provisions of the Intestate Succession Law, 1985 with the communal imperatives of Ghanaian society.

In the discussion of the consanguine family's share of the residue above (see p. 504) it was pointed out that it might lead to the fragmentation of intestate estates, making sale the most viable option for all interested parties. This fear was not borne out by field research. Though children and surviving spouses may have separate and distinct interests in intestate estates, in practice they live more or less peaceably in the matrimonial home. In none of the 15 cases investigated had there been a significant fragmentation of estates beyond what obtained under the old law. In three cases the estate included two or three plots of land together with buildings. In each case members of the extended family had initially disputed the rights of the nuclear family in a bid to assert their traditional privileges but had subsequently given in.

In the first case we came across, the consanguine family accepted the monthly rents for one of the deceased's buildings in lieu of a fixed share of the estate. In the second case, the extended family gave up its rights while the surviving spouse and children undertook to maintain the elderly sister and brother of the deceased. In the final case the deceased was survived by four sets of children by different marriages. The surviving spouse and her children took one house while the other was occupied by the other children or their tenants. This pattern of sharing was repeated in the other two cases where the deceased had had children by previous marriages. In both cases the deceased was possessed of only one house in which the children by previous marriages

were permitted to occupy rooms.

The three cases related above seem to have arisen out of the residual and fractional nature of the consanguine family's interest. Arguably, it is only in extremely large estates, including many plots of land, that the consanguine family's share may amount to a building or plot of land. But even where the consanguine family's interest amounts to a separate interest in land, such interest is under present regulation not alienable by outright sale, leaseholds now being the highest interest a purchaser can acquire (see p. 404 above).

Like the courts, whose approach will be examined below, the traditional dispute settlement mechanism has tended to take a liberal approach to the interpretation of Law 111. Interviews established that most persons are loath to go through the cumbersome process of ascertaining the precise value of the estate, and then hiving fractions off the whole. In only three instances had an attempt been made to distribute parts of an estate which consisted largely of liquid assets in strict accordance with the provisions of Law 111. Two of the cases involved threats by truculent brothers of the deceased.[73] In all cases the strict division of movables according to the provisions of Law 111 proved impracticable and the division had been largely limited to the most valued movables of the deceased, including jewellery and clothing. In every other case, the bulk of the estate had gone to the surviving spouse and children.

The determination of the consanguine family's share of the residue as well as the distribution of the main estate among the spouse and children

[73]All 15 lawyers in the sample, however, stated that they increasingly advise clients to settle for fixed shares of liquid assets in strict accordance with Law 111.

appeared to be based largely on notions of equity and fairness. But this classification conceals the fact that in nearly all the cases the leading members of the family were well-informed persons who were generally aware that the new law heavily favours the spouse and children and therefore made no serious effort to press the consanguine family's old claims.

In sum, the data do not support the view that Law 111 might lead to the fragmentation of estates. Especially in cases where the funeral expenses had been borne by the children of the deceased, the consanguine family had tended to either totally relinquish its interest or restrict it to the acceptance of a few token items of the deceased.

Finally, while it is difficult to attribute knowledge of the Intestate Succession Law, 1985 among recipients to a particular source, it seemed evident that the drama of recent struggles over intestate properties and generalised social commentary on such dramas often tend to etch the broad provisions of Law 111 in the minds of many.[74] Such reception of law as drama illustrates how the "active customary law" has been developing recently to incorporate elements of state law.

Finally, all 208 informants were asked how thoroughly they knew the provisions of Law 111. Except in Domiabra, elders, heads of families and ordinary informants in the other field-areas all showed a general understanding of the fact that it is now the conjugal family that takes the bulk of an intestate estate, but they had little understanding of the details of Law 111. Only the 15 lawyers in the sample demonstrated a good knowledge of Law 111. Further, it

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[74]Cf. Allott 1980, p. 12.

appeared that lawyers played a significant role in convincing prospective clients representing consanguine families of the futility of litigating over small and medium estates under the provisions of Law 111. According to seven of the lawyers, there has been a significant increase in the number of clients seeking advice on testamentary dispositions since the enactment of Law 111.

The foregoing examples show that Law 111 is not being utilised strictly in the manner that the legislator intended. Law, it has been observed, cannot compel action.[75] It may, however, induce a certain course of action.[76] It is in this light that the provisions of Law 111 may be seen as having been adapted by recipients to suit their notions of fairness and legality. Such adaptation, we suggest, is the result of limits to the effectiveness of law located in society itself and in the ambitions of the legislator. Customary law, it has been suggested, relies on traditional and static patterns of behaviour, adapting them slowly to changing conditions.[77] On the other hand, since the legislator's message in Law 111 does not seem to completely disregard the changing convictions of urban society,[78] increasing numbers of families appear to be basing the distribution of the intestate properties on the provisions of Law 111.

Allott has described courts as "the great adjusters of laws to social

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[75]Ibid. p. 45.

[76]Ibid. p. 46.

[77]See A. Ross, Directives and Norms, quoted in Allott 1980, p. 51.

[78]Cf. Allott 1980, p. 67. Allott has further suggested (pp. 204-205) that previous proposals for the reform of Ghanaian law of succession had generated a large volume of comments from individuals, traditional councils of chiefs and church bodies which could prove invaluable in determining what sorts of changes would meet with popular assent and hence probably attract general acceptance and compliance. If Allott is correct, it would appear that such feedback (which seems to have been utilised in the drafting of Law 111) as well as further comments by other social groups, immediately preceding the enactment of Law 111, may partly account for the tendency of some recipients to distribute property under the provisions of the new law.

realities", a task which, he says, they perform without the licence of the legislator.[79] Therefore having seen the unofficial customary law that is emerging in the urban areas in response to Law 111, it is necessary to consider the nature of the judicial customary law that has developed since Law 111 was enacted. Since its enactment, the majority of cases decided under the Intestate Succession Law, 1985 have fallen under its transitional provisions which regulate all cases of intestacy pending before the courts at the time of enactment on June 14, 1985. Section 21 of the 1985 law provides that:

> "Notwithstanding the provisions of section 1 of this law or any other enactment the provisions of this law shall be applicable in the settlement of any claim or adjudication pending before the court or a chief or head of family under customary law at the commencement of this law in respect of the administration or distribution of the estate of an intestate who died before such commencement, and for the purposes of this section the provisions of the Customary Marriage and Divorce (Registration) Law, 1985, (P.N.D.C.L. 112) and the Administration of Estates (Amendment) Law, 1985 (P.N.D.C.L. 113) shall be deemed to be applicable to such claim or adjudication."

The cases of Bannerman v. Bannerman[80] and Kwasaa v. Koranteng-Addow[81] raise interesting issues in relation to this provision. Both cases were pending before the court at the time of the enactment of Law 111, and the relevant issue was the proper law in deciding the mode of succession.

In Bannerman v. Bannerman,[82] the suit was for declaration of a child's entitlement to a reasonable portion of her deceased father's estate. The

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[79]Ibid. p. 101.

[80] High Court judgment, 13 November 1987, unreported.

[81] High Court judgment, 1 January 1987, unreported.

[82]See above note 80.

deceased had been married to the defendant under the Marriage Ordinance, 1884 (Cap. 127) but had secretly had the plaintiff child with a paramour during the subsistence of the marriage under the Ordinance. Evidence in the form of letters of the deceased was adduced to prove his acknowledgment of paternity of the child. It was held by Ammah J. that "this case was pending when Law 111 was promulgated. Thus section 21(1) governs". As the plaintiff was the natural child of the deceased, she was further held to have a share in the deceased's estate along with his seven other children. Said the court: "Section 5 of the Law 111 governs the distribution. Thus the plaintiff is entitled to 1/7 of the 9/16 of the property". On the question of fragmentation, the court held, "As it is difficult to share the seven houses exactly to the defendant surviving spouse, the children and the family, I would recommend that one house be given to the plaintiff or failing that, she should be given reasonable accommodation in any of the houses".

In Kwasaa v. Koranteng- Addow[83] the defendant, a party to a marriage under the Ordinance, had contended that since the deceased died before the enactment of Law 111, he, as widower, was entitled to 2/3 of the estate under the Marriage Ordinance, 1884 (Cap. 127). Further, he argued that the remaining 1/3 vested in the family, which he contended was the immediate or nuclear family, which he said consisted of himself and the deceased's children. He relied on the customary law doctrine that "in the matrilineal areas of Ghana, every woman who has children becomes the originator of a family consisting of

[83]See above note 81.

herself, and her direct descendants".[84] Deciding in favour of the plaintiff/parent, the Court found that since 5 July, 1985 when the Intestate Succession Law commenced, there was nothing to prove that the estate had either been administered or distributed, and the defendant had in a dubious and surreptitious manner sought a grant of letters of administration, about which there was a dispute pending before the court. Therefore the applicable law in the suit was Law 111.

In yet another case, Re Osabutey,[85] the deceased left eight houses, seven children and one spouse married under the Marriage Ordinance, 1884 (Cap. 127). The applicant widow wanted the choice house for herself alone. It was held that the property must devolve within the scope of section 4 of Law 111 to herself and all seven children as tenants-in-common. It was further held that it is only at the point of distributing the residue that the widow may be entitled to a further right to any of the other houses.

These cases bring a number of problems to the fore; we will deal with them in turn. First, it is clear from Bannerman v. Bannerman[86] that also the courts will take a flexible approach to distribution. It is possible offers of accommodation will outweigh the temptation to sell estates and distribute the proceeds in the exact fractions stipulated by Law 111. Indeed, the house could be subdivided into flats as provided by the Land Title Registration Law, 1986

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[84] Mills v. Addy (1958) 3 W.A.L.R. 357, 362.

[85] High Court judgment, 30 March 1987, unreported.

[86] See above note 80.

(P.N.D.C.L. 152) and offers of accommodation will be a peculiarity of medium estates. Large estates might still be threatened by fragmentation as each house and each asset forming part of the residue is carved out to a different beneficiary. But even here, the principle in Re Osabutey[87] is that the beneficiaries will hold as tenants-in-common.

Secondly, polygamy and multiple marriages undoubtedly complicate the straightforward distribution pattern prescribed by section 5. It would appear that where the deceased had two or three spouses, they would be jointly entitled to the spouse's portion. For a medium estate involving one house and household chattels designed for a European-style single family unit, the problem of polygamy could lead to an unhappy co-residence of co-wives in the same house with access to the same facilities, or an outright sale.

Finally, the conjugal family is the greatest beneficiary of all these changes. No longer are children's right in their deceased father's estate limited to a few token movable items or a mere life interest in the house subject to good conduct; they and the surviving spouse retain the essence of the estate consisting of the first choice house and all chattels.

It is submitted that the concept of family arrangement or family settlement[88] may hold the key to the problems of polygamy, multiple marriages and fragmentation of estates entailed by the distribution system of Law 111. These problems can lead to litigation and the waste of the family's estate if

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[87]See above note 85.

[88]On this see in detail J.D.M. Derrett, "Family Arrangement in Developing Countries", in J.N.D. Anderson (ed.), Family Law in Asia and Africa, London 1968, pp. 156-181. See also, P.M. Bromley and N.V. Lowe, Bromley's Family Law, London 1992, pp. 736-738.

various sections of the family insist on a strict division of an estate in accordance with the Intestate Succession Law, 1985. They can thus undermine the bonds that unite the family and lead to much bitterness and unhappiness.

The concept of family arrangement was developed by the English courts to resolve the expectancies of family members in a manner that is conducive to the best interests of the family and avoids the waste of the family's estate by improvident and avoidable litigation. Family arrangement enables parties to trade-off or dispose of such portions of an estate as would fall to them upon the death of a family member in a way that secures the peace, happiness and welfare of the family, especially in cases where the property is not readily partible.[89]

Employed wisely, the concept of family arrangement should be a useful complement to the provisions of the Intestate Succession Law, 1985. A good family arrangement should enable, for example, an aged parent to receive a fairer share of his or her son's estate (that takes account of his or her financial and other circumstances) than the bare provisions of the Intestate Succession Law, 1985 provide for. For instance, under a family arrangement a family can continue to work income-yielding assets or hypothecate land and share or use the proceeds to meet the needs of its members rather than sell or alienate such property outright. In this way the expectancies of family members may be met and problems relating to homelessness, penury, privation, education, etc. can be minimised within the family.

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[89]Derrett 1968, p. 157.

Having outlined the main provisions of the Intestate Succession Law, 1985 and suggested how the concept of family arrangement might be employed to complement its provisions, it remains to assess whether the greater restriction of inherited landed property to the conjugal family under Law 111 is likely to result in development of land.[90] Reference has already been made to the possibility that Law 111 will lead to an increase in individualism and the development of a landlord class (see above, p. 505). It will be interesting to see if, on the pattern of present urban social practice, there is any likelihood of Law 111 leading to an increase in the sale of the matrimonial home and the investment of the proceeds in further land development which, as has been suggested, may hold the key to the emergence of such a class.[91] The present ownership pattern of retained lands within the field-area set out in Table 18 below provides, perhaps, the best framework for assessing the likely impact of Law 111 on the sale of land. The figures in the table relate to developed lands only.

[90]The term "development of land" is here employed to denote activities, mainly extensions to existing housing, which increase the value of property and thereby result in greater accumulation of wealth.

[91]Woodman 1985, p. 127.

TABLE 18

CURRENT OWNERSHIP OF RETAINED LAND			
Relationship of present to original owner	Districts		
	A-C	D-F	G-H
1. Original owner	-	35	21
2. Sons	N/a	29	8
3. Daughters	N/a	15	6
4. Grandchildren	N/a	5	25
5. Brothers/sisters	N/a	7	9
6. Other relatives	N/a	11	7
7. Strangers	2	8	4
Total	2	110	80

The table shows the relationship between the present owners and the original owner of the land. Several points stand out in the table. Firstly, figures for Jamestown are not available, as informants were uniformly unable to trace their exact relationship with the original owner. This suggests the absence of a pattern of sale of landed property that devolved unto the consanguine family under the old law. Re-communalisation of property through the increase in the numbers of beneficiaries and the consequent vesting of title in a large number of people appears to have been the trend under the old law of succession. Germane to the hypothesis that the communally-based rules of customary law may not be conducive to the promotion of the nuclear family as the basis of modern Ghanaian society is whether evidence exists that the operation of statutory law has altered the pattern of re-communalisation of property. To answer this question we have to compare the findings in District C, where titles have devolved several times, to the findings made elsewhere. In all the districts of Jamestown, save District C where the old rules have had the least impact, there appears to have occurred a re-communalisation of secondary titles

confined to the descendants of the original owner. In the case of District C, most of the acquisitions occurred just before or after the earthquake period and more than three-quarters of land transactions recorded in the district were therefore set down in documents. A good number of them have devolved unto the present owners by testamentary disposition. The only two cases of outright sales to strangers recorded in Jamestown occurred in that district. In each of those cases, a will made by the original owner appears to have played a crucial role in eliminating other claimants from ownership of the land and thus facilitating the sale. Secondly, in both Districts D-F and G-H, the majority of present owners and occupiers are direct descendants rather than other relatives of the original owner. Thirdly, sales of developed lands to strangers are still rare.

Two conclusions may be drawn from the trends described above. By preserving the bulk of the estate to the nuclear family, the Intestate Succession Law, 1985 may have given legal validity to the claims of the immediate family but it will not totally stop the process of the re-communalisation of titles. In all probability the Intestate Succession Law, 1985 is likely to intensify the claims of children to land, especially where there are step-children with competing claims.

During several observations of disputes before heads of families, it was clear that the inquisitorial nature of such hearings tended to favour notions of equity and fairness to the children (though not the widow) whenever they had sought to rely on the Intestate Succession Law, 1985. It appeared that it was the spirit rather than the letter of the statute that was generally enforced. It is difficult to say, however, if this reflects a general attitude or just a short-term reaction stemming from the fear of the possible sanctions of the state. In any

case, even before the enactment of the Intestate Succession Law, 1985 there had long developed, in the urban areas, a trend of the children dividing the rooms of their deceased parent's house among themselves to the exclusion of the extended family. In the older housing estates, this was aided by a tendency not to even apply for letters of administration upon intestacy. As a result, the ownership records of the State Housing Corporation which owns the housing estates are grossly misleading, as they still bear the names of many deceased persons. It is possible that in such places as well as the rural areas, old practices will continue, and the provisions of Law 111 will be largely ignored. It is also possible that in large estates and houses partly occupied by members of the deceased's consanguine family, the consanguine family might put up an unedifying fight in a doomed attempt to assert their old customary law rights.

Tables 19, 20 and 21 show a hitherto unremarked relationship between patterns of succession and the development of land. In all three districts a similar pattern emerges of a coincidence of testacy and individualism leading to larger investments in land development. Yet, Table 19 below shows that re-communalisation of landed interests is the overall social trend. Bank credits play a significant role in almost all developments over seven million cedis, and there must be some link between the uncertainties of title associated with communal ownership and the general reluctance of bank managers to advance loans against such titles. Clearly, in all three tables, intestacy and communal forms of ownership land are associated with the lowest levels of investment in developed land.

TABLE 19

RELATIONSHIP BETWEEN SUCCESSION AND LAND DEVELOPMENT AT MAMPROBI			
Value of devt.(cedis)	Present ownership (individual/communal)	Succession (testate/intestate)	Finance
1. None	16/50	15/51	-
2. Up to 3 million	37/7	21/23	self
3. 3 - 10 million	7/1	6/2	self/loan
4. Above 10 million	2/0	2/0	loan

TABLE 20

RELATIONSHIP BETWEEN SUCCESSION AND LAND DEVELOPMENT AT JAMESTOWN			
Valueof devt. (cedis)	Present ownership individual/communal	Succession (testate/intestate)	Finance
1. None	-/63	-	-
2. Up to 3 million	-/57	-	self
3. 3 - 10 million	-	-	-
4. Above 10 million	-	-	-

TABLE 21

RELATIONSHIP BETWEEN SUCCESSION AND LAND DEVELOPMENT AT DOMIABRA			
Value of devt.(cedis)	Present ownership (individual/communal)	Succession (testate/intestate)	Finance
1. None	26/24	2/8	self
2. Up to 3 million	5/0	1/4	self
3. 3 - 10 million	-	-	-
4. 10 million	-	-	-

In these tables the term "land development" is used to refer to additional construction activities such as extensions to buildings, including the erection of walls, perimeter fences, outhouses, undertaken by landowners to increase the

value of their holdings. "None" refers to cases where, at the time of fieldwork, there had been no discernible addition to the structures erected by the original owner. Many such properties have suffered depreciation in value through dilapidation and general wear and tear. The value of development was calculated by using informants' own estimate of prevailing costs of additional construction works as well as the independent estimates of other informants.

It will, however, take several more authoritative decisions of the courts, and a period of adjustment and acceptance by the people to effectively assess whether Law 111 can significantly affect this pattern of land development . The development over the years of a body of judicial decisions will also more fully define some of the interpretative aspects of Law 111.

As we saw, the Intestate Succession Law, 1985 is applicable to all Ghanaians, irrespective of form of marriage, religion and ethnicity upon death intestate. If the deceased died testate, its provisions will be inapplicable. Testacy includes the making of the customary law will or samansiw. Also, the statute is applicable in cases of partial intestacy. Further, only self-acquired property devolves under its provisions. Stool, skin, or family property are expressly excluded from its ambit under section 1(2). In its zeal to create a uniform system of succession for Ghanaians, the legislature initially appeared to have faltered slightly when Law 111 was considered together with the provisions of the Customary Marriage and Divorce (Registration) Law, 1985 (P.N.D.C.L. 112) with which it was enacted simultaneously. Simply put, the problem centred on the requirement of registration of all customary marriages under the latter statute, and the three-month time limitation imposed on such

registration.[92] As a result some writers contended that registration of the deceased's customary marriage might be a sine qua non for the application of Law 111.[93] This would in effect drastically limit the number of persons who could take advantage of Law 111, leaving other persons to settle their disputes under the old system. If this view was correct, very few people could take advantage of the provisions of Law 111. In Accra, for instance, by the end of 1988, less than 3,000 marriages had been registered under the Customary Marriage and Divorce (Registration) Law , since its enactment in 1985 (see p. 253 above).

In fact, the difficulties raised by the interlocking provisions of Law 111 and Law 112 were resolved by the enactment of the Customary Marriage and Divorce (Registration) (Amendment) Law, 1991 (P.N.D.C.L. 263) providing (in ss. 1 and 2) for the application of the provisions of the Intestate Succession Law, 1985 to the estate of a deceased spouse of an unregistered customary law marriage if satisfactory evidence is adduced that a customary marriage had been validly contracted between the deceased and a surviving spouse.

There is no evidence of widespread registration of Muslim marriages either, a fact to which Law 111 itself alludes.[94] Nor does Law 112 make provision

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[92]But see the Customary Marriage and Divorce (Registration) (Amendment) Law, 1991, (P.N.D.C.L. 263) which provided for the application of the provisions of Law 111 to the estate of a deceased spouse of an unregistered customary marriage, where a court or tribunal is satisfied by oral or documentary evidence that a customary law marriage had been validly contracted between the deceased and a surviving spouse.

[93] See E. V. O. Dankwa, "Property Rights of Widows in their Deceased Husband's Estate", University of Ghana Law Journal, Vol. 16 (1982-85), pp. 1-24.

[94] The Memorandum states: "The Marriage of Mohammedans Ordinance Cap. 129, on the other hand is hardly ever enforced. Its registration provisions are probably not known to many Muslims or to the legal profession. So the condition precedent for the application of Islamic rules of succession is not often satisfied".

for the registration of Muslim marriages, unless the drafters can be accused of terminological inexactitude in subsuming Muslim marriages under the term "customary marriages". Again, Dankwa argues that if for any of the foregoing reasons Law 111 fails to apply, article 32 of the 1979 Constitution might be relied on.[95] Article 32 provides that,

> "(2) No spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate is testate or intestate.
> (3) parliament shall enact such laws as are necessary to ensure... (b) that every child, whether or not born in wedlock shall be entitled to a reasonable provision out of the estate of its parents".

Moreover, the provisions of the Intestate Succession Law, 1985, as followed in the case of Bannerman v. Bannerman where the child of a paramour successfully brought an application for a share of the deceased father's estate now make it clear that a child of the deceased is entitled to a share whether or not born within wedlock.

Finally, we can, on the basis of findings in the field-areas, offer a prognosis of the impact of Law 111 on the various sectors of Ghanaian society, principally by assessing the strengths of the various factors in society whose existence have the effect of "pulling" into court parties who might not otherwise benefit from the effects of Law 111. It is necessary, initially, to distinguish among the varying strengths of the various "pulls" in the different field-areas. In the West Korle-Gonno Estates, the relatively high levels of wealth and of wealth holders as well as the involvement of the people with institutions of the modern

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[95] Dankwa 1982/85, pp. 22-24. This constitutional principle was successfully asserted in Asiedua v. Koranteng, (1981) G.L.R.D., 49 but for a general assessment of the court's attitude in intestate succession disputes, see In re Kofi Antubam, (1965) G.L.R. 138, Quartey v. Armah, (1971) 2 G.L.R. 231 and Kuma v. Kuma, (1963) G.L.R. 164.

economy mean that, at death, the requirements of such institutions as banks and insurance companies ensure that the successor or personal representative duly obtains letters of administration or probate from the courts.

The picture is altogether less sanguine in Domiabra where levels of wealth and involvement in the formal economy are minimal. None of the respondents in Domiabra had any notion of the provisions of law . It is clear that in the absence of factors that will strongly "pull" persons in Domiabra into court, the people will, in the short term, not generally benefit from the provisions of Law 111. We must, however, acknowledge that this pattern may not be repeated in cash crop growing rural areas, where land is a more important factor of production; also the higher levels of wealth may well cancel out the effects of non-involvement in the formal economy.

In the urban areas of Old Dansoman and Jamestown, the picture is rather mixed. In both places, while levels of wealth are generally low, the influence of the extended family (as an alternative dispute settlement mechanism) is on the whole less than in the rural areas. Consequently, a relatively high percentage of disputants go to the courts for settlement. For such parties, family arrangements that prevent the waste of the estate in litigation might be a useful alternative to a strict adherence to the letter of the Intestate Succession Law, 1985.

The economic case for the enactment of the Intestate Succession Law, 1985, is persuasive. As the statute goes through its first stuttering efforts, a debate has arisen, as we saw above, about its relationship with the Customary Marriage and Divorce (Registration) Law, 1985. But if the object of the Intestate

Succession Law, 1985 is to ensure the preservation of the estate and the accumulation of wealth by preventing its dispersal within the wider consanguine family, then the argument about the applicability of the Customary Marriage and Divorce (Registration) Law, 1985 to the Intestate Succession Law, 1985 is probably only one of a series of "chicken and egg" dilemmas that the legislators will have to grapple with in the short term. Other dilemmas will, as we have shown (see above pp. 516-517), involve the question of whether the problems of polygamy and co-wives, and the fragmentation of estates, would have to be addressed by new legislation designed to aid the implementation of Law 111. In the end, the effective implementation of Law 111 will depend on the co-operation or apathy of the norm-addressees. The urban "living law" which emerges after the enactment and implementation of the Intestate Succession Law, 1985 will be a combination of the old custom and what the new law says.

8.3 Testate succession

8.3.1 Testacy under customary law

Wills under customary law mainly took the form of samansiw or shamansho (as it is known in Gá),[96] a nuncupative will which is unique to the communities of Southern Ghana; but its alleged provenance within specific communities requires further investigation, particularly as its applicability throughout Southern Ghana has generated considerable controversy among many writers.[97] It appears that

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[96]Bentsi-Enchill 1964, p. 193.

[97] See Kludze 1988a, and by the same author, "Problems of Intestate Succession in Ghana", University of Ghana Law Journal , Vol. 9 (1972), pp. 89-91; K. Bentsi-Enchill "Intestate Succession Revisited", University of Ghana Law Journal, Vol. 9 (1972) pp. 123-133; and E. V. O. Dankwa, "Progress and Regress in Samansiw", University of Ghana Law Journal, Vol. 15 (1978-81), pp. 97-112.

samansiw is virtually unknown among the Northern Ewe and the peoples of Northern Ghana. Its broad principles are clearly based on the ancient communal lifestyles of pre-colonial and colonial Ghanaian peoples in which the family or the stool was the basic property owning unit. However, individuals had well recognised rights in self-acquired chattels and other property which they could freely dispose of by public declarations as they lay on their death-beds. In a society in which ancestor worship was practised, necrolatry invested a dying man's declaration with an authority all of its own, and people lived in awe of incurring the wrath of the dead. Thus, when a dying man called his kith and kin to his bedside and made declarations as to dealings with his property after his demise, his word was, subject to the overriding decisions of the head of the family, largely honoured.[98] Even though Sarbah noted that the custom of will making among the indigenous peoples was of modern origin, it is possible that its development may have coincided with the emergence of stronger notions of private property (see above pp. 471-478).

Samansiw was a death bed ritual, in which the sacrosanctity of a terminally ill testator's directions as to the beneficiaries of his earthly possessions was treated with respect. However, the efficacy of the samansiw as a device for the post-mortem distribution of property was vitiated by the overriding authority of the extended family which could always set it aside. As we have seen, a man's funeral was the obligation of his family (p. 469 above). It seemed

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[98]Ollennu 1966, p. 271. See also Sarbah 1968, pp. 95-97. Cf. Danquah 1928a, p. 198 which follows Sarbah but adds that testamentary disposition under customary law is subject to the approval of the senior surviving members of the extended family.

inappropriate for the deceased to allocate all his property to whom he capriciously would while he saddled his own family with his funeral expenses. Therefore, it seems the rule emerged of the extended family's right to alter or even completely set aside the terms of a samansiw.

Because of its Fanti name the indigenous nuncupative will has generally been assumed to be of exclusively Akan provenance. Indeed both Pogucki and Bentsi-Enchill who wrote on this point have suggested that samansiw was "imported from Akan law" into Accra.[99] This view is worth examining in some detail as it appears to embody an uncritical approach to the origin of the indigenous nuncupative will.

Sarbah was the first of the early indigenous writers to refer to the making of nuncupative wills; he relied on a statement by Cruickshank which, while describing the making of oral wills by local notables, did not make an exact reference to the community in question and did not mention the local name of the nuncupative will. Cruickshank's statement regarding the making of nuncupative wills by natives deserves to be reproduced at some length in order to show how it has been erroneously relied upon for the proposition that the customary law will originated among the Akan:

> "Circumcision is practised among the natives of Accra. This rite is performed about the age of twelve or thirteen, the time observed by the descendants of Ishmael. They can give no other account of the origin of this practice, than that it had always been the

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[99]Pogucki 1955, pp. 38-39 at p. 38 and Bentsi-Enchill 1964, p. 193. Pogucki's view appears to have been influenced by his partial concern to state what appeared to some observers to be the influence of immigrants of Akan origin on the Gá. On the importation of Akan terms to describe Gá customary law notions and procedures cf. Ollennu J. in Akele v. Cofie (1961) G.L.R. 334, 338 describing the traditional giving of drinks by, or on behalf of, a donee to a testator or donor to signify acceptance of a gift as aseda (Akan) rather than shidaa (Gá).

> custom of their ancestors. The ceremonies observed upon occasions of death occupy a large portion of their attention. In view of this event, the head of a family summons around his death-bed his relations. He instructs them about the state of his affairs, and how his property was acquired, and how to be disposed of. He is most particular to furnish them with proofs respecting the acquisition of his pawns and slaves, mentions the names of the witnesses to the transactions, the circumstances under which they took place, and the sums paid for them, in order that his successor may be enabled to defend his rights, in the event of their attempting to obtain their liberty or redemption at the death of their master. He also recounts the names of his debtors, with the sums which they owe him, as well as the debts which he owes others. His death-bed declarations, made in the presence of responsible witnesses, are always received as evidence in the event of litigation afterwards."[100]

The preceding of the death-bed scene with a reference to circumcision in Accra suggests that the making of the nuncupative will might have been observed among the people of Accra. Cruickshank's account of the lives of the natives is at several points too excessively digressive not to admit the possibility that the death-bed scene might have been observed elsewhere. However, this leaves the question whether Cruickshank's statement can correctly be used as the basis for the view that the making of nuncupative wills in Ghana originated exclusively among the Akan.

This is a question that will no doubt continue to occasion wide difference of opinion; its final settlement ought to take account of the hitherto uncriticised reliance on Sarbah's quotation of Cruickshank and the sudden appearance of the term samansiw, at least in the terminology of the courts after the publication of Sarbah's Fanti Customary Laws. The crucial point, as we have suggested, is that Cruickshank's statement cannot be relied upon as proving that the

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[100]B. Cruickshank, Eighteen Years on the Gold Coast of Africa, Vol. II, London 1966, pp. 213-214. Cruickshank's work, first published in 1853, dealt with the tribes of the coastal strip of modern day Ghana.

traditional nuncupative will originated exclusively among the Akan. The point is perhaps not of any great importance, provided the doubt that it creates on the accepted origin of the nuncupative will in Ghana is duly noted and its significance fully grasped.

It is worth stressing that Sarbah, who wrote in 1897, noted that the making of nuncupative wills "is of modern growth"[101] and referred to statements by Edmund Bannerman of Accra in reply to questions put by Chief Justice Hutchinson on certain points of indigenous law, showing that oral wills were being made in Accra by 1891.[102] There is further evidence of the use of the nuncupative will in Accra in the early part of the present century in the case of Re Otoo[103] where a Jamestown man, Timothy Mensah Otoo who had contracted a marriage under the Marriage Ordinance, 1884 died intestate possessed of real and personal property. A petition for letters of administration by the plaintiff, one of his daughters, was opposed by the defendant, his uterine sister. It was proved that during the final illness of the deceased he had made certain declarations amounting to a samansiw in the presence of the defendant and other people. However Michelin, Ag. C.J. held inter alia that by contracting a Christian marriage the deceased had altered his legal status and was therefore incapable of making a samansiw.

In view of the practice noted below (p. 534) pointing to the use of a peculiarly Gá form of death-bed declaration which involves the element of

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[101]Sarbah 1968, p. 97.

[102]Ibid. p. 110. See also Pogucki 1955, p. 42 showing that the majority of testamentary dispositions in Accra were effected by nuncupative will.

[103](1927) Div. Court, 1926-29, 84.

ceremonial farewell or sheh,[104] it is possible that the adoption of the word shamansho by the Gá may have been influenced by the widespread use of Sarbah's Fanti Customary Laws in the courts of the Gold Coast.

It is perhaps significant that the two major early cases on the subject of the traditional nuncupative will suggest that the term samansiw entered the terminology of the courts after the publication of Sarbah's Fanti Customary Laws. The first, In re Anaman[105] involved Fanti parties and was decided before the publication of Sarbah's Fanti Customary Laws. The dying declarations of the deceased were never described as samansiw in Anaman's case, not even by Sarbah who appeared for the caveator. In the other case, Re Otoo ,[106] decided after the publication of Sarbah's work, the term samansiw was used to describe the dying declarations of the deceased; the parties were from Accra.

The nature of the nuncupative will as it obtains in Accra can now be considered briefly. We have already observed that the traditional nuncupative will is generally called shamansho by the Gá after the Fanti samansiw; an adoption of term that conceals distinctive characteristics of the former, notably its element of sheh or farewell.

Sheh which is the ceremonial bidding of farewell by a testator to his or her relatives and friends usually follows the last words of a samansiw and may or

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[104]The precise meaning of the Gá word, sheh is insufficiently conveyed by the English word "farewell". Properly employed within its Gá context sheh combines within its meaning ideas of impending departure, the giving or sending of a message, the bidding of farewell as well as notions of solemnity, sorrow and social solidarity. As sheh is an active verb, a death-bed sheh impresses any declarations it may include pertaining to the future moral conduct of family members with a continuous character.

[105]See note 53 above.

[106]See note 54 above.

may not form part of the samansiw. On the basis of information derived from respondents from all three field-areas, sheh mainly comprises words of wisdom, guidance and admonition in which the testator tries to pass on the benefits of his or her experiences in life to close relatives and friends. Sheh, especially where it contains words of wisdom, serve as a living memorial to a deceased person and its words are often recalled in moments of serious crisis within the family. It may either be a simple direction to the living to preserve and continue the works of the testator or it may, depending on the gravity of the declarant's words and directions, determine the extent to which the extended family subsequently varies the terms of the samansiw.

The tremendous social developments of the last century ruptured the close-knit Ghanaian family. While in the olden days all of a man's family usually lived in the same town or village with him, and he could quickly summon them to his bed-side to hear his declarations, today, with vehicular transport and the consequent geographical dispersion of the family, it is much more difficult to summon one's family. Besides, only the surviving spouse and her children may be aware of the location or existence of some of the deceased's property and may be unwilling to reveal this knowledge to other members of the extended family.

The result has been the erosion of the element of unanimity secured by the presence of all the family members, beneficiaries and witnesses at the bedside. This, in turn, has created evidentiary problems for the continued use of samansiw as a device for the distribution of a deceased person's estate. This is in no small way accentuated by its entirely oral nature and the lack of the

testator's signature. The latter, in particular, renders the samansiw liable to criticism as to the mental capacity of the testator.

Attempts to define the form of the traditional will, and to address the problem of mental capacity go as far back as the writings of Sarbah, a Western-trained lawyer, whose conception of admissibility of evidence relating to gifts has striking parallels to probate of a will. He wrote:

> "What is given by a person in wrath, or excess of joy, or through inadvertence or during minority or madness, or under the influence of terror, or by one intoxicated, or extremely old or afflicted with grief or excruciating pain or what is given in sport is void".[107]

The cases bear little evidence of samansiw being contested on any of these grounds. This perhaps shows the evidentiary difficulty of proving "wrath", "excruciating pain", or "inadvertence". These difficulties are probably explained by the fact that samansiw was originally a matter for the family forum, not a court of law, and the family could always alter its terms. This is attributed by Ollennu to the powers of a man's family over his person and property. He said the extended family had authority,

> "(1) to assume control and management of his person and property at any time should he enter into a state of mind as not to appreciate the nature of any disposition he makes of his property, or into a state of mind when he could not be a free agent in dealings with his property, (2) to take steps to annul any disposition or alienation he could make of his property when in any such condition of mind, and upon his death:
> (1) to bury him, and perform his funeral at his family's expense..."[108]

The debates about the applicability of samansiw to non-Akan communities

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[107]Sarbah 1968, pp. 81.

[108]Ollennu 1966, p. 272.

in Ghana[109] have occluded more pertinent enquiry about the relevance of samansiw to modern Ghanaian society. This has not been conducive to constructive criticism that addresses the shortcomings of the customary law will. The point at issue here is whether samansiw, developed in traditional society, might be of continuing relevance to modern Ghanaian urban society. An answer may be found through statistical data.

Table 22 presents data on the incidence of samansiw in the areas under investigation in a form that is susceptible of empirical testing of the actual importance of samansiw and allows the resolution of questions relating to its relevance in an urban setting. Informants were asked if they knew or had witnessed the making of an oral will or samansiw within their own families. In all, only 13 informants answered "yes". Of these, eight stated that the samansiw had been made by a relative who died more than thirty years ago. Of the 13 informants who answered "yes", five said that serious divisions had occurred in the family as a result of varying interpretations of the samansiw. Three informants recalled that at family meetings specifically convened to distribute the estate, various attempts were made by some beneficiaries to show that the testator had made some other death-bed declarations than the one generally accepted by the family.

[109]For details see note 97 above.

TABLE 22

INCIDENCE OF SAMANSIW	
District	Number of testators
A - C	7
D - F	4
G - H	2

The most common reasons given by informants for samansiw-related disputes were the inadequacies of the traditional system of succession and greed. As to the issues of duress and mistake in the making of samansiw, the majority of informants stated that in either case, the head of family and leading members of the family would normally consider the circumstances surrounding the death-bed declaration, including the known intentions of the witnesses and their relationship with the beneficiaries. The dominant view of informants was that, in practice, the desires of the leading family members tend to replace the intentions of the testator. But when questioned about the continued relevance of samansiw, in the face of the foregoing problems, informant opinions were divided between concern that dishonest people might be able to take advantage of it to claim more than their fair share of the estate and a feeling that there was little point in abolishing it. Finally, informants were asked whether they knew of any case where a testator had tried to use a samansiw to alter or supplement the terms of a written will. The answer, perhaps predictably in every case, was "no".

One problem, however, remained the question of procedure. The underlying factor in all the cases investigated was the imminence of death, particularly as a result of a grave or terminal illness or old age. No clear-cut procedure can be distilled from the statements of informants; but the following

factors occurred time and time again in the replies.[110] The declaration must be made while the testator is confined (not necessarily to his bedroom) by illness, or while he is undergoing treatment in a hospital or at the residence of a traditional healer. In either case, the samansiw is revoked once the testator makes a full recovery. The character and integrity of the witnesses are crucial. The family is more likely to accept the testimony of an honest and disinterested witness than that of witnesses with a reputation for dishonesty and double-dealing. The presence of a combination of family members and disinterested friends appears to be the best form of attestation. It minimises conflict within the family by ensuring both that the wishes of the testator are not doubted and that the opinion of the non-family members exerts some pressure on the family to prevent it from arbitrarily altering the testator's wishes. The testator normally makes a point of ensuring the presence of influential persons in the family. In one case, where a particularly truculent family member's presence could not be secured, one of the widows actually went to the trouble, before the testator's death, of informing that member that the husband had made a samansiw and invited him to seek the testator's confirmation, if he wished. This, however, is far from the usual way of dealing with anticipated objections and contradictions in the making of traditional wills. There seems to be no verbal formula for making a samansiw. It is enough if the testator states clearly that his words are his last will and testament.

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[110]The information that follows is based on the replies of the 22 heads of families and elders in the sample.

The extended family's traditional authority gives it overwhelming control over the deceased's estate. Out of this absolute control was fashioned the rule that "the customary law does not permit any person to bequeath to an outsider a greater portion of his property than is left for his family."[111]

Inevitably, with the decline of the extended family in urban areas, the incidence of samansiw has declined steeply. For one thing, for purely evidentiary reasons, it seems out of place in the adversarial courtroom procedures of today; for another, more and more persons have resorted to the provisions of the Wills Act, 1971, (Act 360). But there is no reason why it should not be possible to make a samansiw before the members of one's nuclear family if one's property were totally self-acquired. While the majority of respondents agreed with this suggestion, dissensions regarding its merits centred on the fear that as the customary law presently stands, such a course of action would leave open the possibility of members of the extended family challenging the validity of the samansiw.

The essentials of a valid samansiw were laid down by the High Court in Summey v. Yohuno[112] thus: (1) the disposition must be made in the presence of witnesses who must hear what the declaration is, and know its contents; (2) members of a family of the testator who would have succeeded to him upon intestacy must be among the witnesses in whose presence the declaration is made; (3) there must be acceptance by or on behalf of the beneficiaries

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[111]Sarbah 1968, p. 99.

[112] (1960) G.L.R., 68, 71. See also, In re Abaka, (1957) 3 W.A.L.R. 236 and Akele v. Cofie (1961) G.L.R. 324.

indicated by the giving and receiving of drinks.[113]

The requirements laid down in Summey v. Yohuno seemed designed to regulate testacy in a simple society where witnesses, beneficiaries, as well as principal family members could be summoned to the bedside at short notice. While the requirement of the giving and acceptance of drinks is designed to formalise acceptance of the gift as well as to publicise the samansiw, the requirement that the witnesses must hear the testator's declaration clearly means that terminally ill persons incapable of speech do not have the capacity to make customary wills.

In Akele v. Cofie, a case involving members of the Jamestown ruling house,[114] the principles laid down by Summey v. Yohuno, though largely repeated, were elaborated somewhat differently. Plaintiff in that case applied for a declaration that as the eldest surviving maternal relation of Kofi Ayeh-Kwao, deceased, she was the proper person to succeed and administer his estate. She argued that the deceased had succeeded to the estates of some members of the family, holding those estates as family properties until his death and acquiring other properties out of proceeds from family properties under his control. She claimed that the family was an Accra or Gá Mashi family, and that by customary law the whole of the deceased's estate, real and personal, became family property to be controlled by herself as head of family and successor but that the defendant, a son of the deceased, was disputing the right of the family to

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[113]On the development of samansiw within the state courts of Ghana generally and a good review of the leading cases thereon, see A.K.P. Kludze, "The Formalities of the Customary Law Will", University of Ghana Law Journal, Vol. 12 (1975), pp. 21-47.

[114](1961) G.L.R. 334.

succeed.

For his part, the defendant claimed that his father had never succeeded to the estate of any member of the extended family, and that in any case his father had made a samansiw leaving all his estate to his children. Finding for the plaintiff, Ollennu J. stated the essentials of a valid samansiw as follows (at p. 337):

> (i) the disposition must be made in the presence of witnesses;
> (ii) some of the principal members of the declarant's family must be present at its making;
> (iii) there must be acceptance by or on behalf of the beneficiaries.

On finding that the deceased had succeeded to the estates of some members of the extended family, the court emphasised that the presence of principal members of the family at the making of the samansiw was all the more necessary for the identification of the testator's individual property, and to distinguish it from family property.

Though the essential requirement of a valid samansiw remains the presence of witnesses, the presence of some members of the family and acceptance, the multiplicity of communities and customary practices means that the form of acceptance or the relevant members of the family may vary. Thus in the case of Brobbey v. Kyere,[115] the court noted that,

> "The Native Court found that the defendant had inherited the properties in question in accordance with a death-bed declaration made by Adu Yaw in the presence of accredited witnesses, including some members of the family, and that the declaration so made was confirmed with "great oath" by the deceased before his death. It is the

[115] (1936) 3. W.A.C.A., 106.

> usual declaration known by native law and custom by which the declarer names the person or persons to whom the inheritance should be distributed".

The test laid down by Taylor J in Abenyewa v. Marfo[116] follows the same trend in emphasising the presence of witnesses, the consent of the testator's family and acceptance by the donee. That test is as follows:

> (1) only the self-acquired property of a testator of sound mind can be disposed of by samansiw;
> (2) The disposition must be made in the presence of witnesses, one of whom at least, it seems, must be a member of the testator's family and the witnesses must be told that the bequests are his samansiw to take effect after his death;
> (3) The family of the testator must know and consent to the disposition;
> (4) There ought to be an acceptance of the gift evidenced by the offering of drink or the exercising of acts of ownership or any act from which an acceptance can be inferred depending on the circumstances of the case.

It may be argued that with the enactment of the Intestate Succession Law, 1985 restricting the consanguine family's share in an intestate estate to a mere fraction of the residue, a case can now be made for both the conjugal and the consanguine families to be present at the making of death-bed declarations. This is particularly important since by successfully making a case for a valid samansiw, however flawed, the consanguine family can deprive the conjugal family of the deceased's house and chattels. It is possible that this may induce some testators to make written wills.

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[116] (1972) 2 G.L.R. 153. See also Abadoo v. Awotwi (1973) 1 G.L.R. 393.

Even in the case of Atuahene v. Amofa,[117] where the Court of Appeal held that in "modern customary law" a man can dispose of his self-acquired property without reference to his (extended) family, the court added the qualification that in the case of samansiw "it may be necessary ex abundanti cautela to have some member of the family present."

The Court of Appeal again had to consider the question of samansiw in a modern context in the case of Hausa v. Hausa.[118] The case concerned the sale of a house belonging to an intestate. The plaintiffs, relatives of the deceased, appointed the first defendant caretaker of the house. While in that capacity, the first defendant purported to sell the house to the second defendant. The plaintiffs brought an action for declaration of title to the house and for a declaration that the purported sale was null and void. It was argued for the defendants that the deceased had made a gift of the house to the first defendant, first, by oral will or samansiw and then by an oral gift inter vivos. It was further argued that the plaintiffs had witnessed the oral will and were consequently estopped from denying that the property had passed to the first defendant.

All three judges agreed that the defendants had failed to prove the existence of an oral will or samansiw. Noting that Ollennu did not profess to be following any authority when he laid down what he called the essential requirements of a valid customary law will in Summey v. Yohuno,[119]

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[117] Court of Appeal judgment, 5 August 1969; digested in (1969) C.C.154.

[118](1972) 2 G.L.R. 469.

Bentsi-Enchill, J.S.C., dispensed altogether with the strict requirements laid down by the earlier cases, and stated:

> "I should have no difficulty in upholding the validity of the gift by will if there had been credible evidence proving that it had been witnessed by two responsible and disinterested persons. Important though it is to insist on strict evidentiary requirements for the nuncupative will, I cannot help thinking, with all due respect to him, that Ollennu J. went too far in the requirements he laid down in Summey v. Yohuno."[120]

The reasoning of Bentsi-Enchill was followed by Apaloo, J.S.C., who said: "As our law develops and acquires some degree of sophistication, we should make a conscious effort to shear it of some of the trappings which enhance its form but not its social objective."

The fact that samansiw is revocable makes it difficult to prove that a particular samansiw was the last samansiw of the deceased. True, the requirement of publicity is designed to address this particular problem. But in an adversarial situation where two opposing sides seek to "prove" two or more samansiw as the last samansiw of the deceased, there could be real difficulty.[121]

Given that the ratio in Hausa v. Hausa[122] is that the strict formal

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[119]See above note 112.

[120](1972) 2 G.L.R. 77.

[121]Of the three areas selected for fieldwork, the knowledge of the rules of samansiw was highest in Jamestown, where 20 per cent of adult respondents demonstrated a good knowledge of its nature. Sixty per cent of adult respondents in the same area, while largely ignorant of its nature and existence, readily agreed that they would be inclined to respect a dying man's declaration as to dealings of his property after his death. But in other areas of higher income and education, where 49 per cent of adult respondents, largely through education, had a clear knowledge of the nature of samansiw, less than 17 per cent stated their willingness to honour a testator's directions in a samansiw, particularly where the value of the estate was high. Their attitude is that it must be proved in Court.

[122]See above note 118.

requirements laid down by Ollennu are no longer necessary for the validity of a samansiw and the fact that the vast majority of people in all three field-areas do not make any form of testamentary dispositions under the Wills Act of 1971, we are left in a position where, potentially, the death-bed declaration or samansiw is the main means of testamentary disposition. That this is not already the case is due to the low levels of wealth. It appears that in the eyes of the people, the size of an estate plays a crucial role in determining whether the declarant's words were intended to constitute an oral will. According to one informant, the directions given by a gravely ill person as to the distribution of his meagre worldly possessions are not generally regarded as constituting an oral will, not least because the value of those possessions does not even meet the cost of the funeral.

8.3.2 Testacy under the Wills Act

The Wills Act, 1971 (Act 360) is the statute presently governing the testamentary disposition of property in Ghana. It is mainly a compilation into one Ghanaian enactment of English law rules of testate succession (including the Wills Act, 1837) that the Ghanaian courts had hitherto been following in relation to common law wills propounded before them.[123]

The incidence of wills made under the provisions of Act 360 has

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[123]F.S. Tsikata, "The Wills Act, 1971 (Act 360)", Review of Ghana Law, Vol. 4 (1972), pp. 5-21 at p. 5. See further, H. Morris, "Wills Act 1971", Journal of African Law, Vol. 16 (1972), pp. 65-70. On the operation of the law of wills in Ghana generally see E.S. Aidoo, Conveyancing and Drafting: Law and Practice in Ghana, Accra 1994, pp. 258-299; and K.K.K. Ampofo, "Testamentary Freedom and Support for Dependents", University of Ghana Law Journal, Vol. 18 (1990-1992), pp. 180-193, esp. at pp. 192-193, arguing for the interests of the extended family to be expressed statutorily in terms of entitlement to provisions under Ghana's current testate succession law.

increased remarkably, as more and more testators have sought an effective way of disposing of their properties by avoiding the uncertainties that the oral nature of the traditional will entails. In an elaborate search through clients' files in lawyers' chambers, not a single case of samansiw was recorded. Most persons interviewed expressed preference for a statutory will, citing its reduction into writing and "proper attestation" as its main advantages. Under section 2 of the Wills Act, 1971 no will is valid unless it is in writing and signed by the testator or some other person at his direction.

The main object of the Wills Act, 1971 is to safeguard and guarantee the testator's intention as to the distribution of his estate against fraud, forgery, misrepresentation, and other skulduggery. Thus, there are precise prescriptions under the Act as to the position of the testator's signature (section 2(2)), attestation (sections 2(3) and 2(4)) and, in the case of blind or illiterate testators, a competent person's declaration that he had read over and explained the contents of the will to the testator before execution (section 2(6)). Since a will is defined as a declaration in a prescribed manner of the intention of the person making it with regard to matters which he wishes to take effect upon or after his death,[124] full consciousness, soundness of mind as well as the presence and simultaneous attestation of witnesses all become vital ingredients in arriving at the true intention of the testator. To do this, the legislature often assumes the worst possible scenario, namely, a death-bed situation in which a terminally ill testator, suffering occasional losses of memory, is surrounded by covetous and

[124]Halsbury's Laws of England (4th ed.) Vol. 50 1984, p. 91.

unscrupulous would-be beneficiaries. Thus, the law requires that:

> "A testator must not only be able to understand that he is by his will giving his property to one or more objects of his regard, but he must also have capacity to comprehend and to recollect the extent of his property and the nature of the claims of others whom by his will, he is excluding from participation in that property."[125]

However, mere eccentricity or perversion of moral feeling is not insanity.[126] But since the law presumes every person to be sane, the onus is on the party alleging insanity to prove it. In Christian v. Instiful[127] where the testator was an old man, nearly ninety, with defective eyesight, it was held that a will made by him was valid as he appeared to have known and understood its contents. So too in Baksmaty v. Baksmaty,[128] even though the testator had been blind, and had had his hand guided to the spot of signature, the will was held to be valid. But in Eshun v. Pantsiwa,[129] probate was refused on the ground that although the testator could sign his name, there was no evidence of his literacy beyond writing his name, and also there was no evidence that the will was read and explained to him, the onus being on the propounder of the will to prove that the testator knew its contents. Finally, in In re Sackitey[130] where evidence was

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[125]Banks v. Goodfellow (1870) L.R. 5, Q.B., 549, 569.

[126]Curator of Intestate Estates v. Bright & Anor. (1942) 8 W.A.C.A, 93.

[127](1953) 13 W.A.C.A. 347; (1954) 1 W.L.R. 253.

[128](1964) G.L.R. 56.

[129](1953) 14 W.A.C.A. 306.

[130]Court of Appeal judgment, 14 July 1988, unreported; digested in (1987-88) G.L.R.D. 90.

led to show, inter alia, that an educated testator had suffered a stroke and lost the use of his right hand it was held that there was sufficient evidence to impeach the genuineness of the will.

As regards attestation, it has been held that where the attestation clause does not make it clear that both witnesses were present at the same time, an affidavit to that effect is admissible in proof of the fact.[131] In In re Yena[132] where all six witnesses were illiterates and signed by marks, the will was admitted to probate. Also, a will which on the face of it appears to have been duly executed is presumed to have been properly executed until the contrary is proved.

An important feature of the Wills Act, 1971 seems to be section 13 which finely balances the freedom of testation against the interests of the family. Section 13 provides as follows:

> "(1) If, upon application being made, not later than three years from the date upon which probate of the will is granted, the High Court is of the opinion that a testator has not made reasonable provision whether during his lifetime or by his will for the maintenance of any father, mother, spouse or child under 18 of age of the testator, and that hardship will thereby be caused, the High Court may, taking account of all relevant circumstances, notwithstanding the provisions of the will, make reasonable provision for the needs of such father, mother, spouse or child out of the estate of the deceased."

This clearly imposes a restraint on freedom of testation in favour of the immediate family who may well be dependants of the testator. It also extinguishes the extensive rights of the consanguine family within the traditional scheme of testation; for while the conjugal family and the parents have a

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[131]Re Lartey (1972) G.L.R. 488.

[132] (1960) G.L.R. 195.

statutory right to apply to the court for a reasonable share of the testator's estate, no such right is conferred on the consanguine family.

An analysis of wills at the High Court Registry in Accra revealed some interesting recent developments in relation to the making of wills in Ghana. First, applications for letters of administration outnumber wills admitted to probate by a ratio of about sixteen to one. Second, most wills are made by men, indicating a greater incidence of intestacy among women. Also, many wills tend to be made by fairly well educated persons. Wills made by such persons tend to be long, and deal with such matters as shares, insurance policies, properties, foreign accounts, leaseholds, etc. Wills made by members of the commercial classes sometimes run into several millions cedis, while most wills by ordinary persons would only fall into the definition of medium estates, in which, aside from a house or two, the value of the residue varies between 100,000 cedis and a million cedis. Finally, the class of beneficiaries is almost entirely restricted to members of the conjugal and consanguine families, often making extensive provisions for children and other dependants still at school.

In both home-made wills and those prepared by solicitors, a distinctive style has emerged. A fair number of wills contain a profusion of biblical references and end with philosophical flourishes and biblical exhortations. In a category all of its own are what may be termed the "revenge wills". These, though they tend to belong to a vindictive and perhaps eccentric minority, tend to exclude certain persons from the testator's funeral or to exact revenge for a long-held grudge by making gifts of a derisory or token sum or, even more often, of a bible, to certain beneficiaries. Though valid, most home-made wills are

poorly drawn up, vague, and tend to give general funeral directions and unclear allocations of shares in property. Overall, most testators give their houses to the conjugal family as tenants-in-common, thus showing that modern urban practice and the 1985 law form a largely harmonious whole.[133]

The making of wills in Accra seems to have been started by the more westernised elements of the population, particularly mulattos and educated African professionals. It was then popularised by lawyers who routinely suggested it to their wealthy clients and were often appointed executors.[134] It is clear from the probate records (see Table 23 at p. 551 below) that rural persons and persons engaged in the pre-capitalist economy (District G-H) hardly ever make wills under the provisions of the 1971 Act. Since, as we have shown, most dispositions in wills are in favour of the conjugal family, this may indicate either the continued satisfaction of rural persons with the traditional mechanisms of succession or their lack of private property.

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[133]The information that follows was first provided by the Chief of Old Dansoman and unanimously confirmed by all other informants who ventured any opinion on it.

[134]Even today it is still very common for lawyers to be appointed executors. It would seem that the lawyer acts as a person of social standing rather than in his professional capacity. However, it appears that many of them are able to increase their influence in this way. The majority of lawyers were of the view that the appointment of a lawyer as one of the executors in a will ensures honest distribution of the estate and minimises conflict among the beneficiaries.

TABLE 23

WILLS MADE UNDER THE WILLS ACT, 1971				
Districts	Prepared wills	% of value of gifts to nuclear family	% of value of gifts to extended family	Oth-ers
A - C	10	65	34	1
D - F	24	87	10	3
G - H	0	0	0	0

In the light of findings at Domiabra and Old Dansoman, various explanations can be put forward to explain the absence of testators from the rural areas and the poorer sections of the urban areas from the probate records. Firstly, in both areas, the value of wealth left at death is very low. As a result, even in cases where there have been disputes in the distribution of estates, the disputants did not deem it worthwhile to incur the enormous expense of going to court. Secondly, in both areas, the percentage of persons engaged in the formal sector of the economy tends to be low. Consequently, life insurance policies, gratuities and other financial arrangements, which in the formal sector make it imperative that letters of administration/probate be obtained on the death of the holder, are relatively absent. If the findings in Domiabra and Old Dansoman accurately reflect the pattern in urban areas, they would be a strong demonstration of the possibility of the provisions of Law 111 becoming more effective in the more prosperous areas of the country with their large formal economic sectors.

Table 23 above shows the distribution of testators in the field-area. The total value of gifts by testators in each district was calculated, firstly, by making rough estimates of the values of houses and undeveloped land in each will, having regard for the localities in which they were situated. The estimated value

of all other gifts was then added. As the relationship of testator to devisees and legatees was often stated in the will it was fairly easy, by this method, to work out the distribution of gifts between members of the extended family and the nuclear family. "Others" refers to gifts made to people who were not members of the testators nuclear and extended families. They were friends, trusted advisors and benefactors.

Wills are generally made by people over the age of fifty. Of the overall figure of 34 testators, as many as 27 were over the age of fifty-five. The youngest testator was forty-one years old. According to the majority of testators the manner of distribution of their properties is dictated by the wish to ensure the material welfare of "their own"; namely their direct descendants in the first instance, and their blood relations in the second instance. But factors like polygamy, the acquisition of landed property and sudden life-threatening illness all appear to have an effect on the ultimate decision to make a will. Only 2 of the 34 testators stated that they had made gifts to charities, though trusted friends were often named as beneficiaries. Revocations, often caused by fundamental changes in the testator's material conditions, are quite common.

8.4 Conclusion

The preceding discussion has examined the most important aspects of the present law of succession in Ghana. In order to adequately survey and understand the picture of the present law of succession of Ghana, it has been necessary to cover both the traditional and statutory laws of succession in Ghana. By placing them in juxtaposition and dealing with them consecutively,

it has been possible to show clearly the main strengths and weaknesses of the customary system of succession, succession under section 48 of the Marriage Ordinance, 1884 and succession under the Intestate Succession Law, 1985.

It has been shown that the roots of the present law of succession of Ghana stem largely from three important developments over the past half century or so. Firstly, within the traditional Ghanaian family, there has occurred a neat reversal of roles as the conjugal family has supplanted the consanguine family as the most important social unit, particularly in the urban areas. Opinions may differ sharply as to whether that role reversal is equally applicable in the rural areas where, arguably, the noticeable change in attitudes which appears to have occurred in the urban areas is yet to occur. Secondly, a perusal of wills in the High Court reflected an almost universal desire by testators to transmit their properties to their surviving spouse and children; again this does not necessarily reflect the attitudes of rural peoples. Thirdly, the use of the traditional will or samansiw has clearly declined.

The centre-piece of the present Ghanaian law of intestacy is the Intestate Succession Law of 1985. Its ultimate impact on succession will depend largely on the development of a specific line of case-law by the courts to give greater meaning to the bare provisions originally framed by the legislature. Clearly, in time, the Intestate Succession Law, 1985 will come to be seen as a major landmark in the evolution of the Ghanaian law when the emergence of the nuclear family from the consanguine family was finally enshrined in the statutes of the country. Individualism is clearly on the rise in the urban areas. As we have argued throughout this study, the emergence of individualism is the thread

weaving up consistently through the evolution of the laws of family and property in Ghana throughout the last century or so, as the notion of the modern state (with a concomitant modern economy) has been superimposed on the traditional system. The adoption of individualism in the law of intestate succession should therefore signal the beginning of the end of the traditional social creed that extols the virtues of communalism. It will also produce a society more receptive to modern ways of producing and accumulating wealth without the periodic intervention of a system of succession that tends to destroy accumulated wealth. This is no mere technicality. As has been noted in this chapter, in the urban areas in particular, an attitudinal climate that embodies a considerable social bias in favour of the nuclear family already exists and the adoption of the new law of intestate succession is not, it appears, against the grain of social practice. But neither would Law 111 lead to the total demise of the consanguine family. A more probable and desirable outcome would be the emergence of a smaller extended family or "active" family, based more narrowly on some uncles, aunts, cousins, nephews and nieces to act as social support for a particular nuclear family. While this somwhat flexible pattern of arrangements introduces new diversities, Law 111 should eventually provide a uniform, simple and fair system of succession that takes account of the changed social environment of Ghana.

CHAPTER 9

CONCLUDING ANALYSIS

This chapter concludes the thesis by pulling together the various strands of arguments, conclusions and suggestions put forward or reached in the foregoing chapters. In this thesis an attempt has been made, firstly, to review the family and property laws of Ghana and to question, on an empirical basis and in the light of modern urban practice, the accepted principles of Ghanaian customary law. Secondly, a critical assessment has been made of the effects of the 1985/86 customary law reforms in Ghana. This was done within the wider context of the changing urban milieu of Accra, the changing nature of the Ghanaian family and the rise of individualism.

The various changes in Ghanaian customary law considered in detail in the present thesis were assessed within the conceptual framework of Allott's notion of the limits of law which analyses factors in society and in the ambitions of legislators that tend to constitute barriers against the effective implementation of statutory provisions. The adoption of Allott's approach enabled us both to identify possible weaknesses in the new legal provisions of the 1985/86 legal reforms of Ghana and to consider the scope for making statutory interventions in customary law more effective within an urban Ghanaian context.

While our contention that many of the book-law rules of customary law are outmoded has not been conclusively proved in the case of rural areas, there is ample evidence to suggest that a stage has been reached in the development of Ghanaian urban customary law where the gulf between official law and actual

practice is too wide to be overlooked. This raises the question to what extent the state ought to intervene further in changing and harmonising the rules of customary law so as to harness them more effectively to economic development and social progress.

The aims of the research were stated in the first chapter. We focused on the present state of the family and property laws of Ghana, testing the hypothesis that the official rules of customary law are frequently out of fit with what goes on in contemporary Ghanaian society, especially in the urban context. Chapter 2 gave an account of the fieldwork on which this thesis is based. It described in considerable detail the nature of Gá society and the characteristics of the particular areas in which fieldwork was undertaken. It also discussed the methodologies employed in the collection of the data presented and interpreted in this thesis.

Chapter 3 briefly analysed the social and historical factors that have moulded the present social and political institutions of Ghana. It traced the evolution of those institutions, examined the nature of Ghana's legal system generally and focused on the early development of customary law. This provided a base-line from which the subsequent evolution and change of Ghanaian customary law could be assessed.

In chapter 4 we began our presentation and interpretation of field data. We examined the present nature of extended and nuclear families in Ghana, showing how the nuclear family has gradually acquired greater independence and importance without superseding the extended family decisively. We also discussed the role of the "active" family as a major focus of family solidarity in

modern urban Ghana. Further, we considered the position of the head of the extended family and family membership in urban Ghana. The role of the extended family and its head was especially highlighted in our assessment of the law of marriage and divorce in Ghana. A major result of this part of the thesis was the emergence of evidence of continuing low take-up of state law in Ghana.

The fieldwork evidence in chapter 4 shows how the official rules of customary law and of statutory law in Ghana have only to a small extent contributed to the development of a new body of "living law", including the emergence of such important phenomena as uncontested customary divorces. In that regard, the instability of customary law marriage, and the dispersal of accumulated property by the traditional system of succession, became major points of concern. Reform of the customary law in urban areas, we suggested, should focus more closely on encouraging the nuclear family-centred approach to family organisation in consonance with changing urban social trends.

Chapters 5 and 6 focused on the land law of Ghana. Chapter 5 was, in a sense, pivotal to the thesis. It discussed the main customary norms of property in Ghanaian law. These are quintessentially traditional and communal in nature. Identifing the rise of individual ownership as the main development in the property law of Ghana over the past century or so, we noted that transfer of property rights to individuals has been complicated by continuing uncertainty over the nature of land titles. This chapter, thus, revealed a further dichotomy between the actual social practices of the people and the body of customary law that the courts and textwriters have formulated. It was shown, for instance, that the primary flaw in Ollennu's work is the distinction he makes between the

paramount and sub-paramount titles. This distinction, we argued, lies at the heart of the uncertainty and confusion that has bedeviled the system of deeds registration. On the whole, it was shown again that the practices of contemporary urban society are generally at variance with the indigenous laws of property described by such leading writers as Sarbah and Danquah, and with judicial pronouncements.

In chapter 6 we examined and analysed how the character of the customary law of property has changed radically in the post-independence era, mainly through government intervention. Several sections of this chapter were devoted to the discussion of important post-independence statutes that have facilitated state incursion into land, and thereby introduced the principle of eminent domain into Ghana.

The principle of eminent domain has been extensively used by central government to grab stool lands, but there is little evidence that those lands are subsequently used in a way that benefits the original owners or the state. It was therefore suggested that in the taking of land by the state consideration be given to the needs of local communities.

We also commented on the various rules which regulate the practice of conveyancing, noting their shortcomings and suggesting ways of making them more efficient. Finally, the chapter prepared the ground for an examination of the new system of land title registration in Ghana and also showed the shortcomings of the state-based model that we have posited as an alternative to the traditional model of property law.

In chapter 7, we argued that the system of land title registration represents, in many ways, the most comprehensive attempt yet to address the problems inherent in the traditional system of land tenure. But we noted that it is too early to say whether the system of land titles registration will succeed where the system of deeds registration has failed.

We showed that the main advantage of land title registration lies in the provision of a record of titles and interests in land and their proprietors. We also showed that this secures the rights of land proprietors and minimises risks to land purchasers.

The Land Title Registration Law, 1986 served as a focal point of the examination of our argument for changing major aspects of the customary law of Ghana. It was shown that without efficient management methods, administrative, technical and financial resources, as well as mechanisms for enforcement, even the most well-meaning attempts at changing the customary law of Ghana are liable to fail. It was noted that the pilot project of title registration has now been suspended due to relatively simple administrative reasons. Even in places like Jamestown, which is very close to the administrative and political centres of Victoriaborg and Christiansborg, official measures may not have much effect unless they are backed by appropriate strategies of implementation. Evidence from the West Korle-Gonno Estates, where only three decades ago titles were completely free from doubt, but are now becoming vested in a wide class of persons, tends to suggest that the emphasis of the new system must be placed equally on first and second registrations.

It will be especially necessary to ensure that heirs and other successors in title take prompt action to effect the transmission of registered land in the event of the death of a registered proprietor. The evidence presented in chapter 7 tends to suggest that it may well be necessary to create penalty provisions to compel successors to arrange for the transmission of registered land within a period of, say, three months. This is consistent with our argument that it is crucial to the realisation of the objectives of a safe, simple, speedy and reliable system of title registration to have an accompanying programme of careful and consistent implementation of the provisions of the Land Title Registration Law, 1986.

In chapter 8 the main strands of chapters 4 and 5 were brought together and analysed within the context of the perennial conflict between the conjugal and consanguine families over the property of deceased persons. The chapter considered the law of succession in Ghana, examining in turn the Intestate Succession Law, 1985 (P.N.D.C.L. 111), section 48 of the Marriage Ordinance of 1884 (Cap. 127) and the various customary rules of succession. Here again, the rise of individualism is the thread weaving up consistently through the evolution of the laws of family and property in modern urban Ghana. The organisation of the urban family, we suggested, is now increasingly based on a narrow group of "active" family members. We therefore argued that members of this "active" family, depending on the respective circumstances, ought to be entitled to greater rights of enjoyment of property than the rest of the wider consanguine family.

Various problems relating to the creation and dispersal of accumulated wealth under the traditional system were examined in detail in this chapter. It was shown that the traditional system of succession is detrimental to the accumulation of wealth and economic development[1] and that the effect of the operation of the traditional rules of succession is often the re-communalisation of wealth. But it was also conceded that Law 111 would probably not lead to a total demise of the consanguine family.

Our analysis therefore suggests that the outcome of further reform ought to be the explicit strengthening of a smaller extended family or the "active family", based more narrowly on certain uncles, aunts, nieces, nephews others. to act as social support for the nuclear family. This would not necessarily involve an amendment of the statute. The provisions of the Intestate Succession Law, 1985 are sufficient to allow the development of a jurisprudence which would reflect the changing nature of urban reality in Ghana as far as family organisation is concerned. It is suggested that measures to ensure adherence to the provisions of the Administration of Estates Act, 1961 (Act 63) in particular, to compel application for letters of administration, and thereby to guarantee the transmission of the provisions of the Intestate Succession Law, 1985 would naturally result in a reduction in the number of family members with an interest in an estate and would thus progressively erode the basis of the extended family.

Finally, detailed examination of the records of the High Court in Accra allowed us to analyse the pattern of distribution of wealth left at death. We

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[1]But see Woodman 1975, pp. 1-20 esp. at pp. 16-17 where he criticises the view that economic reform ought to be the end of law reform for African states and, argues that it is probably more correct to say that economic development is not the end which is ultimately given priority by African states.

showed that the decline of the extended family is reflected in the probate records, as more and more wealth holders who die testate tend to leave their properties to members of their immediate families by the use of wills. Future changes in the law of succession, we contended, should above all reflect the patterns shown in those records.

The 1985/86 reforms of customary law seek generally to consolidate and legalise a shift from group rights to individual rights in Ghanaian law. We knew that official customary law does not always accurately reflect practised customary law. Our field evidence pointed to an illusion of symmetry between official legal prescriptions and actual social practice that conceals a number of open and hidden obstacles. Government agencies charged with the implementation of reform policies were found to be under-funded, norm-addressees were unaware of old and new legal rules and various gaps exist between official legal rules and unofficial rules of customary law. The thorniest issue appears to be the relationship between official and unofficial rules of customary law. Official rules of customary law seek to prescribe rules of behaviour without necessarily recognising that actual social practice is far more nuanced than official policy.

The provisions of the Intestate Succession Law, 1985 and the Customary Marriage and Divorce (Registration) Law, 1985 were found to have been adapted by some norm-addressees to suit their needs. In the case of the Intestate Succession Law, 1985 it was found that what generally purports to be distribution of the estate of an intestate under its provisions is no more than a distribution of the estate according to society's own notions of fairness. Hopes

that a linkage of rights under the Intestate Succession Law, 1985 to registration of marriage under the Customary Marriage and Divorce (Registration) Law, 1985 would lead to a large increase in the registration of customary marriage were dashed by our evidence of low registration figures. Furthermore, evidence suggests also that divorces of registered customary law marriages may not be registered.

Hidden obstacles await the Land Title Registration Law, 1986 and the Head of Family (Accountability) Law, 1985. The former seeks to combine perpetual ownership rights to the stool and extended family with simplified land-security transactions for land proprietors who, as was shown in chapters 5 and 6, are no more than leaseholders in the main. With group property rights that extend perpetually into the future and a registration facility that provides an indefeasible proof of title, it takes little imagination to see the difficulties that may arise in relation to lands owned by the extended family. Secondly and relatedly, it has been shown that holders of temporary interests in land tend to under-invest and over-exploit the land.[2] It remains to be seen if the leasehold would be as successful a medium of land development as the Ghanaian usufruct.

Rules about coparcenaries which govern the ownership of extended family land indicate that there will be perpetual multiplicity of owners with the natural expansion of the extended family. In the past, branches of the extended family often lost their rights in ancestral land if they were unable to prove

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[2]R.C. Ellickson, "Property in Land", Yale Law Journal, Vol 102 (1992-93), pp. 1315-1400.

connection to the original acquirer. It is therefore probable that an unintended consequence of land title registration in Ghana could in the long run be an increase in litigation over rights to group-held land. Such litigation may well be aided by the provisions of the Head of Family (Accountability) Law, 1985 which require disclosure by the head of the extended family of extended family properties in his custody.

Focus on urban society helped to expose the major shortcomings of the 1985/86 reforms of customary law in Ghana. But defects in the 1985/86 reforms cannot be so simply encapsulated; our findings in Domiabra, which is quite close to Accra, only throw some oblique light on the state of customary law in rural Ghana. Equally, much of the extensive and endless debate about Ghanaian customary law in law journals and textbooks has tended to uncritically project solutions based on old principles onto complex new social phenomena within modern Ghanaian society. Moreover, public debates about legislative proposals are periodic and carry with them the propensity to be dominated by the views of urban elites and to be misdirected at urban concerns. Rural trends remain, on the whole, feebly advocated or based on static notions of Ghanaian society.

To give fresh impetus to Ghanaian customary law reform, it is necessary to shift its central debates to new ground. In particular, emphasis on a comparative approach to academic debate in Ghana would ultimately enrich Ghanaian customary law jurisprudence and provide new insights into the role of law in changing urban African societies. Also, there is the urgent need to formulate clearer criteria for legislative intervention in Ghanaian customary law. Such criteria should above all be based on principles of fairness, equity and

efficiency. The application of these principles to the actual social practices of people could render legislative intervention in customary law more effectual. A corollary of this is the detailed study of social norms before the enactment of legislation. Concentration on detailed study of social phenomena before the enactment of legislation should narrow the rift between official law and unofficial law in Ghana.

In the light of all the foregoing, we submit that the evidence in this thesis argues conclusively for further systematic reforms of the laws of family and property in Ghana. However, the mere enactment of legislation aimed at perceived shortcomings and mischiefs in existing law is not enough. Government must adopt and implement policies that would ensure that ordinary people take advantage of the provisions of those laws. On present evidence, the effect of the Intestate Succession Law, 1985 (P.N.D.C.L. 111), Customary Marriage and Divorce (Registration) Law, 1985 (P.N.D.C.L. 112), the Head of Family Accountability Law, 1985 (P.N.D.C.L. 114) and the Land Title Registration Law, 1986 (P.N.D.C.L. 152) upon society could be considerably enhanced through the use of social engineering through law. This should give Ghanaian legislators sufficient cause to re-examine their approach to law reform.

Also efforts should be made to improve the low take-up of state law. For instance, instead of the present method of simply introducing a statute, with little or no incentives and disincentives for norm-addressees, we advocate a shift to a regime combining strong incentives and disincentives as a way of changing inveterate habits. The 1985/86 reforms represent the latest attempt to change the nature and development of customary law in Ghana, following as it does, in

the wake of earlier efforts by the courts and textwriters to determine what constitutes the proper rules of customary law. Earlier attempts to influence customary law in Ghana through statutory intervention, including section 48 of the Marriage Ordinance, 1884 appear to have had only limited impact on customary law. They show that solutions do not come easily in this area of the law.

A major lesson such interventions teach is that where custom and statute meet in a social environment not subject to systematic reform, and impinge on each other, the result is not elimination of custom, but rather the emergence of a new "living law" that combines aspects of both custom and statute. For modern Ghana, too, the suggestion can be made that it is not the mere enactment of legislation that matters but its effective implementation. Rather than concentration on mere technical drafting and the formal enactment of legislation, the emphasis in legislative reform should be on the "science of legislation", using predictions of the effects of legal rules on the activities of norm-addressees and role occupants. This involves the proposition that the legislator must have a detailed knowledge of the situation he wishes to regulate.[3] It means careful planning and consideration of the cost of proposed rules (including the cost of material and human inputs). The legislator must also consider the role of sanctions in the overall efficacy of the rules that he proposes to introduce. In the case of the drafting of legislation to change customary law this must clearly involve an understanding by the legislator of such social issues

[3]Ollennu 1970, pp. 1-30, documents many of the practical problems, including the lack of up-to-date index of Ghanaian statutes and the under-staffing of government departments associated with the drafting of legislation, that hinder the development of Ghanaian law.

as the tensions between individualism and communalism in Ghana as well as the setting of stricter parameters to define the objects of legislation.

We may now begin to suggest some guidelines for future reform of the customary law with a view to harnessing it more effectively to the development process. Throughout this thesis we have noted the decline of chiefly authority. It is suggested that the partial void created by the decline of chiefly authority needs to be filled by the modern state. It is a matter of public interest that the state should assume a more positive role in the management of property resources and secure the ever more prominent role of the nuclear family in Ghanaian society. Not to do so would leave the field open to individualistic concerns which, in the context of a developing economy, will dramatically increase the gulf between rich and poor, the powerful and the dispossessed. State intervention in the management of property resources should, however, be carefully balanced against the equally important need to recognise established property rights of individuals. Reich has suggested that this would engender enterprise and shelter the solitary spirit of the individual and gives society the power to change, to grow, to regenerate and hence to endure.[4]

As regards groups it has been suggested that the state should not be guided in its reforming role by the blind preservation of indigenous traditional institutions in the name of cultural heritage.[5] If this view is correct it should be possible for the state to launch bold and imaginative interventions in the property

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[4]C.A. Reich, "The New Property", Yale Law Journal, Vol. 73 (1964), pp. 733-787 at 787.

[5]See H.S. Daanaa, The Impact of State Law on Custom and Leadership in a Post-Colonial State: A Legal Historical Study of Centralised Wa and Acephalous Chakali in Northern Ghana, London 1992, Unpublished Ph.D thesis, p. 534.

law of Ghana to reform the property law. That such solutions are probably too incautious to form a secure basis of argument for bolder state intervention in customary law is borne out by the tendency of seasoned observers of the laws of developing countries to advocate a more critical approach to law reform.[6] It is also supported by the findings of this thesis.

Family law should be one of the main target areas for further reform of customary law. It is obvious that the consanguine family, like chiefship, is on the decline. But it is also clear that many of the rules of customary law are still based on the consanguine family as the central institution of Ghanaian society. It is therefore suggested that future legislation needs to take account of the declining role of the extended family. For instance, the consent of the head of the extended family should no longer be necessary in applications for letters of administration; this role should be assigned to the surviving spouse. In any projected legislation on the family, the interests of the conjugal family, especially the interests of the children, should have priority over the interests of the consanguine family.

Ghanaian law reformers should also concentrate their attention much more closely on dissolution of marriage and its consequences, particularly for the ex-wife and children. Desertion, for instance, has far more complexities than have been recognised by Ghanaian textwriters. It often involves profound psychological trauma for the deserted party and the children and undermines their financial and legal security. Desertion has rapidly become the poor man's

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[6]See e.g. Cotran 1968, pp. 15-33. See further Allott 1980, esp. pp. v-xiii.

divorce and often leaves economically disadvantaged ex-wives and children without financial support. This calls for the reform and stricter enforcement of maintenance law.

New rules regarding land titles registration need to be enforced and monitored closely. It was suggested in chapter 7 that in registering and assuring the titles of all holders (including stools and extended families) under the system of title registration, particular care must be taken to minimise the re-allocation of resources that might occur if influential persons, such as those within extended families and property-owning stool families, register group properties in their own name. This can cause undue social dislocation, particularly since the statutory systems of conveyancing introduced by the Land Title Registration Law, 1986 (P.N.C.D.L. 152) do not take oral transfers of land into consideration. It was further shown that although the system of registration itself is technically flawless and the principle of indefeasibility of title may well be the panacea to the ills of the old system of deeds registration, by its very reliance on scientific accuracy of data held at the registry, the system becomes susceptible to administrative and bureaucratic inefficiency. We also pointed out the possibility that non-registration of interests and of transmissions upon death of previous proprietors will render the records on title registration out of date. Again, to preserve the intended efficiency of the registration system, the state would need to provide incentives for the norm-addressees.

Another target area for law reform ought to be changes to Ghanaian land law. The stool's absolute interest in land must now be clearly limited to town and village lands, with some outlying land being set aside for the development of the

town or village. The state should, however, provide an efficient legal and administrative framework for the registration of such lands.

Perhaps, as a matter of public interest the state should then assume the allodial interest in all other lands in Ghana in order to assure their proper and effective allocation and development. This would create two regimes or circuits of land ownership. Lands falling under the domain of the state should be fully exposed to the factors of the market economy and attract higher ground rents which could be used by development companies. In the cities, the state could assume a leading role in the regeneration and development of the old quarters and slum areas. In the rural areas, the state should take a more active role in the development of agriculture, in particular the introduction of modern technology and the facilitation of scale economies.

As we have argued, the system of land tenure ought to reflect the rise of individual economic power. At the same time, it should protect the residual interests of communal groups. Since we showed that the system of land tenure is still based on a subsistence, communal model, we suggested two radical methods to enhance the linkage between property and economics.

Firstly, we suggested that the adoption of McAuslan's model of land policy would raise the economic value of land, appreciating its value as collateral, providing an efficient method of transfer of venture capital, and of new farm methods and technology into the agricultural sector.

Secondly, we advocated the revival of the principle of co-ownership as a way of checking reckless sale of land by chiefs. Extensive examples were drawn from Old Dansoman to show the inadequacy of chiefship in the allocation

of lands (particularly to stool subjects) and the formulation of effective mechanisms of management to ensure reasonable returns from land after the alienation of the determinable title. We showed, for instance, how in the rush to develop suburban lands the old customary principle of the stool subject's inalienable right to a grant of any piece of land that had not been previously acquired by another person has been generally disregarded by the stool authorities. We also showed that nuclear families rather than extended families were and still are at the forefront of recent land acquisitions. This was a further demonstration of the declining influence of the extended family in modern Ghanaian urban society.

The state's role in the management and allocation of land should be guided by the following criteria: social equity, economic efficiency, certainty and the safeguarding of the state and national patrimony. This is not to suggest that there are no others. We emphasise merely that legislative or other intervention in the land law of Ghana in likely to be most effective if it is based on notions of economic efficiency, safegarding the national patrimony, and especially social equity which seems to have been the most important principle underlying the traditional conception of land. The essence of these principles can be summarised quickly as follows. Equity can be achieved by ensuring the availability of land as a national resource to all citizens on a basis of fairness. In this regard land could be made available to the urban poor in the form of residential accommodation in low-cost housing schemes, complete with public amenities.

It has been suggested that this gives the poor a stake in society as they

accept the need for the institutions of state to be recognised as legitimate.[7] Equity also means the recognition of the rights of local people in the allocation of their own lands. It is suggested that a fixed percentage of lands acquired by government under this scheme, say 30 per cent, be allocated as of right to local people. This could be financed either through low-interest mortgage schemes or through direct payment by government of proceeds from the sale and acquisition of stool or family lands to property development agencies.

Efficiency in the allocation and use of land should result in a marked decrease in the current level of litigation over land, and should free financial resources employed in such litigation for the development of land. Also, by promoting good land use practices, a government can try to guarantee the protection of the environment and the ecology.[8]

Lands falling under the domain of stools should continue to be governed by the rules of customary land law, thus permitting land relations to be part of social relations of such areas. It is suggested that lands in this domain be governed by the principle of co-ownership[9] which should be modified in such a way as to make local authorities joint trustees of lands with chiefs and to ensure that ground rents and other proceeds from lands are used for the creation of infrastructure and social amenities.

Also, government must assume a leading role in the introduction of policy

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[7]McAuslan 1987, p. 191.

[8]See P.C. England, Sustainable Development and the Forest Sector in Ghana: A Study of the Law in Action, London 1993, Unpublished Ph.D thesis, esp. pp. 425-446.

[9]See p. 334 above.

initiatives in this domain by the establishment of such planning and development devices as Housing Investment Programmes, into which capital from the sale of stool lands can be invested as part of an overall strategic plan to address the housing and other needs of the poorer people. The keystone to land policy in this domain must be the recognition by all concerned that land is now a finite resource but remains the economic foundation of the life of most people in modern Ghana. In the alienation of land, it is suggested that chiefs be encouraged both to use the present dominant leasehold tenure to control land users (through the employment of land use clauses) and to use rent review clauses to ensure a reasonable financial return to the stool for the purposes of development.

As indicated, government policy in this domain must seek to monitor inequalities of economic opportunity by ensuring that land policies are geared to the needs of the people, especially by facilitating a socially acceptable balance in the allocation of land that takes account of the needs of non-stool subjects. In this way, it is submitted, the conception of land as an expression of economic relations rather than an aspect of social relations would gradually be established in all stool areas.

In view of the foregoing, it is proposed that further legislation may be enacted

a) to vest all unoccupied lands outside major towns and villages in the state;
b) to improve financial accountability of chiefs and heads of extended families;
c) to ensure that magistrate courts or specially created family courts, rather than the family forum, become the main machinery for the protection of the conjugal family;
d) to ensure that effective penalty provisions and income tax

mechanisms are built into future legislation on customary law.

Further, in view of Allott's conceptualisation of a legal system as a communication network and the various instances of communication failure, shown in this thesis to underlie the low take-up of state law, we suggest that two methods be adopted to promote the effectiveness of statutory provisions. The first is to improve the existing system of communication of legal provisions through television and radio drama, portraying ordinary families and individuals caught up in situations that illustrate the advantages of new laws and promote awareness of them. The other method is to devise a system for the training of special personnel and the delivery of information packs to communicate and explain the contents of new legal provisions directly to norm-addressees through such fora as social and family gatherings. The adoption of these methods should not, however, altogether oust the use of newspapers and other conventional means for the dissemination of information regarding new laws.

Finally, new legislation ought to take cognisance of changing societal perceptions of what constitutes customary law. In urban Ghana, this should ensure that legislative reform not only promotes the rights of individuals and nuclear families, but also places them firmly within the legal framework of a modern state which has among its prime duties concern for the welfare of all citizens. Changing the customary law of Ghana in this direction does not, in fact, appear to bring a fundamental re-orientation. Within the traditional framework, too, private and public interests were subtly interwoven. What has been changing in the process of secularisation and legalisation is that the modern state, rather than a traditional authority, demands supreme allegiance. A

corollary of this is the state's duty to plan for, and to implement, a legal system that takes account of the various conflicting needs and concerns of the people of Ghana. While the legal changes that are observable in modern urban Ghana may not be reflected all over the country, there are many indications that the state's increasing role in changing customary law, and in recognising changes within it, needs to be more clearly understood. The present study has, hopefully, laid some foundation for further work in this area.

APPENDIX

Questionnaire

Name of respondent (Block):

Address of respondent:

Field-area and district:

Respondent details

Occupation/traditional status:

Age: Up to 40 Stool subject/non-stool subject:

40 Married/single/divorced:

50 to 60 Sex:

Over 60

Signature of interviewer

Date of interview.

Q1. First, can you tell me about your education, income and background?

Q2. Can you tell me about your immediate family, your husband, wife, children and any grandchildren?

Q3. Give me a quick sketch of your extended family's genealogical tree and spell out the nature of your relationship with members of your extended family.

Q4. Tell me a bit more about the organisation of your extended family, e.g., how many branches there are in your extended family, forms of economic co-operation among members of the extended family, whether you have a family house or land and where the various members of the extended family live?

Q5. Can you please describe the nature of the Gá extended family and how infants, strangers, and foundlings are incorporated into it?

Q6. What changes have taken place within the extended family system that you have just described, especially since 1939?

Q7. Can you briefly describe the naming system of the Gá as a whole and your family in particular?

Q8. Can you describe the functions of the head of your extended family?

Q9. Tell me how the head of your extended family was elected?

Q10. In your opinion, have any changes occurred in the functions and election of the head of the extended family since the earthquake of 1939?

Q11. What types of property does your extended family own?

Q12. For how long have these properties been in the family?

Q13. How do you normally ensure that the head of the extended family and his elders give proper account of extended family properties in their care?

Q14. Do you know of the Head of Family (Accountability) Law of 1985?

Q15. Has there been any occasion, since 1985, when the head of your extended family has been asked to give account of properties in his custody and, if so, was there any attempt to use the provisions of the Head of Family (Accountability) Law,

1985 in enforcing the rights of the ordinary members of the family?

Q16. Has an inventory of extended family property been prepared by the head of your extended family as provided for by the Head of Family (Accountability) Law, 1985?

Q17. Do you think making detailed records of all landed properties in the custody of the head of your extended family available to ordinary members of the family is necessary?

Q18. What effect, in your opinion, has the Head of Family (Accountability) Law, 1985 had so far?

Q19. What are your views about the Head of Family (Accountability) Law, 1985 generally?

Q20. Are you married and what form of marriage is it?

Q21. For how long have you been married?

Q22. Can you describe the main procedures for the validation of customary marriage?

Q23. How, in your view, have these procedures changed over the years?

Q24. Can you describe the process of customary divorce and how it has changed over the years?

Q25. Can you briefly describe the customary process of reconciliation between spouses?

Q26. If you or a close relative have ever been involved in divorce proceedings can you tell me who the petitioner was and what the grounds of divorce were?

Q27. There appears to be a higher rate of divorce among parties to customary marriages. Do you know why that is the case?

Q28. Have you heard of the Customary Marriage and Divorce (Registration) Law, 1985?

Q29. What would you say is the purpose of the Customary Marriage and Divorce (Registration) Law, 1985?

Q30. If your marriage is a customary marriage why have you registered or not registered it?

Q31. Are you aware of the link between the effect of the Customary Marriage and Divorce (Registration) Law, 1985 and the Intestate Succession Law, 1985?

Q32. Are you aware that you can register a customary divorce under the Customary Marriage and Divorce (Registration) Law, 1985?

Q33. Do you own any land or building?

Q34. When was it bought and what was the exact process you went through in buying it?

Q35. Did it involve any trama or guaha ceremonies and what was the nature of the publicity that accompanied the sale?

Q36. How did you raise the money to buy the land?

Q37. Did other members of your extended family help in the development of your land and how?

Q38. What is the exact nature of your interest in the land?

Q39. What are the main ways in which the stool-subject may exercise his rights over stool land today?

Q40. What happens to the proceeds of the sale of stool lands today?

Q41. Has there always been any form of financial control between the paramount stool and its sub-stools and in what ways has it changed in recent times?

Q42. Can you describe the general nature of control that stools traditionally exercised over their lands and how it has changed in recent times?

Q43. Is your interest in the land you own evidenced by a deed and have you registered the deed?

Q44. Is the deed registered at the Lands Department under the Lands Registry Act, 1962 and what steps did you go through in registering it?

Q45. Had the property been previously registered under any other law?

Q46. What prompted you to register it under the Land Registry Act, 1962?

Q47. Did you engage the services of any lawyer, surveyor or other professional in effecting registration?

Q48. Have you ever taken a loan facility using your property as a mortgage?

Q49. Have you or any member of your family been a pledgee or pledgor? Please describe the process of pledging.

Q50. Has the nature of the customary law pledge changed in any significant way?

Q51. Would you agree with the statement that pledgors are usually dissatisfied with the state of their lands after redemption?

Q52. Can you name and describe the main forms of tenancies that exist in this part of the country?

Q53. Have there been any changes in the nature of tenancies and what is the nature of those changes?

Q54. Can you describe the main changes that have occurred in the sale of land since 1939?

Q55. Have you heard of the new system of land titles registration under the Land Titles Registration Law, 1986 (P.N.D.C.L. 152) and are you ready to register your land or interest in land under it?

Q56. What do you think the aims of Law 152 are?

Q57. What is the general level of awareness of Law 152 within this locality?

Q58. What would you attribute the general level of awareness of Law 152 to?

Q59. Would your readiness to register your land be facilitated by the help and advice of an educated person or the local chief?

Q60. Do you or anyone you know have land that falls within the present registration district and have you or that person taken any steps to register that land?

Q61. How quickly do you intend to register your land if this area is declared a registration district?

Q62. Would you register the land yourself?

Q63. If you cannot or do not wish to register the land yourself, what steps do you propose to take to contest caveats and ensure representation at adjudication meetings involving your parcel of land?

Q64. At the moment applications to register a parcel of land or an interest in land are advertised in the newspapers and on television. Would you be in a position to know from those media if another person had made an application to register a parcel of land or interest in land that belongs to you in his own name?

Q65. There are provisions in Law 152 for the registration of easements, profits, licences, etc. Do you know what these things are and, if so, would you register them once this place is declared a registration district?

Q66. Has your land been registered under any other system of registration and if not, do you have any receipts, unregistered deeds, etc. upon which you can base your title?

Q67. Under Law 152 it is possible for prospective purchasers to ascertain the precise nature of your interest in the land. Do you have any objections to this open-book system?

Q68. Can you give me a general description of intestate succession among the Gá as you know it?

Q69. Is the practice of levirate still common?

Q70. Have you heard of the Intestate Succession Law, 1985 (P.N.D.C.L. 111)?

Q71. How much detail do you know of the Intestate Succession Law, 1985?

Q72. Has your family or any other family you know had occasion to take P.N.D.C.L. 111 into account in distributing the estate of an intestate since 1985?

Q73. Can you describe the exact process of any post-1985 distribution of the estate of an intestate relative or friend and state what effect P.N.D.C.L. 111 had on the pattern of distribution?

Q74. Can you tell me whether the estate was divided into the exact fractions stipulated by Law 111?

Q75. How were complications like polygamy and its possible effect on the fragmentation of estates resolved?

Q76. Who is/was the original owner of the house you presently occupy?

Q77. If your house has been inherited, who is the present owner and how did it devolve onto him or her?

Q78. If the original owner of your property is deceased and additional structures have been erected on the land since his demise can you tell me how the building operations were financed?

Q79. Do you know or have you witnessed the making of an oral will or samansiw?

Q80. Can you describe the proper procedure in the making of samansiw?

Q81. Do you know of anyone who has bequeathed or devised property to his or her heirs through the use of samansiw?

Q82. Can you describe the nature of difficulties that in your experience can arise in the transmission of property bequeathed or devised by samansiw?

Q83. In your view, is samansiw a good way of distributing property to one's heirs?

Q84. Do you know of any case where a testator has tried to use a samansiw to alter or supplement the terms of a written will?

Q85. Have you ever made a written will before?

Q86. Did you make any gift to a registered charity under your will?

Q87. Have you ever made any revocations and codicils to your will?

Q88. Whom did you appoint as executors to your will and why?

Q89. Have you or your extended family ever been involved in litigation before the traditional authorities or the state courts?

Q90. In what capacity were you involved in the suit? Were you the plaintiff or defendant?

Q91. How was the litigation financed?

Q92. What was the nature of the dispute?

Q93. Can you describe the nature of traditional litigation generally?

Q94. What, in your view is the essential difference between a traditional forum and the state courts?

Q95. How is a judgment obtained in a traditional forum enforced?

Q96. How has traditional litigation changed over the years?

Q97. How would you describe the nature of litigation in the state courts?

Thank you for your co-operation

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