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MATRIMONIAL PROPERTY RIGHTS OF WOMEN UPON DIVORCE IN GHANA, UNDER THE PRISM OF LEGAL EMPOWERMENT

To Which Extent Does The Lack Of Substantive Legislation On Property Settlement Upon Divorce In Ghana Constitute A Breach Of The CEDAW?

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Table of contents

List of Abbreviations and Acronyms

AWLA	African Women Lawyers Association
CEDAW	Convention on the Elimination of All Forms of Discrimination against women
CEDAW Committee	Committee on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
DVA	United Nations Division for the Advancement of Women
ECHR	European Convention on Human Rights
GIMPA	Ghana Institute of Management and Public Administration
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JEP	Jurisprudence of Equity
LAWA	Ghana Leadership and Advocacy For Women in Africa
LECIAD	Legon Centre For International Affairs and Diplomacy
Maputo Protocol	Protocol to the African Charter on Human and Peoples' Rights of Women in Africa
MCA	Matrimonial Causes Act of Ghana
MP	Member of Parliament
NGO	Non-Governmental Organization
Para.	Paragraph
	Peoples Rights
The constitution	The 1992 Constitution of Ghana
UDHR	Universal Declaration on Human Rights
UN	The United Nations
Vienna Convention	Vienna Convention on the Law of Treaties

"The fortunes of nations are inextricably tied to the fortunes of women. It is this simple: Where women flourish, their families flourish. And where families flourish, communities and nations flourish. Issues affecting women and their families are not "soft" issues to be relegated to the side-lines of serious debate. Rather, they are amongst the hardest and most important issues we face." [1]

[1] Clinton (1998) p. xiii.

1 INTRODUCTION

1.1 Presentation of topic and research question

Ghana is a country on the West Coast of Africa with a population of about twenty-five million people. [2] Women represent about 51 of the population.[3] Not long after Ghana became independent from British colonial rule, she became a member of the United Nations (UN), and is very engaged in the activities of the organization.[4] Ghana is also a member of the African Union. As a result of Ghana´s membership in these and other international and regional organizations, she has signed and ratified many international and regional conventions that aim at protecting the rights of women. The most important of these conventions are the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[5], and the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa (Maputo Protocol) [6]. This makes Ghana one of the countries in Africa that aim at protecting women from marginalization, oppression and discrimination.

Even though, Ghana has made significant improvements in women's rights after ratifying the CEDAW and other international human rights conventions, there still remains a lot to

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[2] *Europa Regional Surveys of the World. Africa South of the Sahara 2012* (2012) p. 576.

[3] http://www.un.org/en/ecosoc/newfunct/pdf/vpd_undcf.pdf. Accessed 07.11.2013.

[4] http://www.un.int/ghana/. Accessed 09.07.2013.

[5] The CEDAW, also known as "the women´s convention" (see for instance Hellum (1999)) is the most comprehensive international convention that specifically aims at protecting the rights of women. It came into force in 1981 and was adopted by Ghana in 1986. Hellum (1999) p.22 rightly describes the convention as "a socio-legal tool which within a single and unified framework is intended to help women fit into social, economic and political modernization processes in all parts of the world". Out of the 194 recognized countries in the world, 187 of them, including Norway, have ratified this convention. In the Western part of the world, the USA is the only country that is yet to ratify the CEDAW. Source: http://www.cedaw2012.org/index.php/press-room/fast-facts-about-cedaw. (Accessed 05.11.2013).

[6] The Maputo Protocol was adopted in 2003 and came into force in 2005. It was ratified by Ghana in 2007. This protocol can be described as the African version of the CEDAW. Like the CEDAW it also addresses the civil, economic and social rights of women.

be done in certain areas. The matrimonial property rights of women upon divorce is one of such areas. This is a field where there is no formal legislation, and according to the courts, a spouse must show proof of *substantial financial contribution* in order to get a share in property acquired in the course of marriage (see chapter 3). However, in Ghana there are many women who do not work outside the home. In most cases, those who work outside the home earn much less than their husbands. This is because women account for majority of the "less paid and less prestigious" professions.[7] There are also many women who work in family enterprises or on family farms but do not get any remuneration for their work.[8]

In many families, the income of the wife takes care of consumer expenditure like buying food and clothes for the family whiles the income of the husband is used to acquire properties and fund big projects.[9] This is due to the fact that the work women do in the public sector is "often viewed as secondary to their family responsibilities and their income as supplementary rather than essential to the financial resources of family or household."[10] As a result, a lot of women leave their matrimonial homes after several years of marriage without getting an equal share in property acquired during the marriage, because they are not able to show proof of the contributions they may have made towards the acquisition of the assets.

In some countries, non-financial contribution to the acquisition of marital assets (especially the matrimonial home) in the form of home-making and other indirect contributions is accorded the same relevance as financial contribution. This means that property acquired in the course of the marriage is considered the jointly-acquired property of both spouses even in cases where the stay-home spouse (in most cases the woman) did not contribute financially to its acquisition. In Norway for instance, this principle was historically laid

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[7] *Women And Law In West Africa.* (2003) p. 20.

[8] *Situational Analysis Of The Intestate Succession And Property Rights Of Spouses Legislation In Ghana* (2011) p. 26-27.

[9] Gandedzie (2012)

[10] *Women And Law In West Africa.* (2003) p. 21.

down in a case from the Norwegian Supreme court called *Husmordommen*[11] (the house-wife case) of 1975. This case is presented in detail in chapter 5.

Until recently, the principle followed by the courts in Ghana when deciding on cases of property settlement upon divorce has been what has been described by the courts as *the customary law principle* laid down in Quartey v. Martey & Anor (1959), which states:

"… by customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, e.g. farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property, which the man acquires, with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of the wife and the children is a right to maintenance and support from the husband and father."[12]

The Supreme Court has however laid down new principles in the course of the years, which seek to provide a better protection of the marital property rights of women upon divorce. This is because, even though article 22 (2) of Ghana´s constitution of 1992 (which is the constitution in force per today) entreats Parliament to legally empower women, as part of the process of ensuring an adequate protection of their marital property rights upon dissolution of marriage by divorce, this constitutional requirement has not been adhered to. One may ask what it means to legally empower women.

According to the UN secretary general´s 2009 report on "*legal empowerment of the poor and eradication of poverty"* , legal empowerment can be defined as "the process of systematic change through which the poor are protected and enabled to use *the law* to advance their rights and their interests as citizens and *economic actors*".[13] (My italics). This

[11] See Rt. 1975 p. 220

[12] Quartey v. Martey & Anor (1959) p. 380.

[13] Report of the UN Secretary General A/64/133 (2009) para 3.

report later has been described as the most authentic recommendation on legal empowerment that has a lot of influence as a resource for the UN system, its member states and all who are concerned with global development.[14] Legal empowerment of women can therefore be defined as using the law to protect women and to enable women themselves to utilize the law "to advance their rights and their interests as citizens and economic actors."

It is observed in the Secretary General´s report that the notion of legal empowerment has its basis in the fundamental doctrines of human rights enshrined first and foremost in the UN´s Universal Declaration of Human Rights (UNDHR) of 1948 and other international human rights conventions.[15] For instance it is stated in the UNDHR article 1 that "All human beings are born free and equal in dignity and rights" whilst article 17 acknowledges property rights as a basic human right that is to be enjoyed on equal basis by both men and women. "These international standards of human rights require that everyone's basic rights, assets and livelihoods be effectively upheld and protected by *the law*."[16] (My italics). The law can be said to be the foundation for acknowledging and implementing these rights.[17]

From the definition of legal empowerment in the Secretary General´s report, it can be inferred that there is a connection between legal empowerment and the eradication of poverty. Apparently the UN´s Division for the Advancement of Women (DVA) shares the same view. This is because according to a 2007 report by the DVA on *eradication of poverty and other development issues,* [18] one of the reasons why women are susceptible to poverty is because of the "unequal distribution of resources within the family." [19] This leads to the question of whether women in Ghana become susceptible to poverty when they leave their marriages without getting an equal share of assets they have contributed to accumulating in the course of the marriage is therefore one of the problems investigated in

[14] See for instance Golub (2010) p. 11.

[15] Report of the UN Secretary General A/64/133 (2009) para. 12.

[16] Ibid para. 25.

[17] Svanikier (2007) p.10.

[18] Report of the UN´s Division for the Advancement of women A/62/187 (2007).

[19] Ibid para 5.

this study (see chapter 4). This is because it can be argued that if women are left economically destitute upon divorce, they may find it difficult to gain "access to productive resources,"[20] thereby making them susceptible to poverty. Legal empowerment can therefore be regarded as an essential aspect of the advocacy for the marital property rights of women upon divorce in Ghana.

This study sets out to investigate the matrimonial property rights of women in Ghana upon divorce, with regard to the lack of substantive legislative guidelines on the subject matter.

1.2 Definition of key terms in the study

1.2.1 Marital or Matrimonial property

For the purpose of this dissertation, marital or matrimonial property refers to all property acquired by any of the spouses in the course of the marriage.

1.2.2 Sole Property (eneeie)

Sole property refers to property that is owned entirely by one of the spouses.

1.2.3 Common or jointly-owned property (sameie)

Common or jointly-owned property is the opposite of sole property and in this study it refers to property acquired with the contribution of both spouses, where each of them has an exclusive ideal interest in the whole property, but none of them has the sole right of any part of the property. Accordingly, one spouse cannot sell or rent out more than his or her ideal share in the property. Both spouses have the same legal access to it and the same legal power to manage it.

[20] Ibid

1.2.4 Community property (felleseie)

In Norwegian family law, community property bears reference to property that is acquired with monies that are earned from the work of each of the spouses in the course of the marriage and whose *value* is open to division upon divorce.[21] This means that property that a spouse owned before the marriage or acquired during the marriage by inheritance or by gift from a third person is not included in community property. In the consept of community property, *the value* of community property is upon divorce divided equally between the spouses regardless of who bought it.

1.2.5 Separate Property

Separate property is the opposite of community property, and refers to property that is not subject to division either because the spouses have agreed that it should be so, or because there are other legal grounds, which gives a spouse the right to keep such property out of the division. [22]

1.2.6 Difference between community property/separate property and common property/sole property

The difference between community property/separate property and common property/sole property is that the concepts of community property and separate property are family law terminologies, which denote the property arrangements in marriage, and have nothing to do with the real ownership of the property.[23] The terms common property and sole property on the other hand refer to the real ownership of property. The relationship between the two sets of terminologies is that each spouse´s share of the common property either belongs to his/her share of the community property or to his/her share of separate property.[24]

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[21] Lødrup (2004) p. 112

[22] Ibid p. 111

[23] Ibid p.112

[24] Ibid p. 114

The distinction between community property/separate property and common property/sole property is not entirely vital with regard to property settlement upon divorce in Ghana since Ghanaian family law, unlike that of some Western countries (like Norway[25] and the community property states in the USA[26]) does not distinguish between these terminologies. For instance article 22 of the constitution only makes mention of "jointly acquired" property, and in almost all the relevant case law available on the subject matter, the dispute is normally about sole-ownership or joint-ownership of a specific property. The respondents I interviewed as part of my research (see chapter 2) were also seemingly unaware of these two sets of terminologies.

It may therefore not be wrong to say that there is no legal basis that entitles a spouse to half of the other spouse´s community property in Ghanaian law.[27] Consequently, being regarded as co-owner of marital property is essential for a woman to be awarded a share in marital property upon divorce. Thus, what matters is whether a spouse gets a share of marital property upon divorce, irrespective of which of these terminologies is used as justification for awarding him or her the share of property.

1.2.7 Discrimination against women

In article 1 of the UN Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW), discrimination against women is defined as:

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

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[25] See *lov om ekteskap av 4 juli. Nr. 47. 1991*.

[26] *Family Law: Cases, Text, Problems* (2004) pp. 269-324.

[27] For the case of Norwegian family law, see *ekteskapsloven § 58*, which serves as the legal basis for awarding a spouse half of the other spouses´s community property upon divorce.

It is noteworthy that the prohibition against discrimination in the CEDAW is an *independent* prohibition.[28] This means that the prohibition is self-reliant and can be invoked independent of other rules of law. Independent prohibitions of discrimination can be applied in many spheres of life, and not just the areas that are subject to protection in the same convention.[29] The prohibition of discrimination in article 26 of the UN Covenant on Civil and Political Rights (CCPR) is another example of independent prohibitions of discrimination.[30] The opposite of independent discriminatory prohibitions is *accessory* discriminatory prohibitions. Such prohibitions may only be invoked in connection with the invocation of other human rights provisions. Examples of accessory discriminatory prohibitions are article 14 of the European Convention on Human Rights Convention (ECHR)[31] and article 2 nr. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[32]

For an act to qualify as *discrimination against women* in light of the CEDAW, it must fulfill certain conditions. What these conditions entail and how they apply to the object of my study is accounted for in chapter 5.

1.3 Relevance Of The Research

A lot of researches, campaigns and advocacies have been and are still being carried out on the protection of women's rights in Ghana. The property rights of widows has been a major concern in the past, and widows´ legal rights have improved due to the introduction of the intestate succession law of 1985[33], which seeks to protect the rights of widows/widowers

[28] Emberland (2006) p. 200

[29] Ibid

[30] Craig (2005) p. 7.

[31] Ibid.

[32] Emberland (2006) p. 200.

[33] The Intestate Succession Law of 1985 (P.N.D.C.L 111)

and children upon the death of a spouse intestate.[34] To a large extent, this law has helped to secure the marital property rights of widows in Ghana.[35] Worthy of observation is that, the death of a husband establishes a legal relationship between the widow and the members of her deceased husband´s family, whilst for divorced women, the legal relationship established is between the woman and her estranged husband. The question is whether the marital property rights of women deserve greater protection upon the dissolution of marriage by death, than by divorce.

In recent years, the focus has been on violence against women. This has also been dealt with on the legal plan through the introduction of the Domestic Violence Act (Act 732) of 2007.[36] A women´s right to marital property upon divorce is a very essential tool that can encourage her to leave a marriage that is characterized by violence and abuse. This is because when women are given an equal share in marital property upon divorce, it makes them economically independent, and they may not feel obliged to stay in a marriage for fear of being left economically destitute upon divorce. Thus, the object of this study can be regarded as an important contribution to the debate on spousal abuse.

Despite the fact that the property rights of widows and violence against women have been dealt with on the legal plan and improvements have been made in these areas, the Ghanaian media is superfluous with information and news on violence against women, and literature is abundant with the inheritance rights of widows.[37] However, one hardly hears about the property rights of spouses upon divorce even though this is an area with no formal legislation. This could imply that the economic protection of divorced economic protection is not regarded as an important problem in Ghana.

Literature on the matrimonial property rights of women upon divorce in Ghana is very scanty and the few literature that exists on the topic barely call into question the extent to

[34] Kuma (2012)

[35] Shadow report to Ghana´s 3rd 4th and 5th CEDAW reports (2006) p. 31.

[36] Lithur (2012)

[37] Source: observations made during my fieldwork (2012)

which the lack of legislation constitutes an unjustifiable differential treatment of women.[38] The fact that there is no law on this matter doesn't seem to bother judicial writers and women's rights advocates that much.[39] Out of the many women´s human rights organizations in Ghana, there are only two[40], which are actively working and campaigning for a bill on property settlement upon divorce to be put in place.

This research seeks to contribute to the scanty literature that exists on the matrimonial property rights of women upon divorce in Ghana in light of the lack of formal statutory laws on the subject matter. Another objective of the study is to create awareness of the fact that the lack of legislation on the property rights of spouses upon divorce is a problem that needs to be dealt with, which often affects women; that the property rights of divorced women needs protection on equal footing with the property rights of widows. Whether or not Ghana´s refusal to make laws on this topic constitutes a breach of the non-discriminatory clause in the CEDAW is also an important question that will be investigated, which could be important for creating awareness of this issue.

1.4 Scope of the study

It is essential to point out that this dissertation only seeks to discuss the division of matrimonial property upon *divorce* and is thus within the domain of family law. The rights of women to matrimonial property upon *the death* of the husband is therefore outside the scope of this study. This is because, upon the death of a spouse, the division of matrimonial property moves from within the domain of family law, into the domain of inheritance law. All the same, the overall goal of this thesis is not to give an exhaustive presentation of Ghanaian family law, neither is it to give a presentation of whether or not Ghana is heeding

[38] See for instance Offei (2007), which is the curriculum in Family law at the University of Ghana, and Bowman (2003) pp 68-81 who merely present cases on property settlement by the courts without criticising the fact that there is no legislation on the subject matter.

[39] An exception is Svanikier (1997) who has made an effort to question the extent to which Ghana is adhering to her international obligations in this regard, but devotes very limited space to it.

[40] Leadership and Advocacy for women in Africa (LAWA) and African Female Lawyers Association (AWLA))

to her obligations in the CEDAW in general. Accordingly, it is mainly the aspects of the CEDAW that pertain to the economic rights of women that will serve as part of the legal framework for this study.

1.5 The Concept Of Family In Ghana – Matrilineal and Patrilineal Family Systems

It is important to understand the concept of "family" in the Ghanaian society because the perception of "family" is relevant for several of the issues raised in this study. Thus, a short presentation of the concept of family is given in this section of the study, but the influence this perception of family can have on property settlement upon divorce is discussed in detail in chapters four and six.

Just like many other societies, the family institution forms the basis of the Ghanaian society. The medium by which one can form a family in Ghana is through marriage.[41] Everyone is expected to marry after a certain age even though not everyone gets married before establishing families. A 2008 report by the Ghana Statistical Service[42] indicates that 58.8 % of Ghanaians above the age of 18 are either married or have been married before. The report further states that the average "age at first marriage" is 22.5 years. This suggests that most people get married before they earn enough money to buy property. Consequently, it may not be wrong to say that most matrimonial property (especially matrimonial homes) are acquired in the course of marriage, most probably with the effort of both spouses.

When a Ghanaian uses the word "family," he or she could be referring to both the nuclear and the extended family. Kuenyehia defines the concepts of family in Ghana as follows:

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[41] Kuenyehia (1978) p. 317.

[42] Ghana Living Standards Survey (2008) p.7. In a place like Norway on the other hand, the average age at first marriage for women as at 2003 was 29.7 years. Source: store norske leksikon. Availavle at http://snl.no/ekteskap#menuitem3. Accessed 04.11.2013.

"The family in Ghana denotes a large social group of people all tracing from a common ancestor, male or female. The social group, the members of which are lineally descended in a direct female line from a common female ancestor is known as the matrilineal family. That in which the members are lineally descended in a direct male line from a common male ancestor is known as the patrilineal family." [43]

The concept of matrilineal and patrilineal family systems is an essential factor in property rights and other issues in Ghana, and is therefore essential in this study.

This is how Ollennu accounts for the matrilineal and patrilineal family systems:

"Thus of all the important qualities in a man, Ghanaian belief attached special significance to two things, (1) the sacred blood which sustains and maintains his physical and material body and (2) the spirit which constitutes his full personality and builds him up into a real being, a man. The former is of maternal ancestry, the latter of paternal ancestry". [44]

According to Ghanaian customary law, a married woman is not considered as part of her husband´s family because, she and her husband are not related by blood. Also, customary law does not support the joint acquisition of properties by people not related by blood. [45] Thus, the maintenance of separate identities and of separate properties is the norm under customary law.[46] Since spouses are not considered to be related by blood, where spouses both contribute to the acquisition of a specific property in the course of their marriage, disputes regarding sole-ownership of the property arise upon dissolution of the marriage. The topic of discussion in chapter 3 is the extent to which the courts may have departed from this principle of customary law.

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[43] Kuenyehia (1978) p. 316

[44] Ollenu (1966) p. 71 cited in Kunyehia (1978) p.317

[45] Takyi (2012). This is also observed by the courts in the cases of Yeboah v. Yeboah (1974) and Abebreseh v. Kaah 1976 which are discussed in detail in chapter 3.

[46] *Situational Analysis Of The Intestate Succession And Property Rights Of Spouses Legislation In Ghana* (2011) p. 27

1.5.1 The Plurality Of Marital Forms In Ghana

There are three marital forms that are legally acknowledged in Ghana.[47] These are:

1) Marriage under Customary Law
2) Marriage under the Marriage of Mohammedan Ordinance
3) Marriage under the Marriage Ordinance

1.5.1.1 Marriage Under Customary Law

Marriage under Customary Law, which is "the personal law of the Ghanaian," was the only form of marriage acknowledged by law in Ghana until the year 1884.[48] Customary marriages are often celebrated at home as a union between two families (the families of the spouses). Under customary law, polygyny[49], which means that a man can have many wives at the same time, is permitted.[50]

Almost all Ghanaian marriages are first celebrated customarily before they are eventually celebrated under The Ordinance.[51]

During the celebration of customary marriages, the man gives some money and drinks to the woman´s family as her *bride price.* Thus, in order to dissolve a customary marriage, the woman´s family has to return the money and the drinks to the man´s family.[52] The spouse whose action led to the divorce may be asked to compensate the other spouse by paying an amount of money to that spouse. For instance if the husband "beats the wife persistently without just cause"[53] and the wife decides to divorce him because of that, he has to compensate her upon divorce. On the other hand, if the divorce is as a result of the wife

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[47] Kuenyehia (1978) p. 318

[48] Ghana´s report to the CEDAW committee (CEDAW/C/GHA/3-5) (2006) para. 199.

[49] Polygyny is the opposite of polyandry where a woman can be married to more than one man at the same time. Source: http://en.wikipedia.org/wiki/Polyandry. Accessed: 31.10.2013.

[50] Svanikier (1997) p.81.

[51] Kuenyehia (1978) p.318.

[52] Offei (2007) p. 203.

[53] Ibid 199.

committing adultery for instance, then she will have to compensate the husband. "There is nothing called division of marital property upon divorce in customary marriages. This is because spouses are supposed to acquire property separately."[54]

Customary marriages can also be dissolved in court if the parties so desire, c.f. articles 1 and 41 of Ghana´s Matrimonial Causes Act (Act 367). However, not many people married under customary law want their marriages to be dissolved in court.[55]

1.5.1.2 Marriage Under Mohammedan Ordinance[56]

About 16 % of the Ghanaian population are Muslims.[57] Ghanaian Muslims have to register their marriages under the Mohammedan Ordinance before the marriage can be regarded as valid in Islam.[58] Many Islamic marriages in Ghana are not registered under the Mohammedan ordinance and are therefore regarded as customary marriages.[59] Islamic marriages are also potentially polygamous since the Koran permits men to marry up to four wives at a time.[60]

A marriage registered under the Mohammedan ordinance can be dissolved by divorce if both spouses consent to it.[61] In the absence of agreement, the wife cannot divorce herself from her husband without his consent (except under a contract made before or after the marriage). However, "she may, in some cases, obtain a divorce by judicial decree". [62] The

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[54] Takyi (2012)

[55] Gandedzie (2012)

[56] Ordinance Capitulo 129 of 1907.

[57] *Europa Regional Surveys of the World. Africa South of the Sahara 2012* (2012) p. 584.

[58] Svanikier (2007) p. 81

[59] Ibid.

[60] Qur´an 4:3. Available at http://wikiislam.net/wiki/Dealing_Justly_with_Wives_and_Orphans_(Qur'an_4:3)#Qur.27an_4:3. Accessed 31.10.2013.

[61] Offei (2007) p. 266.

[62] Ibid

husband on the other hand can divorce his wife whenever he wants and he does not need to give a reason for the divorce.[63]

No case of division of marital property upon divorce under the Mohammedan ordinance is "readily available". [64] However, since the Matrimonial Causes Act (MCA) (1971) is applicable to all the three marital forms, Ghanaian jurists believe that if such a case is brought before the courts, the property will be divided based on the discretion of the courts, in accordance with section 20 of the MCA.[65] The non-existence of relevant case law on property settlement upon the dissolution of registered Islamic marriages suggests that property settlement upon divorce in the Islamic marriages (if any) is most probably conducted at home by the spouses themselves. Whether or not women married under the Mohammedan Ordinance get a fair share of marital property upon divorce is therefore uncertain.

1.5.1.3 Marriage under The Marriage Ordinance[66]

Under the Marriage Ordinance, the marriage is celebrated and registered either in church or at the office of a Marriage Registrar. Unlike Customary and Islamic marriages, polygyny is forbidden for those married under the Marriage Ordinance, c.f. sections 263 (1) and 262 of Ghana´s Criminal Offences Act.[67] An ordinance marriage may be dissolved by the courts if it "has broken down beyond reconciliation", c.f. article 2 of the MCA. The courts can conduct property settlement upon divorce if the parties so desire.

The effect this plurality of marital forms can have on the division of marital property is presented in chapters four and six.

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[63] Ibid

[64] Ibid p. 287.

[65] Ibid. This view was also expressed by some of the jurists I interviewed in the course of my research.

[66] Ordinance Capitulo 127 of 1884 (revised in 1951)

[67] Criminal Offences Act, 1960 (Act 29).

In its comments to Ghana´s combined third, fourth and fifth periodic report to the CEDAW committee on the implementation of the CEDAW in Ghana, the committee urged the Ghana government to "enact uniform legislation on marriage and family in conformity with article 16 of the" CEDAW.[68]

1.6 The Ghana legal system, the use of precedents and the hierarchy of the courts

Since there are no substantive legislative guidelines on property settlement upon divorce in Ghana, cases on property settlement brought before the courts are solved based on guidelines outlined in judicial precedents. Precedent in Ghana, just like in most common law countries, constitutes a fraction of the authoritative sources of law.[69] The use of judicial precedent means that the courts apply the rulings in previous cases when the case has similar facts as the previous ruling.[70] This has been described as *stare decisis,* a Latin word which means "to stand by things decided".[71] When a judge is deciding on a later issue and the principle of *stare decisis* is pertinent to that issue, he must consider the previous higher court´s decision in his ruling. It is noteworthy that it is only the section of an earlier ruling, "which stated the rule of law upon which the decision was based"(the *ratio decidendi*), which is binding for future rulings.[72]

In order for the principle of stare decisis to function effectively in a legal system, there has to be a power structure between the courts. This is because the importance of the court has substantial impact on whether its rulings will be obligatory, compelling or brushed aside.[73]

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[68] CEDAW/C/BIH/Q/35 (2006) para. 25.

[69] Quansah (2011) p.153

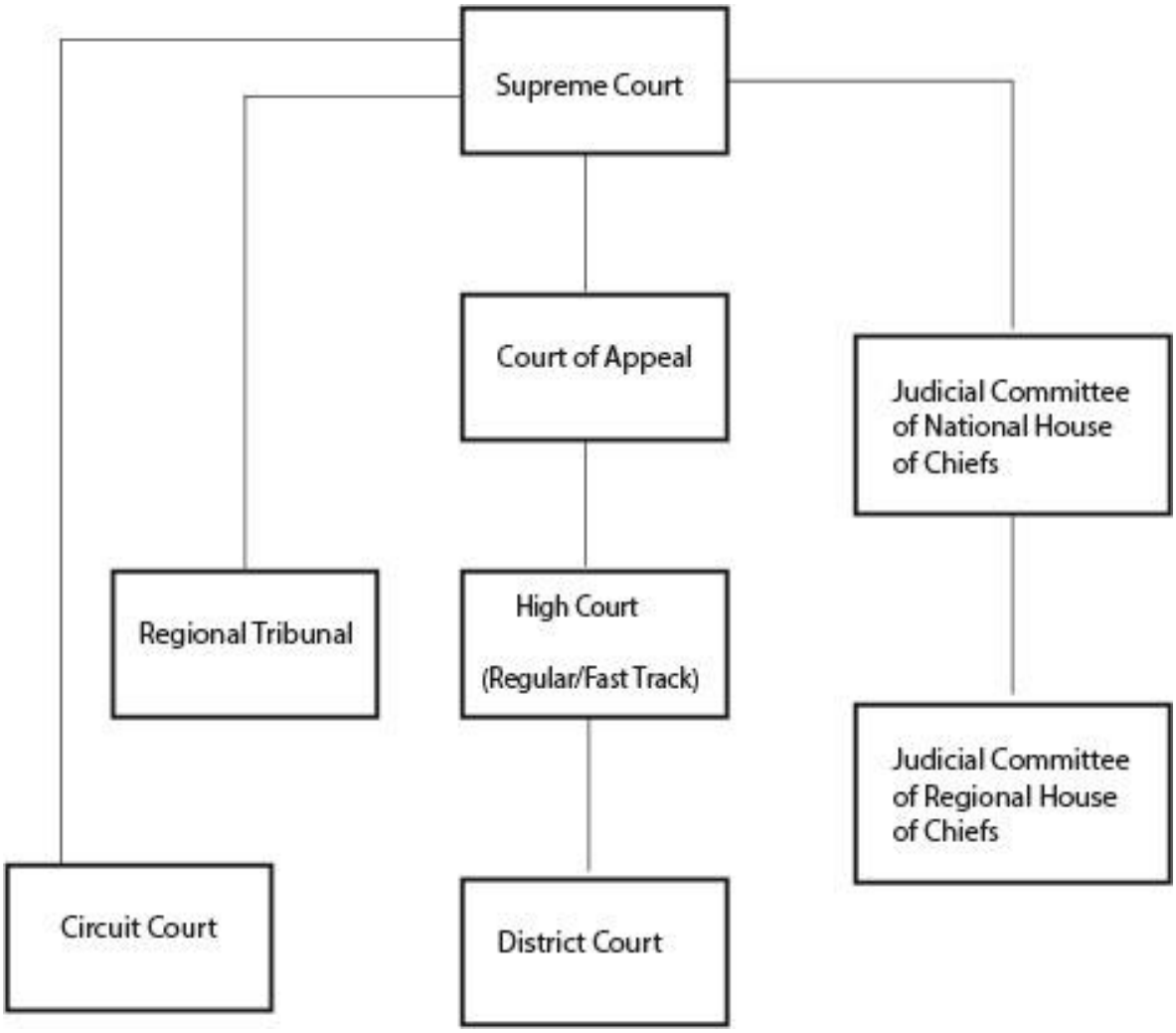
[70] Ibid.

[71] Black´s Law dictionary (2004) p. 1443.

[72] Quansah (2011) pp. 153-154

[73] Ibid.

Hierarchy of the courts in Ghana.[74]



The Supreme Court, which is the final court of appeal in Ghana, is not obliged to abide by the decisions of any other court. Also, "while treating its own previous decisions as normally binding, the Supreme court may depart from a previous decision when it appears to it right to do so, (whereas) all other courts (are) bound to follow the decisions of the

[74] Quansah (2011) p.162.

supreme court on questions of law", cf. article 129 (2) and (3) of Ghana´s constitution. The Appeal Court on the other hand is "bound by its own previous decisions", cf. article 136 (5) of the constitution, and the decisions of the Supreme Court on questions of law. The High Court and The Regional Tribunals are obliged to follow the relevant precedents of the Supreme Court and the Court of appeal, c.f. article 136 (5) of the constitution. The Lower Courts have to follow the decisions of all the aforementioned courts (i.e. the regional tribunals, the high court, the court of appeal and the supreme court).[75] However, whether or not the courts beneath the Supreme Court always observe this constitutional requirement is a question that may need further investigation. This is done in chapter 6.

1.7 Sources of law used in this thesis

This dissertation falls mainly within three disciplines of law, namely Ghanaian family law, sociology of law and international human rights. As a result, both local Ghanaian sources of law and international sources of law that Ghana has consented to, form the legal basis of this study.

1.7.1 Laws Of Ghana: Written Sources Of General And Customary Law

The expression "source of law" can have several meanings. Quansah defines it as "those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform and above all compulsory."[76] This suggests that there are many sources of law in every legal system.

1.7.1.1 Legislation: The 1992 constitution of Ghana and the Matrimonial causes Act

[75] Ibid p.164

[76] Ibid p. 129

Since Ghana gained independence in 1957, three military coups d´état have subverted the constitution in function.[77] The current constitution is the constitution of the Fourth Republic, which entered into force on January 7th 1993.[78] Accordingly, unless otherwise mentioned, any reference made to "the constitution" in this dissertation refers to the 1992 constitution of Ghana.

The Constitution is "the supreme law of Ghana and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void", c.f. article 2 of the constitution. The entire chapter 5 of the constitution is an enshrinement of the fundamental human rights and freedoms of the people of Ghana, and the constitution´s article 22, which entreats parliament to enact legislation regulating the property rights of spouses, is placed under chapter 5. Because of this, the constitution served as a rich source of law and also a rich source of information about the extent to which the written supreme laws of Ghana seek to protect the matrimonial property rights of Ghanaian women.

Ghana´s matrimonial causes Act of 1971 served as a good starting point with regard to the sources of law I used. It was after I read it and found that it has no statutory legislation on how marital property is to be divided upon divorce that I shifted my focus to other sources of law.

1.7.1.2 Case Law

As mentioned in chapter 1.6, case law is an essential source of customary law in Ghana. Since there is no formal legislation on how marital property is to be divided upon divorce, consulting and analyzing relevant case law was the only way of finding out what the courts

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[77] The first republican constitution of 1960 was overthrown in 1966, the second one of 1969 was overthrown in 1972 and the third republican Constitution of 1979 was overthrown in 1981. Quansah (2011) p. 130

[78] Ibid p. 133.

use as a starting point when deciding on such cases. In the course of my research, I read and analyzed 31 cases on property settlement upon divorce decided by the Superior Courts of Judicature, i.e. the High Courts, Appeal Courts and the Supreme Court. Not all the cases I read are mentioned due to the limited framework of the study. However, the cases that have played pivotal roles and served as turning points in the history of property settlement by the courts are mentioned.

1.7.2 International Conventions

The question of to what extent Ghana can be said to be meeting or breaching her international women´s rights obligations is an essential part of this dissertation (see chapter 5). Consequently, the CEDAW, which is the most comprehensive convention, aimed at protecting the rights of women is one of the legal frameworks of this study.

It can be argued that the *travaux preparatoires* (preparatory works) of a convention can give indications or some guidelines as to how the convention is to be understood. However, Elgesem[79] contends that the *travaux preparatoires* of a treaty are often not to be accorded much weight when interpreting the treaty. He argues that that explanatory reports prepared by expert groups on the other hand, have a special status and are to be considered as part of the "context" as described in article 31 (2) of the 1969 Vienna Convention on the Interpretation of Treaties. In accordance with Elgesem´s line of thought, I found out after consulting some of the travaux préparatoires of the CEDAW that they give an insight into what the contracting parties meant when they were signing the convention, but do not give specific guidelines as to how the convention is to be interpreted. Thus, extensive use has been made of explicative documents such as the CEDAW committee´s[80] general

[79] Elgesem (2003) p. 5

[80] The CEDAW Committee is the body of independent experts that monitors implementation of the CEDAW, c.f. article 17 of the CEDAW. It consists of 23 experts on women's rights from around the world. States Parties to the CEDAW are obliged to submit regular reports to the Committee on how the rights of the Convention are implemented, c.f. article 18. During its sessions the Committee considers each State party report and addresses its concerns and recommendations to the State party in the form of concluding observations, c.f. article 20.

recommendations and the general recommendations of other related conventions in my effort to answer some of the questions raised in chapter 5 of this study. This is in accordance with article 31 (2) a of the Vienna convention (1969) [81] which states that "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty" shall be regarded as part of the context of the treaty.

According to article 31 (3) c of the Vienna convention, another means of interpreting a convention is by applying "rules of international law that are applicable in the relations between the parties". Other multilateral treaties are considered as some of such applicable rules.[82] In order to be applicable, these rules must be rules that pertain to what the term of the treaty is about, and they must be in force at the time the treaty is being interpreted.[83] In light of this, the Maputo protocol, which in many ways can be considered as the African version of the CEDAW, and other conventions ratified by Ghana, which can throw more light on the CEDAW and its interpretation have also been applied. Examples of these are the UN Declaration On Human Rights, the UN Charter, the International Covenant on Economic, Social And Cultural Rights and the International Covenant on Civil and Political Rights. These conventions have only been used to throw more light on the CEDAW. The aim has not been to use them as the main legal framework for this study.

1.7.3 Legal textbooks and International Human Rights Literature

Many legal textbooks and literature on international human rights have served as sources of law in this dissertation. This is because the arguments the writers provide, though they

[81] Ghana signed this convention in 1969 but has not yet ratified it. Thus, because Ghana ratified the CEDAW in 1986, applying the guidelines fleshed out in the Vienna convention can be said to be in accordance with article 4 of the convention, which states that the Convention applies only to treaties that are concluded by States after the Convention entered into force with regard to such States.

[82] Villiger (2009) p. 433

[83] Ibid.

cannot be regarded as sources of law in themselves, are often of help to adjudicators when they are deciding on cases.[84]

1.8 Legal Empowerment and Structure of Thesis

This dissertation is divided into six chapters. In chapter 3, I make an effort to determine what the rule of law regarding property settlement upon divorce is in Ghana per today by analyzing and interpreting relevant case law on the subject matter.

As already observed, part of this research lies between the disciplines of law and sociology. The concept of legal empowerment as defined above (see 1.1) relates to the issue of using legal mechanisms to ensure that women get what they are rightfully entitled to. It is therefore built on the supposition that there is a difference between having the right to something, and actually getting what one is entitled to. In order to make a compelling case for the use of formal legislation as the best way of legally empowering Ghanaian women with regard to their marital property rights upon divorce, it is essential to clarify the extent to which such formal legislation is necessary.

Accordingly, the topic of discussion in chapter 4 is whether there are cultural and socio-legal realities in the Ghanaian society which hinder women from actually getting the share of marital property they are entitled to, in accordance with the judge-made non statutory rule of law for the division of marital property presented in chapter 3. A positive answer to this question would imply that many Ghanaian women do not in fact get the share of marital property they are entitled to according to the non-statutory rule of law on property settlement upon divorce, and that perspectively, there is the need for further legal action. In relation to the objective of my study, this further action would entail the codification of the marital property rights of women, in a way that effectively remedies the effects of these socio-legal realities.

[84] Quansah (2011) p. 17.

Although this aspect of legal empowerment as presented in chapter 4 may depict the need for formal legislation on property settlement upon divorce, it would not necessarily mean that Ghana is legally obliged to adopt such legislation. This is because a claim that Ghana is obliged to make such legislation must have a legal basis. There are two possible legal bases that can be invoked in this regard. These are the Constitution and Ghana´s obligations based on international human rights conventions. The latter is discussed in Chapter 5 where the focus is on the extent to which the lack of statutory laws on property settlement upon divorce in Ghana constitutes a violation of Ghana's obligations in the CEDAW. If it is found that the CEDAW requires Ghana to enact legislation on the subject matter, then it would imply that empowering women with regard to their marital property rights upon divorce through the use of formal legislation is a human right in light of the CEDAW. This would further imply that, the lack of substantive laws on property settlement upon divorce in Ghana constitutes a breach of the CEDAW.

In chapter 6, I present my observations and conclusions after conducting my research. Possible challenges that may be faced in an effort to effectively implement future statutory laws on property settlement upon divorce are also discussed in this chapter. Furthermore, I present future prospects for research in this area.

In my effort to answer the questions that are raised in chapters three to five, I had to apply a variety of methodological approaches. Consequently, chapter 2 of the study is a chapter devoted to presenting the different methodological approaches that were used to accomplish this study. Some ethical and social challenges I faced during the research are also discussed in this chapter.

2 RESEARCH METHODOLOGY

2.1 Introduction

As mentioned above, different methodological approaches have been used in accomplishing this research. The data for this research was gathered from both written and oral sources in Ghana as well as literature in Norway. In my effort to determine what the current rule of law on marital property upon divorce in Ghana is per today, which is presented in chapter 3, I had to find relevant case law and apply legal research methodology in analyzing and interpreting them.

In chapter 5 which is the international human rights chapter, where I discuss the extent to which the lack of legislation on property settlement in Ghana constitutes a breach of the CEDAW, I make use of methods of interpretation of human rights treaties as established in international customary law. This is presented in chapter 5.3 of the study.

This project could not have been carried out without empirical research. Thus, I was in Ghana from the period 29th November to 29th December to gather relevant empirical data as part of the study. The findings of this empirical research are presented in chapters four and six. Sections 2.2 to 2.4 of this chapter seeks to give a presentation of how I used generally accepted methods of data collection and data analysis to carry out my empirical research.

2.2 Pre-research Arrangements

I started preparing for my research by reading the scanty literature on the rights of women in Ghana I found here in Norway. In order to broaden my horizon I also read a lot on women´s rights in Africa in general.[85] A more concrete research was carried out when I went to Ghana. I contacted some people through telephone calls and emails, who put me

[85] Bowman (2003), Hellum (1999) and Banda (2005) proved very useful in this regard.

into contact with some of my key respondents before I arrived in Ghana. This facilitated the commencement of my empirical research.

2.3 Data Collection Methods

The data for this dissertation was collected through analysis of relevant material gathered through interviews, case law, and other written documents. Because these methods were rich sources of material and information for my research, I deemed them relevant for the study.

2.4 Types Of Data

2.4.1 Primary Data - Qualitative Interviews

My primary data was gathered through qualitative interviews[86] conducted in Ghana. By interviewing some carefully chosen people, I got answers to the questions I had regarding the legal and social issues pertaining to the matrimonial property rights of women upon divorce in Ghana.

2.4.1.1 Choosing Respondents – Sampling

I interviewed three categories of respondents: people with expert opinion (this group consisted of people with legal background), academicians (this was a group of highly educated people with different educational backgrounds apart from law) semi-literates and illiterates (this was a group of people who have been through the process of property settlement upon divorce). I made sure I interviewed quite a number of people (in all 19 people) on the topic of my study even though some of the questions could differ depending on what I wanted to find out. This prevented my research from being centered on a few

[86] Interviewing can be defined as a discussion with the goal of gathering information that is relevant for the object of study. Berg (2012) p. 105.

people. I believe this helped strengthen the credibility and reliability of the answers I got from my respondents.

I chose some of my interview respondents because their experiences were of direct relevance to the topic of my research. I thereby applied what some qualitative research methodologists describe as *purposeful sampling.* Purposeful sampling simply means that a researcher chooses a preferred category of people with the aim of obtaining profound "understanding of some phenomenon experienced by" these people.[87] The interviews were mainly centered on the rule of law on property settlement upon divorce in Ghana, and social and family issues relating to it.

2.4.1.2 My Different Categories of Respondents

2.4.1.2.1 Interviews With People With Legal Expertise (Jurists)

I interviewed a total of five lawyers (three women and two men), and a female magistrate who works at the Accra family tribunal. In addition to being lawyers, the three female lawyers were all women's rights advocates working in different non-governmental organizations (NGOs). They therefore overlap between the two categories, and there was no doubt that they had a clear interest in the topic of my research. I interviewed this category of people because they are all legal experts with a lot of knowledge about the matrimonial property rights of women in Ghana. I wanted to find out what people with legal background regard as the rule of law on property settlement upon divorce, given the fact that there are no substantive laws on the subject matter, and the fact that relevant case law pull in different directions. I also wanted to hear their views on the 2012 ruling of the Supreme Court in Mensah v. Mensah [88] and the role it would play in shaping the legal framework on property settlement upon divorce in Ghana. I found their answers essential to the questions discussed in chapters four and six.

[87] Maykut (2004) p. 56.

[88] This case is presented in detail in chapter 3.

Having two male lawyers on my list of key informants was my way of dealing with my standing as a female law student and women´s rights advocate as a potential source of bias in my choice of respondents. This also dealt with the possible bias the female respondents with legal background could represent. My supposition that female lawyers are in a better position to give accounts of the realities on the field certainly influenced my choice of respondents. However, even though the focus of this thesis is on the matrimonial property rights of women, I believe that choosing only female respondents with legal background could have jeopardized the reliability of my data. I therefore deemed it very necessary to hear the viewpoints of people of the opposite sex who are not women's rights activists. Interviewing both sexes of jurists also helped me gain insight into the extent to which knowledge about the legal issues pertaining to the marital property rights of women upon divorce is common amongst male jurists on one side and female jurists on the other.

2.4.1.2.2 Interviews With Academicians With Different Educational Backgrounds

I interviewed nine academicians; five men and four women. I interviewed this category of people because I wanted to hear their views on the Mensah v. Mensah (2012) ruling and social issues relating to women´s marital property rights upon divorce. In a way, this category of people can be regarded as an expert group. This is because even though they are neither women´s rights activists nor legal experts, they are good at criticizing policy. Hearing their views on the object of my study therefore contributed to enriching the findings of my data. Interviewing this category of people was also a way of ruling out any possible bias that could be justified with the fact that I only interviewed people with legal background because I am a law student. I observed that the opinions of this category of respondents differed from that of the jurists on certain themes.

2.4.1.2.3 Interviews With Semi-Literates And Illiterates

This category of respondents consisted of two men and two women who were all divorced. I interviewed them because I wanted to know how they divided their marital properties with their estranged spouses after they divorced. I also wanted to listen to their views on

the Mensah v. Mensah (2012) ruling. This category of respondents represents the ordinary Ghanaian. Thus, my categories of respondents cut across all sections of the society, thereby constituting variation in my respondent sample.

I interviewed more educated people than uneducated people because they were "close at hand" due to the environment I lived in, and due to the fact that I spent a lot of time at the University of Ghana, Legon. I thereby used the *convenient or availability sampling strategy,* which implies that I chose respondents that "are easily accessible."[89] Whether or not interviewing more educated people than uneducated people could have affected the quality of my data is debatable. However, since the issue of matrimonial property rights upon divorce is relevant to both rich and poor, educated and uneducated alike, I do not believe the quality of my work was affected by the biased representation of respondents with regard to education.

I also got to know and interview some of my respondents through earlier respondents. For instance after I had interviewed one women´s rights advocate, she gave me the contact details of another woman who is a prominent lawyer in family law and women's rights, whom I later contacted and interviewed. This method of choosing respondents is in line with the *snowball* sampling strategy as outlined by Maykut. Snowball sampling can be defined as a sampling procedure where "one research participant or setting leads to another".[90]

Even though my interview respondents consist of a variety of people in the Ghanaian society, it must be clarified that my subjects only gave me an insight in the topic of my study. They are not a representative sample of the entire Ghanaian society. Thus, the possibility that a big-scale research with a larger sample of respondents could yield different results cannot be ruled out.

[89] Berg (2012) pp. 50-51.

[90] Maykut (2004) p. 57.

2.4.1.3 The Kind of Interviews Used

I made use of structured and unstructured interviews.[91] This means that I had an interview guide with the questions I wanted to ask my respondents but I had different follow-up questions depending on whom I was interviewing and the kind of in-depth knowledge I acquired as I interviewed the person. By using this interview format, the flow of the discussions differed noticeably depending on the responses of each informant.

2.4.1.4 The Location

The research was mainly carried out in Accra, which is the capital of Ghana. I chose Accra because that is where most of my key informants were to be found. Also, written sources of information about Ghana law were easily accessible in Accra since Accra has many law libraries such as the Faculty of Law library of the University of Ghana, the Ghana Law School library, the GIMPA[92] law library and the Supreme Court library. Because of this, conducting my research in Accra gave me easy access to most of the sources of data I needed.

I always booked appointments with my respondents beforehand and told them about what the interview is about before I went to meet them. This way my respondents were able to prepare for the interviews beforehand so they could answer my questions efficiently. Depending on how much time the respondents had, the interviews lasted between 45 minutes to one and a half hours. I interviewed all my respondents on a one-on-one and face-to-face basis.

Majority of the interviews were carried out in the offices and homes of respondents whilst a few of them were carried out in libraries. An advantage of carrying out interviews in the offices of respondents was that some of the respondents gave me documents they felt would be helpful for my research. Such documents might not have been that easily

[91] Berg (2011) p. 93-110.

[92] Ghana Institute Of Management And Public Administration

accessible if I had not interviewed them in their offices. Interviews that took place in the homes of respondents were often in the evenings, after the respondents had returned home from work and relaxed for a while. Interviewing people in libraries was not that interesting because, even though the interviews took place in the quite corners of the libraries, we had to keep our voices low in order not to disturb others.

The language of communication during the interviews was English but I had to use the local language *Twi*[93] when interviewing my illiterate and semi-literate respondents. My ability to speak both English and *Twi* fluently served as a very important tool for me because I did not need the help of a translator in order to communicate with any of my respondents.

2.4.1.5 My Status As A Researcher: Insider and Outsider Roles

My identity as a Ghanaian-Norwegian and the fact that I could fluently speak both English and a local language (*Twi*) contributed to creating harmony between me and my respondents. Many of them did not regard me as the rich European researcher who had come to study the less-privileged people of a developing country. They spoke at length on the questions I asked them, and I had the impression that they felt I understood them easily. An expression, which was frequently used whenever a respondent shared his or her opinions on a social phenomenon relevant to the topic of my research, was " you know how things are in our culture". This can be said to be one of the advantages of conducting home-based research.

2.4.1.6 Limitations Of The Empirical Research

2.4.1.6.1 Power relations and imbalances

[93] Twi is one of many local languages that are spoken in Ghana.

Some qualitative research methodologists argue that power imbalances can be experienced when researchers from the western world conduct research in the third world. [94] This can either be due to differences in financial and other resources or "perceived differences" between the researchers who might consider themselves "superior" to the participants, and the participants who might deem themselves "inferior "to the researcher.[95] Western researchers are therefore advised not to "reinforce any feelings of low self-esteem" amongst certain participants when conducting research in the Third World.[96]

In the course of my research, I observed that a remark I often got from the male respondents who did not like the idea that non-financial contribution (such as home-making) should be accorded the same relevance as financial contribution during property settlement upon divorce was, "because you have lived abroad for a long time, you think just like them. That is European culture. We Africans are different." Such comments give reason to question whether these male respondents shared their true views with me on the questions I asked them. This is because since they know that Europeans are different from Africans, it could be contended that they probably they gave me answers they knew I wanted to hear instead of expressing their actual opinions. Such comments also gave the impression that I was there to impose on them an aspect of western culture that is a threat to their culture.

2.4.1.6.2 Lack of access to a specific category of respondents

A category of respondents I had the aim of interviewing as I prepared for my research was members of parliament (MPs) and politicians. This is because one of the questions I sought answers to in the course of my research was why there are no substantive laws on property settlement upon divorce in Ghana despite the fact that the constitutions article 22 urges parliament to put such legislation in place. Since MPs and politicians are the people who make the laws, I believe they were the right people to give me the answer to this question.

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[94] Scheyvens (2003) p. 149.

[95] Ibid.

[96] Ibid.

However, during the time of my research, there were ongoing elections and getting a politician to interview proved very problematic. Thus, the answer to this question was sought from my category of respondents with legal background instead, even though none of them was an MP or a politician.

2.4.1.6.3 Quartson v. Quartson (2012)

Another limitation I experienced in the course of my research was that a new ruling, Quartson v. Quartson (2012) (see chapter 3) came out a day before I left Ghana. This ruling deviates from the ruling in Mensah v. Mensah (2012) around which many of my research questions were centered. I could not get a copy of the case because it was still unreported at the time of my departure. A friend sent me a copy of it through email after I returned to Norway. Consequently, I did not get to interview people on this case. I however phoned some of my respondents upon my return to Norway, to here their views on the court´s ruling.

Even though these limitations I faced may have had a negative impact on my primary data, I believe the positive aspects of my research outweigh the negative aspects. This is because amongst other things, there was variation in the choice of my respondents. I had two categories of respondents with expert opinion, and another category with first-hand experience of my object of study. This helps strengthen the validity and reliability of my data.

2.4.1.7 Ethical Issues- Anonymity and confidentiality[97]

Some of my respondents (mostly the male academicians, semi-literates and illiterates) asked that their names be kept anonymous due to various reasons. Also, there were some who did not permit me to record their interviews.

[97] Anonymity refers to the duty of the researcher is to see to it that the identities of her respondents are kept safe if requested by them. The term confidentiality has a wider scope and refers to the fact that a researcher can be trusted with intimate information. Scheyvens (2003) p. 146

I had a general policy to respect the privacy concerns of all my respondents as I prepared for my research. Accordingly, before I interviewed anyone, I made sure I presented myself, who I am, where I am from and the purpose and objective of my research. I also asked for permission from the respondents before I recorded any interview. I informed them that any information I acquired from them would be kept with the strictest confidentiality, and that the information will be used solely for the purpose of the research. This is not something I just said, I also applied it in practice. By so doing, I believe I fulfilled my ethical obligations as a researcher.

2.4.1.8 Storage, Transcriptions And Analysis Of Interviews

The interviews were stored in different ways. I recorded some of them by using the recorder on my mobile phone. Where I was not allowed to record, I took notes from the interviews in a notebook. Other observations I made in the course of my research were also written down in this notebook right away.

I transcribed the recorded interviews by replaying them and writing them down in word documents on my computer. Interview notes from my interview-notebook were also rewritten in word documents in order to keep them safe in the unlikely event of my notebook been misplaced. Having the interviews in text form on my computer made them easily accessible.

In analyzing the data gathered from the interviews, I used the qualitative content analysis[98] approach as defined by various social research methodologists. Content analysis can be defined as "a careful, detailed systematic examination and interpretation of a particular

[98] See Flick (2011) p. 136-139 and Berg (2012) 352-355.

body of material in an effort to identify patterns, themes, biases and meanings".[99] An important aspect of content analysis is "coding". [100]

I started coding my data by first outlining the areas of the interviews that were important for answering my research questions. [101] I did this by first defining what the main themes (the core questions I sought answers to) of the interviews were, and grouped them. I then matched the answers of each respondent to the various themes. This exercise helped me get rid of portions of the interviews that were less relevant,[102] thereby making my data more transparent and orderly. By so doing I could also identify specific patterns of similarities and divergences in the responses of my informants. This helped me generate various theories from the interview data.[103] These findings are presented in chapter 4 of the study.

2.4.2 Secondary Data – Case Law And Other Sources Of Secondary Data

2.4.2.1 Case Law

Case law constitutes a major part of my secondary data. As already noted in chapter 1, I read and analyzed 31 cases on property settlement upon divorce. An analysis of the most important of these cases is given in chapter 3. I got access to these cases through my visits to the Supreme Court library, and the Ghana law school library where I found a book with a compilation of summaries of some of the major cases on property settlement upon divorce in Ghana.

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[99] Berg 2011: 349

[100] Birks (2011) p. 93 defines coding as "an active process drawn from the real field of investigation, the researcher´s knowledge and experience" and existing concepts. Coding helps the researcher to "identify conceptual reoccurrences and similarities in the patterns of the participants´ experiences.

[101] This is suggested by Flick (2011) p.136.

[102] Flick (2011) p. 136 describes this as *summarizing content anlysis*

[103] This is an aspect of the grounded theory approach as described by Glaser and Strauss.Grounded theory is defined by Glaser and Strauss as "the discovery of theory from data (which is) systematically obtained and analyzed…" Glaser (1967) p. 1. The grounded theory approach has many aspects but not all of these aspects are applied in this study.

2.4.2.1.1 Method Of Analysis Of Case Law

Most of the cases that have served as sources of data for this dissertation are cases on property settlement upon divorce in Ghana. This is because they are directly relevant for my research. However, as will be observed in chapter 3, some of the cases presented are about property settlement upon the death of a spouse (the husband). This means that in its strictest sense, those cases fall within the domain of inheritance law. However, I used these cases because the statements by the courts in them have served as precedents for subsequent cases regarding property settlement upon divorce.

When analyzing these cases, I focused on what the judges based their arguments on and how they reasoned in order to arrive at the conclusions they arrived at. Usually, when judges are deciding on a case, they use the formal written laws as a starting point and interpret these laws by retrieving arguments from other sources of law such as legislative instruments and earlier rulings. However, since there are no written statutes on property settlement upon divorce in Ghana, in most of the principal cases on the subject matter, the courts make reference to previous cases, as well as English case law. I therefore had to read some of the cases the courts had referred to in order to interpret the conclusions of the courts in certain cases.

2.4.3 Other Sources Of Secondary Data

Other secondary data in the form of literature, and other written documents were amassed through my extensive use of various libraries in Accra. During my research in Oslo, I made immense use of the various libraries belonging to the University of Oslo. Literature on international human rights and international conventions served as good background reading and good sources of information.

With regard to the interpretation of international conventions in chapter 5, cases from the European Human Rights Court (EHRC) served as invaluable sources of data. The CEDAW committee only gives comments on the shortcomings of member states instead of formally

declaring that the state has breached its obligations in the convention.[104] Because of this, rulings from the European Human Rights Court on to which extent a country can be said to have violated its obligations in an international human rights convention served as a good substitute in this regard.

2.5 Triangulation

By using these different methods and sources of data, I applied what social research scientists refer to as *triangulation*. The term triangulation signifies the examining of things from several perspectives in order to gain a better understanding of the object of a study. [105] For instance, reading relevant case law on the object of my study served as good background knowledge for me when I was preparing the questions I wanted to ask my interview respondents. It also gave me an idea about the kind of relevant literature to search for. By gathering and analyzing relevant information through case law, interviews, and relevant literature, I acquired profound knowledge about various aspects of the realities on the field relating to the marital property rights of women upon divorce.

In order to be able to cross-check the legitimacy of my discoveries, it was essential that I compared the data I gathered from the different sources. For instance, the social perception that a woman´s wealth has no "respect" in the Ghanaian society and that many women prefer to give their money to their husbands to acquire property (see chapter 4) is information I gathered by interviewing some respondents. I later read about this in literature on women´s rights[106], and also in the facts of some relevant case law. By so doing, I could ascertain the validity of the information I acquired from the interviews by reviewing it in light of the other sources.

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[104] Hellum (1999) p.117.

[105] Denscombe (2007) p. 134.

[106] See Kuenyehia (2003) on *Women And Law In West Africa*

3 THE RULE OF LAW ON THE DIVISION OF MATRIMONIAL PROPERTY UPON DIVORCE IN GHANA PER TODAY

3.1 Division of marital property according to the constitution

The constitution has given parliament the authority to make laws that give spouses equal access to jointly acquired property during marriage, and an equitable share of such property upon divorce.

Article 22 of the constitution states:

" (2) Parliament shall as soon as practicable after the coming into force of this constitution, enact legislation regulating the property rights of spouses.
(3) With a view to achieving the full realization of the rights referred to in clause (2) of this article
(a) spouses shall have equal access to property jointly acquired during marriage
(b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."

It is important to draw attention to the fact that even though the Constitution is a major source of law in Ghana, a constitutional provision that addresses the legislature is, as a main rule, not to be directly applied by the courts in the judicial determination of the applicable law on a subject matter. Thus, in article 22, the Constitution is only telling parliament what needs to be done with regard to marital property settlement upon divorce. The Constitution is specifically asking parliament to make statutory laws on the subject matter. Until that has been done, the legal subjects cannot depend upon what is in the

Constitution. [107] Until the relevant statutory laws are in place, the courts will only take into consideration the existing laws, see 3.2, and the rulings of the courts, see 3.3.

However, according to the Supreme Court, the courts can to some extent rely on constitutional provisions that address the legislature "especially in cases where the inaction of Parliament results in the denial of justice and delay in the realization of constitutional rights."[108] Since article article 22 clause (2) talks about "regulating the property rights of spouses", the courts have regarded these rights as "constitutional rights" in this sense. Accordingly, article 22 has been applied directly in some of the court´s rulings on property settlement upon divorce. It is therefore necessary to discuss the constitutional provisions on the subject matter as outlined in article 22 of the constitution.

Worthy of attention is the fact that article 22 (3) litra a and litra b of the constitution address different aspects of marital property. Whilst 3 litra a addresses the rights of spouses with regard to matrimonial property *during marriage,* 3 litra b on the other hand addresses the rights of spouses to such property *upon the dissolution of marriage.* 3 a litra b is therefore the most important aspect of the constitution with regard to the topic of this study.

The wording of article 3 (a) suggests that property that is jointly acquired during marriage should be the common property of spouses. Being the common property of spouses implies that both spouses shall have the same legal access to it and hence the same legal power to manage it (see definition of common property in 1.2.3). Having the same legal access to the property encompasses amongst other things, the same rights to use, sell or rent out the property.

Article 3 (b) on the other hand, suggests that both spouses are to get an *equitable* share of *jointly acquired property* upon divorce. The wording of this article (and to some extent

[107] Benson (2012)

[108] Quartson v. Quartson (2012) p. 11. This case was unreported at the time of my research so the numbering may of the pages are mine.

article 3 (a)) brings to the forefront the question of what is to be regarded as jointly acquired property. Put differently, in what ways should a property be acquired in order for it to qualify as a *jointly acquired property?* Another question article 3 (b) raises is the question of what is to be regarded as an *equitable* share of marital property. Since the Constitution does not give a further explanation of what is to be regarded as *jointly acquired property* and *equitable* share of property, the next question is whether the answers to these questions can be found in formal legislation.

3.2 Division of marital property according to the matrimonial causes (MCA)

As already noted, Ghana´s Matrimonial Causes Act (Act 367) delegates the responsibility of property settlement upon divorce to the Judiciary. According to section 20 of Act 367,

"(1) The court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof, as part of financial provision as the court thinks just and equitable.

(2) Payments or conveyances under this clause may be ordered to be made in gross or by installments".

According to the Supreme Court, this implies that in a divorce case, the division of marital property is "left to the good sense and judgment of the court".[109] In other words, the court is to use its own wisdom to divide marital property between spouses in a way that it finds "just and equitable."
Hence, neither the constitution nor the law specifies which conditions that must be fulfilled in order for a property acquired in the course of marriage to be regarded as the *jointly acquired* property of both spouses. The answer to this question and the question of which

[109] Achiampong v. Achiampong (1983) p. 1021.

requirements that must be met in order for a specific share of jointly acquired property apportioned to a spouse to be regarded as *equitable,* must therefore be sought in relevant case law.

The fact that the division of property is left to the wisdom of the courts does not necessarily mean that spouses do not have any legal protection with regard to matrimonial property upon divorce. This is because ”in exercising (their) discretion, the court would have to be guided by law; the discretion (in article 22 of Act 367) meant sound discretion guided by law, not vague, arbitrary or fanciful”.[110]

Accordingly, the courts have in the course of the years at least developed “guidelines” that are to be followed when dividing marital property between estranged spouses. The question I endeavor to answer in this chapter is whether the courts have developed these guidelines into a binding rule of law that is applicable in the determination of ownership of property upon divorce. An analysis of the different principles that have been laid down by the courts in the course of the years is an essential exercise that must be undertaken in this respect. The goal is to draw a conclusion as to which of the principles that can be regarded as the rule of law pertaining to property settlement upon divorce per today.

3.3 Principles for division of marital property laid down by the courts

The Supreme Court has stated in its 2012 ruling in Mensah v. Mensah [111], that three different principles have been established regarding property settlement upon divorce in Ghana since 1959. These are:

- The Customary Law principle
- The Substantial Contribution principle and
- The Equality is Equity principle.

[110] Ibid.

[111] In Mensah v. Mensah (2012), the supreme court presented a ”historical case law development” on property settlement upon divorce. See pages 11 to 18 of the ruling. This case was also unreported at the time of my research. Thus, the numbering of the pages are mine.

A fourth principle, which is the Jurisprudence of Equality principle, was established in Mensah v. Mensah (2012). These principles will be discussed one after the other in the following in my endeavor to find out the conditions that have to be fulfilled in order for a marital property to be regarded as the jointly acquired property of spouses, and what is regarded as an equitable share of marital property upon divorce.

3.3.1 The Customary Law Principle For Property Settlement Upon Divorce

The facts of the case of Quartey v. Martey (1959) [112] in which the courts established the customary law principle for property settlement upon divorce are as follows:

H.A Martey and Evelyn Quartey were farmers who were married under customary law for 25 years before Martey died in ….. The land on which they farmed was owned by Martey who had inherited it upon the death of his father. The properties included a house, 70 cattle and cash amount of 1 305 pounds.[113] Quartey who had assisted Martey during his lifetime and given him active assistance in all the jobs he did claimed shares in the properties they had jointly acquired during their marriage. The members of Martey´s family alleged that Quartey had no claim in any of the deceased´s property.

The High Court ruled that Quartey did not have the right to a share in the property she had jointly acquired with her dead husband because:

"…by customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, e.g. farming or business. The proceeds of this joint effort of a man and his wife and/or children, and any property, which the man acquires, with such proceeds, are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or the children. The right of

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[112] Quartey v. Martey (1959) GLR 377

[113] From 1958 to 1965, the currency used in Ghana was the *Ghanaian pound*. Source: http://en.wikipedia.org/wiki/Ghanaian_pound. Accessed: 08.03.2013.

the wife and the children is a right to maintenance and support from the husband and father."[114]

Even though this case falls within the domain of inheritance law, the statement by the court has also served as a precedent for subsequent cases regarding property settlement upon divorce.

From the statement of the court, it can be inferred that Customary Law imposes upon the woman a responsibility to assist her husband to acquire properties. However, her assistance does not give her the right to any share of these properties no matter how significant the assistance may be. Also, the fundamental rule is that a woman´s contribution to the acquisition of property does not count. In the view of the court, Quartey had a duty to assist her husband, and since she merely fulfilled her duty, it did not entitle her to any share in the properties.

It could be argued that the court arrived at this conclusion because Martey owned the land. The question is whether there is reason to believe that he could have acquired the house, cattle and cash if his wife had not helped him to cultivate the land. Worthy of observation is that the courts did not dispute the fact that Quartey had rendered assistance to Martey in his farming business. The most important thing was that her contribution did not count. In the courts view, the long duration of the marriage and Quartey´s unpaid domestic work were of no relevance. Whether or not the courts would have declared Quartey sole owner of all the properties if she were the one who owned the land is also questionable.

The ruling in Quartey v. Martey (1959) was followed in subsequent cases like Adom and Another v. Kwarley (1962)**,** Gyamaah V. Buor (1962), and Ayer v. Kumordzie (1964). Cases after the year 1970 demonstrate a deviation from the customary law principle.

[114] Quartey v. Martey (1959) p. 380.

3.3.2 The Principle Of Substantial Financial Contribution

The principle of substantial financial contribution was introduced in an *obiter dictum* in Gyamah v. Buor (1962). In the *ratio decidendi* of the case, the courts had followed the customary law principle, but in an *obiter dictum* The Supreme Court mentioned that "where the wife´s assistance takes the form of *substantial financial contribution* she will be entitled as of right to a share in the properties acquired by the husband."(My italics)[115] The question then is what is regarded as substantial financial contribution in this sense, and how much should the financial contribution be, in order to qualify as substantial?

Many of the cases that will be used as guidelines to answer this question are cases from before the constitution came into force. However, according to articles 11 (1) litra d and article 11 (4) of the constitution, laws that existed before the constitution came into force are considered as part of the laws of Ghana. Accordingly, since case law is recognized as a source of law in Ghana, using cases that existed before the constitution can be said to be legitimate.

3.3.2.1 Requirements for the establishment of substantial financial contribution

A review of relevant case law shows that, for a spouse´s (in most cases the woman) contribution to the acquisition of marital property to be considered as a relevant basis for joint ownership of marital property upon divorce, :

1. The spouse has to show proof of agreement or clear intention by the spouses to acquire the property jointly,
2. secondly, her contribution has to be "financial", and
3. finally, in order to be regarded as a co-owner of the property, the financial contribtuion has to be "substantial" in relation to the contribution of the other spouse (the man).

[115] *A Casebook on the rights of women in Ghana (1959-2005)* (2006) p. 66.

3.3.2.1.1 Agreement Or Clear Intention

For a contribution to be regarded as contribution to the acquisition of marital property, it is necessary that the spouses have an agreement or a clear intention that the contribution should be regarded as such. This raises the question of what is considered *agreement* or *clear intention*. In the 1974 case of Yeboah v. Yeboah, a wife who had acquired the plot of land on which the matrimonial house was built (but later transferred it into the name of her husband), supervised the building of the house and financed structural adjustments to it, claimed co-ownership of the house upon divorce. The court found that her contribution to the acquisition of the house could not be disregarded, and consequently ruled in her favor.

It was held that "the wife was a joint owner of the house with the husband because judging from the *factors attending to the acquisition* of the house and *the conduct of the parties* subsequent to the acquisition, it was clear that they intended to own the matrimonial home jointly (…) therefore, the wife would be held to be entitled to an equal share in the house with the husband".[116](My italics).

It was also held that "although customary law does not encourage joint ownership of property between persons who are not connected by blood, there is no positive rule of customary law which prohibits the acquisition of joint interests in property between persons not connected by blood. Where there was clear evidence that the parties *intended* to hold the property as joint tenants, the law would give effect to such an intention".[117] (My italics).

From the ruling of the court, it can be deduced that an agreement does not necessarily have to be a formally written agreement or a verbal agreement. The *conduct* of the spouses and the *factors attending to the acquisition* of the property alone could indicate that an agreement had been reached. Consequently, the wife was declared co-owner of the house in the case of Yeboah v. Yeboah (1974) because even though there was no formal agreement

[116] Yeboah v. Yeboah (1974) p. 72.

[117] *A Casebook on the rights of women in Ghana (1959-2005)* (2006) p. 71.

of co-ownership between her and her husband, there was a clear intention on their parts to own the property jointly.

Thus, it can be concluded that according to the substantial financial contribution principle, one of the basis for co-ownership of marital property is that there should be an agreement between the spouses indicating that the property was meant to be their joint property. However, if the spouses had not entered into a clear agreement (which is often the case in Ghana because signing pre-nuptial agreements is not a common practice[118]), it is the duty of the courts to " infer from their conduct in relation to the property what their *common intention would have been* had they put it into words before matrimonial differences arose between them."[119] (My italics). This inference is based on an overall assessment of all the circumstances pertaining to the acquisition of the property, and the court has to make a hypothetical assessment of what the parties *would have intended* if they had entered into an agreement before they acquired the property.

3.3.2.1.2 The Amount Of Financial Contribution By Each Spouse

Even though agreement between spouses or their common intention could give an indication of whether or not they intended to own a specific property together, there could be cases where there is neither a clear agreement between the spouses nor a clear intention on their parts to own a marital property jointly. This raises the question of how to find out whether or not the property was meant to be owned jointly.

In the 1976 case of Abebreseh v. Kaah, Husband (H) and Wife (W) got married under customary law in 1933. They had ten children. H worked was a bookkeeper whilst W was a wealthy trader. When they decided to build their matrimonial home, they agreed that H

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[118] Minkah-Premoh (2012)

[119] See the English case of Ulrich v. Ulrich and Felton (1968) pp. 180-189, cited in Achiampong v. Achiampong 1983 p.1029. This principle was later followed in Reindorf alias Sacker v. Reindorf (1974) and Bentsi-Enchill v. Bentsi-Enchill (1976).

should use his income to pay the children´s school fees, whilst W paid for all the other family expenses. H financed the cement used for the building, whilst W paid for the timber and they both shared the cost of the other building materials. W oversaw the building of the house in addition to helping to carry water to the building site together with their children. W who was an illiterate did not keep account of her contribution. The family moved into the house upon its completion in 1960. In 1969, H died without making a will.

Upon H´s death, a family member of H (who had been appointed as H´s successor by H´s family) sold the house without the consent of W. W alleged that the sale was illegal because the house was a joint property of herself and the dead H and so the house could not have been sold without her consent.

The court ruled that W was co-owner of the house because "the rule of customary law that property acquired by a husband with the assistance of his wife and children became the property of the husband alone took its root from the fundamental principle that the wife and children were dependent upon the husband. That (is) not the case here. Furthermore, the *size of the plaintiff´s contribution* in this case (is) *far more in excess* of the assistance contemplated by the customary law".[120] Consequently, the sale of the house was declared illegal. (My italics)

This gives an indication of how "substantial" a woman´s contribution should be in order to earn her co-ownership of marital property. Her contribution must exceed a contribution proportional to the man's contribution to the family economy.

In the case of Achiampong v. Achiampong (1982-83),[121] husband (H) and wife (W) got married under the Marriage Ordinance in 1951. After they got married, they moved into a two-bedroom house, which H had acquired a loan of 6, 400 ¢ to buy. W had told H before

[120] *A Casebook on the rights of women in Ghana (1959-2005)* (2006) p. 80.

[121] Achiampong v. Achiampong (1982-83) GLR 1017

they got married that she had plans of buying her own house. She had saved 3, 360 ¢, which she intended to use for that purpose. H asked her to use the savings and her monthly salary of 165 ¢ for the upkeep of the family (the family consisted of the couple, two of H´s siblings and a househelp). They agreed that H should spend his salary of 150 ¢ to pay back the loan he used to buy the house. In addition, W had to sell her car because they needed the money to settle the cost of their wedding. After some years, they had to make extensions to the house since the house was too small to accommodate all the five people living in it. The extensions included the building of two new bedrooms, a storeroom, a garage, terrazzo floors in the whole house and the fitting of kitchen cabinets. W had to obtain a loan of 3,000 ¢ from her employers to finance these extensions and renovations.

In 1972, H was appointed as a diplomat to China. W resigned from her work to follow H to China. In China, W worked as a part-time teacher from which she earned 120 ¢ a month, in addition to keeping the home and looking after their children. The marriage broke down when they returned to Ghana.

W claimed joint ownership of their matrimonial home and all their household items whilst H claimed sole ownership of all the properties. The High Court gave a ”consent order” ordering H to pay W a sum of 4 000 ¢. The order did not specify what the money represented with regard to the division of property. Thus, W using article 20 (1) of the Matrimonial Causes Act applied to the High Court again claiming joint ownership of the matrimonial home and all the household items. This time, a different judge ruled on the case and he ruled in favor of W.

H, appealing to the Appeal Court argued that the High Court had misapplied the regulation in section 20 (1) of the Matrimonial Causes Act. He claimed that the court should asked him to give W a sum of money corresponding to her contribution to the acquisition of the properties instead of declaring her co-owner of the house.

The appeal was dismissed. The Appeal Court ruling in favor of W held amongst other things that:

" Quite apart from agreement, where during the marriage a spouse had induced the other to apply his or her income resources for the joint benefit of both of them, and where the earnings or resources in question could be regarded as *substantial contribution* and were so expended in the reasonable belief that he or she was acquiring a beneficial interest in properties purchased by the other spouse, as in the instant case, the court must on equitable principles hold that the spouse who bought the property held the beneficial interest therein as a trustee for himself or herself and the other spouse."[122] (My italics)

Accordingly, the court concluded that "(…) the wife was entitled both in law and in equity to some beneficial interest in all the properties in dispute, absence of agreement notwithstanding. Having regard to *the extent of the plaintiff´s contribution***,** that beneficial interest should be nothing less than a half-share"[123] (My italics).

The court also noted that section 20 (1) of Act 367 mandates the courts "to make an order not only for the payment of monetary compensation (…) but also an order for the transfer of real or personal properties."[124] This statement by the court brings to the forefront the question of whether a woman´s financial contribution to the acquisition of marital property gives her the right to be co-owner of the property, or just the right to reimbursement during property settlement upon divorce. In this case, the court used her contribution as a basis to declare her co-owner of the property.

The cases of Abebreseh v Kaah (1976) and Achiampong v. Achiampong (1983) illustrate that the courts did not regard the ruling in Martey v. Quartey (1959) as a blanket ruling. By using the principle of substantial financial contribution as a fundamental principle, a spouse was regarded as co-owner of matrimonial property first and foremost if the spouses had agreed on it. Secondly, the intention of the parties had to be taken into account if there was

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[122] Ibid p. 1031-1032. The court noted that this perception of trust was first established in English law in Falconer v. Falconer (1970 p. 1336) and Gissing v. Gissing (1971 p.904-905).

[123] Ibid p. 1033

[124] Ibid p. 1036.

no carefully formulated agreement. In the absence of agreement or clear intention, the financial contribution made by each of the spouses was taken into consideration. This implies that contributions made by a woman were not to be brushed aside if it is found to be substantial. If it was proved that the contribution was substantial, then the property was considered the joint property of the spouses, regarding each of them as a co-owner with an equal share of the property, with all the legal rights and obligations it involves, such as the right to administer and enjoy the property.

Even though the principle of substantial financial contribution can be regarded as a positive development that seeks to give women some protection with regard to marital property upon divorce, it can be observed that the women in these two cases were women who worked outside the home and made more money than their husbands. Their contributions were extremely substantial. In addition, they had extra help in taking care of the home. For instance n Achiampong v. Ahciampong (1983), the couple had a house help whilst the couple in Abebreseh v. Kaah (1976), had ten children.[125] Thus, it can be argued that the women in these cases had people who could take care of the unpaid domestic labor in the house like cleaning, cooking, etc. They could therefore work outside the homes in order to be able to contribute financially to the acquisition of the disputed properties.

Thus the question that can be raised in this regard is whether it can be inferred from the substantial financial contribution principle as outlined in these cases that the customary law principle is to be applied also in situations where the woman´s contributions are in the form of non-financial contribution like unpaid domestic chores in the form of cooking and generally taking care of the home.

[125] In Ghana, children who are around the age of 12 or older, have a duty to help with the domestic chores in the home. See *Women And Law In West Africa. Gender Relations In The Family, A West African Perspective (2003) p. 15.*

3.3.2.2 The burden of proof according to the principle of substantial financial contribution

From the conclusion of the High Court in Yeboah v. Yeboah above, it can be observed that the court is not clear as to what the distinction between agreement and intent is, and this raises the question of the importance of intention. It is generally believed that once the parties to a contract have a common intention about the content of the contract, then there is an agreement. The legal fact that a formal written agreement is not an absolute criterion in order to establish that an agreement of co-ownership of property has been entered into, raises the question of who has the burden of proof of mutual agreement. This is because there must be evidence that the spouses actually intended to own the property together, if they did not put it into writing.

The question of burden of proof was clarified in Achiampong v. Achiampong above where the Supreme Court held that " (…) the burden of establishing an agreement is on the party alleging it; and that not every agreement entered into is a contract enforceable by law. (…) once the court finds (…) that the transaction was such that the parties must have intended it to be binding, the court must give effect to it, even though there was no carefully formulated agreement." (My italics).

From this, it can be inferred that if the woman can prove the existence of an agreement, she will also have to prove that this agreement was intended to be the binding legal document regarding ownership of the property. However, in the absence of proof, if an overall evaluation of issues pertaining to the acquisition of property indicated that her contributions were clearly substantial, then she would not be denied joint-ownership of the property.

These cases also raise questions about the significance of the fact that most marital property (especially the matrimonial home) is often acquired or registered in the names of the husbands. As clarified in the court´s ruling in Acheampong v. Acheampong above, the formal ownership of property is not to be used as the deciding factor in declaring ownership of property. How easy it is to prove (especially in a place like Ghana where

property documents are often not registered in electronic databases) that the formal ownership of property does not depict its real ownership gives reason for concern. The reason why property is often registered in the names of the husbands, and the possible effects this practice could have on the implementation of future statutory laws on property settlement upon divorce are discussed in chapter 4.

3.3.3 The Equality Is Equity-Principle[126]

Even though the substantial financial contribution principle to the acquisition of marital property has been used to solve a lot of disputes of property settlement upon divorce in the course of the years, there could be situations where the agreement or intention of the spouses with regard to the acquisition of the property was not clear, and the contribution of one of the spouses could not be identified clearly. The question of how much substantial financial contribution each spouse has made to the property´s acquisition and what should be considered an equitable share to be given to each of the spouses would then arise.

In England, the answers to these questions were first provided in the 1952 case of *Rimmer v. Rimmer (1952)* where it was decided that: " In cases when it is clear that the beneficial interest in the matrimonial home, or in furniture, belongs to one or other, absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention (….), *but when it is not clear* to whom the beneficial interest belongs, or in what proportions, then, in this matter as in others, *equality is equity."*[127] (My italics).

It is noteworthy that *Equity is equality* is a "maxim of equity stating that if there are no reasons for any other basis of division of property, those entitled to it shall share it

[126] The doctrine of equity was developed in English law by the Chancery with the purpose of redressing the injustices of the principles of common law, and dealing with its shortcomings. Equity means fairness. Equity examined the situation of both the petitioner and the respondent in a given case, and the party whose conduct was found to be "inequitable" or whose demands would yield unjust solutions was denied remedy. Ingman (2011) p. 322-323.

[127] Ibid p. 73

equally."[128] Thus, according to English law, the solution to a situation where spouses neither have a clear intention or agreement regarding a specific property, and their financial contributions also cannot be clearly identified, is that that property should be shared equally between the spouses, since this is what will lead to a fair (*equitable)* division of the property.

The principles of equity were adopted in Ghana as part of the country´s colonial heritage, c.f articles 11 (1) litra e and article 11 (2) of the constitution. The question for discussion in this section is the extent to which the maxim of *equality is equity* is applicable in Ghana with regard to the marital property rights of spouses.

In the case of Mensah v. Mensah (1998), [129] it was not disputed that husband (H) and wife (W) both had contributed to the acquisition of their matrimonial home. However, they had also made extensions to the house in the course of the marriage, which according to the Appeal Court was solely financed by W. Upon divorce, H and W each claimed sole ownership of the house.

The High Court declared W sole owner of the house. H appealed to the Appeal Court where it was found that the house was the joint property of H and W but the extensions made to the house were the sole property of W. H appealed to the Supreme Court claiming that he was co-owner of the extensions made to the house as well. The Supreme Court unanimously held that H and W were co-owners with equal beneficial interests in both the house and the extensions. The court stated that:

" there was no evidence that the intention of the parties in acquiring the main house was any different from that in respect of the extension to the house; nor was there any evidence of a prior agreement between the parties that the extensions were to belong solely to one party. In such circumstances, the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on

[128] http://www.oxfordreference.com/view/10.1093/oi/authority.20110803095755518. (Accesed 12.10.2013).

[129] Mensah v. Mensah (1998-99) SCGLR 350

divorce; because the ordinary incidents of commerce have no effect on acquired property during marriage". [130]

From this statement it can be deduced, that the burden of proof has been reversed. In the earlier cases the main rule was that marital property belonged to one of the spouses (in most cases the man) unless the other spouse (the woman) could show proof of co-ownership. In this case on the other hand, the court made co-ownership of property the main rule, and sole-ownership the exception. This implies that it is the spouse claiming sole-ownership who has the burden of proof.

The principle of *equality is equity* as established in Mensah v. Mensah (1998) was later affirmed in the case of Boafo v. Boafo (2005) [131] where a woman who had contributed financially to the acquisition of marital properties was not able to clearly identify her contributions. The court stated that "in cases where the evidence clearly points to a joint ownership, I found no inflexible rule stipulating that a spouse´s inability to clearly identify a contribution automatically disentitles her from a half share." [132] and that "(…) the principle of equitable sharing of property jointly acquired by a married couple would ordinarily entail the equality principle, *unless* one spouse could prove separate proprietorship or agreement of a different proportion of ownership."[133] (My italics)
This ruling indicates that the courts sought after what would give a fair division of marital property, by seeking flexible rules that would yield reasonable results. However, this fair division is subject to the contributions of both spouses (reference the use of the term "jointly acquired")

From the ruling of the courts in the cases of Mensah v. Mensah (1998) Boafo v. Boafo, it can be gathered that in situations where both the intention and agreement between the spouses with regard to the acquisition of marital property was unclear, and where their

[130] Ibid p. 354-355.

[131] Boafo v. Boafo (2005-2006) SCGLR 705.

[132] Ibid p. 716

[133] Ibid p. 711.

financial contributions were also unclear, an equal division of the property was considered as what would yield *equitable* results.

The cases of Mensah v. Mensah and Boafo v. Boafo, which were motivated by the English case of Rimmer v. Rimmer, represent a turning point in the rule of law on property settlement upon divorce in Ghana, where the courts had apparently developed a good and manageable rule of law on the subject matter, based on principles of fairness, with the main rule being that spouses are to share marital properties equally unless proof of a different proportion of ownership was presented. It was nevertheless mentioned in Boafo v. Boafo that section 20 of the Matrimonial Causes Act does not lay down any principles as guidelines regarding how marital property should be divided upon divorce because "the question of what is 'equitable,' in essence, what is just and reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are, therefore, fixed in accordance with the equities of any given case."[134]

The Supreme Court has later interpreted this as a modification to the principle of equality is equity, and the statement has been described by the courts as the "locus classicus and a restatement of the law"[135] on property settlement upon divorce. This is because, according to the courts, the ruling in Mensah v. Mensah (1998) gives the impression that the courts approve of the equal division of marital property in all cases. However, "even though an equal (…) distribution (is) usually a suitable solution to correct imbalances in property rights against women, (it) may not necessarily lead to a just and equitable distribution as the Constitution and Act 367 envisages."[136] Accordingly, the *equality is equity* principle cannot be regarded as the main rule. This is explained further in 3.3.5.

Worthy of observation is that, in the case of Mensah v. Mensah (1998) where the principle of *equality is equity* was first introduced, it was the man in the case who was the weaker

[134] Ibid 714.

[135] Mensah v. Mensah (2012) p. 10.

[136] Ibid p. 18.

party. Mensah v. Mensah (1998) is one of the few cases in which the contribution of the woman was apparently much more than that of the man, but the courts settled for an equal division instead of a division in proportion with the contribution of each spouse. Accordingly, the man benefitted from the reversed burden of proof. Yet, when this same rule of law was to be used to the advantage of the woman in the case of Boafo v. Boafo, a modification was made to the rule. This calls into question whether the woman in the case of Mensah v. Mensah would have been declared a co-owner of the extensions to the house with an equal beneficial interest if it were the man who had solely funded it. This has since not been clarified by the courts and is therefore subject to debate.

3.3.4 The Jurisprudence Of Equity Principle (JEP) – Mensah V. Mensah (2012)[137]

The principle of equality is equity as established in Mensah v. Mensah (1998) and Boafo v. Boafo (2005) has later been regarded by the courts as a ”far reaching” principle that needs to be improved upon. Consequently, a new principle called the Jurisprudence of Equality principle was introduced in Mensah v. Mensah (2012).

In Mensah v. Mensah (2012), Stephen Mensah and Gladys Mensah both had no properties before they got married. Gladys was a petty trader whilst Stephen was a junior accounts officer. They had a farm on which they both worked during the weekends. They sold the proceeds of the farm, which Gladys used as capital for trading. She also got some money from her father, which she invested in her trade. Gradually, they built up their business, which was run by Gladys, and made a lot of profit. At the peak of their business, they were making between 150 to 300 million ¢ a month. The diligent Gladys bought plots of land on which she built several houses. They also bought a number of cars. Stephen was in charge of the accounts. He paid himself 500,000 ¢ every month and paid Gladys nothing.

[137] This case is different from Mensah v. Mensah (1998) but the names are similar because the couples in both cases have similar surnames.

Upon divorce, Gladys claimed she had a 50 percent share in all the property they had acquired. The High court ruled in her favor based on the equality is equity principle. Stephen appealed to the Court of Appeal but the appeal was unanimously dismissed. He then appealed to the Supreme Court. (The statements made by the Supreme Court in this case are very important for the purpose of this study. Consequently, I present a lot of quotes from this ruling than any of the other rulings).

The court, referring to article 22 (3) of the constitution remarked that " it is a sad reflection that since 7th January 1993 when this 4th Republican Constitution came into force"[138] formal legislative guidelines that seek to give spouses equitable shares of marital property upon divorce have not yet been put in place.

Thus it was held that:

" In view of the pride of place that our Constitution has in the sources of law in Ghana, reference article 11 (1) of the Constitution 1992, such fundamental philosophical principles which underpin distribution of marital property acquired during the subsistence of a marriage upon its dissolution should not be glossed over. This constitutional principle is similar to the emerging principle of *"Jurisprudence of Equality"* which is now applicable in issues concerning gender affairs."[139] "Furthermore, the provisions spelt out in article 33 (5)[140] re-enforce the guarantee and protection of all the fundamental human rights contained in chapter 5 of the Constitution 1992 including the property rights of women, economic rights, cultural rights and practices and general fundamental freedoms and others."[141]

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[138] Ibid p. 8

[139] Ibid p. 8.

[140] According to article 33 (5) of the constitution, "The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this Chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man."

[141] Ibid.

The court also observed that "Ghana is also a signatory to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). (...) article 5 of CEDAW adds a key concept to international equal protection analysis; the need to eradicate customary and all other practices, which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women. On the basis of the above conventions and treaties and drawing a linkage between them and the Constitution 1992, it is our considered view that the time has indeed come for the integration of this principle of *"Jurisprudence of Equality"* into our rules of interpretation such that meaning will be given to the contents of the Constitution 1992, especially on the devolution of property to spouses after divorce. Using this principle as a guide, we are of the view that it is unconstitutional for the courts in Ghana to discriminate against women in particular whenever issues pertaining to distribution of property acquired during marriage come up during divorce. There should in all appropriate cases be sharing of property on equality basis."[142]

According to the Supreme Court, the jurisprudence of equity principle has been defined as *"the application of international human rights treaties and laws to national and local domestic cases alleging discrimination and violence against women."*[143] The court noted that the objective of this principle is to ensure that " women will no longer be discriminated against and there will be equal application of laws to the determination of women issues in all aspects of social, legal and economic and cultural affairs."[144]

It was further observed that " common sense, and ***principles of general fundamental human rights*** require that a person who is married to another, and performs various household chores for the other partner like keeping the home, washing and keeping the laundry generally clean, cooking and taking care of the partner's catering needs as well as

[142] Ibid p. 24-25.

[143] The court observed that this is the definition adopted by the International Association of Women Judges in their November, 2006 USAID Rule of Law Project in Jordan.

[144] Mensah v. Mensah (2012) p. 24.

those of visitors, raising up of the children in a congenial atmosphere and generally supervising the home such that the other partner, has a free hand to engage in economic activities must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved. This is so because, it can safely be argued that, the acquisition of the properties was facilitated by the massive assistance that the other spouse derived from the other. In such circumstances, it will not only be inequitable, but also unconstitutional (…) to state that because of the principle of substantial contribution which had been the principle used to determine the distribution of marital property upon dissolution of marriage in the earlier cases decided by the law courts, then the spouse will be denied any share in marital property, when it is ascertained that he or she did not make any substantial contributions thereof. It was because of the inequalities in the older judicial decisions that we believe informed the Consultative Assembly to include article 22 in the Constitution of the 4th Republic."[145]

Accordingly, it was concluded that " even if this court had held that the petitioner had not made any substantial contributions to the acquisition of the matrimonial properties, it would still have come to the same conclusion that the petitioner is entitled to an equal share in the properties so acquired during the subsistence of the marriage. This is because this court recognizes the valuable contributions made by her in the marriage like the performance of household chores referred to supra, and the maintenance of a congenial domestic environment for the respondent to operate and acquire properties. Besides, the constitutional provisions in article 22(3) of the Constitution 1992, must be construed to achieve the desired results which the framers of the Constitution intended."[146]

(…) This court is of the considered view that the petitioner´s contribution even as a housewife, in maintaining the house and creating a congenial atmosphere for the

[145] Ibid p. 9

[146] ibid p. 23

respondent to create the economic empire he has built are enough to earn for her an equal share in the marital properties on offer for distribution upon the decree of divorce."[147]

As already noted (see chapter 2), this ruling is at the core of my research and it formed the basis for my interview questions during my research. The court´s decision can be said to be quite revolutionary, and very good for the marital property rights of women in Ghana. First of all, by introducing the Jurisprudence of Equity Principle, it regards woman´s right to an equal share in marital property as a fundamental human right which women are entitled to, irrespective of the amount of financial contribution they make to the acquisition of the properties. Secondly, it accords household chores the same weight as financial contribution. Thus, it disregards the principle of substantial financial contribution as a requirement for an equal share in marital property. Thus, the decision appears to lay down the same principle that in Norway was established in the Norwegian Housewife judgment (*Husmordommen)* of 1975[148]. (See chapter 5 for a detailed discussion of this case)

3.3.4.1 The Supreme Court´s deviation from the JEP principle in Quartson v. Quartson (2012)

A day before I left Ghana after conducting my research, I was informed that a new ruling, Quartson v. Quartson (2012) had come out and that it deviates from that of Mensah v. Mensah (2012).

In this case, husband (H) and wife (W) were married for 25 years. H was a seafarer and was therefore away for many years. During these years, he gave a lot of money to W to build their matrimonial house. W oversaw the building of the house alone from the foundation level until the house was perfectly built. For a period, H was imprisoned in Liverpool and it was W who took on the responsibility of taking care of their three

[147] Ibid p.25.

[148] Rt. 1975 p. 220. This case is discussed in detail in chapter 5.

children. Upon divorce, W claimed co-ownership of the matrimonial house whilst H claimed sole-ownership. W did not dispute the fact that H alone ***financed*** the matrimonial home.

The High court awarded W an amount of ¢ 35 000 and divided their assets not on an equal basis. The court also ordered her to leave the matrimonial home within 30 days. W made an appeal to the Appeal Court, who dismissed the appeal, but awarded her ¢ 50 000 as financial settlement. She then appealed to the Supreme Court on the grounds that her contribution to the acquisition of the matrimonial home entitled her to an equal share in it.

The Supreme Court[149] held that:

"The decision in Gladys Mensah v. Stephen Mensah (…) is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case. The ruling, as we see it, should be applied on a case-by-case basis, with the view to achieving equality in the sharing of marital property. Consequently, the facts of each case would determine the extent to which the judgment applies."[150]

From the statement of the court, it can be inferred that the facts and equities of each case are to be assessed independently, thereby giving judges a lot of freedom when deciding on such cases, as opposed to the ruling in Mensah v. Mensah (2012) which laid down a lot of principles, giving little room for adjudicators of cases of property settlement to rely on their own discretion.[151]

It was further held by the Supreme Court in Quartson v. Quartson (…) "that on the strength of Gladys Mensah v. Stephen Mensah (…) the wife would be entitled on a share of the

[149] The Supreme Court judges in this case were different from those who presided over the case of Mensah v. Mensah (2012)

[150] Quartson v. Quartson (2012) p. 13.

[151] Ibid p. 16

value of the matrimonial home. The evidence is abundantly clear that she performed her supervisory tasks over the building of the house satisfactorily. Even though she was a housewife, she single-handedly took charge of the household when her husband, the appellant, was incarcerated for years in Liverpool. We would agree with the reasoning in Gladys Mensah v. Stephen Mensah supra that the inability to adequately quantify the appellant's wifely assistance towards the construction and upkeep of the matrimonial home does not in itself bar her from an equitable sharing of the matrimonial property."

This could mean that the courts meant that in the absence of financial contributions, a wife should be entitled to a share of community property (reference the expression *a value of a share of the matrimonial home).* Thus, it was stipulated that the case of Mensah v. Mensah (2012) did not establish the right of a woman to an equal share in community property, but to a certain percentage of it.

Consequently, it was concluded "(…) it must be noted that this court has taken into account the equality principle laid down in Mensah v. Mensah and Boafo v. Boafo, supra. However, as (…) held in Boafo v. Boafo supra, the equality principle may be waived if in the circumstances of a particular case, the equities of the case would demand otherwise. We think that the equities of this particular case do not call for a half and half sharing of the marital home".[152]

Based on this, W was not considered as a co-owner of the house, but she was awarded a financial settlement of ¢ 65 000 ($ 29 000).

As already noted, the Supreme Court in Ghana is not bound by its previous decisions, c.f. article 129 (2) and (3) of the constitution. In my opinion, the Supreme Court in this case did not follow the principle it had laid down in Mensah v. Mensah 2012 that even if the woman had not contributed financially to the acquisition of matrimonial properties, the court would still have concluded that she is entitled to an equal share in the properties because the court recognizes the valuable contributions made by her in the marriage like the performance of

[152] Ibid p. 14.

household chores, etc. It is therefore necessary to make a comparison of the case of Mensah v. Mensah (2012) and Quartson v. Quartson (2012) in an attempt to find out why the court deviated from its ruling in Mensah v. Mensah (2012).

3.3.4.2 Comparison Of Mensah V. Mensah (2012) And Quartson V. Quartson (2012)

In Mensah v. Mensah (2012), it was found that the woman had contributed substantially because the man worked for the government during the day whilst the woman was the one who managed their businesses and supervised the building of their houses. Therefore the properties they acquired in the course of the marriage were acquired with monies, which the man had earned from his work, and monies, which the wife had acquired from the business. In Quartson and Quartson (2012) on the other hand, the woman had not contributed in monetary terms to the building of the house. The husband however was a seafarer and was hardly at home. Therefore the woman solely took care of the kids in addition to building their matrimonial home, which was solely funded by the husband.

Thus the main difference between the facts of these two cases is that the woman in Mensah v. Mensah made substantial financial contributions to the acquisition of properties in addition to performing unpaid domestic chores like cooking, cleaning, etc, whilst the woman in Quartson v. Quartson did not make any financial contributions towards the acquisition of the disputed property. All her contributions were non-financial.

It is not mentioned in Mensah v. Mensah (2012) whether the couple had children. However, the court clearly stated that even if the woman had not contributed financially to the acquisition of the matrimonial properties by trading and running the family business, her contribution alone as a housewife, keeping the home clean and creating a congenial environment for the man to work and make monies was enough to give her an equal share in the matrimonial property. In Quartson v. Quartson on the other hand, it is pointed out that “the fact that a wife has served her husband dutifully, faithfully and responsibly during marriage does not by itself entitle her to a share in the property acquired by the husband”.

In Mensah v. Mensah, it is stated clearly that the woman had contributed directly by performing household chores and that this indirect contribution is what "facilitated the acquisition of properties by the" husband.[153] This implies that there was a direct causal connection between the indirect contributions of the wife and the properties acquired by the husband because the contributions of a wife gave the husband " a free hand to engage in economic activities". [154]

The court did not lay much emphasis on the woman´s household chores in Quartson v. Quartson. It can be argued that since the husband in Quartson v. Quartson was hardly at home, whether or not the woman created a congenial atmosphere or cleaned the matrimonial home was irrelevant for him. Nonetheless, the couple had three children who this woman single-handedly took care of. The question then is whether "raising up of the children in a congenial atmosphere and generally supervising the home such that the (husband had) a free hand to engage in economic activities"[155] whilst staying abroad, was not enough housework for the woman to gain an equal share in the matrimonial home she built alone with the husband´s money. In my opinion, there is a more direct causal connection between these chores the woman in Quartson v. Quartson performed and the amount of time she freed up for her husband, than there is in the case of Mensah v. Mensah.

Thus, the fact that these household chores were not accorded the weight that it was meant to be accorded in light of Mensah v. Mensah indicates that the courts deviated from this principle.

The question is whether the statement the court made in Mensah v. Mensah that household chores alone would have entitled the petitioner to an equal share of property, was a statement they made because they knew the woman´s substantial contribution was enough to acquire her an equal share in the property anyway, irrespective of the role she had played as a housewife. This argument can be fortified with the fact that the court laid emphasis on

[153] Mensah v. Mensah (2012) p. 9.

[154] Ibid

[155] Ibid

the accounts of witnesses, which indicated that she was not a lazy housewife, but had actually contributed financially to the acquisition of the disputed properties.

The statement by the court in Quartson v. Quartson (2012) that Mensah v. Mensah (2012) is not a "blanket ruling, which gives unwarranted access to property" indicates that a woman must still show proof of substantial financial contribution in order to get a share in matrimonial property upon divorce. In other words a woman must contribute in other ways apart from "raising up of the children in a congenial atmosphere and generally supervising the home such that the (husband) has a free hand to engage in economic activities" in order to get a share in marital property upon divorce.

Thus, this if the same Supreme Court (though composed of different judges) that based its arguments mainly on the Jurisprudence of Equity principle and the Constitution 1992 in order to equally divide matrimonial property in Mensah v. Mensah (2012), bases its final argument on the principles of substantial financial contribution in order to waive equal division of matrimonial property in another case, then it indicates that the courts are not ready to value indirect contribution in the form of home-making as a form of contribution to the acquisition of marital property.

From the facts of the case of Mensah v. Mensah, it is obvious that the contribution of the woman extensively exceeded the contribution of the man. The question is whether the courts would have declared the woman co-owner of all the properties if she were the one who had a government job whilst her husband run the businesses. I believe that the woman in Mensah v. Mensah should have been awarded a larger share of the properties than 50 % since her contributions far exceeded that of the husband.

3.4 Conclusion

In light of the ruling in Mensah v. Mensah 2012 and Quartson v. Quartson 2012, the current rule of law on property settlement upon divorce in Ghana can be described as follows:

Where a spouse has made substantial financial contribution to the acquisition of marital property, that spouse will be entitled to an equal share of the property upon divorce. The spouse will become a co-owner of the property with all the legal rights and obligations it entails. However, a home-making spouse (in most cases the woman) who has contributed to the acquisition of marital property solely with indirect contributions such as taking care of the home and performing unpaid domestic duties, will get some compensation depending on how diligently she carried out these domestic duties. In other words, performing household chores and contributing indirectly alone is not enough to give the woman co-ownership of marital property with any percentage.

This further implies that Ghana still relies on the principle of substantial financial contribution, which was established in the 1970s. Accordingly, what is to be regarded as jointly acquired property, and equitable share of marital property according to article 22 (3) of the constitution, will depend on the facts of each case and on the contribution of each of the spouses. Even though the courts have made efforts to establish new principles, it is still quite unclear what the rule of law on property settlement upon divorce in Ghana is per today. What can probably be said for sure is that the customary law principle is no longer the fundamental principle. According to the courts, it "should be regarded as outmoded,"[156] and "cannot be allowed to stand, in this twenty-first century world."[157] Instead, women can be entitled to a share of marital property if and only if they have contributed significantly to its acquisition. Whether or not this current rule of law is what article 22 (3) b of the constitution urges parliament to codify in substantive legislation can therefore not be said for certain considering the fact that the constitution urges parliament to make legislation that will give both men and women an equal share of marital property.

The extent to which this current rule of law effectively secures the matrimonial property rights of women in Ghana warrants further investigation, and is therefore the topic of discussion in the next chapter. This is because it is necessary to find out whether leaving

[156] See Bosfo v. Boafo (2005) p. 711.

[157] Quartson v. Quartson (2012) p.10.

the question of the division of marital property to the discretion of the courts is the best way to ensure the effective protection of women´s matrimonial property interests, or whether there should be legislative guidelines along which the courts shall exercise their judgment in order to ensure the effective protection and advancement of women with regard to marital property upon divorce.

In the next chapter, I discuss certain conditions in the Ghanaian society which indicate that judge-made non-statutory laws may not be sufficient to ensure the effective protection of the property rights of women in Ghana, and that there might be the need for written statutes in order to ensure this effective protection, I this is found to be the case, it will serve as the relevant premises for the discussion in chapter 5 on the extent to which the lack of formal legislation on property rights upon divorce constitutes a breach of Ghana´s human rights obligations in the CEDAW.

4 CAN JUDGE-MADE NON-STATUTORY LAWS ENSURE ADEQUATE PROTECTION OF THE MATRIMONIAL PROPERTY RIGHTS OF WOMEN UPON DIVORCE IN GHANA?

"…to alter the position of woman at the root is possible if all the conditions of social, family and domestic existence are altered."- Leon Trotsky [158]

4.1 Introduction

Findings of my research indicate that the common knowledge amongst Ghanaians is that a lot of women suffer injustice during the division of matrimonial property upon divorce. Ghanaian jurists were however not convinced that the ruling in Mensah v. Mensah (2012) is a ruling that will better the matrimonial property rights of women upon divorce. They believe that the result might differ from case to case and that the *substantial contribution principle* (see chapter 3) is still the main rule. This view was confirmed in Quartson v. Quartson (2012) where the courts acknowleged that the facts of each case would determine the extent to which the judgment in Mensah v. Mensah (2012) will apply.

On this account, and expecially with the rulings in Quartson v. Quartson the courts and other authorities that decide on cases of property settlement upon divorce have been given a legal basis to depart from the principles in the decision of the Supreme Court in Mensah v. Mensah (2012). One consequence of this is that women have no way of clearly predicting their legal position since it all comes down to the discretion of the courts in the particular case. The question is whether this situation where judge-made non-statutory laws govern the devolution of marital property upon divorce, can ensure the adequate protection of the matrimonial property rights of women upon divorce.

[158] Women and the family (1973) p.45 cited in Munoz (2000).

In this chapter I discuss certain conditions in the Ghanaian society which indicate that judge-made non-statutory laws may not be able to provide adequate protection of the marital property rights of women upon divorce and that these rights may have to be provided in written statutes to give women a satisfactory legal basis that will protect guarantee their marital property rights. In chapter 5 the question of whether or not Ghana is obliged by the CEDAW to enact legislation on property rights of spouses upon divorce in order to ensure the marital property rights of women is discussed.

4.2 Conditions In The Ghanaian Society Which Indicate That Formal Statutory Laws May Ensure A Better Protection Of The Marital Property Rights Of Women Than Judge-Made Non-Statutory Laws

4.2.1 The Matrilineal And The Patrilineal Family Systems

Even though there is no clear rule of customary law stating that people not related by blood are not to acquire properties together, Ghanaian customary law does not support the joint acquisition of properties by people not related by blood.[159] Thus according to customary law, it is not advisable for a man to jointly acquire property, (like building a house) together with his wife.[160] A man is supposed to acquire property with his maternal siblings if he belongs to the matrilineal family system, and with his paternal siblings if he belongs to the patrilineal system. This is because they are the people with whom he is related by blood through a common ancestor, (see chapter 1). The same applies to the wife. Because of this, it is very common that in situations where the spouses have acquired a lot of property, the families on each side get involved in the division of property upon divorce, (or upon the death of one of the spouses) to help their kinsman fight for his/her share of the property. Consequently, a spouse who does not have strong family members to fight for him/her (in most cases the woman) ends up leaving the matrimonial home with nothing.

A view many of my male respondents expressed regarding the court´s decision in Mensah v. Mensah (2012) is that if the court´s decision that household chores should be accorded the same weight as financial contribution is made law, it will encourage many men to acquire properties in the names of their family members (maternal or paternal) depending on which family system they belong to.

[159] See chapter 1 and the observations of the courts in Yeboah v. Yeboah (1974) and Abebreseh v. Kaah (1976).

[160] Takyi (2012)

"This will ensure that the property stays in the family and does not go to a stranger[161] in case of divorce," says Dr. Hakeem Ofosu, a medical doctor (28).

Another respondent (anonymous male) (42) said "I am very much aggrieved by the court´s decision in this case. So now I have to register all my properties in the name of my brothers to be on the safer side. How can you say that because my wife has done her duty as a woman in the course of our marriage, she should be given half of everything I have made in the course of the marriage? No, that won´t work".

Such clear remarks from people in my opinion strongly indicate that even though people´s perceptions may have changed to a certain extent today with respect to the traditional perception of family in Ghana due to modernization and urbanization, the belief in matrilineal and patrilineal family systems is so deeply rooted in many Ghanaians that people will find a way around the ruling in Mensah v. Mensah in order to protect the interests of people they regard as family, but also that they would find a way around future legislation on the topic.

Getting the kind of remark I got from a young academician like Dr. Ofosu was a bit surprising since I was expecting the views of people of younger generation to differ from that of the older generation. This indicates that it may be necessary to have thoroughly legislation on property settlement upon divorce. Such legislation should be legislation that takes into account the pro forma situations where men may acquire properties in the names of their siblings in order to keep it from division upon divorce. Thus, such legislation should give women the right to an equal share of all property acquired by the man in the course of marriage even if they are in the names of other family members. This is because, findings of my empirical data indicate that modernization may not lead to any improvement in the position of women when the next generation of men are put in positions that can influence the devolution of marital property upon divorce.

[161] Stranger here refers to the wife since she is regarded as a stranger in relation to the husband and his kinsmen.

4.2.2 The Plurality Of Marital Forms In Ghana

The three different ways by which marriage can be contracted and dissolved in Ghana, presented in 1.5.1 may also imply that it is necessary to put in place a formal statutory law on property settlement upon divorce. As already observed (see chapter 1) "there is nothing called "division of assets" after divorce in customary marriages. Just as they are celebrated at home, they are also dissolved at home. The man just has to give some drinks to the woman´s family and that is it. The woman is not entitled to any share of the property. This applies to the Islamic marriages as well."[162] Many of my respondents expressed this same view.

Putting in place clear statutory laws on women´s matrimonial property rights may encourage many women in customary marriages and Islamic marriages to pursue their share of marital property when they know they have a clear legal basis for it.

4.2.3 Challenges With Regard To Polygamy.

As already noted, (see chapter 1) polygamy is allowed in customary and Islamic marriages. Even with the Ordinance Marriage where polygamy is forbidden according to the criminal offences act, the law is not obeyed and many Ghanaian women believe that the law cannot protect their marriages from becoming polygamous. This is because the law is "disregarded with impunity".[163]

One of my respondents, Ms. Beatrice Brew, a student (27) remarked:

"Even though bigamy is a crime for those married under the ordinance, none of the wives would like to report it to the authorities for the man to be sanctioned. If she does so and the man is arrested, who will take care of her? Who will pay her children´s school fees? That is why polygamy is so prevalent in Ghana even in Ordinance Marriages."

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[162] Takyi (2012)

[163] Svanikier (1997) p. 82.

At the time of my research, there were no discussions or deliberations on the abolishment of the practice of polygamy in Ghana. "It is part of our culture," says Ms. Edna Kuma, executive director of the African Women´s Lawyers Association. She is of the view that polygamy should be abolished but she also recognizes the fact that it will not be an easy task. She noted that it would even be more difficult in the Muslim communities, "because, for them it is not only part of their culture, but also part of their religious belief".

Thus, it may be necessary to make legislation on division of marital property that cuts across all the three marital forms, and takes into consideration the situation of women in polygamous marriages. If the country is not ready to abolish polygamy, then it may have to make provisions in its legislation to protect the rights of women that are in it.

4.2.4 Social Norms

Social norms such as the obligation of children to take care of their parents in their old age could also suggest the need for formal legislation on property settlement upon divorce. This is because the main purpose of marriage in the Ghanaian society is to have children.[164] Having children helps to strengthen the marriage and children have a duty to take care of their parents when they grow old.

A female respondent (anonymous) (age 37) said, "My main worry after I got divorced was the education of my children. How was I going to pay for their school fees? You know school fees are very expensive these days. But when he (referring to her ex-husband) agreed to pay their fees, I was relieved. That was the most important thing for me. I really do not care about property as long as the future of my children is secured."

According to magistrate Gandedzie,

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[164] *Women And Law In West Africa. Gender Relations In The Family, A West African Perspective* (2003) p.27.

"Most women say that as long as the man will take care of the children and pay their school fees to ensure they get good education and a good future, they know their children will come back and take care of them in future. So these women do not have any interest in fighting for matrimonial property. They even fear to take it to court. There are cases of situations where after the man´s death the children go to bring the woman back to the house. Most of the women who bring their cases to the courts and family tribunals do so when the man refuses to take care of the children or throws the children out of the house. They never ask about the division of assets. Some of them do not even know that they have the right to demand a share in the matrimonial property. All they care about is their children."

This indicates that many women care less about matrimonial property upon divorce because upon the dissolution of marriage, the welfare of their children is the most important thing for them.

Another common perception in the Ghanaian society is that women who earn more than their husbands or who are wealthier than their husbands do not respect them.[165] Because of this, "in the Ghanaian society, a woman´s money has no respect no matter how wealthy she is. A woman who is wealthier than her husband will be called all sorts of names by the society. So even if a married woman is wealthier than her husband, she would like to give her wealth to her husband, in order to give the impression that he is the owner of the wealth. That way both she and the husband get respect", says Ms. Harriet Takyi.

This statement by Ms. Takyi can be seen in some of the cases presented in this chapter, such as the case of Yeboah v. Yeboah (1where the woman transferred the plot of land she had acquired into the name of her husband) and the case of Mensah v. Mensah (2012) where all the properties were acquired in the name of the husband even though both spouses had contributed to its acquisition. This suggests that future legislation on property settlement upon divorce should be formulated in way that takes this social phenomenon

[165] Ibid p.21.

into consideration, so women do not lose financially because they have given their money to men to acquire properties.

Magistrate Gandedzie who cited the example of her sister also made this same point. She said "I have a sister who got a lot of money and wanted to buy a plot of land. Instead of buying it herself, she gave the money to her husband to buy the land. When the man bought the land, he registered it in his own name, without stating his wife as co-owner. Now, in the unlikely event of a divorce, how is my sister going to prove that the land actually belongs to her? There are a lot of women facing a similar situation here in Ghana because of our social norms. In such a situation, the men do not care when their wives want to divorce them. This is because they know the court works with evidence."

Such social beliefs and norms indicate that clear legislation on property settlement with rules of evidence that takes such social realities into consideration is needed to ensure the effective protection of the marital property rights of spouses. Such legislation may help many women leave oppressive marriages and make them economically capable of taking care of their children so they may not have to be dependent on their alienated husbands for the upkeep of their children upon divorce.

4.2.5 Religion

In Ghana religion plays an important role in the lives of the majority of the people. A consensus from the year 2000, shows that 69 % of the population was Christians and 16 % was Muslims, while 7 % followed the traditional African beliefs.[166]

One of my respondents Mr. Samuel Antwi (30) observed that,

[166] *Europa Regional Surveys of the World. Africa South of the Sahara 2012* (2012) p. 584

"Many Ghanaians especially the women, are ultra-religious and have the tendency to ascribe all their troubles to supernatural forces. So, rather than using the justice system, most women prefer to "leave everything to God" to judge the case in heaven. Taking one´s own spouse to court in relation to the division of marital property may also attract negative comments from fellow worshippers, or might be contrary to "the word of God". This being the case, many would prefer to leave everything to God."

If there is clear legislation on what each spouse is entitled to upon divorce, it may be easier for people to understand that there is nothing negative about claiming what rightfully belongs to oneself. People might not even have to access the legal system in the first place if they already know what they are entitled to, based on the written statutory laws.

4.2.6 Educational Barriers And The Lack Of Access To Information.

English is the formal language used in Ghana. However, a 2008 survey by the Ghana Statistical Services indicates that only 51 percent of adults in Ghana can read and write in English.[167] This means that about 49.9 % of the population can't read or write in Ghana´s official language. Often, boys are prioritized when a cannot afford the school fees for all the children, while the girls are often obliged to stay at home and help their mothers in their chores learn a trade.[168] This means that a lot of Ghanaian women have little or no formal education. The report states that 6 out of every 10 men are literates whilst only 4 out of every 10 women are literates.[169] Consequently, the ability of women to access information is more limited than that of men. This can easily be a hindrance to the enjoyment of their rights because in general they will be the last group of people to become aware of the passing of any law that seeks to protect the rights of women.[170] The question then is how

[167] Ghana Living Standards Survey (2008) p. 14.

[168] Takyi (2012)

[169] Ibid.

[170] Armstrong (1987) p. viii.

women who have little or no education can be expected to read and understand legal court cases in order to find out what their rights pertaining to marital property are.

Findings of my research show that apart from people with legal background, many people are not even aware that there are no statutory laws on the property rights of spouses upon divorce. None of my respondents without legal background, no matter how highly educated they were, was aware of this. Each one of them expressed surprise when I told them about it. They would then ask; “but what about the intestate succession law?”. I then had to explain to them that the intestate succession law only applies if the marriage is dissolved by the death of a spouse, not when the marriage is dissolved by divorce. It can be argued that people are aware of the intestate succession law because it is codified in the laws of Ghana. Accordingly codifying the law on property settlement upon divorce could help to make the matrimonial property rights of women better known and encourage women to pursue these rights upon divorce.

4.2.7 Lack Of Access To, And Unavailability Of Legal Information

Out of my 19 respondents of which 79 % had higher education, only my respondents with legal background knew about the Mensah v. Mensah (2012) case. This means that only 26 % of my respondents knew about it. None of my respondents without legal background had heard of Mensah v. Mensah (2012). Their reactions to the court´s ruling were a mixture of surprise and disappointment. It may therefore be appropriate to say that a considerable number of Ghanaians may not be aware of the relevant cases on the division of matrimonial property upon divorce. Even the magistrate I interviewed at the Accra family tribunal was not aware of it. How then can women make convincing cases for their share of marital properties when they are not aware of the rights they have?

Unlike in developed countries like Norway where court rulings are available online, legal practitioners in Ghana have to go to the Supreme Court library and pay for the cases before they can get access to them. As of December 2012, the fee for getting access to a case from the Supreme Court library was 10 GHC ($5.2). The cases are not available to everyone.

They are hidden in the Supreme Court library. This might be an important reason why most of the people I interviewed, even though educated, were not aware of the current rulings.

Since decisions from the courts are not easily accessible, having legislation on the subject matter becomes even more important because once the rights are codified in the law, people can easily get access to it. When people are obliged to pay before getting access, it discourages them. All the women´s rights activists I interviewed were of the opinion that the case of Mensah v. Mensah (2012) is a big victory for the rights of women with regard to marital property. However, they also meant that until the ruling is codified in the laws of Ghana, the ordinary woman would not be able to benefit from it. When the cases are not communicated through legal information systems[171], this also makes it easier for the Supreme Court, who is not bound by its own rulings, to deviate from it. (I did not ask my respondents whether they had read or heard about the case of Mensah v. Mensah (2012) in any social media, so it would be difficult to tell whether the ruling could have been communicated to people through the media.

4.2.8 Institutional Barriers

There are also a number of institutional barriers, which may necessitate clear legislation on marital property rights upon divorce. First, the high cost of legal services can discourage women from claiming their rights in judge-made laws. Lawyers are gatekeepers of the courts and can either shut or open the doors of justice. One´s ability to pay for the cost of legal services is therefore very essential. Thus, if a woman is not sure of how the outcome of the case will be, it will be less encouraging to go the way of the courts to claim a right that is provided in earlier court rulings, most especially when the Supreme Court is not bound by its previous decisions. One of my respondents, Mr. Samuel Antwi (30), observed that:

[171] See for instance Bing (2011) pp 1-95 on the importance of publicizing the law through legal information systems.

"It is generally agreed that the right to a speedy trial is integral to justice delivery. However, in Ghana, the red-tape that characterizes judicial proceedings may deter people from accessing the justice system. If therefore women perceive that their cases would drag in the courts, in addition to the fact that they are not sure of what the outcome will be, they may not, from the beginning, go to the courts. The implication is that women´s ability to claim their rights will be constrained".

This indicates that there should be clear legislation on property settlement upon divorce so that women from the start will have a fair idea of what they are entitled to. It will also encourage a lot of men to settle marital property disputes with their estranged wives amicably since both parties will have a fair idea of what they are entitled to from the start.

4.2.9 Administrative Hindrances

Certain administrative hindrances are also the reason why it may be necessary to have clear legislation on property settlement upon divorce in Ghana. Laws can be ineffective because the people or institutions who apply the law refuse to apply it. For instance officials may hesitate to apply a law, which seems to contradict to customary law[172].

An example of this can be seen in the Quartson v. Quartson (2012) case. At the time when the Appeal Court decided on that case, the Supreme Court had already ruled in Mensah v. Mensah (2012) that household chores are to be considered as contribution to the acquisition of matrimonial property by stating that:

" We believe that, common sense, and principles of general fundamental human rights requires that a person who is married to another, and performs various household chores for the other partner like keeping the home…. *such that the other partner, has a free hand to engage in economic activities* must not be discriminated against in the distribution of properties acquired during the marriage when the marriage is dissolved. This is so because,

[172] Armstrong (1987) p. vii.

it can safely be argued that, the acquisition of the properties was facilitated by the massive *assistance* that the other spouse derived from the other"[173] (my italics)

Despite this emphasis by the Supreme Court, it is observed that in Quartson v. Quartson (2012), the Appeal Court refused to follow the precedent laid down in Mensah v. Mensah (2012) stating:

" In the absence of such legislation in Ghana, I am of the considered opinion that domestic services rendered, however important they may be, for now, cannot amount to a contribution by a spouse in a property acquired through the financial resources of the other spouse. I am of the view that if the courts are left on its own to quantify such domestic services without legislative guidance, the result will be judicial chaos in matrimonial suits."[174]

In response to the above statement by the Appeal Court, the Supreme Court held in that:

"In view of the changing times, it would defy common sense for this court to attempt to wait for Parliament to awaken from its slumber and pass a law regulating the sharing of joint property. As society evolves, a country's democratic development and the realization of the rights of the citizenry cannot be stunted by the inaction of Parliament. We do not think that this court is usurping the role of Parliament, especially in cases where the inaction of Parliament results in the denial of justice and delay in the realization of constitutional rights..."[175]

This shows that if the woman in Quartson v. Quartson (2012) had given up after the Appeal Court´s ruling or if she did not have the financial means to appeal to the Supreme Court, she would not have gotten a fair compensation for her contribution to the acquisition of the

[173] Mensah v. Mensah (2012) p. 9.

[174] Quartson v. Quartson (2012) p. 11.

[175] Ibid p. 11-12.

disputed property. This also shows how the lower courts do not always heed to the constitutional requirement of following the Supreme Court on questions of law, c.f article 129 (3) of the constitution.

This further indicates that there may be the need for which clearly spells out how marital property is to be divided. If such a legal framework within which the courts are to operate is put in place, it could contribute to a more unambiguous practice by the courts and make it easier for spouses to predict their legal positions with regard to marital property upon divorce

4.2.10 Economic Barriers (Capitalism And Poverty) And Legal Empowerment

Ghana is a capitalist state. [176] Capitalism can be defined as an economic and political system in which private owners for profit, control a country's trade and industry.[177] According to the founders of Marxism, the general submission of women is based on the private ownership of the means of production and that, the enslavement of women is completely and inevitably connected "to the class structure of society because it can only be defined in terms of male ownership of private property."[178]

" The exploitative capitalist production relations" prevents a lot of women from "directly" working in the public sector.[179] It also undervalues domestic work because, in a salary economy, domestic work has no value that can be quantified by salary.[180] This can be said to be the reason why proof of substantial financial contribution is required by the courts in cases of property settlement upon divorce. This indicates that there may be the need for legislation on marital property, which appreciates the value of domestic work, as observed by the courts in Mensah v. Mensah (2012).

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[176] Darko (2010)

[177] http://www.thefreedictionary.com/capitalism. Accessed 17.10.2013.

[178] Ncube (1987) p. 4.

[179] Ncube (1987) p. 4

[180] Ibid

In addition to being a capitalist state, Ghana is a country where poverty is intense and widespread. The kind of poverty that exists in Ghana is what some writers refer to as "mass poverty". [181] As opposed to "individual" or "case poverty" where a few people are poor in a generally wealthy society, mass poverty is the kind of poverty where being poor is the general thing, and not to be poor is the exemption.[182] Women can be hindered from questing after their marital property rights when they are so poor that they cannot afford accessing the legal system. This can also force women to stay in marriages even if they want to get out.

According to the UN secretary general ´s 2009 report on *legal empowerment of the poor and eradication of poverty*, "a characteristic of virtually all communities living in poverty is that they do not have access, on an equal footing, to government institutions and services that protect and promote human rights — where such institutions exist in the first place. Often, they are also unable to adequately voice their needs, to seek redress against injustice, participate in public life, and influence policies that ultimately will shape their lives." [183]

Furthermore, as already observed in chapter 1, it has been discovered that one of the reasons why women are susceptible to poverty is because of the "unequal distribution of resources within the family."[184] This unequal distribution of resources makes it difficult for women to gain access to resources and makes them economically dependent on men, thereby making them susceptible to poverty.

Having clear legislation on the portion of marital property a woman is entitled to upon divorce will encourage more women to pursue their economic rights upon divorce so they can be economically independent of their husbands. Also when women are given an equal share of marital property upon divorce, it may make it easy for them to get loans from

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[181] Donkor (1997) p. 210.

[182] Ibid

[183] Report of the UN Secretary General A/64/133 (2009) para. 8.

[184] Report of the UN´s Division for the Advancement of women A/62/187 (2007), para 5.

banks[185], which will enable them, establish themselves by starting minor businesses so they can stand on their own feet and not be economically dependent on their estranged husbands

4.3 The Probability Of Statutory Laws Being Put In Place In The Near Future

Because of the above-mentioned conditions which indicate that judge-made non-statutory laws may not provide an adequate protection of the marital property rights of women, the probability of the court´s decision in Mensah v. Mensah (2012) being codified in the laws of Ghana as a step toward ensuring an effective protection of the marital property rights of women upon divorce, was one of the main questions I sought answers to in the course of my research.

The response I got from almost all my respondents was that it will require a lot for this ruling to be codified in the laws of Ghana, mainly because there are more men in parliament than women, and since the objective of the ruling is to improve the marital property rights of women, it is not likely that it will find favor in the eyes of the men in parliament. This was confirmed by Mrs. Sheila Minka-Premoh, one of the prominent members of LAWA Ghana[186] and Ms. Edna Kuma, executive director of the Africa Women Lawyers Association, Ghana branch. These two women have together with the organizations they work for drafted a "property rights of spouses bill" which has been presented before parliament. The bill was drafted in the year 2000 and was presented before parliament in 2008. Since then, nothing has been done about it. Mrs. Sheila Minka-Premoh said:

"Normally bills have to go through four reading processes. When a bill is laid before parliament, it is referred to a committee to review and write a report, and that report is used as a basis for the second reading. After the first reading of our property rights of spouses bill, it was referred to the constitutional, legal and parliamentary affairs committee where

[185] Ibid para 28.

[186] Leadership and Advocacy for Women in Africa, an NGO that has the property marital property rights of women as one of its main concerns.

there was no female and then it was referred to another committee. They had a few women in that committee but you could see that the male attitudes towards the bill was bad, so they never got their report ready. We met lawyers, judges, queen mothers, etc. and collated various views furnished to help them draft their report but the report never came out. So we have done a lot of work on it but we are not making much progress because of the attitudes of the men in parliament."[187]

Ms. Edna Kuma on the other hand observed that:

"Those raising the resistance in parliament are from the matrilineal side because of the inheritance system. And it´s also because parliament is male-dominated. These are the two reasons. The men feel threatened that the women are just coming to take their properties from them. They claim if it is passed then the women are pulling the rag from under their feet."[188]

It can be inferred from this that it is unlikely that the Ghanaian parliament will statutory laws on property settlement upon divorce in the near future even though it has a constitutional obligation to do so. Whether or not Ghana could be obliged by international conventions to put in place such legislation must therefore be clarified. This is the topic of Chapter 5.

4.4 Conclusion

Discoveries from my empirical research reveal that there are certain conditions in the Ghanaian society, which indicate that judge-made laws in the form of case law may not be an adequate medium to ensure the protection of the marital property rights of women. The paramount of these conditions are the plurality of marital forms, the economy, institutional barriers, religious barriers, social norms, patriarchy and administrative hindrances. These

[187] Minkah-Premo (2012)

[188] Kuma (2012)

conditions further suggest that an adequate protection of the marital property rights of spouses may require a codification of these rights in the laws of Ghana. These same conditions indicate that it will require a lot for statutory laws to be put in place that give women equal access to marital property upon divorce. Also, these conditions could signify possible challenges that may be faced in the implementation of a future law on property settlement upon divorce in Ghana.

My empirical research show that many Ghanaians do not seem to find anything wrong with a woman leaving the matrimonial home with nothing after divorce, especially if she did not contribute financially to the acquisition of marital property.[189] However, for people who are interested in the effective protection and advancement of women, law reform is one of several ways through which they can attain their goals.[190] This is because having legislative guidelines on property settlement upon divorce will contribute immensely to the legal empowerment of Ghanaian women with regard to marital property by giving them "the legal tools to proactively shield themselves from" [191] unjustifiable differential treatment during property settlement upon divorce. "Legal empowerment (…) seeks to establish the rule of law and ensure equal and equitable access to justice and tackle"[192] issues from their origin. If the law is obeyed by the society "it can ensure protection for all and can prevent and protect against abuse of authority, bias and"[193] unjustifiable differential treatment of women.

This suggests that the very act of creating rights will contribute to enlightening both policy makers and ordinary citizens.[194] One could argue that for many women, the legal system is out of reach and that laws might not be able to give them the protection they seek in any

[189] source: fieldwork (2012)

[190] Svanikier (2007) p.10

[191] Report of the UN Secretary General A/64/133 (2009) para 9.

[192] Ibid para 5.

[193] Ibid para 6.

[194] Svanikier (2007) p. 10

case. [195] However, law reforms create future possibilities even for the women to whom the legal system may seem inaccessible. [196] Even though cultural or economic constraints may prevent women from knowing or claiming their matrimonial property rights today, unless the rights are enshrined in the law, lack of legislation may place perpetual limitations on their lives as well as the lives of generations that will come after them.[197]

In the words of Ms. Edna Kuma, " the effective implementation of a bill on the property rights of spouses upon divorce will most definitely face some challenges, but if passing the intestate succession bill has contributed to improving the property rights of widows, what shows that a bill on the property rights of spouses will not improve the property rights of women when they get divorced?"

It can also be argued that leaving the division of marital property to the discretion of the courts gives the courts the free room to divide marital property fairly between spouses. However, having laws on the subject matter will give the courts a framework within which they have to operate. This can be very necessary especially in a place like Ghana where the Supreme Court is not bound by its own earlier rulings. When the courts are given the freedom to divide marital property according to their own discretion, it creates inconsistencies in the rule of law and thus does not give the people (especially women), the possibility of predicting their own legal position with regard to marital property. This is because "while statute law can be known in advance, case law can only be known at the same time that it is made. If there is no statutory provision covering a particular legal point, the parties may not know what their rights are until after the judge has decided the dispute between them."[198]

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[195] Ibid

[196] Ibid

[197] Ibid

[198] Ingman (2011) p.126

Furthermore, the principle of the separation of powers enshrined in chapters 8 to 11 of the constitution is met to a larger degree by legislation than by judge-made law.[199] In the words of Ingman, "Parliament *makes* law but does not *enforce* it, whereas judge-made law is enforced by the very people who make it."[200] Giving the Judiciary in Ghana the freedom to make and enforce laws on property settlement as and when it pleases may not entirely be in accordance with the constitutional principle of separation of powers.

Since it has been concluded that non-statutory law is not sufficient to ensure the adequate protection of the marital property rights of women, and Ghana has refused to heed to her constitutional requirement to put statutory laws in place in order to achieve this purpose, c.f. article 22 of the constitution, the question remains whether Ghana could be obliged by international norms to clearly codify the matrimonial property rights of spouses in her national laws. This is the subject of discussion in the next chapter.

[199] Ibid.

[200] Ibid.

5 DOES THE LACK OF SUBSTANTIVE LEGISLATIVE GUIDELINES ON PROPERTY SETTLEMENT UPON DIVORCE IN GHANA CONSTITUTE A BREACH OF THE CEDAW?

5.1 Introduction

The notion of ”state sovereignty” and the ”non-interference ”in the internal matters of the state has always been regarded as an essential principle in international relations.[201] Accordingly, a generally accepted doctrine in international relations is that the state is the primary element, not the individual. [202] Some writers use the term *realism* as an equivalent word for the respect that state interests have, the most important of which are security and state power. [203] The discipline of international human rights has consequently been described as a subject that ”projects liberalism into a realist world”- a world which has otherwise always been controlled by the collective interests of states.[204]

The principle of state sovereignty implies that sovereign states can choose to submit to binding legal schemes in the form of treaties and other supranational legal instruments. This means the sovereignty principle also includes a state´s right to relinquish sovereignty, or place restrictions on its own sovereignty through different kinds of agreements. However, this also implies that every state is sovereign and is only subject to its own will. Thus, each state is only bound by rules it has accepted in accordance with international law.

In this chapter I am discussing the extent to which Ghana is meeting her obligations in the CEDAW with regard to the lack of formal legislation on property settlement upon divorce. The first question in this regard is whether this convention demands that Ghana makes legislation on the division of matrimonial property upon divorce in order to ensure the

[201] Forsythe (2010) p. 218.

[202] Ibid p. 217-218.

[203] Ibid.

[204] Ibid p. 218.

equal treatment of men and women during property settlement upon divorce. If this question is answered in the affirmative, it will mean that Ghana is breaching her obligations in the CEDAW and many of the human rights conventions that she has ratified, which aim at protecting the economic rights of women. A negative answer on the other hand will lead to a question of whether a claim by Ghana that she is not obliged to make such legislation if "other means" can be used to achieve the same purpose, will be upheld, and whether Ghana is actually employing such "other means".

In order to answer the question of whether or not Ghana is obliged by international norms to make formal legislation on property settlement upon divorce, I will first give an analysis of the connection between the problem statement of this dissertation and the idea and concept of international human rights. This will give a better understanding of the issues that will be raised in this chapter.

5.2 The Concept Of International Human Rights In Light Of Women's Rights To An Equal Share Of Matrimonial Property Upon Divorce

Høstmælingen defines human rights as fundamental rights and freedoms that individuals have in relation to state authorities, and which are as a result of international agreements and practices.[205] Thus, he focuses on the role of the government in relation to the citizens, which includes an obligation to enact necessary legislation in order to protect the rights of the citizens. This is in line with article 27 of the Vienna convention on the law of treaties (1969), which states that:

"a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

[205] Høstmælingen (2007) p.27.

Article 27 suggests that a state cannot argue that it is waiting for its legislature to pass laws before fulfilling its obligations in a convention it has consented to. [206] Hence, if it is necessary for a negotiating state to a convention to enact new legislation or modify extant laws in order to perform its duties in the convention, the state has to do so before the convention enters into force. [207] Otherwise, the state runs a risk of being in violation of its conventional obligations. This implies that if it is found that Ghana is obliged to legally empower women with regard to their marital property rights upon divorce in light of the CEDAW, a claim by Ghana that she is s not in violation of her international human rights obligations because the lack of legislation is the fault of her parliament, will not be upheld.[208]

This chapter tends to concentrate on whether the sources of human rights law applicable to Ghana today, especially the CEDAW, impose upon the country a duty or responsibility to put in place substantive legislative guidelines on the division of matrimonial property upon divorce.

Worthy of observation is that "equality before the law" or "non-discrimination before the law" is emphasized in all the different sources of human rights law such as treaties, court rulings, and literature on human rights, and is often included as a criterion in the definition of the term human rights. Many regard equality or non-discrimination as the core concept of the idea of human rights, and hence the advocacy for women's rights to an equal share of matrimonial property upon divorce can be said to be an important demand for equal treatment before the law.

As already noted, (see chapter 2), Ghana has embodied the principle of the equality of men and women with regard to matrimonial property in her national constitution. This is in

[206] Aust (2000) p. 144

[207] Ibid.

[208] Ibid.

conformance with article 2 (a) of the CEDAW. The question remains whether this principle is being applied in practice, or whether it is merely a political principle.

It is important at this point to draw attention to the legal fact that the rights enshrined in human rights conventions can only be materialized if they are integrated into the national laws of the state.[209] In some countries like France and Germany, a treaty can be allowed to be part of the national law without legislation after "it has been concluded in accordance with the constitution and has entered into force for the state." [210] This is called "monism" or "the monist approach".[211] In countries like Norway and the United Kingdom on the other hand, treaties do not have any special position in the national constitution. The rights and obligations provided in them do not have a direct impact on the internal laws of the state unless they are included in the domestic law through legislation. [212] This is called the "dualism" or "the dualist approach." [213]

Dualism is the approach used in the Ghana legal system, c.f. articles 11 (1) b and 106 (11) of the constitution. Even though Ghana has ratified the CEDAW, she has not yet incorporated it into her domestic laws.[214] The question is therefore not which rights the individuals in Ghana can deduce from the CEDAW, but whether Ghana is breaching its obligations under international law. The fact that Ghana has not incorporated the CEDAW in her domestic laws might also contribute to hindering the effective protection of the matrimonial property rights of women upon divorce.[215]

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[209] Ibid.

[210] Ibid p.146

[211] Ibid.

[212] Ibid p. 150

[213] Ibid.

[214] Report by Ghana´s Ministry of Women and Children´s Affairs (2006) p. 4

[215] This is of particular interest because in its reply to the CEDAW committee´s comments on the third, fourth and fifth periodic reports of Ghana on the implementation of the CEDAW, Ghana stated that, as the laws stand per today, "counsel can cite (…) the CEDAW for its persuasive value only and it is not binding on the courts."

5.3 Matrimonial Property Rights Of Women Upon Divorce In Ghana In Relation To The Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW)

5.3.1 Method Of Interpreting International Conventions

The guidelines for interpretation of treaties outlined in the Vienna convention of 1969 are used as a guideline in my effort to interpret the CEDAW in light of the object of my study. This is because these guidelines "enunciate in essence generally accepted principles of international law" which are applied by international human rights courts in their interpretation of human rights treaties.[216]

Elgesem[217] differentiates between three different theories of treaty interpretation. He observes that a treaty can be interpreted based on the *objective theory of interpretation*, where the emphasis is on the analysis of the text, *the subjective interpretation theory*, where the emphasis is on identifying the will of the contracting parties, and *the teleological theory of interpretation* where the emphasis is on realizing the purpose of the treaty. These three approaches do not necessarily contradict each other. This is because it can be safely argued that the will of the parties will primarily be expressed in the text of the treaty, and emphasizing on the purpose of the treaty when its text gives room for multiple interpretations is entirely legitimate. Accordingly, these three theories will be applied in the following in my attempt to interpret the CEDAW in light of the lack of formal legislation on property settlement upon divorce in Ghana.

When interpreting a treaty, the ordinary meaning of its words often serve as the starting point, c.f. article 31(1) of the Vienna convention, which states that "a treaty shall be interpreted in good faith **in accordance with the ordinary meaning** to be given to the terms…" The ordinary meaning refers to how the words are generally understood.[218] This

[216] Golder v. The United Kingdom (1975) para 29.

[217] Elgesem (2003) p. 3

[218] Woxholt (2006) p. 402.

is in conformance with the objective theory of treaty interpretation.

Also, the requirements of the treaty are to be understood "**in their context and in light of their object and purpose**". The context encompasses the whole treaty including its preamble and annexes and other instruments acknowledged in article 31 (2) litra a and litra b of the Vienna convention. This entails applying the teleological treaty interpretation method.

With regard to the subjective interpretation theory, the European Human Rights Court has observed that, "the very essence of the (European Human Rights) Convention is respect for human dignity and human freedom."[219]

The EHR Commission also observed in Wemhoff v. Germany (1968) that:

"it is also necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties."[220]

Based on this, the EHR Commission has for instance interpreted article 6 (1) of the EHRC to include the right to court hearing even though this is not explicitly specified in the article. See the case of Golder v. The United Kingdom (1975) where the Commission stated that " The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally "recognized" fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice". [221] Thus, it was concluded that "it follows that the right of access (to court) constitutes an element which is inherent in the right stated by Article 6 para. 1. This (…) is based on the very

[219] Goodwin v. The United Kingdom (2002) para 90.

[220] Wemhoff v. Germany (1968) para 8.

[221] See Golder v. The United Kingdom (1975) para 35.

terms of the first sentence of Article 6 para. 1 (…) read in its context and having regard to the object and purpose of the Convention"[222]

From the ruling of the Committee, it can be inferred that the main purpose or function of international human rights conventions in general is to protect the rights of individuals. Secondly, in interpreting the conventions, less emphasis has to be laid on the sovereignty of the state and greater emphasis on an objective interpretation consistent with what the Member States meant when signing a convention.

These are regarded as general principles of interpreting human rights conventions. Accordingly, in my effort to interpret the CEDAW in light of the marital property rights of women in Ghana per today, less emphasis will be laid on Ghana´s sovereignty as a state, whilst the focus will be on the purpose of the CEDAW, which according to the preamble is to "adopt measures to required for the elimination of (…) in all its forms and manifestations" and to "achieve full equality between men and women" CEDAW.

5.3.2 Does The CEDAW Require Member States To Accord Indirect Contributions Such As Household Chores, Etc The Same Weight As Substantial Financial Contribution?

The matrimonial property rights of women is enshrined in article 16 (1) of the CEDAW which states that " States Parties shall take all appropriate measures to ensure (…) on a basis of equality of men and women:

(h) The same rights for both spouses in respect of the ownership, enjoyment and disposition of property…"
According to the CEDAW committee´s general recommendation no. 21[223], article 16 (1) h

[222] Ibid para. 36

[223] CEDAW Committee´s Recommendation no. 21 (2004) Available at : http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 02.09.2013

encompasses the economic rights of women both during marriage and at its dissolution.[224]

The question is whether the term " same rights" in respect of ownership of property means the **equal** division of property acquired during marriage, upon divorce. In order to answer this question, article 16 (1) litra h has to be interpreted in light of the above-mentioned general principles that have been established for the interpretation of international conventions.

A synonym of the word "same" is "equal". Thus the ordinary meaning of the term "same rights" is "equal rights". Accordingly, considering the ordinary meaning of the words in article 16 (1) litra h alone, it could be concluded that the CEDAW only requires the state parties to guarantee women an equal share of marital property upon divorce when the contribution from both spouses during the marriage is the same.

However, as already mentioned several times in this dissertation, many Ghanaian women´s contribution to the acquisition of property is often in the form of indirect or non-financial contribution. The question is whether article 16 (1) litra h could imply that a woman should have the right to an equal share of marital property even if she did not contribute financially to its acquisition. In other words, is indirect non-financial contribution enough to earn women an equal share of marital property according to article 16 (1) litra h of the CEDAW?

As already noted, international conventions are to be understood in their context, and the context encompasses the whole treaty, c.f. article 31 of the Vienna Convention, and other articles in the convention are part of the context. According to article 14 of the CEDAW, States Parties *shall take into account* the "significant roles, which rural women play in the economic survival of their families, including their work in ***the non-monetized sectors of the economy"*** (my italics).

[224] Ibid comment 30.

The expression "take into account" suggests that the role women play in the non-monetized sector should to some extent be considered as a form of contribution. The article is silent on how much or to which extent this form of indirect contribution should count. It merely denotes that the non-monetized sector of the economy should not be brushed aside or overlooked c.f. the expression "the significant role". It can be argued that the term "take into account" implies that the non-monetized sector of the economy alone does not necessarily have to amount to an equal share in property acquired during the subsistence of the marriage since this is something that just has to be considered. However, article 14 acknowledges that the role that women play in the non-monetized sector of the economy is what leads to the economic survival of the families. This is because the contribution of the woman in the form of taking care of the children and the home or buy taking care of the family´s consumer expenditure is of great importance since without it, the man cannot go out and work, or save the money he earns in order to acquire properties.

Put differently, the convention recognizes the fact that by taking care of the home and taking care of the family´s consumer expenditure, many women free up time and capital for their husbands to work, earn, and save money. Thus, even though article 14 of the convention does not state to which extent women´s contribution to the non-monetized sector of the economy should count, the wording of the article indicates that it should not be ignored, and that it should be taken into consideration since the purpose of the CEDAW is to ensure that women and men can enjoy economic rights on an equal basis.

The CEDAW committee´s general recommendations no. 21 gives a clear answer to this question by stating clearly that "financial and non-financial contributions should be accorded the same weight".[225] This conclusion was drawn after the committee noted that the great emphasis some countries place on "financial contributions" made with regard to the acquisition of marital property lessens the importance of indirect contributions such" as raising children, caring for elderly relatives and discharging household duties."[226] The

[225] CEDAW Committee´s Recommendation no. 21(2004) comment 32.

[226] Ibid

committee also observed that "often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets." [227]

From this, it can be deduced that the contribution women provide in the non-monetized sector of the economy is to be considered as contribution, which entitles women to an equal share in marital property upon divorce. Accordingly, states that have signed the CEDAW, including Ghana are required to lay equal emphasis on the indirect contributions of women such as home-making, and substantial financial contribution during property settlement upon divorce.

Though not the main object of investigation in this study, it is noteworthy that 16 (1) does not only apply at the dissolution of marriage, but also during the marriage, thereby giving women access to marital property on an equal basis with men to marital property during the marriage.[228] Accordingly, Ghana is not only obliged to ensure that women are not denied the enjoyment of their property rights during the dissolution of marriage, but is also to ensure that women have the same legal rights to common property as men during the marriage. The legal consequence of this as mentioned by the CEDAW committee is that it will increase women´s power to administer "the disposition of the property or the income derived from it."[229] For instance a man cannot sell or dispose of common property (especially the matrimonial home) without the consent of the wife. Based on my interviews and the facts of relevant case law in Ghana, it is my opinion that it may even be much more difficult for women to claim such rights during marriage if they do not have formal legal grounds for it.

Women´s right to an equal share of marital property is also enshrined in article Article 7 (d) of the Maputo protocol which states that States Parties shall (…) ensure that in case of separation, divorce or annulment of marriage, women and men shall have the right to an

[227] Ibid

[228] See article 16 (1) c of the CEDAW.

[229] CEDAW Committee´s Recommendation no. 21 (2004) comment 31.

equitable sharing of the joint property deriving from the marriage. It is important to observe that the word "equitable" does not mean, "equal". It means "fair and impartial".

Thus, article 7 (d) places the rights of men to a fair share of property on the same level as the rights of women without making any exceptions. This indicates that both men and women are to get a fair share of marital property upon divorce regardless of whether they contributed financially or not to its acquisition.

Accordingly, it can be concluded that article 16 (1) h of the CEDAW may be regarded as a conventional establishment of non-financial contribution as a form of contribution to the acquisition of marital property, which is enough to give women an equal share of marital property upon divorce.

This principle that non-financial contribution should be regarded as contribution on equal basis with financial contribution has been established in some countries that have also ratified the CEDAW, like Norway, Sweden, Denmark[230] and Hungary[231]. In Norway, the principle was established in *Husmordommen*[232] (the housewife case of 1975), a ruling, which came out even before, the CEDAW entered into force.

In *Husmordommen*, a couple had been married for 19 years with three children. Their matrimonial home, which was built in the course of the marriage, was financed solely with the man´s income. He also contributed physically to the building of the house. Upon divorce the man claimed sole ownership of the house whilst the woman claimed joint ownership of the house with 50 percent share. The Norwegian Supreme Court ruling in favour of the woman held that:

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[230] Electronic journal of comparative law. Available at http://www.ejcl.org/123/art123-4.pdf. (Accessed 01.10.2013)

[231] Dóci (2003) p.211

[232] Rt.1975 s. 220

"the acquisition of the house was financed with the man´s income and that he had physically contributed directly to its construction, but his wife was fully occupied with taking care of the house and their three young children. In my view, this is what made it possible for the man to put so much work into the construction. When spouses practice such a division of labor, it leads to the wife being cut off from paid work and from any great physical participation in the construction business. The wife can be said to have helped the family get their own home, and legally I find it inappropriate to regard this effort as insignificant in relation to the man's efforts in in the acquisition of the property."[233] (my translation)

With this ruling, the principle that women should be entitled to an equal share of matrimonial property even if they have not contributed substantially to its acquisition was established in Norwegian law. Since then, it has been used in many court decisions and in 1991 it was codified in article 31 (3) of the Norwegian Matrimonial Causes Act (*Ekteskapsloven).* In that case, the court specifically acknowledged "housework" as a form of contribution. The woman provided *indirect contributions* by taking care of their children and the home, making it possible for the husband to provide *direct contributions* by building the house and working and earning money in order to provide the materials used for the building.

"Housework" as mentioned in *Husmordommen* is more specific and limited than "non-monetized sector" as stated in article 14 of the CEDAW. Thus, the convention gives a broader protection since it acknowledges other forms of contribution apart from housework. All the same, housework and other non-financial contributions are still not valued in Ghana and are in light of the latest supreme court ruling on the division of matrimonial property, Quartson v. Quartson (2012) not enough to establish for the woman an equal share in matrimonial property upon divorce. This indicates that Ghana is not ready to take into account the non-monetized sector of the economy, which many Ghanaian women represent, during property settlement upon divorce, thereby violating her obligation

[233] Ibid p. 226.

in article 16 (1) h of the CEDAW.

One of the fundamental criteria regulating the initiation and carrying out of legal commitments is "good faith" [234], c.f. article 31 (1)[235] of the Vienna convention. Good faith demands that signatories to the treaty are sincere, just and rational in relation to the contents of the treaty.[236] When a convention forbids the "abuse of rights", it imposes upon the parties to make sure these rights are protected, and thereby prevents a party from shunning its responsibilities.[237]

Accordingly, the fact that many other signatories to the CEDAW recognize non-financial contribution as a form of contribution to property acquisition in conformance with article 16 (1) h of the CEDAW indicates that countries like Ghana that have also ratified the CEDAW but are not conforming to its requirements are not acting in good faith. This is because they are not honoring the "legitimate expectations"[238] they may have risen in the other signatories to the convention and the international community.

5.3.3 Do Women In Ghana Suffer Discrimination During Property Settlement Upon Divorce?

Since it has been established that non-financial contribution under the CEDAW is to be regarded as a form of contribution that entitles the woman to an equal share of marital property, the question remains whether the current rule of law on property settlement upon divorce in Ghana, which leads to many women not getting an equal share of matrimonial property upon divorce because of the demand for proof of substantial financial

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[234] Villiger (2009) p. 425

[235] See also article 26 on *pacta sunt servanda.*

[236] Villiger (2009) p. 426.

[237] Ibid.

[238] Woxholt (2006) p. 402 (my translation)

contribution, qualifies to be described as "discrimination against women" in light of the CEDAW.

In order to answer this question, the definition of "discrimination" in the CEDAW must be clarified. The prohibition of discrimination in the CEDAW is used as the legal basis because it must first be established whether the effect the current rule of law on property settlement upon divorce as discussed in chapter 3 has on women in Ghana as discussed in chapter 4 is a conventionally unacceptable differential treatment of women, which qualifies as "discrimination" in light of the CEDAW.

The definition of discrimination against women in article 1 of the CEDAW can be summed up as:

Any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms.

From this definition it can be deduced that it is the enjoyment of women´s human rights and fundamental freedoms that the convention seeks to protect. The question is whether women´s right to an equal share of marital property is to be regarded as a human right in light of the CEDAW.

As already noted, the prohibition of discrimination against women during property settlement upon divorce is enshrined in article16 (1) h of the CEDAW. This indicates that women´s right to an equal share of marital property is to be regarded as a human right, since the CEDAW is a human rights convention. This is also in accordance with article 3 of the ICESCR,[239] which states that the states parties are "to undertake to ensure the equal right of men and women to the enjoyment of all economic rights (…)."

[239] International convenant on social, economic and cultural rights.

From the above definition of discrimination against women, it can be inferred that an act must fulfill certain conditions in order to qualify as discrimination against women. These conditions will be presented in the following and discussed one after the other.

To begin with, for an act to qualify as discrimination against women, the act must constitute a differential treatment, which is unjustifiable (*distinction, exclusion or restriction*). The differential treatment must be ”unjustifiable” because, not all not all differential treatments constitute discrimination in light of article 1. [240] This means that for a person to be able to invoke article 1 of the CEDAW, there must be a form of treatment of the person, whether through deliberate action or by way of inaction by the authorities.[241] Also, there should be evidence that men in the same situation have been or would have been treated differently.[242]

Secondly, this differential treatment should be given on the basis of *sex,* which is the prohibited ground for unjustifiable differential treatment according to the CEDAW. This means that the unjustifiable differential treatment should be given to women by virtue of the fact that they are women.[243]

Furthermore, the differential treatment should lead to in women being disadvantaged in the enjoyment of their rights. The enjoyment of their rights should be impaired or nullified *as a result of* this unjustifiable differential treatment.

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[240] An example of this is the use of “preferential treatment or quota systems to advance women's integration into education, the economy, politics and employment”. See CEDAW commitee´s General Recommendation no. 5 (1998) Available at: http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm Accessed 30.04.2013.

[241] Emberland (2006) p. 207.

[242] Ibid.

[243] Depending on its object and purpose, the various human rights conventions each have their prohibited grounds for unjustifiable differential treatment. For instance the ICCPR has race, colour, language, religion, political opinion, etc as its prohibited grounds. c. f article 26 of the ICCPR.

Finally, the differential treatment does not necessarily need to have the objective of putting women in a disadvantaged position, as long as its *effect* yields the same results. This implies that an act or exclusion that neither has the purpose nor effect of impairing or nullifying the enjoyment of rights by women does not qualify as discrimination. In the same way, an act, law or policy which may not have the purpose of preventing women from enjoying their rights will qualify as discrimination if its *effects* impair the enjoyment of rights by women.

From the wording of article 1 of the CEDAW, it can be deduced that these conditions are cumulative conditions. This means that an act must fulfill all these four conditions in order to qualify as discrimination against women in light of the CEDAW. The question is whether the current rule of the law on property settlement upon divorce in Ghana, where spouses (in most cases women) must show proof of substantial financial contribution in order to be regarded as co-owners of marital property upon divorce fulfills the above-mentioned conditions.

The words *distinction, exclusion and restriction* denote the denial of access to something. As mentioned earlier, (see chapter 1) it is mostly women who constitute the non-monetized sector of the Ghanaian economy and the CEDAW committee has stated that "financial and non-financial contributions should be accorded the same weight". However, the current rule of law on property settlement upon divorce does not accord non-financial contribution to the acquisition of marital assets the same relevance as financial contribution. This indicates that the contribution of men is regarded as more important than that of women and therefore constitutes a differential treatment of women during property settlement upon divorce. This differential treatment cannot be said to be justifiable since both financial and non-financial contributions in the family is what sustains the "economic survival of the families" c.f article 14 of the CEDAW.

The reason why it is women who are often affected negatively by the demand for proof of substantial financial contribution can be said to be due to the stereotyped gender-roles in

the society, which in itself is not in conformance with article 5 of the CEDAW. This is reflected in the fact that almost all the cases of property settlement upon divorce brought before the courts, are brought by women who have been denied a share in jointly-acquired marital properties. As presented in chapter 3, relevant case law shows that where it is the woman who has contributed the most to the acquisition of marital properties, the courts divide the properties equally between them and their husbands. (see for instance the case of Mensah v. Mensah 1998 and Mensah v. Mensah 2012). However, if where it is the men who have contributed the most, the women are asked to show proof of their contributions. Thus, it can be concluded that the differential treatment given to women during property settlement upon divorce is done on the basis of sex.

Ghanaian women often find it difficult to show proof of the contributions they may have made to the acquisition of marital assets since most of their work cannot be quantified in monetary terms. Also they may not have receipts of all the consumer expenditure they may have taken care of in the course of the marriage. Furthermore, the only way for women to get an equal share of matrimonial property upon divorce is by going to court. However, many women cannot access the legal system due to factors like economic and institutional barriers (and other factors presented in chapter 4). This results in many women being denied an equal share in marital property upon divorce, thereby leaving them economically destitute.

Consequently, a lot of women are often put in a disadvantaged position with regard to the enjoyment of their marital property rights upon divorce. In light of this, the current legal framework on property settlement in Ghana can be described as having the effect of preventing many women from enjoying their marital property rights.

Accordingly, all the four conditions that must be fulfilled for an act to qualify as discrimination against women in light of the CEDAW, can be said to be fulfilled. It would therefore be just to conclude that the fact that Ghanaian women in most cases do not get an equal share of matrimonial property upon divorce because of the great emphasis that is laid

on proof of substantial financial contribution by the courts, qualifies to be described as discrimination against women in light of the CEDAW. Many Ghanaians attribute the persistence of this form of discrimination mainly to the lack of legislation on property settlement upon divorce.[244]

The question then is whether Ghana is obliged by the CEDAW to make legislation on property settlement upon divorce, or whether Ghana has a freedom of choice with regard to which means to use in order to eliminate this form of discrimination. In other words, can Ghana justify the lack of legislation on property settlement by arguing that other means can serve the same purpose?

5.3.4 Is Ghana Obliged To Use Legislation As The Medium To Ensure Adequate protection of the Marital Property Rights of Women According To The CEDAW?

In order to answer the question of whether or not Ghana is obliged to make legislation on property settlement as the means to eliminate discrimination against women during property settlement upon divorce, one has to look at the means for elimination of discrimination against women that are suggested in article 16 (1) of the CEDAW. This is because it will give a better understanding of whether or not Ghana is using the means she has agreed to use, by ratifying the CEDAW.

According to article 16 (1) of the CEDAW, states are to employ "*all appropriate measures"* in order to ensure the elimination of discrimination against women during property settlement upon divorce.

The use of the term *all appropriate means* suggests that the states have the freedom of choice as to which means to use to eliminate discrimination against women with regard to

[244] This is a view shared by all the women´s rights advocates I interviewed as part of my empirical research. shared

marital property upon divorce. Thus, in light of the wording of article 16 (1), the fundamental principle is that Ghana is not obliged to make legislation on property settlement upon divorce. Ghana can use any means she deems fit as long as it will guarantee women the freedom to enjoy their marital property rights on an equal basis with men.

The question then is whether a claim by Ghana that she is not obliged to make legislation if "other appropriate means" can be used to eliminate discrimination against women during property settlement upon divorce, will be upheld. Whether or not Ghana is employing such "other appropriate means" and to which extent these means will actually achieve the intended purpose, are also other questions that may need further investigation.

5.3.5 Can Ghana Choose To Use Other "Appropriate Means" Instead Of Legislation?

In order to answer the question of whether a claim by Ghana that she is not obliged to make legislation if "other appropriate means" can be used to eliminate discrimination against women during property settlement upon divorce, will be upheld, the term "all appropriate means" in article 16 (1) has to be interpreted in light of the object and purpose of the CEDAW, c.f. article 31 (1) of the Vienna convention. This is because an interpretation of article 16 will give a clearer understanding of whether or not legislation is required even though it is not explicitly mentioned.

As already noted, the overarching purpose of the CEDAW is to eliminate all forms of discrimination against women. According to the CEDAW committee,[245] "the elimination of discrimination against women requires States Parties to provide for substantive as well as formal equality. Formal equality may be achieved by adopting gender-neutral laws and policies, which on their face treat women and men equally. Substantive equality can be

[245] General recommendation on article 16 of the CEDAW (CEDAW/C/GC/29) (2013). Available at: http://www2.ohchr.org/english/bodies/cedaw/docs/comments/CEDAW-C-52-WP-1_en.pdf. Accessed 02.09.2013.

achieved only when the States parties examine the application and effects of laws and policies and ensure that they provide for equality in fact, accounting for women´s disadvantage or exclusion".[246]

The Committee also observes that some countries have adopted constitutions that include equal protection and non-discrimination provisions but have not revised or adopted legislation to eliminate the discriminatory aspects of their family law regimes and that all these constitutional and legal frameworks are discriminatory, and in violation of article 16 and other articles of the convention such as articles 2, 5 and 15. In consequence, the fact that Ghana has enshrined the principle of women´s rights to property upon divorce in article 22 of her constitution but has not adopted any legislation on property settlement upon divorce constitutes a breach of the non-discriminatory provisions of the CEDAW.[247]

From this it can be deduced that article 16 does not entirely give the states the freedom of choice as to which means to use in order to ensure the elimination of discrimination against women during property settlement upon divorce. Legislation is required as one of the means, which the states must use. This implies that legal empowerment is regarded as a human right according to the CEDAW, and Ghana is consequently obliged by the CEDAW to make laws on property settlement upon divorce.

However the word "law" in Ghana can be quite ambiguous. This is because in the Ghana legal system "law" encompasses written statutes, case law and unwritten jurisprudence, c. f article 11 of the constitution. The question is whether "law" as mentioned in the CEDAW only encompasses written statutes.

According to the CEDAW committee, "the preservation of multiple legal systems is in itself discriminatory against women" and that "States parties should adopt *written family codes* or personal status laws that provide for equality between spouses irrespective of

[246] Ibid para. 8.

[247] Ibid para 10.

their religious or ethnic identity or community, in accordance with the Convention and the Committee´s general recommendations".[248] (My italics)

Apart from that, article 7 (d) of the Maputo protocol specifically mentions legislation as the appropriate tool to be used to achieve the equitable division of matrimonial property between spouses upon divorce. This strengthens the idea that legislation is needed not only as one of many other appropriate means, but also as the most essential appropriate means to guarantee the economic rights of women upon divorce.

Furthermore, the Committee on the CESCR[249] has observed in its General Comment no. 16 on article 3 of the ICESCR[250] that " guarantees of non-discrimination and equality in international human rights treaties mandate both de facto and de jure equality. De jure (or formal) equality and de facto (or substantive) equality are different but interconnected concepts. Formal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and particular groups experience. [251] This indicates that the use of formal legislation is of much importance to the international community.

Even though it may be quite unclear whether or not the CEDAW demands that legislation should be used, the fact that Ghana has enshrined the use of legislation in her constitution, indicates that the use of legislation is deemed by the country itself as an essential tool towards eliminating discrimination against women during the division of matrimonial property upon divorce. Thus, the lack of legislation on property settlement upon divorce in Ghana is not only conventionally unacceptable, but it is also unconstitutional.

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[248] Ibid p. 4

[249] Covenant on civil, economic, social and cultural rights.

[250] This article is ablut "the equal right of men and women to the enjoyment of all economic, social and cultural rights"

[251] ICESCR, General Comment No. 16 (2005) p. 2, para. 7. Source: http://www.refworld.org/docid/43f3067ae.html. Accessed 03.10.13

Also the fact that NGOs such as LAWA[252] and AWLA[253] and many other women´s rights advocates are advocating for substantive legislative guidelines on property settlement upon divorce to be put in place suggests that legislation on the subject matter is necessary to achieve the desired result, which is getting women an equal share of matrimonial property upon divorce.

Accordingly, it can be concluded that Ghana is obliged to make legislation on property settlement upon divorce in addition to applying "other appropriate means" in order to ensure both de jure and de facto elimination of discrimination against women during property settlement upon divorce. By refusing to make such legislation, Ghana is not only breaching her obligations in the CEDAW, but she is also breaching her obligations in other international conventions she has agreed to, such as the Maputo protocol and the International Covenant on Economic, Social and Cultural Rights. By violating the non-discrimination clauses in these conventions, Ghana can also be said to be violating the non-discrimination clauses in the UN Charter, the Universal Declaration Of Human Rights and the African Charter, since they all have the prohibition of discrimination on the basis of sex as one of their fundamental principles.

5.3.6 Is Ghana Employing "Other Appropriate Means" In Order To Eliminate Discrimination Against Women During Property Settlement Upon Divorce?

It is essential to investigate the extent to which Ghana is using "other appropriate means" in order to ensure the equal treatment of men on women upon divorce. This is because it can be argued that if such other means are being applied and are achieving the desired results, then Ghana might not need to make legislation after all. In order to find out whether other means are applied, an inquiry must be made into what the convention refers to as other appropriate means.

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[252] Leadership And Advocacy For Women In Africa (Ghana)

[253] African Female lawyers association

Amongst other things, the CESCR committee´s[254] , General Comment No. 16 mentions the conducting of human rights education and training programs for judges and public officials, making available and accessible appropriate remedies such as compensation, educational programs and prevention programs, and establishing appropriate venues for redress such as courts and tribunals or administrative mechanisms that are accessible to all on the basis of equality as some of the appropriate means that can be used.

However, findings of my research did not reveal that such measures have been put in place with the purpose of ensuring a better protection of the marital property rights of women upon divorce.

Since the purpose of legal empowerment is to use legal instruments to profit the underprivileged, the above-mentioned means suggested by the CESCR committee, which can be regarded as law- and development-directed projects, cannot be classified as legal empowerment.[255] These efforts will merely help women indirectly and serve other purposes as well. They therefore do not have the primary aim of strengthening the marital property rights of women, even though women could benefit from them Consequently, they do not represent legal empowerment. [256]

5.4 Conclusion

This chapter has sought to discuss the extent to which Ghana is meeting her international human rights obligations in the CEDAW, with regard to the current rule of law on the division of matrimonial property upon divorce.

It has been brought to light that the requirement of proof of substantial financial contribution, which is the current rule of law on property settlement upon divorce in Ghana

[254] Committee on Economic, Social and Cultural Rights

[255] Golub (2010) p. 13.

[256] Ibid

per today, and which leads to many women having to leave their matrimonial homes upon divorce without an equal share of marital property, constitutes discrimination against women in light of the CEDAW.

It has also been concluded that Ghana is obliged by the CEDAW to make legislation on property settlement upon divorce and that the lack of legislation is a violation of Ghana´s obligations in article 16 (1) h of the CEDAW to eliminate discrimination against women during property settlement upon divorce. In addition, Ghana has to use other appropriate means in order to ensure a complete de jure and de facto elimination of all forms of discrimination against women during property settlement upon divorce. This is because according to these conventions, Ghana has taken it upon herself to ensure the equal treatment of men and women in all aspects of life, especially in the economic field. Besides the CEDAW and the Maputo Protocol which specifically aim at protecting the rights of women, all the other relevant conventions urge Ghana to do everything possible **especially through the use of legislative measures** to ensure that both men and women enjoy their marital property rights to the fullest.

It cannot be claimed that Ghana has done everything possible to achieve this obligation in the CEDAW, since no effort has been made by the state to make legislation on the matrimonial property rights of women upon divorce, and no other appropriate measures have been taken in this regard. As already mentioned, two NGOs namely, the Leadership and Advocacy for Women in Africa for (LAWA) and the African Women Lawyers Association (AWLA) are working together and campaigning for such legislation to be passed. They have even drafted a bill, which they sent to parliament but their voices have not been heard. It is now 27 years ago since the CEDAW was ratified by Ghana, but no attempts have been made by the legislature to incorporate it into the laws of Ghana.

Since Ghana has not taken any measures, legislative or otherwise to ensure the equal treatment of men and women during the division of matrimonial property upon divorce, it may be just to conclude that Ghana is not adhering to her obligations with regards to the

economic rights of women in the CEDAW.

It can be concluded say that Ghana has failed to fulfill her obligations in international law to protect the matrimonial property rights of her women upon divorce. This is an obligation that Ghana took upon herself by signing the CEDAW and other international human rights conventions that aim at protecting the marital property rights of women. In my opinion, this failure can be directly ascribed to the legislative body of the state.

6 CONCLUSION

6.1 Introduction

The purpose of this study has been to contribute to scholarly findings about women's matrimonial property rights upon divorce in Ghana, in light of legal empowerment. In order to achieve this purpose, I aimed at answering the following questions:

1. What is the rule of law regarding the division of matrimonial property upon divorce in Ghana?
2. Does this rule of law constitute an unjustifiable differential treatment of women?
3. Can judge-made non-statutory laws provide adequate protection of the marital property rights of women upon divorce?
4. Does the lack of legislation on property settlement upon divorce in Ghana constitute a breach of the international human rights conventions Ghana has ratified?

This chapter is more or less an abridgement of my dissertation. It is divided into two parts. The first part is a presentation of my observations after conducting my research. In the second part, I suggest ways in which social-legal realities in Ghana can make the effective implementation of future statutory laws on property settlement upon divorce challenging. I end this dissertation by calling for further research in this field.

6.2 Findings in the various chapters of the thesis

When I started my research, I found out there are no substantive laws on the division of matrimonial property upon divorce in Ghana. Because of this, in chapter 3, I made an attempt to find out what the law on the division of matrimonial property in Ghana upon divorce is per today, by analyzing relevant rulings from the courts in the course of the years. It was found that in the course of the years, four principles have being laid down by

the courts with regards to the division of matrimonial property upon divorce. These are *the customary law principle, the substantial contribution principle; the equality is equity principle and the jurisprudence of equality principle.*

According to *the customary law principle*, a wife has a domestic responsibility to help her husband in his work, but property acquired with the assistance of a wife was regarded as the sole property of the husband. Thus according to this principle, a woman cannot claim any interest in any property she helped her husband to acquire, c.f. *Quartey v. Martey (1959).*

With time, the customary law principle was abraded and the courts in Yeboah v. Yeboah (1974) introduced a new principle, which is *the substantial contribution principle.* According to this principle, even though Customary Law does not encourage the joint acquisition of properties by spouses, where it was clear that a spouse has contributed substantially to the acquisition of property, she was regarded as a co-owner of the property. Factors that were considered by the courts in this regard was agreement between the spouses or their intentions with regard to the acquisition of the property, and the amount of contribution made by each spouse.

The substantial contribution principle reigned until the principle of **"equality is equity"** was introduced by the Supreme Court in the case of Mensah v. Mensah (1998). According to this principle, the courts divided marital property based on what according to their discretion would provide fairness. According to the courts, this principle "sung the death knell to the substantial contribution principle".[257] The equality is equity principle is presumably in accordance with article 22(3) (b) of the 1992 Constitution, which provides for equitable distribution of matrimonial property upon the dissolution of marriage. The substantial contribution principle and the equality is equity principle, unlike the customary law principle seemingly gave a better protection to women than the customary law

[257] Mensah v. Mensah (2012).

principle. However, this presupposed that they had contributed substantially to the acquisition of the properties.

In February 2012, a new principle, which is the Jurisprudence of Equality Principle, (JEP) was established by the Supreme Court who interpreted article 22 of the constitution in light of international conventions signed by Ghana, amongst others the CEDAW and the UN declaration on human rights. In principle, this principle accords household chores the same weight as financial contribution. This means that a woman´s contribution as a housewife should be enough to earn for her an equal share in marital properties upon divorce.

However, when another case (Quartosn v. Quartson 2012) on property settlement upon divorce was brought before the courts later in 2012, the court based its decision on the substantial contribution principle (in the words of the court, it used the *equality is equity principle,* but it is clear from the arguments that they meant the substantial contribution principle) stating that "The decision in Mensah v. Mensah, *(2012)* is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case." Consequently, the woman in this case was only given some compensation in the form of cash instead of her prayer for an equal share of the matrimonial home, which she built alone with her husband´s money.

Thus, in chapter 3, it was concluded that there is no clear rule of law on property settlement upon divorce in Ghana per today. This is because the jurisprudence of equity principle cannot be regarded as the rule of law on property settlement upon divorce in Ghana per today, since the same Supreme Court that established this principle deviated from it, thereby not making the Jurisprudence of Equity P principle a precedent for subsequent cases. The conclusion of the courts in Quartson v. Quartson (2012) indicates that proof of substantial financial contribution is still required of women if they want to be regarded as co-owners of property acquired during marriage. It was therefore found in chapter 5 that this requirement leads to an unjustifiable differential treatment of women since they are

mostly the ones who represent the non-monetized sector of the economy, and are therefore not able to contribute financially to the acquisition of marital assets in all cases.

Findings of my research suggest that in order to ensure the effective protection of the marital property rights of women in Ghana, they must first be empowered legally. In chapter 4, I presented some conditions in the Ghanaian society which indicate that written statutes may provide a more effective protection of the marital property rights of women than judge-made laws in the form of case law. The perception of "family", economic barriers, social norms and conditions, institutional barriers and administrative hindrances are some of the conditions that were mentioned. It was noted that these conditions might also make the effective implementation of a future law on the subject matter quite challenging. This is the topic of discussion below in this chapter.

6.3 Possible Challenges That May Be Faced In An Attempt To Effectively Implement Future Statutory Laws On Property Settlement Upon Divorce In Ghana

A research on the matrimonial property rights of women may require an investigation into how the rule of law on the subject matter functions in practice. This is because laws, no matter whom or what they aim at protecting "may be misapplied or ignored in practice". [258] This happens especially if the laws do not favor the customary practices that the people are used to. The law then becomes unproductive because the citizenry disregards it.[259] The law can also be inefficient because of many other factors including economic and social barriers.

Thus, even though findings of my research suggest that formal legislation may be able to ensure a better protection of the marital property rights of women upon divorce, it was also discovered that the same conditions in the Ghanaian society, which may necessitate the

[258] Armstrong (1987) p. vii.

[259] Ibid.

establishment of statutory laws on the subject matter, may make the effective implementation of such laws challenging when they are put in place. These conditions may therefore call for certain requirements regarding the content and form of any future statutory laws in order to remedy such conditions.

6.3.1 Polygamy

For instance polygyny, which is the form of polygamy practiced in Ghana, where a man can have many wives at the same time can prevent the effective implementation of future statutory laws on property settlement upon divorce.

In section 20 of the proposal for a property rights of spouses bill laid before parliament by LAWA[260] and AWLA,[261] it has been suggested that:

(1) Where a husband has more than one wife in a polygamous marriage, the ownership of the property shall be determined as follows:

(a) joint property acquired during the first marriage and before the second marriage was contracted is owned by the husband and the first wife; and

(b) any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage.

According to section 10 of the bill, joint property refers to ”property however titled, acquired by one or both spouses during the marriage” with the exception of separate property.[262]This suggests that joint property is all property acquired during marriage, irrespective of which of the spouses who bought it during the marriage.

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[260] Leadership and Advocacy for Women in Africa (Ghana branch)

[261] African Women Lawyers Association (Ghana branch)

[262] Separate proeprty is defined in article 11 (4) of the bill. See appendix.

Ainuson[263] contends that this form of dividing marital property in polygamous marriages is not the best. This is because it will lead to the wife who has stayed longer in the marriage getting a bigger portion of the property than the other wives, and that may not necessarily lead to a fair division in all circumstances. His reason is that if for instance wife number three is highly educated, has a good job and contributes more substantially to the acquisition of properties (than the first two wives) after she entered into the marriage, it will be unfair to divide property acquired after she became part of the family equally between all three spouses and the man. He therefore suggests that all the wives in a polygamous marriage should be given an equal share of all marital property upon divorce. This means that if there are four wives in the marriage, the properties should be divided into five portions so that the man and the wives each gets a one-fifth portion of the properties irrespective of how long they have been in the marriage.

Gandedzie[264] also disagrees with the suggestion in section 20 of the suggested property rights of spouses bill. This is because ”some first-wives are terrible. They do not give the men any sound mind to do their work. So if a later wife gives him the comfort and support he needs in order to carry out his work, this wife should be given more of the property than the first-wife who probably nags him and does not give him his piece of mind”.

In my opinion, Ainuson and Gandadzie´s approach may not lead to a fairer division than the approach suggested in the property rights of spouses bill. This is because, whichever way one views it, an effort to clearly identify the contribution of each of the spouses may not be an easy task. Apart from the fact that the division of property in itself may be problematic, the amount of property to be divided will also reduce in proportion to the number of wives that are to share the properties. The more wives there are in the marriage, the less proportion each spouse gets. Since the purpose of future statutory laws will be to protect the marital property rights of spouses, there will be little or no marital property to protect if the wives are so many that each one is only entitled to a certain portion.

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[263] Ainuson (2012)

[264] Gandedzie (2012)

Consequently, it can be concluded that as long as polygyny exists in Ghana, future statutory laws that aim at ensuring the effective protection of the marital property rights of spouses may have limited effect for many Ghanaian women. The law will have little or no impact as part of the effort to guarantee women an equal share of marital property upon divorce, and also as part of Ghana´s effort to heed to her obligations in the CEDAW. However, Ghana cannot use the existence of polygamy as an excuse to deprive all married Ghanaian women of the effective protection of their marital property rights in accordance with the CEDAW.

All my respondents were of the opinion that applying future statutory laws on property settlement upon divorce in polygamous marriages will be very challenging. An anonymous male respondent (48) said "this is one of the reasons why Ghana should not even attempt to make a law on property settlement upon divorce in the first place".

6.3.2 Cultural Norms

Some of my respondents also saw the ruling in Mensah v. Mensah (2012) and also future statutory laws as unsuitable for the Ghanaian culture. " This is bad. It is a threat to our culture. I heard they even want to give the same rights to cohabitees as well. Why do you people want to Europeanize our culture?", said an anonymous respondent (68). In his opinion, it will be entirely wrong for a law that gives women an equal share of marital property upon divorce to be implemented in Ghana because, it is against the cultural norms.

When asked why he thinks a future law on property settlement upon divorce may not function effectively in practice, Mr. Majeed Osman (26) a student, said "it just can´t work because this is Africa. This is not Europe". When asked to explain further, he said, " our culture will not allow it. You know how male-dominated our society is. I do not foresee such a law functioning in Ghana in the near future." Many of my academician respondents

were of the opinion that it would take some time for such a law to function effectively in Ghana even if it is put in place in the near future.

6.3.3 Institutional barriers and administrative hindrances

Making substantive laws that seek to protect the marital property rights of women may not help much if administrative hindrances prevent women from actually getting what is rightfully theirs. This implies that in order for a future law on property settlement upon divorce to achieve its desired goal, very high standards must be set for those who will be administering the law so they do not "practice their own laws, which have no relation to the law as it really stands."[265]

6.3.4 Lack of access to and unavailability of information

Moreover, the limited availability and access to information may impair the legal effects of future statutory laws on property settlement upon divorce if women are not aware of the rights established in those laws. For the effective implementation of future statutory laws to achieve the desired results, it would require educating the women on these rights in addition to making them easily accessible.

6.3.5 Religion

Considering the role religion plays in the lives of many Ghanaians, the extremely religious nature of most Ghanaian women, which makes most of them prefer to "leave everything to God" in the name of religion instead of pursuing their marital property rights may lead to many women not making use of the law in order to acquire their share of marital property even if they have a good case.

[265] Armstrong (1978) p. vii

From the above-mentioned challenges, which are far from exhaustive, it can be concluded that good laws on the marital property rights of women upon divorce alone may not bring about any significant changes in the matrimonial property rights of women. Thus, legally empowering women by putting in place statutory laws that seek to give them an equal share of marital property upon divorce is to be regarded as "a means to an end, not an end in itself."[266] In addition to putting legislation in place, Ghana may be obliged to do more if she wants to *guarantee* both *de jure* and *de facto* equality between men and women during property settlement upon divorce, c.f. article 3 of the CEDAW. [267] Having formal gender-neutral laws may seem satisfactory, but these laws may not have any effect if the socio-legal and socio-cultural realities on the field are not taken into consideration when establishing and implementing these laws.

Other measures such as "awareness-raising, advocacy and capacity building addressed to the Government"[268] should be taken in order to ensure the effective implementation of any future statutory laws on property settlement upon divorce in Ghana. This is because "a fully functional and equitable property rights system (…) requires effective regulation and oversight by the State authorities to ensure that asymmetries in property ownerships do not create opportunities for exploitation and marginalization."[269]

Accordingly, in order to achieve the effective implementation of future statutory laws after they have been put in place, Ghana may have to put in place a plan on how to implement the laws. Strategic frameworks, benchmarks, short term goals, and long term goals should be set up so that progress made with regard to the implementation of the laws can be

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[266] Report of the UN secretary General A/64/133 (2009) para. 3

[267] Article 3 states that "States Parties shall take in all fields, in particular (…) economic (…)fields, all appropriate measures, including legislation, to en sure the full development and advancement of women , for the purpose of *guaranteeing* (my italics) them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

[268] Report of the UN Secretary General A/64/133 (2009) para 35.

[269] Ibid para. 28.

measured. This way, the country can access its own efforts, how far it has reached, and the way forward.

6.4 Prospects For Future Research

As already mentioned earlier on in this study, I got some ideas for future research as I gathered the data for this study. I therefore call for further research in this area. In the course of my research, many of my respondents remarked that putting in place laws that seek to grant women an equal share of marital property may cause many men to acquire properties in the names of their family members, in order to prevent the wife from getting a share in them upon divorce. The findings of an in-depth research (before or after future statutory laws on property settlement are put in place), on how this will actually go on in practice will be very interesting to know.

Also, how future statutory laws will actually be formulated with regard to polygamous marriages and how they will be applied in practice when the laws are finally passed, will be an interesting research topic.

Since no cases of property settlement upon divorce have been brought before the courts by people married under the Mohammedan Ordinance, an investigation into the division of marital property upon the dissolution of Islamic marriages in Ghana could be an important research topic.

A project on how legal information systems could contribute to improving the rights of women in Ghana if information about their legal rights is made easily accessible to them, is also a project I would strongly recommend.

7 TABLE OF REFERENCES

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Respondents With Legal Expertise (Jurists):

Name of Respondent	**Title/Affiliation**	**Location of interview**	**Date and time of the interview**
Ainuson, Kweku	Lawyer and Lecturer in Intellectual property law at the University of Ghana, Legon	Faculty of Law, Unversity of Ghana, Legon, Accra	21.12.12 @15.45 pm GMT
Benson, John	Barrister and intellectual property attorney at Kyidom Chambers, Accra	Ghana Law School Library. Makola, Accra.	18.12.2012. @ 13.30 pm GMT
Gandedzie, Felicia	Magistrate at the Accra Family Tribunal.	Accra Family Tribunal. Accra	20.12.12 @14.40 pm

			GMT
Kuma, Edna Leslie	Executive director of African Female Lawyers Association (AWLA), Ghana Branch.	African Female Lawyers Association, Ghana Branch. Asylum Down, Accra	19/12/2012 @14:20 pm GMT
Lithur, Nana Oye	Lawyer and executive director of Human Rights Advocacy Centre (HRAC), Ghana. Currently minister for Gender, Children and Social Protection.	Human Rights Advocacy Centre. Osu, Accra	05/12/1012 @10:26 am GMT
Minka-Premo, Sheila	Lawyer and managing consultant at Apex Law Consult. Prominent Member of LAWA (Leadership And Advocacy For Women In Africa), Ghana Branch.	Apex Law Consult. Labone, Accra	14/12/2012 @15:17 pm GMT

Respondents With Different Academic Backgrounds (Academicians)

Name of respondent	**Title/Affiliation**	**Interview location**	**Date of interview**
Anonymous female respondent (37)	Employed in a bank	Accra	13/12/12

Anonymous male respondent (42)	Graduate. Masters in political science	Accra	14/12/12
Anonymous male respondent (68)	Pensioner. Worked at Ghana Broadcasting Cooporation before retirement.	Accra	07/12/12
Brew, Beatrice (27)	Student. Masters in international affairs and diplomacy. University of Ghana, Legon	Accra	09/12/12
Karimu, Rabiatu (26)	Student. Masters in business administration. University of Ghana, Legon	Accra	15/12/12
Ofosu, Hakeem Kwadwo (28)	Medical doctor at Tamale Teaching Hospital	Accra	15/12/12
Osman, Majeed (26)	Student. Masters in mechanical engineering at Kwame Nkrumah University of Science and Technology, Kumasi.	Accra	08/12/12
Owusu, Samuel (30)	Graduate. Masters Degree In International Affairs And Diplomacy	Accra	19/12/12
Takyi, Harriet	Lecturer and Head of Department of Sociology and	Kumasi	10/12/12

	Social work. Kwame Nkrumah University of Science and Technology (KNUST), Kumasi		

Semi-Litterate And Iliterate Respondents

Name of respondent	**Title/Affiliation**	**Location of interview**	**Date of interview**
Anonymous female respondent (37)	Semi-literate trader	Accra	06/12/12
Anonymous female respondent (40)	Illiterate hairdresser	Accra	11/12/12
Anonymous male respondent (48)	Semi-literate taxi driver	Accra	11/12/12
Anonymous male respondent (39)	Trader	Accra	14/12/12

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Matrimonial Causes Act 1971 (Act 367) (Ghana)

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The Intestate Succession Law of 1985 (P.N.D.C.L 111) (Ghana).

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Rt. 1975 p. 220.

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8 APPENDIX

8.1 A map of Ghana, showing its geographical location in West Africa. [270]

8.2 Interview Guides

8.2.1 Interview Guide For Respondents Who Are Legal Experts

Introduction

I am a student from the University of Oslo (Norway), conducting a research on "The Matrimonial Property Rights Of Spouses Upon Divorce In Ghana." I am here to gather relevant data for this purpose. Part of my method for gathering research materials is through discussions with people with legal opinion on the topic of my research. This research is for academic purposes only and responses will be kept with uncompromising confidentiality. Thank you for your time.

[270] Source: https://www.google.no/?gws_rd=cr&ei=KQR8UvbbCoeMswbv74GgBA#q=map+of+ghana+in+africa. Accessed 07.11.2013.

1. What is your name? (Optional)

2. Can you explain what your job entails? On a day-to-day basis, for example.

3. Are you aware of the Mensah v. Mensah case from February this year (2012)? (If I get yes for an answer I continue with the next question. If the respondent answers with a no, then I explain what the case entails. It is a case in which the court amongst other things ruled that household chores should be accorded the same weight as paid jobs, and should therefore be enough to entitle the stay-home spouse to an equal share of property acquired during the marriage)

4. What do you think about the court´s ruling in this case?

5. If this ruling is made a statutory law, what do you think will be the possible challenges that may be faced in an attempt to enforce it?
6. What do you think this case will mean for the ordinary Ghanaian woman?
7. How do you think this would work in polygamous marriages?
8. Why do you think parliament has not yet made legislation on the property settlement upon divorce?
9. Do you think this case will prompt parliament make legislation on the property settlement upon divorce?

8.2.2 Interview Guide For Academicians Without Legal Background

Introduction

I am a student from the University of Oslo, conducting a research on "The Matrimonial Property Rights Of Spouses Upon Divorce In Ghana." I am here to gather relevant material for this purpose. Part of my method for gathering research materials is through discussions with academicians who are not legal experts, on the topic of my research. This research is

for academic purposes only, and all responses will be kept with uncompromising confidentiality. Thank you for your time.

1. What is your name? (Optional)
2. How old are you?
3. What is you education level
   - Masters degree or above
   - Bachelors degree
4. Can you explain what your job entails? On a day-to-day basis, for example.

1. Are you aware of the Mensah v. Mensah case from February this year (2012)? (If I get yes for an answer I continue with the next question. If the respondent answers with a no, then I explain what the case entails. It is a case in which the court amongst other things ruled that household chores should be accorded the same weight as paid jobs, and should therefore be enough to entitle the stay-home spouse to an equal share of property acquired during the marriage)

5. What do you think about the court´s ruling in this case?

6. Would you consider being a stay-home spouse given the fact that this new case favours stay-home spouses?
   - If yes, why? If no, why?
7. What do you think this case will mean for the ordinary Ghanaian woman?
8. How do you think this would work in polygamous marriages?
9. Why do you think parliament has not yet made legislation on the property settlement upon divorce?
10. Do you think this case will prompt parliament to make legislation on property settlement upon divorce that accords home-making the same relevance as paid jobs?
11. If this ruling is made formal law, what do you think will be the possible challenges that may be faced in an attempt to enforce it?

8.2.3 Interview Guide For Semi-Litterates And Illiterates (Who Have Been Through The Process Of Property Settlement Upon Divorce)

Introduction

I am a student from the University of Oslo, conducting a research on "the matrimonial property rights of spouses upon divorce in Ghana." I am here to gather relevant material for this purpose. Part of my method for gathering research materials is through discussions with people on the topic of my research. This research is for academic purposes only and all responses will be kept with uncompromising confidentiality. Thank you for your time.

1. What is your name? (Optional)
2. How old are you?
3. What is you education level
   - Basic education
   - Elementary school
   - Illiterate
4. What do you work with?
5. How did you and your spouse divide the property you had acquired in the course of the marriage when you got divorced?
6. Do you think the outcome would have been different if you had taken the issue to court?

2. Are you aware of the Mensah v. Mensah case from February this year (2012)? (If I get yes for an answer I continue with the next question. If the respondent answers with a no, then I explain what the case entails. It is a case in which the court amongst other things ruled that household chores should be accorded the same weight as paid jobs, and should therefore be enough to entitle the stay-home spouse to an equal share of property acquired during the marriage)

7. What do you think about the court´s ruling in this case?

8. What do you think this case will mean for the ordinary Ghanaian woman?
9. How do you think this would work in polygamous marriages?

8.3 The property Rights of Spouses Bill proposed by the NGOs LAWA[271] and AWLA[272]

The property rights of spouses bill is a 21 page document which is available at: https://www.google.com/search?q=the+property+rights+of+spouses+bill+ghana&oq=the+property+rights+of+spouses+bill+ghana&aqs=chrome..69i57.6689j0j8&sourceid=chrome&espv=210&es_sm=91&ie=UTF-8. Accessed 09.11.2013.

[271] Leadership And Advocacy For Women In Africa

[272] African Women Lawyers Association