CHATTER 8

MARRIAGE AND DIVORCE UNDER THE MATRIMONIAL CAUSES ACT

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Since the late nineteen fifties there has been considerable interest, concern and controversy over the procedures appropriate to govern marriage and divorce in Ghana. The emerging patterns of Christian marriage and/or marriage under the Ordinance, and the appeal to civil procedures in divorce has made it necessary to reconsider the legal elements of marriage and divorce under the Matrimonial Act, and the consequence of these laws for the institutions of marriage and divorce in Ghana. This paper therefore is primarily concerned with the wider social implication of this Act on marriage and divorce in Ghana.

Historical Perspective:

The Law practised in Ghana today has been carried over from the former colonial government with relatively little modification and adjustment to the indigenous institutions of the country. Despite independence of the Gold Coast, and despite the mushrooming of development programmes, there are various areas of the law that have remained relatively untouched by the social and political changes occurring in Ghana—this has been especially true in the area of marriage and divorce. From the memorandum on the Matrimonial Causes Act 1971, by the former Attorney-General and Minister of Justice, Victor Owusu, we have the following statement as evidence of the preponderance and dominance of English law in the Civil procedure governing divorce. He states:

> "English statute and case law governs the divorce and annulment of all monogamous marriages in Ghana today. As the English Parliament and Courts have amended and interpreted their laws of divorce and nullity and family responsibility these changes have automatically become the law of Ghana. More than a decade after achieving sovereignty and independence, Ghana is still dependent on Britain for its laws of marital relations."[1]

The purpose therefore of the Law Reform Commission's proposal on divorce in 1971, was to secure a "thoroughly Ghanaian matrimonial causes law"[2], an act that would reflect the indigenous institutions and culture of Ghana.

Prior to the Act of 1971, the doctrine and the concepts embodied in the marriage and divorce laws were fundamentally foreign in origin and culturally and socially irrelevant for the majority of the population. The effect therefore, of these laws on the indigenous institution of marriage and divorce could be said to be (in most cases) marginal. Except for the element of Christianity in marriage ceremonies, the majority of Ghanaian marriages have had and continue to have their basis and expression in the customary law. Therefore much of the historical controversy that has

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shrouded the English laws of marriage and divorce, has neither existed in Ghana nor has been relevant to the African situation. There was little influence of the Victorian Family Code (with all its rigidity: prudence and hypocrisy) on the institution of the family in Ghana. Thus, much of the anxieties and turmoil of the "Era" for the most part had little impact on Ghanaian society.

Despite the fact that the social turbulence and religious schisms in England did not substantially affect the Ghanaian family tradition and customs nevertheless, since it was English law that was practised in the legal administration of social and political life of the country, there was by necessity an unavoidable tendency to reflect English doctrine in the promulgation of law in Ghana. Thus even in the case of marriage and divorce in Ghana the courts and the church adhered to the procedures, tenets and doctrine governing English society with little or no attempt to accommodate indigenous practices of course one of the fundamental explanations may be that English and African marriage patterns are basically different, and the concepts embodied in the institution of one society can not simply be provided for by *ad-hoc* procedures of another society. Another explanation was that the appeal to the civil code in matters of marriage and divorce was relatively small before the nineteen-sixties. Moreover the strength of customary law governing the institution of marriage, as well as the inappropriateness of the English mode of marriage made the practice of marriage under the Ordinance relatively insignificant at this time.

However, since nineteen-sixty, there has been an increase in ceremonies characterised by a church ceremony (i.e., registered church marriages with or without the Ordinance). The above can be supported by data from the various churches in Accra. However, too much should not be read into this fact, since the absolute increase in church ceremonies or marriages under the Ordinance (by themselves) has no intrinsic significance but rather must be viewed against the wider social and cultural changes occurring in the society. What is perhaps remarkable however is the relative stability in the institutions of marriage and divorce in West Africa and Ghana in particular. Nevertheless, in order to understand fully the changes occuring in marriage and the implications of this change for the larger society, let us examine the institutions of marriage in Ghana.

Marriage:

It is relatively difficult to characterise Ghanaian marriage under one set of procedures. Marriage customs and laws vary from group to group, and may show significant variations even within groups. However it is possible to analyse those aspects which are common to most marriages, whether contracted under customary law, Church marriage or Ordinance marriage in Ghana.

Firstly most marriages irrespective of the education, age, and income of the spouses are preceded by some form of "custom." The most basic step therefore to announce your intention to marry is to perform the necessary "custom" demanded by the women's kin, in asking for the hand of their daughter. This custom may involve a relatively inexpensive ceremony of local drink and gifts to the more expensive ceremony of imported drinks and gifts, depending in most cases upon the circumstances of the man and his kinsfolk. Once this basic custom has been performed, several alternatives are open to the couple, and these seem to be more conditioned by means and status rather than any fundamental change in attitude or beliefs on the part of Ghanaian in marriage. The couple in the majority of cases will try first and foremost to fulfil the customary

procedures prescribed by their kinsfolk. In a number of cases however the customary ceremonies may have the additional feature of the Christian church ceremony, depending upon whether the couple is Christian or not. The additional feature of the Church ceremony in marriage has not fundamentally changed or altered the form of marriage—the marriage is still a customary marriage governed first and foremost by customary law and not Church law.

Another alternative is that after the performance of "custom" the couple register their marriage under the Ordinance and celebrate it with an elaborate church wedding. The incidence of this type of wedding is far more rare than the former two ceremonies. First, because of the sheer cost many can not possibly afford such a display. Secondly, and even more important, is the fact that marriage as a mere civil contact between two persons has not gained wide acceptance in Ghana and is not likely to do so for some time. The attitude that one's choice of partner is an individual concern, has little meaning for the average Ghanaian. Marriage encompasses the much wider network of friends, relatives and kinsfolk. Therefore, it is not difficult to understand the slowness in embracing this custom. A most appropriate description in this instance is the following by G. K. Nukunya, in which the author vividly describes the social atmosphere that surrounds a customary Anlo Ewe marriage ceremony.

> "The elaboration of the marriage ceremony and the large number of kinsfolk taking part in the proceedings bring home to the couple and the relatives the seriousness of their undertaking; and at every stage the ancestors are invoked adding supernatural authority. This together with the high moral code of the past; the punitive measures of the traditional authorities and the strong parental authority, provide a suitable environment for marital stability." (Nukunya, 1969)

A third and equally important factor is that most couples subscribe to the rights and obligations prescribed by customary law and not civil law irrespective of the procedures of marriage, and rarely wish to build their marriages on the English precepts (except where it seems socially expedient). Thus the impetus to contract a purely English type of marriage is still relatively small in Ghana.

If this is so why then do we have such a proliferation of church weddings throughout the country? The mere proliferation of a fashion is neither sufficient grounds nor a reliable basis for judging changing patterns, and this is especially so with modern modes of marriages in Ghana. First, one must ask, what percentages of all marriages performed in the society are contracted under the Ordinance, under customary law, under church law? In most cases, the marriage will be customary marriage, but in a smaller number of instances there will be a combination of custom with a Christian church ceremony, and in a still smaller number of marriages, one finds all three features combined, that is, where the couple perform the customary ceremony and in addition they register their marriage under the Ordinance and have it blessed with a church ceremony. However, it should be noted that where the marriage is registered and celebrated in the church, the ceremonies often do not coincide in time. Some may perform the necessary custom and wait sometime before performing either the church wedding or the Ordinance marriage. In any case, when the individuals have performed the necessary customary rites they are allowed to cohabit as man and wife. This pattern is particularly common and important in the urban settings (among the more affluent) where "weddings" have become not only fashionable but a status symbol in themselves—individuals often perform the necessary custom and then plan an elaborate wedding at some future date.

From the above argument therefore, it seems, that the fundamental basis for marriages for the majority of Ghanaians is in the customary law and not civil law. However, because aspects of church law and civil law affect the institution of marriage and are expected to influence the patterns of marriage and divorce in Ghana, there is need to integrate and reflect the indigenous laws and practices into these procedures. Nevertheless, discrepancies, confusion, and controversy between the civil/church law and customary law in marriage practices make it difficult to reconcile these disparities. For example, Christian churches in Ghana still expect church marriage to precede customary marriage (however, in rare cases is this born out in practice).

Secondly, the Christian church attaches undue legal credence to their procedures. Church law states that marriages registered under church law must be monogamous. Again, this is an anomaly in Ghana, since the prevalent form of marriage in the population is customary marriage which is potentially polygynous. When we therefore consider these facts, we see that a large part of the population are excluded from the rights, obligations and protection that are embodied in civil/church laws. Thus the very law that should be expected to influence and shape the institution of marriage in Ghana (for the most part) stands apart from the main stream of Ghanaian life.

Despite these gaps and inconsistencies between the law (church/civil) and practice (custom), there are factors that are likely to narrow the areas of contention, and influence these spheres moving closer together over time.

ASPECTS AFFECTING MARITAL CONDITIONS

(*A*) **Changes in Household Composition:**

The concept of "moving out" or "marrying out" does not seem to be relevant for describing changes in household composition in Ghana due to marriage. What rather happens (in the case of women) can be characterised as a "marry in." Without necessarily relinquishing her rights and obligations to her kinsfolk, the married woman remains under the protection of her paternal and maternal ancestors and the social solidarity of her sibling group. This is important if one considers that the maintenance of kinship bonds were often reinforced and strengthened by the act of marriage. The nearness of the newly formed matrimonial home further facilitated these relationships. However, with increased urbanisation, due to changes in mode and location of employment, many customary marriages have become more characterised by elements (in terms of location of spouses) of monogamous marriages. Conditions are such that couples are often obliged to establish their matrimonial homes in urban centres—separate and removed from the ancestral home. This has implied changes in spouse's expectation and obligations in marital duties and relations. The expected roles and behaviour of spouses are more blurred in such settings and the division of labour by sex and age in the home and the community becomes much less rigid. Socialising also become less strict and women and children often mix freely with men for such activities as eating and merry-making. The shift therefore in form and in location of the matrimonial home has altered relations between the spouses and has implied changes in the roles and norms on the part of the spouses in marriage.

(*B*) Another factor that is affecting marriage patterns in Ghana is the changes taking place in the type of labour participation of the Ghanaian woman. There is an increasingly large number of Ghanaian women entering the wage sector of the labour force. The effects of this develop-

ment on marriage and the family are beginning to be evident in the changing economic and social roles of the woman in the family and the wider Ghanaian society. The nature of the more formalised, bureaucratic, mechanistic labour market places considerably more pressure and strain on the family than would otherwise be in the non-wage market sector. Moreover the combined effect of formalised working conditions, and inadequate or non-existing public-services (e.g. day-care centres, reliable public transportation etc.) to assist working mothers, frustrates their desire to secure a decent home as well as the leisure to pursue a life within; the health and education of children, the protection and care of dependants, is often dissipated under the regime of working hours and physical exhaustion. Why then does she choose to work? Traditionally the Ghanaian women has always carried on some economic activity to contribute to her family welfare. However, the recent entrance of women into the wage sector of the economy is one that has been enhanced by the relatively recent improvements in educational facilities for women as well as social and economic changes in the society as a whole. It should therefore be expected that as more and more women enter into a more formalised work situation there are likely to be substantial changes occurring in how she relates to her spouse and her children. Matrimonial obligations and duties are likely to alter, and partners' roles as spouses and parents are likely to be modified especially in such areas as care of the children and domestic activities. Such changes are likely to have considerable implications for marriage and divorce irrespective of the education and incomes of spouses. However, it must be noted that there are distinct differences between the highly educated worker and the less educated worker in terms of her alternatives and prerogatives in solving these problems.

(C) Population and Divorce:

Nineteen-seventy, the date of the implementation of the population programme in Ghana coincided with the implementation of the Matrimonial Causes Act;[1] and although these two events were not deliberately planned to coincide in time, it is nevertheless, useful to view these two developments as complementary parts of the social development occurring in Ghana at this time.

The population programme is meant to develop and support a policy that will bring about a reduction in the birth rate of the population over time. Therefore, the deliberate attempt to reduce the rate of the population growth implies that changes are expected in the fertility behaviour on the part of the Ghanaian women and men; and this further implies changes in such spheres as:

(*a*) type of marriage,
(*b*) age at marriage,
(*c*) proportion of women marrying,
(*d*) amount of reproductive time spent in marriage.

It is evident therefore that such policies are likely to have considerable repercussions and influence for marriage dissolution. The wide and extensive propagation of information, services, and knowledge about patent contraceptives is likely to alter a somewhat fundamental assumption implicit in Ghanaian marriage law, that is, that reproduction is the prime and foremost reason for sex in marriage. This basic assumption has been and continues to be one of the strongest elements of social control in marriage, and its frequent abuse has still not altered its place of value in Ghanaian society.

The effects therefore of widespread contraceptive use in this society is likely to have far reaching implications for the family and its organisation. For example, it has been demonstrated that the relationship between fertility and duration of marriage is particularly close among couples practising contraception, since they seem to become infertile when the desired family size is achieved. Furthermore, as women gain more control over their fertility behaviour it is likely that there will be further development/changes in marriage patterns throughout the society. (i.e. later age marriage, shorter time spent in the reproductive period, etc.).

Marriage Stability:

In the sphere of marriage it is not possible to know without detailed studies the stability of the different types of marriage (e.g. Christian as opposed to non-Christian; monogamous as opposed to polygamous), but it can be safely said that all types of marriage have some inherent instability.

From the data collected by G. K. Nukunya on Anlo, we observe (see Appendix Table 1) that among the females of Woe and Alakple (in the Volta Region) in 1962 despite the high rate of marriage in the two communities there is divorce, although relatively low (by the figures available). However, one must be cautious in making inferences from these figures because the nature of the data makes it difficult to generalise about the larger Anlo population or the Volta Region. Nevertheless it is clear that divorce for these two areas increases with age. Also age appears to figure very prominently in marriage, divorce and remarriage in these two communities. The high rate of marriage in both communities among the age group 18-25 years (e.g. 100 per cent in Woe were married by age 25 and 96.4 per cent in Alakple) give some insight into the incidence of marriage, in a rural community. Although we do not have information on the age at marriage, or duration of marriage, it is possible to say that the women in the age group 18-25 years for either community (in the majority cases) have rarely experienced two or more marriages, but for all subsequent ages the pattern is reversed except in the extreme older ages. Where the tendency to divorce increases with age of the women so does the tendency to remarry. However, it must be noted that in both cases the proportion of marriages which ultimately reported broken by divorce are relatively small among the group under review.

Attitudes and Divorce:

From survey data on attitudes to divorce among University students it is clear that divorce is recognised and accepted as a means to end an unhappy marriage (Kumekpor and Twum Baah, 1972). The findings of this study reveal that 86 per cent were in favour of divorce being permitted. However, in divorce, every society must prescribe the conditions or grounds for divorce and these may range from very rigid rules to more liberal grounds for granting divorce. In Ghana customary law recognises divorce as a possibility of dissolving marriage in special cases. However, the general tendency in Ghanaian society (and most African societies) is to minimise this aspect and in general to discourage divorce. Nevertheless, the conditions and grounds for customary divorce are explicit and widely known throughout the society. Therefore, it should not be surprising to find University students favouring divorce. However, what is interesting is the fact that the attitudes expressed by this group on divorce show considerable discrepancy with the legal and social reality. About one quarter of the respondents expressed the view that divorce should always be granted whenever the spouses arrived at an agreement, "that it was best for them." This is not supported or encouraged by customary or civil law. Divorce by consent or collusion is legally and socially undersirable, although it is difficult to prove legally. Customary law does

provide very stringent checks on such behaviour by the elaborate use of arbitration and reconciliations.

The conditions of insanity, cruelty, infertility and desertion do not figure very prominently among the reasons for divorce for this "elite" group. But this is likely to be very different in the wider Ghanaian population—failure to bring forth children in marriage; impotency; failure to provide for one's children; and desertion of one's matrimonial home, do constitute very important and serious grounds for divorce as well as presenting serious problems to the family and society as a whole.

From the above discussion it is not possible to come to any final conclusion on attitudes to divorce in the wider Ghanaian society, but one can say that the possibility of divorce in cases of matrimonial discord, among the different sectors of the population, does exist; and that the grounds or conditions precipitating divorce appear to be somewhat more loose for the higher educated. However it is clear that the expressed views of this group at this time do not adequately reflect social reality. It should be interesting to know how these views find their expression in actual practice.

Statistics:

The actual number of cases petitioned under the various causes of the Matrimonial Act is difficult to discover from the records. The incomplete recording of cases "pending" and cases "disposed of" makes any estimate tenuous indeed. However, the recorded cases can be used to discuss some trend (despite the nature of the errors involved). From Appendix Table II one can observe that the absolute number of petitions filed has not shown any significant increase over the decade. The records used are for the cases processed through the High Court in Accra and are not necessarily representative of the other Regions. Except for the period January 1968—December 1968 the number filed seems relatively stable. When we compare divorce petitions filed and decrees made absolute more circumspection is needed. The decrees granted in a year include not only current cases but also accummulated arrears fortuitously worked off in the year. Inferences therefore based on figures alone for "Decrees absolute" would be misleading, number of petitions must be related to the changes in the size of the married population. The rise or fall in divorce petitions has little significance in itself in general, and probably greatly understates the proportion of marriages in Ghana that ultimately are broken by divorce. The existing data for this reason is very limited for estimating the number of marriages in Ghana that are dissolved because of divorce. However, the low recorded number of petitions for divorce in Ghana ultimately leads one to suspect that the low rate seems to be more of a reflection of the unwillingness to petition for divorce under the civil law as opposed to the unwillingness of individuals to seek divorce.

The Matrimonial Causes Act 1971:

The most significant change brought about by the Matrimonial Act of 1971 is the fact that it seeks to make possible the dissolution of marriage on grounds other than "fault." Its major contribution is that it makes provision for the use of customary practices in reconciling and remedying marital discord. Specifically, the subsection 2(f) of Part I of the Act states that:

> "The parties to the marriage have after diligent effort been unable to reconcile their differences."

Another important aspect is that the law offers more protection to the woman than was hitherto the case. The former practice (on the part of men) of using a situation of adultery as grounds for divorce has been weakened in this Act. The practice of having to accuse one of the partners or to continue a situation to prove one partner guilty of infidelity has been minimised considerably. In the sphere of maintenance, provision has been made for either partner to be awarded maintenance by the other, whereas, formerly this provision was granted only to the wife. This latter provision in the Act is an attempt to take cognisance of changes in the women's position, but in rare cases has this applied (i.e., when the husband is incapacitated due to illness, etc.).

Defects of the Act:

It is difficult to carry out legal reform in most areas of law and this is especially so with divorce. Thus there are bound to be areas of contradiction and confusion. Nevertheless, the sole basis for this Act is to provide a more reasonable ground for divorce within the Ghanaian context. Under this Act therefore, the sole grounds for divorce is that "marriage has broken down beyond reconciliation," and to prove that marriage has broken down beyond reconciliation the petitioners are obliged to satisfy the Court on one or more of six defined conditions. However even a cursory reading of these conditions makes one feel very uneasy about their meaning and possible interpretation. The central issue is that some of these conditions are extremely nebulous and vague, and can be loosely interpreted to suit the circumstances. In cases where the plaintiff is ignorant of legal procedure and jargon, the very wording of the statements is likely to create confusion rather than reform, especially where existing social conditions may obstruct or hamper their effective implementation. There have been situations where women were divorced without their knowledge, for example, after a long separation of one or two years the spouse may come to know that her marriage has been dissolved.

Secondly, the requirement that one must prove breakdown beyond reconciliation in a marriage, seems to be an unnecessary impediment to divorce and in such cases may prolong the suffering of the spouses needlessly. There is ample evidence to show that when the procedures are unnecessarily cumbersome or lengthy, individuals often take matters into their hands and just dispense with formalities altogether, and this is certainly true in the case of the less educated plaintiffs, thus forfeiting the possibility of a proper settlement of the case.

Thirdly, the reasons justifying reconciliation present some ambiguity and inconsistencies in their legal logic. For example, in issues such as (*b*) and (*f*) under subsection (2) Part I, the grounds seem superflous since one can appeal to condition (*a*) of same subsection and divorce three months after mnarriage.

The above points are by no means exhaustive. There are other areas of this Bill that must undergo further testing and scrutiny before we can hope to achieve the necessary reform needed in this area. It is however safe to predict that the needed reforms will not come immediately—they take a long time. Nevertheless, if Ghanaians are to realise fully or benefit from such social change there must be an even greater attempt to incorporate those aspects of customary practice that prove desirable and complementary to legal reform. In such areas as marriage and divorce, legality must reflect to a large extent social reality and the institutions that support it if they are to have any meaning for the society as a whole. "The only comfort in all this is the reflection that in tackling social problems, consciousness of ignorance may be the beginning of wisdom." (McGregor, 19).

APPENDIX

TABLE I

(A) MARITAL EXPERIENCE OF FEMALES BY AGE: WOE 1962 ALL FEMALES WITH MARITAL EXPERIENCE

Age in Years	*No. of Marriages since Birth*					*No of Divorce since Birth*				
	1	2	3	4	*Total*	1	2	3	4	*Total*
18—25	100.0	0.0	0.0	0.0	16.9	100.0	0.0	0.0	0.0	0.0
26—35	89.2	7.7	3.1	0.0	20.4	89.2	7.7	3.1	0.0	12.0
36—45	48.7	43.6	2.6	5.1	17.7	33.3	35.9	25.7	5.1	53.3
46—55	24.2	63.6	12.2	0.0	17.1	69.7	27.3	3.0	0.0	14.7
56—65	36.0	64.0	0.0	0.0	11.3	76.0	8.0	8.0	8.0	16.0
66—75	70.3	24.3	5.4	0.0	13.8	94.6	5.4	0.0	0.0	2.7
76—85	66.7	33.3	0.0	0.0	2.2	83.3	16.7	0.0	0.0	1.3
86	100.0	0.0	0.0	0.0	0.6	100.0	0.0	0.0	0.0	0.0
Total	69.8	26.1	3.4	0.7	100.0	80.6	12.3	5.6	1.5	100.0

(B) MARITAL EXPERIENCE OF FEMALES BY AGE: ALAKPLE 1962 ALL FEMALES WITH MARITAL EXPERIENCE

Age in Years	*No. of Marrages since Birth*					*No. of Divorce since Birth*					
	1	2	3	4	*Total*	0	1	2	3	4	*Total*
18—25	96.4	3.6	0.0	0.0	21.0	96.4	3.6	0.0	0.0	0.0	5.3
26—35	92.6	7.4	0.0	0.0	10.7	92.6	7.4	0.0	0.0	0.0	5.3
36—45	76.9	15.4	7.7	0.0	12.5	96.2	3.8	0.0	0.0	0.0	2.6
46—55	58.3	33.3	4.2	4.2	13.6	79.2	4.2	12.4	0.0	4.2	28.9
56—65	67.6	20.6	8.8	3.0	18.4	68.8	15.6	9.4	3.1	3.1	47.3
66—75	70.4	22.2	7.4	0.0	13.6	92.6	7.4	0.0	0.0	0.0	5.3
76—85	11.2	44.4	44.4	0.0	7.7	88.8	0.0	11.2	0.0	0.0	5.3
86	50.0	25.0	25.0	0.0	2.5	100.0	0.0	0.0	0.0	0.0	0.0
Total	76.2	16.5	6.3	1.0	100.0	88.7	6.4	3.4	0.5	1.0	100.0

TABLE II

Period	*Number of New Cases (Petitions)*	*Decrees Made Absolute*
Jan. 1961—Dec. 1961	38	20
Jan. 1962—Dec. 1962	40	16
Jan. 1963—Dec. 1963	45	24
Jan. 1964—Dec. 1964	53	23
Jan. 1965—Dec. 1965	50	20
Jan. 1966—Dec. 1966	58	29
Jan. 1967—Dec. 1967	59	28
Jan. 1968—Dec. 1968	71	26
Jan. 1969—Dec. 1969	63	21
Jan. 1970—Dec. 1970	52	16
Jan. 1971—Dec. 1971	47	3
Jan. 1972—Dec. 1972	52	6
Total No.	628	232

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