

GHANA: MARRIAGE AND DIVORCE

Tad Crawford

I. INTRODUCTION

Independence in Ghana and across Africa has offered the opportunity to reform pluralistic legal systems and has required an intensified examination of the problems of legal pluralism. In Ghana today the choice to marry under colonial statute or indigenous law is not merely a choice of ritual, but also a choice as to which of two very different legal constellations will govern all family relations. In a time of rapid social and economic change, it is doubtful whether English or indigenous law can fully meet the needs of the Ghanaian family. This paper will examine the indigenous law, the colonial statutes, and the 1962 proposals for unification and reform. The author will then present his Model Marriage and Divorce Act for Ghana. The Model Act will draw eclectically from the English, the indigenous, and the simply innovative. It will attempt to guide itself between rigid traditionalism and hypermodern rhetoric to achieve a unified body of law serviceable for the present and flexible for the future.

II. THE INDIGENOUS LAW

Ethnically, Ghana divides into four rough groupings- the Akan, the Ewe, the Ga-Adangme, and the northern population. Differences between the indigenous marriage and divorce laws can be significant but, for purposes of the comparison of indigenous law to colonial statutes, the homogeneity of law between these ethnic groupings is more important.

Traditionally, the indigenous law marriage was considered a contract between two families as well as two spouses.¹

¹W.C. Ekow Daniels, "Toward the Integration of Laws Relating to Husband and Wife in Ghana," University of Ghana Law Journal, (Vol. 11, 1965), p. 22.

It is possible that even this view indicates a shifting from an older belief that the contract was primarily between the families and secondarily between the spouses.² Today, the Criminal code, s.109 provides that, "WHOEVER BY DURESS CAUSES ANY PERSON TO MARRY AGAINST HIS OR HER WILL, SHALL BE GUILTY OF A MISDEMEANOR." If this provision forbids a contract being formed between families for marriage, its force can only be legal and not moral; even in the absence of a contract between families, the marriage relationship raises a common interest and alliance between the two families. Also, nullification of the law exists, for example among the Konkomba of the north:

A girl's marriage is fixed at her birth...

A man's first marriage is arranged when he is about twenty... Indeed, a girl is sometimes betrothed not to a specific husband but to an elder who, when the girl is old enough to marry, will give her to whichever of his sons is old enough to marry. This practice shows that the marriage relation is not conceived primarily as one between individuals but as between a woman and a kin group.³

Among the Fanti:

Marriage is the union of a man to a woman to live as husband and wife for life.

It is sometimes preceded by betrothals, which often take place long before a girl arrives at marriageable age.⁴

And among the Ashanti:

A girl may be betrothed in childhood

²R.S. Rattray, Ashanti Law and Constitution (Oxford: Clarendon Press, 1929), p. 26.

³David Tait, The Konkomba of Northern Ghana, ed. Jack Goody (London: Oxford University Press, 1961), p.78 and p.84.

⁴John Mensah Sarbah, Fanti Customary Law (Third Edition; London: Frank Cass & Co., Ltd., 1968), p.45.

(asiwa), but cannot be taken in⁵ marriage until after her puberty period.

However, the force arranged marriages previously possessed among the Ashanti is now weakening.

Young people of both sexes exhibit an increasing tendency to initiate courtship and marriage without consulting their parents. This is a trend deplored by older parents and grandparents, but the absence of sanctions against it indicates gradual acceptance of the pattern.⁶

Indigenous law marriage is characterized throughout Ghana by the exchange of gifts or marriage consideration. The Ashanti call this aseda (thanksgiving gift), the Fanti tsir nsa (head drink), the Konkomba ungkwob (which includes bride corn, beer, fowls, and some work by the husband for his father-in-law) and the Ga-Adangme have four named gifts-kplemo da (agreement wine), yi nii (head money), heno to bo (buying the waist), and bladzu (public party). These gifts may be such things as wine, corn, kola nuts, cows and, increasingly except in the northern regions, money. The gift is paid by the husband or his family to the family of his prospective wife whose acceptance of the gift manifests their consent to the marriage. Among the Ga-Adangme, this gift money is divided in the following way:

Messengers are sent from the man's parents bearing £15...(the girl's) father and mother receive £1 each...

The mother and her women relatives get the rest of the money...of which part is used to buy the girl's trousseau.⁷

Among the Fanti:

The money given...by the husband does not

⁵ Meyer Fortes, "Kinship and Marriage among the Ashanti," African Systems of Kinship and Marriage, ed. A.R. Radcliffe-Brown, Daryll Forde (London: Oxford University Press, 1950), p. 278.

⁶ Robert A. Lystad, "Marriage and Kinship among the Ashanti and the Agni: A Study of Differential Acculturation," Continuity and Change in African Cultures, ed. William R. Bascom, Melville J. Herskovits (Chicago: University of Chicago Press, 1959), p. 191.

⁷ Madeline Manoukian, Akan and Ga-Adangme Peoples of the Gold Coast (London: Oxford University Press, 1950), p. 78.

always go to the mother alone, but also to the father, as well as the nearest relations.⁸

Indigenous law marriages are almost all potentially polygynous. Actual polygynous unions, however, occur in only twenty to twenty-five percent of the marriages, mainly among those contracted by older, wealthier men. And, while chiefs may have large harems, it is rare for commoners to have more than three wives simultaneously. Also, among the Ashanti, the husband must obtain his wife's consent before taking another wife. This is due to the equality matrilineal descent engenders between Akan husband and wife and is not found where descent is patrilineal. Polyandry, one woman having more than one husband, is universally forbidden.

The indigenous law marriage creates duties between the spouses and in relation to third parties. The husband must maintain his wife—⁹supply the, "NECESSARIES OF HEALTH AND LIFE TO HIS WIFE." Among the Ashanti the husband is, "liable for his wife's debts and torts and for her maintenance and that of her children," during the marriage.¹⁰ The husband's liability for the wife's debts and torts varies, and may not exist if the husband has paid¹¹ no marriage consideration and refuses to admit liability.

The wife must bear and raise children and carry out the normal household duties. She is not, however, liable for her husband's debts.¹² Also, the wife's private property, since it really belongs to her extended family, remains her own. Similarly, the husband's private property¹³ does not become subject to an interest of the wife.

⁸Sackie v. Agawa (1873) Sar. F.C.L. 126.

⁹Criminal Code, 1960 (Act 29), s. 79.

¹⁰Rattray, p. 26.

¹¹Daniels, W.C. Ekow, "Toward the Integration of Laws Relating to Husband and Wife in Ghana," University of Ghana Law Journal, (Vol. 11, 1965), p. 37.

¹²Ashon v. Snyder (1869) Sar. F.C.L. 136.

¹³Sarbah, John Mensah, Fanti Customary Law, p. 56.

The husband's rights in the marriage include the right to ayefare- the collection of damages from third parties with whom the wife commits adultery. The husband may choose to divorce the wife rather than collect ayefare. Other grounds for divorce by the husband are barrenness, desertion, witchcraft, and offensive conduct.¹⁴ The wife may divorce her husband for cruelty, neglect, impotence, desertion, and persistent extramarital relations. These extramarital relations may not be adulterous, as the Marriage Ordinance provides, "ADULTERY SHALL NOT BE HELD TO INCLUDE INTERCOURSE OF A MAN MARRIED BY NATIVE CUSTOMARY LAW WITH AN UNMARRIED WOMAN."¹⁵ It is important to note that almost all indigenous law divorces are accompanied by arbitration which attempts to reconcile the spouses or, failing this, to determine child custody and settlement payments.

Upon divorce the husband computes the marriage consideration, advances to the wife, and gifts. The wife computes advances and gifts to the husband. The difference between the two computations must be paid to the spouse or family which made the excess payments. The husband must also pay send-off money or, among the Ga-Adangme, he may waive the wife's refund of marriage fees and avoid the payment of send-off money.¹⁶ If one spouse cannot make this payment it may give the other spouse the right to custody of the children. Generally, however, the following arrangement is used among the Ashanti for child custody:

If a man who divorces his wife has young sons, they will remain with the father if they wish...Daughters will generally follow the mother, and will certainly do so if very young...There is no law about sharing children.¹⁷

This, however, finds some contradiction:

The custody of the children is usually given to the wife when they are young because, as their mother, she is regarded as the better person to look after them

¹⁴ J.B. Danquah, Akan Laws and Customs (London: George Routledge & Sons, Ltd., 1928), p. 156.

¹⁵ Marriage Ordinance, Cap. 127, s.49(2), (1951 Rev.).

¹⁶ Manoukian, p. 80.

¹⁷ Rattray, pp. 10-11.

at that stage. The father will at all times have access to the children.¹⁸

Among the Fanti the rule is:

If the man provides for the child, it belongs to him when it grows up, i.e., when fit to part from the mother, about four or five years.¹⁹

Among the Ga-Adangme:

In every case of separation and divorce the husband is the possessor of the children, provided he has paid the full marriage fee to his wife's relatives.²⁰

Among the Gonja of the north:

Rights to custody of children on divorce are not precisely defined. Young children in any case will accompany their mother, and older girls are likely to do so. Boys past the age of six are more likely to remain with the father...But the claims of the kin of both parents to foster children, and hence the availability of a mother substitute among paternal kin and a father substitute among the mother's relatives, to some extent balances this tendency to divide the children along lines of sex...The sibling group tends to be split up.²¹

Mechanical family relationships may not be determinative here, however, for in modern times, the interest of the children may well be the paramount consideration.

No mention was found in the literature of requirements for involuntary child support payments by the male parent upon divorce. The theoretical explanation of this rests upon the nature of the matrilineal extended family and its child custody arrangements. In the matrilineal society a woman's children belong to the family of her eldest brother. They

¹⁸Daniels, p. 49.

¹⁹Neizer v. Dontoh (1874) Sar. F.C.L. 130.

²⁰Manoukian, p. 80.

²¹Esther N. Goody, "Conjugal Separation and Divorce among the Gonja of Northern Ghana," Marriage in Tribal Societies, ed. Meyer Fortes (Cambridge: The University Press, 1962), p. 34.

are not members of their father's family and his obligations toward them are, in theory, highly limited. It would therefore be anomalous upon divorce, when the woman obtains custody of the children because her eldest brother is filling the role of the father, to require the real father to make support payments. In fact, of course, the real father is obligated under indigenous law to support the children during the marriage. But, although the theory of the substitute father fails today to explain the obligations of the father to the children during marriage, it is still probable this theory explains the father's lack of obligation upon divorce. Where descent is patrilineal the mother is not in the father's extended family which encompasses the children. Upon divorce the father has custody of the children and, although women in Ghana work on par with the men, there is no obligation on the woman to make child support payments.

The final feature of indigenous marriage relates to prohibited unions. Briefly, unions prohibited depend on whether the families of the contracting parties use patrilineal or matrilineal descent. In either case, marriage to a descendant of the common ancestor or ancestress is likely to be prohibited. Basically, marriages must be exogamous, that is outside the lineage group. Less extreme prohibitions apply to marriage to the relatives of the husband in a matrilineal society or of the wife in a patrilineal society. The exogamy requirement is especially strong where parallel cousins, the children of a father's brother or mother's sister, are involved. The exception is that cross-cousin marriages, with the children of a father's sister or of a mother's brother, are preferred. Both the requirement of exogamy and the preference²² for cross-cousin marriages appear to be losing viability.

The distinguishing features of indigenous law marriage and divorce can be briefly summarized. Such marriage allies two families as well as uniting two people. Marriage is almost always accompanied by the husband or his family paying marriage consideration to the bride's family. All indigenous law marriages are potentially polygynous although actual polygyny is limited. Both husband and wife have

²²Lystad, p. 191.

certain duties within the marriage and certain rights to divorce. Divorce is preceded by arbitration to achieve conciliation. If this fails a property settlement attempts to return the spouses to their non-marriage positions. Custody of the children is unsettled, although the interest of the children may well be considered of primary importance. There is no requirement for child support payments to be made to the spouse having custody of the children.

III. THE COLONIAL STATUTES

The colonial statutes have regulated Moslem marriage and divorce since 1907 and proto-English marriage and divorce since 1884.

The Marriage of Mohammedans Ordinance, Cap. 129, requires registration of all Moslem marriages and divorces. The registration is accomplished by the bridegroom, bride's wali (a guardian representing the bride's father), two witnesses to the marriage, and a priest licensed under the Ordinance going to the Registrar to give notification of the marriage or divorce and be given a certificate of marriage or divorce. Marriages must be registered within one week and divorces within one month. The failure to register within the specified time makes the marriage or divorce invalid but this may be cured at any time thereafter by application to a Judge of the Divisional Court (under the pre-independence court system). However, as one writer has pointed out, the Marriage of Mohammedans Ordinance, "has been honoured by its breach rather than by its observance."²³

The Marriage Ordinance, Cap. 127, takes within its ambit Christian and civil marriage. It was first enacted in 1884 and based primarily on English Marriage Acts prior to that date. Amendments to the English Act after 1884 have been incorporated whenever possible.

The Marriage Ordinance provides for marriage by three different types of certificates. First, a Registrar upon receipt of notice from the parties of their intended marriage, places such notice in the Marriage Notice Book and affixes it outside his office so the public may learn of the intended marriage. Then, if the Registrar is satisfied the marriage

²³Daniels, p. 25.

is legal, he issues his certificate which is valid so long as the parties marry within three months of the original notice. Second, ministers of religion may be appointed Marriage officers under s.6(1). Again notice must be given by the parties but the purpose of the Marriage Notice Book is fulfilled by the publication of banns. If no one comes forward to object the certificate will issue and the marriage, if it takes place within three months of the original notice, will be valid. The third certificate is a Special License issued by the Governor who may dispense with the notice requirement if he is satisfied no lawful impediment exists to the marriage.

Upon issuance of one of the certificates the parties may celebrate under s.30, "IN ANY LICENSED PLACE OF WORSHIP BY ANY RECOGNIZED MINISTER," or under s.36, "BEFORE ANY REGISTRAR." In either case two witnesses are necessary and, upon completion of the ceremony, the Registrar or minister, the parties and the witnesses must sign the certificates and a duplicate certificate is filed in the Registrar's office. Under s.39 the Registrar of marriages must file the duplicate certificates in a Marriage Register Book and send certified copies of all entries to the Principal Registrar. This provides a comprehensive recordation system for Ordinance Marriages.

Finally, marriages invalid under the Ordinance are set out. S.42, after allowing a man to marry his widow's sister or niece, provides:

NO MARRIAGE IN THE GOLD COAST SHALL BE
VALID, WHICH IF CELEBRATED IN ENGLAND,
WOULD BE NULL AND VOID ON THE GROUND OF
KINDRED OR AFFINITY.

The English Marriage Act, 1949 (12, 13 & 14 Geo.6, c.76), s.1 (1), Sch.1, Pt.I specifies the prohibited degrees of relationship. These prohibitions are complex and, of course, arbitrary when applied in Ghana where degrees of prohibition find their rationale in unilinear systems of descent. Also, as one writer complains:

Few people are likely to know the English
rules as to consanguinity and affinity,
especially as these rules are not²⁴ to be
found in our Marriage Ordinance.

²⁴Ibid., p.59.

The effect of the Marriage Ordinance is far-reaching. The spouses' relations to each other and their children are regulated by English law. Beyond this, however, it has been said an Ordinance marriage completely removes the spouses from the operation of customary law.

A Christian marriage clothes the parties to such marriage and their offspring with a status unknown to native law.²⁵

A more realistic view may be that an Ordinance marriage, being monogamous, affects the spouses' legal status under indigenous law only when expressly or implicitly necessary. The result of these conflicting views is confusion as to when English law should be applied. And, to the extent English law is applied, internal conflicts of law arise between the rules governing English marriages and the rules governing indigenous marriages.

Serious problems develop when marriages are contracted under both Ordinance and indigenous ritual. The cases are in conflict as to whether a man and woman who are married by indigenous ritual and later go through an Ordinance marriage have the status of man and wife under indigenous law or under the Ordinance. It is likely that the status of the customary marriages becomes merged in the wider status offered by the Ordinance marriage. Still, the possibilities for confusion are manifold for parties who are uncertain or unaware of which marriage status affects them. For example, breach of a promise to marry under the Ordinance gives rise to a cause of action for damages but under indigenous law:

If...afterwards he refused to be married to her, there would be no penalty...But if he had already provided the necessary things...the penalty is that the man forfeits what he has provided.²⁶

Parties married under the Ordinance must make their will in conformity with English law. The husband to an Ordinance marriage cannot sue for ayefare, an indigenous law cause of action. There is conflict as to whether Ghana's Married Women's Property Ordinance, Cap.131, applies to all marriages

²⁵Cole v. Cole (1898) 1 N.L.R. 15 at p. 22.

²⁶Neizer v. Dontoh (1874) Sar. F.C.L. 129. Similarly, Ado v. Duko (1915) Danquah, Cases in Akan Law (London: George Routledge & Sons, Ltd., 1928), 166.

in Ghana or merely those contracted under the Marriage Ordinance.

These examples typify the conflicts between English and indigenous law which exist across the full spectrum of the marriage relation in Ghana. It is not this paper's purpose to explore in detail the convolutions of these conflicts, but rather to draw from their existence the need for a unification of Ghana's marriage and divorce laws. It is a point well taken that such a unification should not only bring together the Ordinance and indigenous laws of marriage, but also the penalties for marriage offenses which are now scattered through the Criminal Code.

IV. THE WHITE PAPER

The government of Ghana recognized this need for unification and in its 1962 White Paper on Marriage, Divorce and Inheritance proposed its:

...formula whereby the essence of customary law marriage could be preserved and indeed blended into a marriage law for all citizens of Ghana instead of the present state of affairs in which two parallel systems of marriage law operate.²⁷

The White Paper and the Marriage and Divorce Bill which followed it were imaginative in seeking unification but unimaginative in effectuating it. The Bill would have allowed all pre-enactment marriages to be registered. After passage a man would be allowed to register only one wife. This registration would be voluntary and a man who had registered a wife could marry another woman and have issue without committing an offense or giving the registered wife grounds for divorce. At the man's death all his children but only his registered wife would share in his estate.

Divorce for registered marriages would be allowed only after arbitration, without lawyers, before a court-appointed panel. This panel would first attempt reconciliation but,

²⁷ Ghana, White Paper on Marriage, Divorce and Inheritance (Accra: Government Printer, 1962), p. 4.

failing this, would create the divorce arrangements.

The Bill's divorce provisions adopted indigenous procedure and were both sound and imaginative. Its marriage provisions, however, were unfortunate. First, leaving registration voluntary would allow parallel legal systems to continue. Instead of a schism between the Marriage Ordinance, Cap.127, and the indigenous law, there would be a schism between the new act and the indigenous law. Secondly, the inheritance provisions discriminating against the unregistered wives of a man who had contracted a registered marriage were clearly unfair. Finally, if this Bill was a covert attempt to achieve monogamy it would have failed, being too permissive as to men who would register and completely ineffective as to men who wouldn't.

The Bill received well-deserved euthanasia in committee and the following excerpt, supplementing the foregoing animadversions on the Bill, is quite justified.

The quality of draftsmanship, particularly in the earlier Acts, has been high, though it must be said that the Marriage, Divorce and Inheritance Bill which the Government has promulgated for public criticism appears to represent the nadir of the draftsman's art. In fact, however, one is inclined to suspect the inadequacies of this Bill arise from uncertainty at the policy level which not even ²⁸the most skilled draftsmen could overcome.

V. THE MODEL ACT

The author's Model Act is designed to be suggestive of a viable and just approach to reform of marriage and divorce laws. This approach seeks always to draw from indigenous practice while meeting modern needs. It is commonly said that in England and the United States the state is a third party to marriage. Traditionally, the third parties to a Ghanaian marriage have been the extended families. Both the

²⁸William Burnett Harvey, A Value Analysis of Ghanaian Legal Development since Independence (Accra: Government Printing Department, 1963), p. 15.

state and extended families provide contexts for marriage stability and protection of spouses and children. For a country in transition, like Ghana, there can be no certainty in any given marriage that stability and protection can best come from the extended families or the state. To stabilize and protect all marriages the law must be a unified hybrid, an amalgam drawing on both tribal and national strengths. Only such an amalgam can develop a body of law comprehensible and acceptable to the populace but within the supervisory powers of the state. With hope and diffidence, the author in his Model Act searches toward the development of such a unification.

MODEL MARRIAGE AND DIVORCE ACT FOR GHANA

Article 1. This Act applies prospectively to all marriages and divorces within Ghana.

- A. All pre-enactment legal marriages and divorces are unaffected.
- B. All pre-enactment arrangements appurtenant to pre-enactment legal marriages and divorces are unaffected.

Article 11. Each Local Court shall appoint a Marriage Referee who shall:

- A. Assume the marriage jurisdiction of the Local Court, subject to Section G.
- B. Appoint within the jurisdiction Marriage Recorders sufficient to record all marriages and divorces.
- C. Supervise and inspect the work of the Marriage Recorders.
- D. Decide marriage and divorce causes by non-adversary proceedings.
- E. Submit compilations of the Marriage Recorders' reports to the Local Court.
- F. Alter private arbitration settlements only when such settlements are clearly unjust.
- G. Submit to the appellate jurisdiction of the Local Court, provided the Marriage Referee's decision will be altered only when clearly unjust.

Article 111. The Marriage Recorders shall:

- A. Issue, without charge, marriage licenses before or after the marriage ceremony, provided no violation of Article 1X is discernible.
- B. Issue marriage certificates following ceremonies under Article VI:

1. Without charge for one month after the marriage ceremony.
 2. Upon payment of the fine of Article 1V, Section A beyond one month after the marriage ceremony.
- C. Issue, without charge, divorce certificates, provided:
1. The parties show compliance with the private arbitration requirement of Article X; and
 2. The arbitration agreement is not so clearly unjust as to require referral of the case to the Marriage Referee.
- D. Compile lists of marriages and divorces to be submitted at regular intervals to the Marriage Referee, said intervals to be determined by the Marriage Referee but in no case to be greater than six months, provided:
1. The marriage lists shall include the:
 - a. Name of each spouse.
 - b. Place of marriage.
 - c. Date of marriage.
 - d. Type of marriage ceremony.
 - e. Name of the person performing the marriage.
 2. The divorce lists shall include the:
 - a. Name of each spouse.
 - b. Place of divorce.
 - c. Date of divorce.
 - d. Type of divorce ceremony.
 - e. Name of the person performing the divorce.
- E. Perform marriages and divorces by civil ritual.

Article 1V. The failure to obtain a marriage certificate will be:

- A. Curable at any time before divorce proceedings in that marriage upon payment of a fine by each spouse of one-tenth of the value of one week's income.
- B. Non-curable after the initiation of divorce proceedings, and will raise a presumption as to each fact determinative of child custody, property settlement and, if necessary, child support against the spouse who either had actual knowledge or, from the surrounding circumstances, should have had knowledge of the requirements of Article VI.
- C. Provided, each presumed fact will be assumed until the party against whom the presumption operates shows evidence sufficient to support a finding of the non-existence of the presumed fact, after which the existence of that fact will be determined as if no pre-

sumption had ever been operative.

Article V. The failure to obtain a certificate of divorce will raise a presumption as to each fact determinative of child custody, property settlement, and, if necessary, child support, against the spouse who either had actual knowledge or, from the surrounding circumstances, should have had knowledge of the requirements of Article X, provided this presumption will operate in the same manner as that in Article IV.

Article VI. A marriage is valid if:

- A. A marriage license is obtained.
- B. A marriage certificate is obtained.
- C. The marriage is contracted by:
 1. Indigenous ritual.
 2. Christian ritual.
 3. Moslem ritual.
 4. Civil ritual.
- D. Provided, the failure to comply with Sections A and B will in no way alter the marriage obligations as set forth in Article VII.

Article VII. The obligations of the husband and wife during the marriage are:

- A. On the part of the husband:
 1. To maintain his wife.
 2. To maintain his children.
 3. To pay his wife's debts or tort damages.
- B. On the part of the wife:
 1. To bear and raise children.
 2. To maintain the household.

Article VIII. Polygyny is legal regardless of the marriage ritual under which contracted, provided the polygynist must evenly divide all duties set forth in Article VII among his wives and failure as to any wife to do this will be considered neglect under Article XIII.

Article IX. Marriage is prohibited and void:

- A. Between a person and:
 1. Any lineal ascendent or descendent.
 2. Any collateral relative in the second degree.
- B. If either party is:
 1. Of unsound mind.
 2. Venereally diseased.
 3. An habitual drunkard.

- 4. An addict of a narcotic drug.
- C. If both parties are paupers.
- D. If one party is under fifteen.
- E. If one party is under eighteen, unless the consent of one parent is obtained.

Article X. A divorce is valid if:

- A. The spouses have attempted conciliation by seeking the advice of mutually agreeable third parties.
- B. The spouses have submitted to arbitration by mutually agreeable third parties as to:
 - 1. Child custody.
 - 2. Property settlement.
 - 3. Child support payments, if necessary.
- C. The spouses have participated in the divorce ritual corresponding to the marriage ritual which joined them.
- D. The spouses have obtained a certificate of divorce.

Article XI. Grounds for divorce include:

- A. Against the husband:
 - 1. Cruelty.
 - 2. Neglect.
 - 3. Impotence.
 - 4. Desertion.
 - 5. Adultery, provided adultery for all marriages is defined as the intercourse of a married man with a woman other than his wife or wives, or the intercourse of a married woman with a man other than her husband.
 - 6. Misrepresentation.
- B. Against the wife:
 - 1. Barrenness.
 - 2. Desertion.
 - 3. Adultery.
- C. Incompatibility between the parties.

Article XII. Custody of a child will be awarded to the husband or wife according to:

- A. Which parent has greater affection for the child.
- B. Which parent can best provide for the child.
- C. Which parent's family has greater affection for the child.
- D. Which parent's family can best provide for the child.
- E. Provided, Sections C and D will be considered only if the parent's ties to the family are such that the family's affection and support capability would benefit the child.

- F. The preference of the child.
- G. Provided, the separation of siblings is disfavored, but will be allowed when, at the Judge's discretion, it is appropriate.

Article XIII. A successful divorce action on the following grounds will raise a presumption in favor of the successful party as to each fact determinative of child custody and, if necessary, child support:

A. Against the husband:

1. Cruelty.
2. Neglect.
3. Desertion.
4. Persistent adultery.
5. Misrepresentation.

B. Against the wife:

1. Desertion.
2. Persistent adultery.

C. Provided, each presumed fact will be assumed until the party against whom the presumption operates carries the burden of proof as to that fact by showing the non-existence of the presumed fact is more probable than its existence.

Article XIV. The crime of bigamy is eliminated, provided any woman who marries relying on statements by her prospective husband as to the number of wives he has by previous marriages, and such number proves in fact to be greater than stated, shall have a cause of action for both:

- A. Damages, and,
- B. Divorce on the ground of misrepresentation.

Article XV. Adultery by a wife will create a cause of action in the husband against the male partner to the adultery.

Article XVI. Breach of a contract to marry shall effect a rescission of that contract, provided the party causing the breach shall have no right to restitution.

Article XVII. Child support payments are disfavored, but will be allowed when the custodial parent and, where appropriate, that parent's family have inadequate support capabilities to provide for the child as he was provided for during the marriage.

Article XVIII. Alimony is disfavored, but may be paid by either spouse at the judge's discretion.

Article XIX. Property settlement between a husband and wife upon divorce should return the parties to the positions they would have occupied if the marriage had never occurred.

Article XX. All children are legitimate.

Article XXI. Custody and support of a child whose mother is not and never was married to the child's father will be determined by the provisions of Article XII and Article XVII.

Article XXI. Alimony may, at the judge's discretion, be required between unmarried parents.

VI. CONCLUSION

This paper has examined the indigenous law, the colonial statutes, and the 1962 reform proposals. In a society increasingly mobile and urban, the indigenous law is unsuited to protecting marriage stability, the spouses and their children. The colonial statutes also fail to meet modern Ghana's needs for they make no guarantee that the urban or uprooted peoples will register their marriages. Yet it is here, where family relations lack the presence of the extended family, that state supervision is needed. To require registration of all marriages under the Marriage Ordinance, Cap. 127, would be undesirable as it would give all marriages English law status. Not only would this meet with nullification, but it would for no reason deprive those large segments of Ghana's population only peripherally involved in modernization of the use of indigenous law marriage. The arbitrarily different legal statuses upon marriage and the internal conflicts of law caused by the pluralistic legal system add to the need for a reformed and unified body of law for marriage and divorce.

It is this need the Model Marriage and Divorce Act for Ghana seeks to meet. Registration for all marriages and divorces brings family relations within the state's supervisory capacity. Adoption of indigenous law whenever possible minimizes the risk of nullification. The provisions of the Model Act are just, looking to the facts of each marriage before determining the legal relations of the parties. Also, if nullification of the Model Act does not take place, the universal registration requirement will serve to educate the people and make future reform more effective.

Dr. K.A. Busia, Ghana's Prime Minister, has called for, "the development of political institutions that meet the particular historical and social realities of African states."²⁹ It is toward this goal the author, in writing the Model Act, has striven.

²⁹K.A. Busia, Africa in Search of Democracy (New York: Frederick A. Praeger, Inc.) quoted in The African Consciousness (New York: American-African Affairs Association, 1968), p. 19.

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