

GHANA'S MARRIAGE ORDINANCE: AN INQUIRY INTO  
A LEGAL TRANSPLANT FOR SOCIAL CHANGE

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The Marriage Ordinance, 1884 (Cap. 127, Laws of the Gold Coast, 1951 Rev.) enabled natives of the Gold Coast (now Ghana) to contract marriages of the type prevailing in Western societies, although not debarring them from contracting customary law, traditional marriages. There is evidence, referred to below, that it was enacted by the imperial power, Great Britain, with the intention of changing the social behaviour of Ghanaians. It has been retained in force since Ghana became independent in 1957. This paper examines the extent to which the Ordinance has produced the intended social effect.

I. THE ORDINANCE AND THE EFFICACY OF LAW

It seems that neither the colonial legislator nor his indigenous successor thought much about the interaction of law and social change. This interaction is especially relevant to this discussion because the law here is, to use Pospisil's term, of the "authoritarian" type,<sup>2</sup> in that it was part of the kind of legal system colonial dependencies were given by the imperial power. Studies in the process whereby people change their attitude in consonance with new and reforming legislation mention three important factors - the nature of the particular society's "folkways", the totality of coercion available to ensure compliance with the law, and the "legitimacy" of the law and the lawgiver.<sup>3</sup>

The argument as to the first factor is that "changes which run with the mores are easily brought about but changes which are opposed to the mores require long and patient effort, if they are possible at all."<sup>4</sup> However, as Podgorecki points out, the former type of change "may be said to be cheap" precisely because the same behaviour will prevail even in the absence of law.<sup>5</sup>

We consider the second element, coercion. The modern state has a plethora of coercive means to enforce its will upon its citizens. Real limits to the state's ability are imposed, however, by such factors as the availability of resources, the extent of citizen disapproval, and the relative political strength of the dissentient portion of the population.<sup>6</sup> The element of coercion then, although relevant, seems insufficient to make people change their attitude in conformity with new legislation.

What of the third factor? Is law obeyed because of the legitimacy of the law itself?<sup>7</sup> In other words, do citizens conform to a certain required behaviour embodied in law because "the law" so requires? This correlation cannot be established without proof of how the awareness that a given law requires a given behaviour changes the perception of the citizen about that behaviour's appropriateness. Kohlberg has defined such perceptual process and conformity as "internalization", by which he means "learning to conform to rules in situations that arouse impulses to transgress and that lack surveillance and sanctions."<sup>8</sup>

How has Ghana's Marriage Ordinance fared on this analysis? On congruence with "folkways", it would seem, at least on the surface, that law coming from a "foreign source" (England) would be contrary to rather than in accordance with Ghana's folkways, assuming there are common folkways for the whole of the country in the first place. On coercion, it is also a notorious fact that, as in most countries similarly situated, the law enforcement machinery was very weak from lack of resources in colonial times, and remains so today.

This leaves only the variable element of internalization as the crucial factor if compliance with the legislation is found. In Massell's study of Soviet "legal engineering" in tradition-bound Soviet-Central Asia,<sup>9</sup> and Mundt's more recent study of the internalization of Ivory Coast's new civil code,<sup>10</sup> the point is made that the lawgiver and the law need not be viewed as legitimate by the whole population for changes introduced by law to be accepted. The former study in particular observes that support from groups in the population who are traditionally disadvantaged by the society's own folkways can be sufficient to ensure that the laws have an impact even if they are disapproved of by the majority of the citizens. Is there any identifiable disadvantaged group whose interest coincides sufficiently with the Ordinance to secure its impact? If so, where do we place the congruence and what is the assurance that this is not a mere accident? Was it the law per se that induced the prescribed behaviour, or was it some other economic, social, psychological or other factor? In sum, we seek in this paper to address the questions why the ordinance was introduced, why some people choose to adapt their behaviour to it and others ignore it, and whether it has a future.

## II. RESEARCH METHODOLOGY

An attempt was made over a period of six months to collect such relevant information as the writer could without the time and expense of a full-scale, scientifically oriented survey, for which he was untrained. An intensive and essentially unstructured interview was conducted with priests of the "old" churches - Catholic, Methodist, Presbyterian and Anglican. The same was done with High Court judges in the two towns of Cape Coast and Berekum described below where the sampling took place, the Registrars of these courts, District

Court Magistrates, State Attorneys, and private attorneys.

The bulk of the interviewing however was done among married people in the two towns just mentioned. The term "married" (as the term "couple") was applied to mean men and women then married, divorced or widowed, i.e. persons who either then had a going marriage or had had such a relationship previously. It was intended to interview a hundred couples in each town but the actual number at the end of the work came to 94 at Cape Coast and 88 at Berekum. In addition, a highly intensive socio-psychological interview was conducted with 10 randomly selected, highly-educated women married under the Ordinance.

Interviewing started from a central location in each town (usually near the open market) and proceeded in a spiral. The questionnaires were administered personally but not according to any rigid schedule. On the contrary, ample room was allowed for respondents to talk about the whole gamut of marriage, family relations, succession, etc. it being necessary in the process to listen painfully to a lot of irrelevancies. No significant economic or social differences were found between people living in the various "quarters" of "sections" of the towns.

It cannot be suggested that no problems were encountered. On the essential question of who was and who was not married and therefore qualified for the interview, people were taken on their own declaration, as in the 1970 Census of Ghana on which reliance was placed. A claim to a marriage under the Ordinance could have been checked at the central office of the Registrar General in Accra, or by asking for the production of a marriage certificate by the couple. But to check a claim to a customary marriage there seems to be no way other than the rather cumbersome one of interviewing witnesses to the attendant ceremony or ceremonies. Since marriage is thought to enhance status, one could never be sure whether an interviewee was truly married, or lied in order to bolster his own ego.

But even the official statistics on Ordinance marriages were not completely reliable. A count of marriages in the Registrar's books over an 11-year period (1960-1970) for which official figures were available, and said to be complete, produced figures at variance with the official totals. No satisfactory explanation could be given by the government agents. In this study the official figures will be stated later, for what they are worth.

My English questionnaire had to be frequently translated into the vernacular, Akan. I speak this well being a native Akan myself. However, a special difficulty, and one not entirely expected, was encountered in explaining the difference between a "wedding" in two different situations. One was a "wedding" in the context of a church blessing for Christians who were married customarily but performed this church ritual in order to satisfy their church

regulations. The other "wedding" was an Ordinance marriage conducted by priests of the "old" churches in their capacity as marriage officers under the Ordinance. To many of my illiterate and semi-literate informants, both ceremonies were 'not customary.' The fine distinction between a private affair dealing with the internal regulations of a church, and a publicly recognised legal act (also done by a priest), made very little impression.

The adequate translation of degrees of comparison was another source of frustration. It proved very difficult to secure adequate comprehension of degrees of approval such as "satisfied," "fairly satisfied" and "very satisfied." It is worth reflecting that some degree of literacy seems to be a sine qua non to the use of that method of inquiry, prodding one to reflect that some researchers who have done work in Ghana were able to use that method because their respondents were predominantly literate.<sup>11</sup>

The work is not, however, based on the interview only. Research in the National Archives in Ghana on the administrative files and records of the colonial administration turned up very valuable material relating to the insights and outlook of the British colonial administrators. Court cases, other relevant "legal" material, and literature from other social science disciplines have been liberally drawn upon, as they should be in a study of this nature. Data based in large part on the 1970 Census of Ghana have also been analysed. Finally reliance has of course been placed on my own observations, insights and intuitions, especially in situations where published material is lacking. The justification for this perhaps unscientific study, as Lempert has put it in the case of research designs in legal impact studies, is that "it is almost always better to use an inferior design than to do no study at all."<sup>12</sup>

The study took place in Cape Coast and Berekum in the Central and Brong Ahafo Regions of Ghana respectively. Cape Coast with a 1970 population of 52,000 (the fifth largest city in Ghana) and Berekum with 15,000 were chosen not for the difference in population size but primarily because of the former's relatively modern and Westernized outlook and the latter's relatively traditional outlook.

Cape Coast is situated on the south-central Atlantic coastal shores of Ghana, and until 1874 was the administrative seat of the government of the Gold Coast. Because of its position and its early contact with Europe dating back to the 15th century, its citizens have received more exposure to Western ideas through trade, education and Christianity than the inhabitants of any other town.<sup>13</sup>

In contrast, Berekum's location in the west of the middle forested zone of Ghana assured its isolation from all early European influences until in the early years of the present century at the close of the "scramble for Africa" the British brought it into their "sphere of influence." And, while census figures are not always

revealing, the late start of Berekum as compared to Cape Coast regarding education seems to be shown by the 1970 figures. As an example, in persons over the age of 25, 73% of citizens of Berekum were listed as having had no formal schooling/education, while the corresponding figure for Cape Coast was only 10%.

One must not, however, be misled into believing that Cape Coast is completely Westernized and Berekum completely native. The latter has also its own educated elite, even though small and with no long history of education. It is also important to remember that in neither of the two towns does Westernization mean a complete abandonment of traditional culture. Thus, for instance, Christian and state marriages and burial are paralleled by polygamy and native funeral custom.

Both towns have a common linguistic background. Though Cape Coasters speak Fanti and Berekums Brong (or Bono), these are but different dialects of the parent Akan linguistic and cultural group, different segments of which easily understand each other. Although this does not imply political unity before colonization, their cultural, social and political organization and institutions, except for minor details, had similar patterns. Both Cape Coast and Berekum, for instance, belong to the matrilineal descent group system whereby property succession is reckoned through the female line.<sup>14</sup>

Given such homogeneity, this study sought to find the similarities and differences, if any, in citizen perceptions of marriage and the family that modernity has wrought in relatively "Westernized" Cape Coast as compared to "traditional" Berekum.

The interviews were also designed to provide insight into the marriage relationship itself. The Akans were chosen because, taken as a whole, they comprise about 60% of the total national population. Since no other single ethnic group is more than 10% of the population, Akan laws and customs have often been generalized by the courts to be the standard customary law applicable to the whole country<sup>15</sup> though this tendency has recently met criticism.<sup>16</sup> Perhaps we ought therefore to warn ourselves here that this work is more concerned with the Akans than with other ethnic groups of Ghana.

Lastly, another consideration worth mentioning for the choice of the two towns was their convenience in terms of expense, language and accessibility. The facts that I am Akan (Brong), that my home is only 20 miles from Berekum, and that at Cape Coast I had many old classmates, all greatly facilitated my work.

### III. WHY WAS THE ORDINANCE ENACTED, AND WHY DOES IT PERSIST?

The enactment of the Marriage Ordinance in 1884 appears somewhat inconsistent with the declared policy of the imperial power, Great Britain, not to interfere in the private lives of her subjects.<sup>17</sup>

The legal basis of that philosophy was perhaps best epitomized in the Gold Coast Supreme Court Ordinance of 1876, which was to be the prototype for other colonies.<sup>18</sup> This provided for the continued application of native law and custom, particularly "in causes and matters relating to marriage and to the tenure and transfer of real and personal property and to inheritance and testamentary dispositions."<sup>19</sup>

The British policy of non-interference, we may surmise, was the most practicable in the circumstances. A large number of administrators would have been necessary for a contrary policy and their provision would either have been beyond Britain's capacity or would have cost a great deal of money. Besides, the laws and customs relating to marriage and family life were only minimally relevant to the purpose primarily economic, of the colonialists. Lastly, the possibility of native revolt could have been greater if there had been too much tampering with family and marriage matters for in such essentially private matters, age-old customs are often deeply rooted.

However, the taboo areas were not sacrosanct, and in retrospect there appear many instances where laws were made to modify or even abolish essentially private areas of native law and custom when that suited British interests. Although the primary motive for imperialism and colonialism was the need for raw materials and markets for industrialized Europe,<sup>20</sup> one must not forget the part played by anti-slavery movements and philanthropy. Anxious to make up for the guilt of the slave trade, philanthropists thought of introducing "legitimate trade" along with the "saving and civilizing" of the natives of Africa. The resulting marriage of economic interest and philanthropy was decisive, for it came to control British policy towards her colonies as embodied in the political economy of colonialism. Thus Lord Lugard wrote:

The nations in control of colonies are ... 'Trustees for civilization'... In carrying out this trust they exercise a 'dual mandate'... as trustees on the one hand for the development of the resources of these lands on behalf of the congested populations whose lives and industries depend on a share of the bounties with which nature has so abundantly endowed the tropics. On the other hand, they exercise a 'sacred trust' on behalf of the people who inhabit the tropics and who are so pathetically dependent on their guidance.<sup>21</sup>

In the Gold Coast, the 'sacred trust' of the British was clear enough. The people being in a most elementary stage of civilisation, material progress was to be brought to them through free trade and the opening up of the country with roads and mines, whilst the less tangible advantages were to come through missionary pioneered schools.<sup>22</sup> Philanthropy and profits were bound to go hand in hand. This mood was commonly coupled with an all-prevailing sense of Western cultural superiority not only on the part of militant imperialists but also of many socialists and, perhaps not surprisingly, of

"Europeanized" Africans.<sup>23</sup> A very important aspect of this sense of cultural superiority was to manifest itself in the drive for the recommendation of the European family to the natives of the Gold Coast.

For the British, like other European colonialists, came to Africa with minds culturally foreclosed. Whether native institutions such as the family and marriage were functional in the African social setting was, therefore, largely irrelevant - the European and Christian ideal was the only one the British knew, was the best, and should prevail if progress was to be assured to the native. According to the ideas later to be articulated by Max Weber,<sup>24</sup> European industrial and scientific progress had been made possible by the nuclear family because individuals were thereby isolated from wide kinship and descent groups. Important consequences followed because the extended family was seen as "enforcing conformity upon its members and thereby discouraging change, progress and innovation."<sup>25</sup> In the nuclear family, on the other hand, a man's options to pursue any occupation free from any claims by his kin were unfettered.

Hierarchical ranking of kin in descent groups, and the concomitant correlation of authority with age, it was argued, were associated with extended families. In nuclear families, on the other hand, greater stress was placed on individual initiative and achievement, rather than on the sense of affiliation and the desire for the approval of one's neighbours stressed in African tribal organization. The accumulation of capital was made difficult in the latter system because of the obligation to help others, a characteristic of extended family groups.<sup>26</sup> This situation led to a dispersal of savings as needy relatives and the unemployed members of the family lived parasitically on the earnings of the successful member.

On property holdings, it was argued that wide descent group interests or community ownership kept rights frozen and almost impossible of alienation even when the latter course was clearly in the interest of the owning group and of society as a whole. Lastly, it was thought that the geographical mobility essential if men were to move from one job to another to utilize their talents to the utmost, was easy only with the nuclear family, not the wider family system.<sup>27</sup>

We do not intend to contest the truth of these assumptions. It is sufficient to say here that the example of Japan, which remained faithful to her traditional descent group system, and nevertheless developed into one of the foremost industrial nations of the world, casts serious doubt on their veracity.<sup>28</sup> It need only be observed that the Ghanaian and African system was antithetical to all those assumptions, and so was an early target for reform in the name of progress.

For the Ghanaian family was of the wide descent group type. Logically therefore, it suffered from all the disadvantages listed above. In the matrilineal Akan areas, important because of their

number and also because they were the first to be encountered by Europeans by virtue of their coastal location, the family suffered an additional defect. Because inheritance was here reckoned through females, not males, sons never inherited from their fathers on intestacy. The likely consequence was that a business venture which depended on a father's enterprising effort was unlikely to thrive after his death through his own child. For as soon as this individual died, all his property passed to his traditional family which excluded both his spouse and his children, the very people closest to the deceased and who were the most likely to have carried on or helped in the business and acquired useful knowledge about it. Among the Akans the rules of succession placed such property in the charge of someone not as close to the deceased and probably with less knowledge or business acumen than his children or spouse. If there was to evolve a society conducive to civilization and progress, these disadvantages of the family system had to be eliminated.

In this regard, s.39 of the Ordinance (now s.48) was primarily directed to the end of realigning the institution of the family by cutting its very roots - property. It provided that all a deceased intestate's property was to pass to his surviving spouse and children, whereas by native custom it had devolved on his customary family. As it turned out, however, enlightened native opinion detected the intentions of the law and led a fight against it. There was therefore much native agitation against the Ordinance as a whole and the s.39 provision in particular. A government commission was set up to inquire into the working of the Ordinance in 1905, i.e. only two decades after it had come into operation. Perhaps the most important finding of the Commission was that the Ordinance had failed to attract natives because s.39 was especially offensive to native ideas.

The Commission therefore recommended that the section be amended to give a third of a deceased's property to his family. This recommendation was adopted and is retained in the Ordinance today. Against this majority view however, the President of the Commission, the then Chief Justice of the Gold Coast, objected vigorously. He saw in it a reversal of the implicit policy of breaking the family hold on the individual and re-aligning the native family on British standards.

① In his minority report to the Governor he wrote, inter alia:

In my opinion it should be the aim of the Government to strengthen the tie between father and mother and children, and if necessary this should be done at the expense of the 'family' feeling. An educated well-to-do native is fair prey to his 'family'; they batten on him. But for his 'family' many an educated man would be in a far better position today and would have capital to invest in local ventures. No doubt the family has been and still is and will continue to be of great value to a struggling clever youth, but the time has now come to encourage the individual; family life



has had its day, we must advance a step in civilization towards individualism. By retaining the terms of s.39 we do this, by altering s.39 in the sense asked for by the native community we take a retrograde step.<sup>29</sup>

To the President's mind "the plea for civilization and individualism and the strengthening of the bond between father, mother and children [was] far weightier than the objections"<sup>30</sup> expressed by natives appearing before the Commission.

It is also true that religion often buttresses the predominant economic, political and social philosophy of a place and time.<sup>31</sup> Even though the missionary might have had the purest of motives in discharging his "God-given burden" of "civilizing the heathen races" of the world, he could hardly have escaped his background and, therefore, his cultural sense of superiority and his prejudice against anything "African" or "native".

Thus in the 1905 inquiry into the workings of the Marriage Ordinance, one John Samuel Ellenberger, whose title was given as "Superintendent of Aburi Circuit" of the Presbyterian Church, said in the course of his evidence:

Men mostly leave their wives. Natives do not regard marriages from the same standard; moral tone is lower than in England.

When asked then whether, "...the native [was] not fitted [sic.] for the Christian marriage," he answered:

No. They do not realize the seriousness and contract marriages more lightly.<sup>32</sup>

The marriage incident of polygyny<sup>33</sup> received special condemnation. A polygamist was in many churches disbarred from membership, and a church member who took another wife was promptly expelled.<sup>34</sup> The practice of giving "bridewealth"<sup>35</sup> was condemned and likened to a sale. In sum, the wrong African approach to marriage was seen in such practices as betrothals, "forced marriages" and the "inheritance of wives." In the eyes of the missionary, all these constituted ill-treatment of African women, whose condition was therefore perhaps only a shade better than that of slaves. Salvation and progress for the Gold Coast native could only come by his being made a new man. Hence the Marriage Ordinance was seen as a corrective, making marriages more "serious" as contended for by the Methodist Minister's evidence just quoted, and reversing the "unnatural" tendencies in the native approach to intestacy whereby widows and children did not inherit an intestate's property.

Why does the Ordinance persist in post-independence Ghana if it was a colonialist plot to destroy the indigenous family and

marriage? Possibly ideas were in the long run better tools of imperialism than force. We submit that in this connection the most lasting impression during colonial days and today has come through missionary education and indoctrination, subtle and sometimes not as subtle. The European administrator and especially the missionary became in a very real sense of the word censor of African customs and way of life. The only institutions worthy of copying were the European or Christian ones.

Towards this end, the image of family life given to the native convert, or that which he formed in his own imagination, was a distorted picture of the real European Christian marriage. This romanticized picture still largely prevails today,<sup>36</sup> and many a Ghanaian visitor to Christian Europe is pleasantly surprised to find that some marriages in these parts also break down, that couples quarrel and fight, that there is infidelity! In any case, a "good church member" was, and is still today, expected to marry according to church rites, which in the main means in the Western fashion. Of course, if one is to be married a church marriage is a sine qua non to entering an office in the church.<sup>37</sup>

In the early days a church marriage was also a precondition for a teaching appointment, and until recently church membership was itself one of the requirements for entry into missionary schools.<sup>38</sup> Even today, when these schools have been taken over by the government and entry made open, a church-managed school still reserves all the top administrative positions for its members.

Whether in the schools or the churches, everything the native received went to degrade his own self and his institutions, from his very name,<sup>39</sup> down to the smallest detail of his life. The extent to which this indoctrination went, and the credulity exhibited by the native audience are unbelievable. Not even table manners and etiquette escaped attention, censure and acceptance, for to eat with one's fingers, as is universally done by Ghanaians, was condemned as heathen; one had to use forks and knives, to show one was civilized.<sup>40</sup> The missions' native protégés acquiesced in all this, and in fact actively encouraged it. So far did this process go that Miss M.J. Field, the Government Anthropologist in the Gold Coast in 1930, had occasion to complain about it in her evidence to the London Colonial Secretary on "...Forced Marriage of African Girls" thus:

There is a type of literate African who prides himself on despising native customs and is prone to display an arrogant disregard of others in setting up what he imagines to be European standards...<sup>41</sup>

However, she was

not prepared to lay the blame where it rightly

belonged because it would be unfair to blame missionaries for this type of incident, although it was they who introduced the Christianity behind which these literates shelter.<sup>42</sup>

In many instances these overzealous and "Europeanized" natives had to be restrained from going too far in the condemnation of their own society's "heathen ways," for left alone they would have touched off serious riots. To quote Achebe, the educated, detribalized African had come to be the "outsider who wept louder than the bereaved."<sup>43</sup>

The continuing effects of this cultural domination may be traced in part to the imperial policy of indirect rule. The Gold Coast, like other colonial territories, was to form an appendage to the metropolitan economy of Great Britain. Its dependence, even unto today, was therefore consciously fostered by policies and programmes of the metropolitan country.<sup>44</sup> For the fulfilment of their objectives it was not necessary for the British to take direct control of native lands and settle there to produce agricultural produce or precious metal, for as Lugard above rationalized, it was sufficient to make the Africans want the products of Western civilization: "Indirect Rule," as developed and applied by Lugard in Northern Nigeria, later to become the cornerstone of British imperial administration, only required that the British remain in the background while nevertheless retaining effective control over the native population by directing events through the latter's chiefs and other indigenous rulers. This was also necessary because of the opinion exemplified by one British District Commissioner's comment:

...I do not think, speaking generally, that the native has sufficient integrity, intelligence or energy to qualify him to be the judge of others...<sup>45</sup>

The reason for the continued retention of the Ordinance is to be found in the continued effect of that indoctrination which now is more respectfully called "Westernization." The very full effect of colonization may perhaps never be entirely documented, but one very serious legacy has been its devastatingly negative influence on the general self-confidence of the colonized.<sup>46</sup> This has led to a general erosion of trust and belief in native institutions. While lip service is paid to "African personality" and African culture and such other confidence-resuscitating phrases, the educated elite who are the leaders judge progress in terms of Western values and standards. The recent Ghana Law Reform Commission proposals on intestacy, for instance, start from the premise that the indigenous inheritance system is bad and needs to be changed, without considering the philosophical, social and sentimental basis of it.<sup>47</sup>

But introducing a law reform is one thing and enforcing it quite another. The actual operation of the Ordinance must be examined. First, however, we pause to consider the background of

the indigenous marriage and family system.

#### IV. THE AKAN MARRIAGE AND FAMILY SYSTEM

The laws of Ghana today provide three modes of contracting marriage - (a) under one of the various customary laws of the indigenous communities, (b) under Muslim law, and (c) under the Marriage Ordinance. The last two are statutory.<sup>48</sup> Nevertheless, it is a fundamental principle that a person belongs to his or her own abusua (family) from cradle to grave, and this is not changed by one's marriage by whatever mode.<sup>49</sup> We may quote Allott's illuminating observation here:

To the Akan, ties created by marriage are transitory, those arising from membership of a family permanent. In many ways a woman is more intimately bound to her brother (who is the uncle, or legal guardian, of her children), then to her husband. A father, in Akan terms, is not related - though he is connected - to his children.<sup>50</sup>

This is an important distinguishing mark from Western conceptions about marriage and the family, for in the latter family systems are based on the central relationship of husband and wife - the "conjugal family" as we may call it, constituted by a man, a woman, and their children.

In the Akan system, the central relationship is not that of husband and wife, but of "blood relatives." The American sociologist Ralph Linton summarizes this situation by saying that the conjugal family consists of "a nucleus of spouses and their off-spring surrounded by a fringe of relatives" and the "consanguine family" or African type as consisting of "a nucleus of blood relatives surrounded by a fringe of spouses."<sup>51</sup>

Membership in the family, determined by matriliney in Akan communities, gives a person his political and legal status, determines his property interests in group-owned property, and his office and ritual status<sup>52</sup> such as the office of abusuapanin or headship of the family, or of ohene (the political office of chief). Marriage here does not give rise to a new organism but may be said to be only a means of assuring the perenniality of the larger family group.<sup>53</sup> The two principal participants, husband and wife, have limited rights and responsibilities towards each other. Neither entirely leaves his or her own family to form a merged household on the Western legal conception that the "twain" become one. Thus a married woman in traditional customary societies, even in patrilineal societies where a husband's authority over his wife is very extensive, keeps her own name and does not adopt the name of her husband as in Western society. Each partner perpetuates the name of his or her own family line, as one would expect in the social environment. In the "consanguine" family systems we also find that, even when

a marriage has been formed, the two spouses tend to remain in their parental homes surrounded by people of their own "blood."<sup>54</sup>

The two families of the respective couples incur rights and obligations towards each other, and as a direct consequence of this a relationship is established which endures beyond the life of the marriage itself. The death of the husband per se does not terminate his marriage, for his successor becomes in very substantial measure, responsible for the widow and children of the deceased.<sup>55</sup>

And because of the centrality of the family in the individual's life, the consent of his or her family is necessary for the individual's marriage.<sup>56</sup> This may appear startling to those familiar only with other systems. Thus Osborne, C.J., an Englishman, in the Nigerian case of Re Sapara disapproved such a suggestion by saying that he was "unable to accept the proposition...that the consent of a man's family [was] a legal essential to his marriage."<sup>57</sup> Of course consent of the family is in most cases not unreasonably withheld but any prospective spouse, male or female, will think twice before entering into a marriage in the face of active opposition from either family.<sup>58</sup>

Obviously the element of love is not considered to be the primary reason for marriage, and to many Ghanaians, "love is over-emphasised by abrofo (Europeans)." The ends of marriage being the procreation and continuation of the family line, love and sexual gratification, even though important, are not emphasized. This understood, it perhaps becomes a little less difficult for the Westerner to accept that marriages in these parts can be arranged, for marriages are not entered into primarily to satisfy the interests of bride and bridegroom.<sup>59</sup> And because African traditional conceptions hold the basic purpose of marriage to be procreation and the continuance of the family line, a childless marriage provides enough reason for a man to take a new wife.

During the subsistence of the marriage, the husband is responsible for the care of the wife in illness, for her accommodation, the provision of food and her general maintenance.<sup>61</sup> Indeed, so absolute is the husband's latter responsibility that it seems he is bound to do it even if the wife has independent means of subsistence.<sup>62</sup> There is a corresponding obligation on the wife, however, to help her husband in the latter's farms or in his profession. Any revenue accruing from such venture is the sole property of the man.

In keeping with each other's individuality during the relationship, there is no communal ownership of property, each keeping his or her own property separate from the other.<sup>63</sup> Bosman writing on the Akan in the 17th century observed:

Married people have no community of goods;  
but each has his or her particular property.

And because each belongs to his or her own family,

On the death of either the man or the woman the respective relations come and immediately sweep away all not leaving the widow or widower the least part thereof.<sup>64</sup>

A husband is not liable for the private debts of his wife in these circumstances. Sarbah discussing the responsibility of the husband towards his wife at the close of the 19th century, wrote:

While a husband is living with his wife, or is providing for and maintaining her, he is not liable for her contracts, debts or liabilities, except for maintenance for herself or child by him. For the wife, ... can acquire and hold property apart from the husband, and has her own family to fall back on.<sup>65</sup>

On the death of the husband, his rights and responsibilities fall on his family through the successor appointed by that body. Therefore the wife, unless "properly divorced" by the deceased's family, is entitled to maintenance and to reside in the house of her deceased husband.<sup>66</sup>

Lastly, regarding the living arrangements of the Ghanaian couple, data are inadequate, but it is clear that both in the past and present the Western ideal of common residence has never been the rule. It is a reasonable guess that perhaps half of all couples live separately even today.<sup>67</sup> Many informants, for instance, mentioned as a cause of marital difficulties that, "You are not alone with your wife and children like a European family," and also that "living together with relatives makes relatives frequently interfere with your marriage affairs." We now turn our attention to the question whether the Ordinance has change the situation.

## V. ACTUAL OPERATION OF THE ORDINANCE

### A. Choice of Marriage Law and the Attraction of the Ordinance: Reasons for Preferring the Ordinance

Even though the overwhelming number of people in Ghana marry customarily,<sup>67A</sup> there are many who, with one or two obstacles removed, would have married under the Ordinance. At present only a small number of marriages are governed by the Ordinance.<sup>68</sup> Ordinance partners when interviewed were almost unanimous in the view that they had chosen rightly by electing to marry under the Ordinance. But as the table below shows, for those married under customary law, the position was different.

TABLE ONE

Cape Coast Women Married Under Customary Law

No. Interviewed	Prefer Ordinance	Prefer Cust. Law	% Preferring Ord.
35	17	18	48.5%

Berekum Women Married Under Customary Law

No. Interviewed	Prefer Ordinance	Prefer Cust. Law	% Preferring Ord.
39	12	27	30.8%

Corresponding percentages for men at Cape Coast and Berekum were 20% and 8% respectively. Even though these figures are not overwhelming they are still impressive, for if this large number would have preferred the Ordinance, we might look forward to a wider acceptance in the future, favourable conditions being present.

The following presentation is largely a synthesis of reasons given by our informants for the attraction of the Ordinance. As will be seen, apart from the reasons that may be reasonably inferred as possible benefits conferred by the law, many others are pure myths, indeed in some cases directly contrary to what the law means or says. But then the same could be said of reasons, such as illiteracy, and indissolubility of Ordinance marriages, which some gave as disabling them from using the Ordinance. Whether myths, fantasies or facts, they merit attention since they directly influence behaviour.

1. *The Ordinance is chosen because of families*

The intermixture of family and individual member's interest is evident in statements that people chose the Ordinance because they knew it would satisfy the wishes of their families. In some cases the spouses simply complied with a family recommendation to use the Ordinance.

But there was an interesting finding related to "family reasons" worthy of note here. Cases were narrated where families objected to an intended marriage. In order to overcome the objection, one partner then suggested use of the Ordinance because they could "freely marry" thereunder without family consent if they satisfied the age requirement. The Ordinance in this instance, instead of being used to "satisfy" families, was rather employed as an evasion device against parents.<sup>69</sup> One might perhaps call this a negative

family reason, but in any event the family then becomes actively instrumental in the use of the law. It is indeed widely believed that the Ordinance confers "freedom from interference" from the couples' families thus leaving the couple free in cases where one family or even both families raise objections to the marriage.<sup>70</sup>

From here, we consider the answers to one of our questions which asked informant-spouses the system of marriage they would recommend for their children. The responses from the two towns are combined because there appeared to be no significant differences in their choices.

TABLE TWO

(i) Parents' Recommendation for SonsWOMEN PARENTS

<u>No. of Women</u>	<u>Recommend Ord.</u>	<u>Recommend Cust. L.</u>	<u>Not Sure</u>
91	20	25	46

MEN PARENTS

<u>No. of Men</u>	<u>Recommend Ord.</u>	<u>Recommend Cust. L.</u>	<u>Not Sure</u>
91	10	70	11

(ii) Recommendation for DaughtersWOMEN PARENTS

<u>No. of Women</u>	<u>Recommend Ord.</u>	<u>Recommend Cust. L.</u>	<u>Not Sure</u>
91	70	12	9

MEN PARENTS

<u>No. of Men</u>	<u>Recommend Ord.</u>	<u>Recommend Cust. L.</u>	<u>Not Sure</u>
91	66	21	4

We make a preliminary note that the "Not Sure" column represents answers from persons who genuinely felt they had no preference for one over the other and also for those who thought they "would leave it to the children to decide for themselves."

It is clear that there is an apparently overwhelming preference for the Ordinance by both male and female parents for their daughters.



The rather high "not sure" rate for male children generally bears out the observation that the Ordinance confers few advantages on men. That is not the full explanation, however. The hidden additional reason comes from the ambivalent attitude of women parents as evidenced by the disproportionately high "not sure" rate for sons in Table 2 (i). For it is generally believed, even if the contrary occurs in practice, that a deceased man "loses" all his property to his wife and children and leaves nothing to his family when he enters an Ordinance marriage. Of course, this is not legally true for the Ordinance mandates that a third of an intestate man's property should devolve by customary law, which usually means this portion goes to his traditional family. The misinterpretation however is prevalent. Now, since a person's real heir (in the sense of the person standing first in line of priority) is his mother,<sup>73</sup> and the women know this, they seem indecisive when they are faced with the question whether to favour an Ordinance marriage for their sons.

## 2. Prestige

The prestige the Ordinance is believed to confer no doubt stands out as one of the most important reasons today for marrying under it.

Lucy Mair has observed:

In every society people regard as good the esteem of their fellows, the possession of material wealth and the ability to influence the actions of others, and they manipulate their social relationships in pursuit of these ends.<sup>74</sup>

Ordinance spouses without exception believe that "an Ordinance marriage is more respected in the society than customary marriage" and that it raises their esteem in the eyes of the community.

This view, we observe, is not baseless for official attitudes at least create the impression that an Ordinance marriage has a higher status or prestige than a customary one and that it is the one to be encouraged. This we have referred to earlier but here again we point to s.48(1) of the Ordinance. This provides inter alia that on the death intestate of any issue of an Ordinance marriage, his property also shall be distributed in accordance with the provisions of the Ordinance as if he had in fact personally been married under the Ordinance during his lifetime. The implication seems plain - the children of civilized forms of marriage would not be allowed to slide back into barbarism.<sup>75</sup>

The Ordinance, in its demeaning attitude towards customary marriages, makes it impliedly possible for such lower forms of marriage to be "converted" into the higher Ordinance marriage.<sup>76</sup> As far back as 1889, the then Chief Justice had had occasion to question the whole rationale thus:

I should have thought that persons already lawfully married could not be married over again. The Ordinance, however, certainly seems to contemplate that in future such persons can be married over again and that the second marriage shall have certain important consequences in the devolution of their property.<sup>77</sup>

To this, the succeeding Chief Justice acidly rejoined four years later:

...the question to my mind is not whether a person married according to native law and therefore lawfully married cannot be married over again, but what has the Legislature declared on the subject. For the Legislature can legislate that a square peg shall be considered and taken to be a round peg. Now the Legislature has provided in clear and unmistakable terms that a person married according to native law can be again married according to English law.<sup>78</sup>

Is this second marriage in law a new one? When the parties are before the marriage officer, he is required to address them thus: "Do I understand you A.B. and you C.D. that you come here for the purpose of becoming man and wife?"<sup>79</sup> Does this procedure not enjoin parties to make a false declaration since they are already married?<sup>80</sup> At the risk of overkill, we observe that this official discriminatory attitude has prevailed until today. In recent cases like Afrifa v. Class-Peter<sup>81</sup> and Acheampong v. Acheampong<sup>82</sup> the plaintiff customary law wives successfully sued for breach of promise by their husbands because the latter had failed to convert their customary law marriages into Ordinance ones. These add to the impression that the law places Ordinance marriages above customary law ones.<sup>83</sup>

The other prestige aspect of the Ordinance and consequently its appeal lies in its being Western and foreign. For to those Ghanaians who judge everything through Western eyes, it is irrelevant whether the Ordinance be a "foreign imposition," "imperialist-oriented" or fits any of such similar deprecatory descriptions used by nationalists. The group holds fast to Western values, or what they think them to be, in spite of all the nationalistic fervor that surrounds them. Indeed the social scene presents a confused, contradictory and sometimes embarrassing picture of nationalism and rejection of alien values on the one hand, and the considerable appeal of Western values on the other. In the result, a kind of complex love-hate syndrome exists.<sup>84</sup> But for a certain section of the population, especially the university graduate and others of that socio-economic class, the West is generally the standard of reference. This holds especially true with the female university graduate.

This manifests itself in various ways in the marriage process. That class, for instance, holds a customary marriage as an "engagement only," a stage in the marriage process which only a wedding (i.e. marriage under the Ordinance) completes. To a female of this group or class, it is almost a right, a matter of course, that she "weds." At Cape Coast in particular, it is held out as an ideal that "every educated girl" should "wed."

Lastly, since the Western lifestyle is held to be the ideal by its adherents, their names and lifestyles are patterned on that model. Thus the women adopt the names of their husbands at marriage, and to forget to call a wedded wife by her title of "Mrs. ..." is an unpardonable violation of etiquette. The children of the marriage too are given the name of their father - a very unusual "custom" in the Akan context.<sup>85</sup>

### 3. Security

The Ordinance is also wanted because of the security it gives or is supposed to give to those who use it. This has two aspects - (i) economic security, and (ii) stability of the marriage.

(i) *Economic security.* We have already said that in Akan law when a man dies intestate, because he belongs to his family, everything of his including his property goes to his family. We note, moreover, that because there is very little opportunity for the female spouse during the life of the marriage to acquire property on her own<sup>86</sup> she stands at a decisive disadvantage when the husband dies intestate. Even though in that event she takes the children of the marriage, while the man's family takes his property, however rational and equitable this appears in theory, it works harshly on her. Because she actively toils with her husband to acquire the property, the woman's sense of fairness suggests to her (and many Ghanaian males perhaps agree) that she deserves at least some portion of it in all circumstances<sup>87</sup> if her husband dies first<sup>88</sup> and intestate (the possibility of testacy being negligible because wills are rarely made).

While, therefore, not disputing the Akan social philosophy that a husband and his property belong to his own family as she belongs to hers, she is in sympathy with the provisions of the Ordinance relating to the devolution of an intestate's property. She rationalizes that, if a part of the property she actively helped to acquire is given her, this does not derogate from the Akan social arrangement. The Ordinance is therefore attractive in this respect.

(ii) *Marriage stability.* The Ordinance is also attractive because of the stability it is believed to bring into marriage, as contrasted with customary law. There is an erroneous but popular conception that marriage under the Ordinance is the same as a church (especially Catholic) marriage. This is not surprising remembering the instrumental role the churches played in the enactment of the Ordinance. This connection of church and Ordinance is continued by

s.30 of the law which empowers priests to be marriage officers. Because by far the greatest number of Ordinance marriages are celebrated in one or other of the "established" churches - Catholic, Anglican, Presbyterian, and Methodist - the connection still remains very close.

However the practice of the churches in this case greatly adds to the confusion. Under church rules, a customary law marriage can subsequently be "blessed" in order to receive full recognition in the church. But then the same priest who does the blessing may also celebrate an Ordinance marriage proper, using virtually the same procedures and rituals. To make confusion more confounded, the church issues its own certificate for the customary marriages it blesses for the parties! The average Ghanaian therefore sees no difference. He also assumes that an Ordinance marriage, like one celebrated in a Catholic church (this being the biggest denomination), which does not recognise civil divorce, is indissoluble.

Even when it is realised that divorce is possible, the belief prevails that the Ordinance qua Ordinance assures marriage stability, in that it prevents frivolous divorces. An Ordinance marriage can only be dissolved by a "competent court". This often involves lawyers and legal fees, courts and their intimidating atmosphere, towards all of which many have a strong aversion. Moreover, the argument goes, on application for divorce, the female spouse has complete equality with the male as far as grounds for divorce are concerned.<sup>89</sup> Thus her right in this respect is more substantial than her narrowly circumscribed position under customary law. Hence a man who has an Ordinance marriage cannot, almost on a whim, throw his wife out and get a divorce because, for instance, "she does not cook as well as [his own] mother does."<sup>90</sup>

Another aspect of the stabilizing function of the Ordinance is its psychological impact which "makes people know and understand each other well" before they go in for it - a sort of "look before you leap" caution. Whether based on the erroneous belief that the marriage is indissoluble or the more factually true one that it is comparatively hard to break, an Ordinance marriage is rarely, if ever, entered into ab initio, for fear of later difficulties. It is almost invariably preceded by a customary marriage.<sup>91</sup> In the absence of any official figures, we will hazard a guess that on the average, there is a lapse of five years between the conclusion of a customary marriage and its conversion into an Ordinance one. This gives the couple enough time to make a real commitment to each other. In these various ways the Ordinance contributes to stability, although whether it can hold spouses who later find themselves wholly incompatible and determine to break is doubtful.<sup>92</sup> We are also mindful of the fact that some marriages are better ended in law if they have broken down in fact, but of course a discussion of that nature does not belong here.

There is an interesting side-effect of the stability function

of the Ordinance. There is evidence that a partner who is not very sure of the other's commitment to their existing customary marriage may use the Ordinance to bo no paregoo (nail him/her down). For since it is popularly believed that an Ordinance marriage is indissoluble, or hard to dissolve, the more loving partner suggests and often succeeds in committing the wavering partner into an Ordinance arrangement in order to "pin her or him down."

#### 4. *The Worth of the Marriage Certificate*

(i) *As proof of marriage and paternity.* Although under the customary law marriage is not necessary to legitimize a child, the putative father must acknowledge him, if, for example, he is to be held liable for the child's maintenance.<sup>93</sup> Disputes about paternity and maintenance can be acute, and one gets the impression that they are on the rise. They usually appear after the death of the alleged father when his responsibilities of maintenance to children and widow would have fallen on his successor or family.

Paternity is easier to prove if it can be established that there was a marriage between the parents of the child. But because of the nature of customary law marriage procedures, it is always difficult to tell at what moment in time or what final act makes it effective.<sup>94</sup> And even though the legal requirements for a valid customary law marriage as stated by the cases<sup>95</sup> have been criticised,<sup>96</sup> the courts seem to show no inclination towards loosening them. In fact, if the recent case of Afrifa v. Class-Peter<sup>97</sup> is any indication, we can look forward to an even tougher standard of proof for a valid customary marriage.<sup>98</sup> But as the court there incidentally also recognized, the multiplicity of modes of contracting customary marriages makes it very difficult in many cases to determine which was followed, and whether in fact it was ever completed.<sup>99</sup>

It is therefore thought that with this multiplicity and uncertainty of marriage laws and procedure, an easy outlet is provided for a father to escape his maintenance responsibilities by denying that a marriage, from which the child was born, ever existed. An Ordinance marriage with its certificate to evidence it has an undoubted advantage in this respect.

(ii) *Other uses.* Other perhaps comparatively minor reasons for preferring the Ordinance for its evidenciary value are furnished by the need to produce the marriage certificate in various situations, such as before a foreign visa-issuing official, or in securing membership in an organization which makes an Ordinance marriage, if one is married, a condition for membership.

#### B. Has the Ordinance Been Internalized?

In terms of extent of use the Marriage Ordinance has been disappointing.<sup>100</sup> However, a quantitative judgment alone, we think,

would be inadequate in evaluating its impact. This is because in the previous discussion we saw that many couples, besides those who had actually used the Ordinance, desired it. Besides, we there saw that many desired it for use by their children. All this suggests that we may see its more frequent use in the future.

But even more important, it is a fact, even if repugnant to our egalitarian ideals, that in every society some members have more status, power, money and influence than others, and that it is these who set standards for the society.<sup>102</sup> From the interviews conducted with spouses, priests, court registrars, judges and attorneys (as well as from personal knowledge), it is evident that Ordinance marriages are overwhelmingly contracted by the university graduate, high-ranking civil servant, army officer and such other top calibre members of Ghanaian society.<sup>103</sup> These surely are the people who make policy, influence public opinion, and set standards for the rest of the society. If, therefore, they have accepted the Ordinance, then it may be mistaken to deduce failure of the law from the rarity of Ordinance marriages at present.

The great question is whether the Ghanaian Ordinance spouse has changed his perceptions of marriage and family life in accordance with the intentment of the Ordinance. The answer seems to be in the negative. Before we proceed further, we ought to say that we are mindful of the fact that there are perhaps too many variables to enable us to point to the Ordinance's independent effect and that this may have to await more rigidly defined scientific investigation. A fair idea was however got from the informants and from the observable social scene.

#### 1. Inheritance

We remember from our earlier discussion that the most important change sought to be effected by the Ordinance as a necessary change to the nuclear family pattern was in the inheritance laws whereby property would pass from father to child. This was thought to be "more natural." Such notions have not been held only by the European and "detrribalized" African. Many anthropologists and other social scientists have observed an "inherent tension" in Akan society between the claims and conflicts "arising out of marriage and fatherhood and those imposed by matrilineal kinship."<sup>104</sup> Indeed, this vexed question has long dominated Akan thought. Thus during the 1941 session of the Ashanti Confederacy Council, the Asantehene (king of Ashanti) preceded the agenda with these words:

I brought up this question at our last session but we did not come to a definite decision about it. One fact with us Ashantis is that we appear to be too conservative. We always like to stick to custom even though it may have outlived its day. I do not deprecate the idea of brothers and nephews succeeding their deceased brothers or uncles, neither

do I propose that the custom should be abolished, but I want you to understand that our children are blood of our blood and bone of our bone for whom we are accountable to God for bringing them into this world. God and our country expect us to make provision for the children we bring into the world. They and their mothers help us in our farm and domestic work. Sometimes you find that all your nephews and nieces do not come near you at all. It is only your children who care for you. Is it not fair, then, that we should make provision for them and their mothers who look after our interests and welfare, so that they may not become useless and wretched after our death? I would advise you to consider this question very carefully and favourably.<sup>105</sup>

The problem had been before the council since 1938 but the chiefs had been unable to reach a decision on it. On the occasion when these words were spoken the Asantehene was opposed by all three chiefs who next spoke. In the end, the only 'unanimity' reached was a consensus to shelve the question! Only a very mild suggestion by the Asantehene the following year that a father be enabled to make a gift to his wife and children during his lifetime, "whether the relatives of the donor approve of it or not,"<sup>106</sup> was able to carry the assembled body of chiefs, and even that was never implemented.

Fortes had observed in his illuminating kinship and marriage study of the Ashanti in 1950 that, "in spite of nearly forty years of rapid social change under the influence of European economic, social and cultural agencies, the Ashanti have tenaciously upheld this rule of matrilineal descent."<sup>107</sup> We submit that the rule is very much alive this day with all the inherent tensions. And the rule persists whether one's marriage is customary or Ordinance. In fact the recent proposals by the Ghana Law Reform Commission, referred to earlier, give one an inkling that the onslaught on the rule by all previous official machinery and modern Western ideas has been in vain.

We know of course that s.48 of the Ordinance was especially directed towards the rule. Its effect in practice may be the opposite. While a real factor why people will not have the Ordinance may be the erroneous assumption that all their property would go to the surviving spouse on their death intestate, it is doubtful whether this is an inducement to enter an Ordinance marriage. We can say on hunch that many do not think of intestate succession when considering marriage under the Ordinance. A "wedded" wife at Cape Coast, an enthusiastic supporter of Ordinance marriages, for example, confided

that she did not get to know her rights under the relevant provisions until two years after her wedding. And that revelation came to her accidentally during a conversation with a friend.<sup>108</sup> The whole situation indeed leads to scepticism whether the reasons given above as to the Ordinance's appeal are not merely theoretical.

But even where the provisions are known and may have influenced the choice of the law, there is strong reason to believe that they will not be enforced in practice. This is largely due to the predominating inertia towards "going to court" in Ghana.<sup>109</sup> Apart from the strong reason that a widow (the party usually in question) feels it is a disgrace to be involved in a court case, she also fears being accused of witchcraft.<sup>110</sup>

People are further held back from claiming under the provisions because of the traditional belief that those currently living should not fight over the dead person's property. Otherwise the dead person's spirit will punish those guilty with some affliction.<sup>111</sup> Therefore the surviving spouse resigns herself to fate and lets things lie the way they are - which usually means the property goes to the dead spouse's family. For if we remember what Bossman says, the invariable custom is that on a person's death his family immediately comes to "sweep away all [the property], not leaving the widow or widower the least part thereof..."<sup>112</sup>

In the case of a wife dying intestate, the Ordinance mandates that two-thirds of her property should go to her surviving spouse. There is a strong disapproval of this provision even among the most "enlightened" couples. Not a single woman interviewed agreed with it. The women seem to be simply against any portion of their property going to their husbands. And, strangely enough, the provision has no support among men either. The reason is that it is against custom and tradition. Since historically the woman had very little property of her own, and this was likely to consist of such things as household utensils, beads and other female accoutrements "unworthy" of a man's attention, a woman's property invariably went to females. That notion still prevails even though there has been a dramatic change in the economic circumstance of the Ghanaian woman today.

## 2. Governing Law

The legal consequences envisaged to surround an Ordinance marriage are another area where divergence from reality is wide. Since it was the original intention that Ordinance couples were to be those who were "civilized" and from whom "civilization would radiate," earlier cases like Cole v. Cole<sup>113</sup> decided that persons who contracted a "Christian" marriage had clothed themselves and their offspring with a status unknown to native law. Thus, in Re Otoo<sup>114</sup> Michelin, J. held:

...when a person who is subject to native law or custom, alters his legal status, by contracting a marriage under the Marriage Ordinance,



1884, he is incapable of making such a will [i.e. according to customary law]...The only form of which he can legally make one is in accordance with the provisions of English law.

This case and others of similar hue have since been overruled by Coleman v. Shang<sup>115</sup> which has stated the correct law to be that the Ordinance applies only in regard to their obligations, rights and duties in respect of the marriage. So interpreted, we submit, the observation below in 1893 was apt:

...a native of this country [i.e. the Gold Coast] cannot have it both ways, that is, he cannot by marrying another native in accordance with the Marriage Ordinance, give himself the choice of asserting or defending his matrimonial rights either by petition in the Supreme Court or by action in the native court as circumstance may dictate or convenience may prescribe.<sup>116</sup>

It is respectfully submitted that what is meant by these cases interpreting the Ordinance is that a person who has contracted an Ordinance marriage cannot, during the life of the marriage, expect to claim benefits accorded to parties married under customary law.<sup>117</sup>

The observable fact however is that the parties do exactly the opposite. Thus the spouses' families, village elders and customary arbitrators have far more control over marriage, Ordinance or customary, than the courts. The Superintendent of the Methodist Church at Cape Coast for example, said during an interview that the Ordinance marriage certificate is given to the female spouse to keep because, if given to the husband, he can tear it up before the wife on provocation and declare the marriage to be at an end! And the elders of the two families, who under customary law have a final word in divorce, give their stamp to it. This was corroborated by priests from the other churches. Then also, the women unanimously agreed that they would approach either the man's friends, his family, or a respectable person in the town, to complain in case of bad conduct, like adultery, by their husbands. None said she would go to court to seek divorce. And the responses of the men were no less instructive in this regard. In case of their wife's adultery, for instance, they would simply "send the woman to her parents." This usually is preliminary to convening a customary arbitral tribunal to reconcile the parties or divorce them formally, for as was stated in Penin v. Duncan "the word of mouth of the husband is not sufficient."<sup>118</sup> In all these, the answer did not differ according to the law governing the informant's marriage. One can only guess how many Ordinance marriages have been dissolved by the elders even though legally only the pronouncement of a "competent court" can do this.

The criminal law also prohibits an additional marriage if an Ordinance marriage has not been dissolved.<sup>119</sup> We would simply note that these provisions are honoured more in the breach than in the observance as any Ghanaian knows. In fact, there is only a single reported case of bigamy in the law reports<sup>120</sup> and apparently not many even of those who ought to know - state attorneys, lawyers and judges - know about it. Thus, when the case was brought to their attention, many remarked that the circumstances must have been extraordinary.

We share in that remark, for with the antipathy towards courts and with societal pressure against it, it must have been an audacious woman indeed who could have reported her husband's bigamy to the police. Moreover, the official attitude is such that even where a case of this nature is openly known (as indeed many are), the prosecuting machinery refuses to activate itself. Prosecuting attorneys and judges all opined that they would "recommend a reconciliation in such cases." There is simply no shame and no wrong committed if a married man takes another wife, and to prosecute or jail him because his first marriage was governed by the Ordinance would border on the ridiculous in Ghanaian eyes.

### 3. Domestic Regulation

Finally, it is pertinent to know whether the organization of the marriage and family life differs significantly in households according to whether the marriage is customary or Ordinance. Questions were asked particularly in relation to: (a) eating together; (b) going out together; and (c) sharing the money in a common budget.

The nuclear family which the Ordinance hoped to promote of course responds to the Biblical concept of the union between husband and wife: "...a man will leave his father and mother and unite with his wife, and the two will become one."<sup>121</sup> This is also the Western and Christian ideal, considered to be the Will of God. In Ghana this ideal was to be realized in an environment in which the extended family was the dominant system.

A Catholic survey on "Church, Marriage and Family," conducted nationwide and over a four-year period regretfully concluded that "the fear of permanent ties, rejection of divorce, fear of infertility, and lack of confidence in partner" in that order were the most difficult problems, causing the church to have failed to influence marriage in Ghana.<sup>122</sup> The survey also concluded, following, we submit, on an honest realization of the irrelevance of their ideal to their Catholic faithful, that

...marriage takes place when the people think it takes place, i.e. when the customs are completed. Church marriage, as a Western, European social function, ruinous in its cost, is no more necessary, nor can it be used as an excuse any longer.<sup>123</sup>

We submit, as the church survey also found, that the failure to find any difference in practice between customary and Ordinance or church marriage finds a common source in the social organization - the extended family and its claims.

This came out vividly in the research for this work. For instance, in relation to (a) above, i.e. eating together at the same table, the type of marriage was found to be wholly irrelevant. What seemed to matter was the level of education of the spouses. Thus, for highly educated spouses, the answer generally was "yes," but it was not so for the less educated. Women in particular felt embarrassed because traditionally the husband eats with other men in the household. There were some women who even stated that "eating together [was] against Akan custom," a very doubtful proposition which we interpret to mean that it was not generally done in the past.

On the second item, (b) "going out together," the results were no different. Again, other characteristics, especially the level of education and place of residence, i.e. whether urban or rural, seemed more important. It is not normally done because of the traditional atmosphere which tends to segregate the sexes, but the new status of educated women is demanding it. It seems to be a sore point, though, with women generally, for they often suspect their husbands of drinking too much and "having affairs" with other women when they go out frequently in the company of other men. This is apart from the fact that their absence from home means that the caring for young children at home and all other household chores are left to the woman. Men usually resist their women accompanying them on evenings out and reproach them with nagging and "not forgetting anything."

On the all important question of (c), a common budget, this was rejected by both spouses but most vehemently by the men. Here the type of marriage, education and other sociological factors did not make much difference, though stronger disapproval was voiced by illiterates than literates. This was a matter of degree only, for generally the men laughed at the idea of a common budget, and many educated and salaried husbands remarked that, "anyone telling his wife his true income [was] a fool." Whilst wives complained that they had no say in the budget, they on the other hand, due no doubt to traditional attitudes, were not prepared to contribute a share in the support of the household, "because it [was] the task of the men." At marriage, this is reinforced by the advice of the female's family to the couple: "A woman brings everything good to her family, diverts everything bad to her husband" (obaa na ade a ɔde ba fie, onya asem a ne kunu dea).

The Catholic survey referred to above explained this situation in terms of "a basic problem of trust between husband and wife." The correct reason, we submit, lies deeply rooted in the traditional social organization and the claims and demands of the respective families of the spouses. If spouses do not appear to trust each other, it is because each suspects the other will spend their common

money on his own family's interests. A common budget does not work because at any time there may be claims from one's relatives which cannot be ignored. For example one husband, a middle-level worker, said that that very day (it was about 7.00 p.m.) he had not eaten because his relatives had come from their village, as usual without warning, and they had had to be fed and be given money to take back home; his budget for the month had thus fallen short and been "thrown into confusion."

In closing this part, we advert to another relevant question - "Is it common for a household to maintain some dependents"? Again the type of marriage law was irrelevant, but from the replies it appears very common. Many do not like it, but all agreed it was hard to refuse the demands of the family. It seems that even people not married but with jobs had one or two dependents from the family staying with them. "They may even outnumber your own children," informants frequently would say. It is sometimes resented especially by young couples but "it is the custom; you have to do it" or lose face. Many people related the stories of "big people in Accra who dare not go back to their home towns because they have refused to help relatives."<sup>124</sup> They were sure to be reproached and scorned if they should return.

In sum, in relation to their married life, their perceptions about the family, how a household should be run, etc., the Ordinance is wholly irrelevant to the Ghanaian spouse. To quote Professor Woodman speaking of a different law, the Ordinance has "in no way prevented, changed or caused social development."<sup>125</sup>

## VI. CONCLUSION

In conclusion, we reason that Ghanaians do not seem ready to replace their customs with the values the Ordinance seeks to promote. This is not surprising, for as Harris has observed:

...it is almost in the nature of man to have greater esteem and love for what belongs specially to their own nation or tribe; there are few things more likely to alienate them than the modification of their national custom.<sup>126</sup>

The law may have failed to make a significant impact because, referring back to the efficacy of law theories, there is no correspondence with folkways. There is nothing, for example, in the Ordinance wedding ceremony with respect to banns, trousseaux, bridesmaids, exchange of rings, Bibles, etc., which has any correspondence with Akan or Ghanaian marriage law and procedure.

As to the element of coercion, the availability of the customary marriage as an alternative makes it clear that neither the colonial

administration nor their African successors ever considered forcing people to use the Ordinance. Perhaps all societies recognize the futility of coercion in marital relations, even in the circumstance where the assumed duty and mission of "civilizing" natives was concerned.

And what of the factor of legitimacy? How far is it true to say that Ghanaians have accepted, or are going to accept the Ordinance because the provisions are known, seem fair, and correspond with their ideas of what a right law should be? As we have seen, even those who have heard about the law and use it, often do not know its provisions, not even the most important. And where they know them, they are ignored in practice. The provisions of the Ordinance, in sum, are irrelevant in inducing the decision to marry under it, during the life of the marriage, and at its cessation. Indeed the myths about what the Ordinance does and does not do, we would say, are often more important to couples than the true import of the law, and it would be fictitious to speak of the Marriage Ordinance having been internalized in Ghana.

## NOTES

- <sup>1</sup> This paper is culled from my J.S.D. dissertation (School of Law, University of California, Berkeley). My fullest gratitude goes to Dr. G.R. Woodman of the University of Birmingham Law Faculty, who carefully read and made useful suggestions on the paper.
- <sup>2</sup> L. Pospisil, Anthropology of Law (London and New York, 1971), passim.
- <sup>3</sup> R.J. Mundt, "The Internalization of Social Legislation in a Developing Country: The Ivory Coast's Civil Code," African Law Studies, No. 12, 1975, p. 60.
- <sup>4</sup> W.G. Sumner, Folkways: A Study of the Sociological Importance of Usages, Manners, Customs, Mores and Morals (Boston: Ginn & Co., 1906), p. 947. See also B. Kutchinsky, "The Legal Consciousness: A Survey of Research on Knowledge and Opinion about Law," in Adam Podgorecki, et al., Knowledge and Opinion About Law (Bristol: The Baileyman Press, 1973), p. 102.
- <sup>5</sup> A. Podgorecki, "Public Opinion on Law," in Podgorecki, et al., op. cit., p. 66.
- <sup>6</sup> J.H. Skolnick, "Coercion to Virtue: The Enforcement of Morals," in Lawrence M. Friedman and Stewart Macauley (eds.), Law and the Behavioral Sciences (Indianapolis: Bobbs-Merrill, 1968), p. 288 passim; R.D. Schwartz and Sonya Orleans, "On Legal Sanctions," in Friedman and Macauley, op. cit., p. 249.
- <sup>7</sup> Leonard Berkowitz and Nigel Walker, "Laws and Moral Judgments," in Friedman and Macauley, op. cit., p. 198.
- <sup>8</sup> L. Kohlberg, "Moral Development," (1968) 10 International Encyclopedia of the Social Sciences, p. 483.
- <sup>9</sup> Gregory J. Massell, "Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia" (1968) 2 Law and Society Review, p. 179.
- <sup>10</sup> op. cit., note 3, passim.
- <sup>11</sup> See esp. J.C. Caldwell, Population Growth and Family Change in Africa: The New Urban Elite in Ghana (Canberra: Australian National University Press, 1968); E. Date-Bah, "Some Features of Marriage Patterns among the Members of One Elite Group in Ghana," Legon Family Research Papers, No. 3 (I.A.S. University of Ghana, Legon, 1972).
- <sup>12</sup> Richard Lempert, "Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses" (1966)

- 1 Law and Society Review, 111 at p. 132.
- 13 Margaret Priestley, West African Trade and Coast Society: A Family Study (1969), passim; Kaplan, et al., Area Handbook for Ghana (U.S. Govt. Printing Office, 1971), passim.
- 14 R.S. Rattray, Ashanti Law and Constitution (1929, reprinted 1969, New York: Negro Universities Press), passim; K.S. Carlston, Social Theory and African Tribal Organization (Urbana: University of Illinois Press, 1968), p. 125.
- 15 See e.g. N.A. Ollennu, Principles of Customary Land Law in Ghana (London: Sweet & Maxwell, 1962), passim; The Law of Testate and Intestate Succession in Ghana (London: Sweet & Maxwell, 1966), passim.
- 16 A.K.P. Kludze, Ewe Law of Property (London: Sweet & Maxwell, 1973), passim.
- 17 See e.g. Select Committee Report of the British House of Commons on the State of the British Settlements of West Africa (1865), Vol. 5, pp. 15-16; L.C.B. Gower, Independent Africa (Cambridge, Mass.: Harvard University Press, 1967), p. 3; R. Seidman, "Law and Economic Development in Independent English-Speaking Sub-Saharan Africa" (1966) Wis. L. Rev., p. 999, passim.
- 18 R.B. Seidman, "Law and Stagnation in Africa" (1973) 5 Zambia L. J., p. 39 at p. 48.
- 19 Supreme Court Ordinance, s.19 in A.N. Allot, New Essays in African Law (London: Butterworth, 1970), p. 123.
- 20 See e.g. K.A. Busia, Africa in Search of Democracy (New York: F.A. Praeger, 1967), pp. 35-52 esp. at p. 38.
- 21 F. Lugard, "The White Man's Task in Tropical Africa," quoted in R.B. Seidman, supra note 18 at p. 46.
- 22 "British colonial policy can be symbolized as an alliance between Wilberforce and Adam Smith...One took it for granted that any individual of any race could find a fuller life within the expanding Christian Church; the other took it for granted that he would live more abundantly within the expanding economy of Europe." W.K. Hancock, "The Wealth of Nations" (Marshall Lectures, 1950), pp. 18-20 in G.B. Kay, The Political Economy of Colonialism in Ghana: A Collection of Documents and Statistics 1900-1960 (Cambridge University Press, 1972), p. 11.
- 23 Gann & Duignan (eds.), Colonialism in Africa 1870-1960, The History and Politics of Colonialism, Vol. I (Cambridge University Press, 1969), p. 2.

- 24 The Weberian analysis is conveniently summarized in P.C. Lloyd, Classes, Crises and Coups: Themes in the Sociology of Developing Countries (London: MacGibbon & Kee, 1971), esp. at pp. 68-71; Lloyd also thinks David McClelland's contemporary theory of "need achievement" is just a derivation from Weber's concept of the protestant ethic: ibid.
- 25 P.C. Lloyd, Africa in Social Change, "West African Societies in Transition" (New York: F.A. Praeger, 1968), p. 71.
- 26 See K.A. Busia, The Challenge of Africa (New York: F.A. Praeger, 1962), esp. pp. 59-61.
- 27 Lloyd, supra note 25, ibid.
- 28 See A.T. Von Mehren (ed.), Law in Japan: The Legal Order of a Changing Society (Harvard University Press, 1962), passim; see also G.B. Kay, supra note 22 esp. pp. 12-25, where he recounts the stupendous expansion of the cocoa industry in the essentially wide (matrilineal) descent Akan community areas of Ghana.
- 29 In Adm. 11/1457, Ghana National Archives, Accra.
- 30 Ibid. Indeed in a letter written back in 1882 before the Ordinance was enacted, the then Administrator of the Gold Coast Colony, Alfred Maloney, had observed in a correspondence relating to the advisability of such a law to realign the Gold Coast family thus: "to benefit children by the property of their parents would no doubt be productive of much social good inasmuch as the tie between parent and child would then be additionally strengthened ..." Letter dated Accra, 18th September 1882, to the Right Honorable The Earl of Kimberley, Gold Coast Despatches from Governor to Secretary of State, 1882, Gold Coast No. 441 Adm. 1/2/27, Archives, Accra, Ghana.
- 31 A classic example today is furnished by the Dutch Reformed Church of South Africa which propagates the inferiority of black South Africans and their condemnation forever to hellfire (because they are allegedly descendants of the cursed Biblical personality, Lot). On earth therefore, they are to serve as "hewers of wood and drawers of water" for the immigrant European population. This ties in well with the political and economic philosophy of apartheid which, under the guise of separate development of each race in that country, degrades and exploits the native black African population.
- 32 Ghana National Archives, Accra, File No. Adm. 11/1457, emphasis mine.
- 33 Earlier writers and judges had declined to call a customary marriage a marriage properly so-called because they had rationalized that the potentially or actually polygamous nature of that marriage prevented it being a "union between a man and a woman "



As Obi points out however, "a polygamist is a man who has entered into two or more separate marriage contracts concurrently with as many women, not one who has entered one marriage contract with two or more women considered as a legal entity. In other words there are as many marriages co-existing in a polygamous household as there are wives. To postulate the converse of this would be to imply that the various contracts are simultaneous in their inception and interdependent on each other for their existence, so that they either stand or fall together." See S.N.C. Obi, Modern Family Law in Southern Nigeria (1966), p. 155. See also Nkongho Mathias, Structure of the Family According to Nigerian Law (1967), p. 32, footnote 35; Vesey Fitzgerald, in a fiery reaction to Lord Penzance's famous diatribe against polygamy in Hyde v. Hyde is reported to have said, inter alia: "The marriage which he finds so revolting to Christian ideas included...the marriage in Cana of Galilee, the marriage of the Mother of Christ, and the marriage of the Chief of the Apostles." Quoted in S. Poulter, "Hyde v. Hyde - A Re-appraisal," 25 I.C.L.Q. p. 475 at p. 477.

- 34 F.L. Bartels, The Roots of Ghana Methodism (Cambridge University Press, 1965), esp. pp. 135-36.
- 35 Most traditional African laws require some form of matrimonial gift from the family of the bridegroom to that of the bride. The Ashantis and Brongs call this tiri nsa (lit. head-drink) and the Fantis, tsir nsa. Different terms are used by various writers, in most cases depending upon the particular author's general attitude towards African marriages. A few are: 'bride price,' 'bride wealth,' 'dowry,' 'marriage compensation,' 'marriage consideration.' As for the controversy surrounding its significance, see Kwame Opoku, The Law of Marriage in Ghana: A Study in Legal Pluralism (1976), p. 34 and the list of relevant authors therein in footnotes 36 and 37, pp. 117-18.
- 36 It is therefore no surprise that in a research survey of secondary school students conducted in Ghana, results showed an overwhelming preference for the Western model of marriage and family life. See Gustav Jahoda, "Aspects of Westernization: A Study of Adult Class Students in Ghana I" (1961) British Journal of Sociology, Vol. V, No. 4, p. 12.
- 37 Interviews with priests.
- 38 Bartels, supra note 34, ibid.
- 39 Because it was the missionaries who first brought schools to the Gold Coast, those who wanted education had no choice but to enter a missionary school where they were baptised into the church concerned and immediately given a Christian (Western) name. This baptism with Christian names still continues and so the vast majority of educated Ghanaians have at least one "Christian name" - see e.g. M.J. Lowy, The Ethnography of Law in a Changing Ghanaian

- Town (Ph.D. Thesis, University of California, Berkeley, 1972), p. 110. This is a hot issue in some churches and among university students today as the latter seek to discontinue their "foreign names." The Registrar of the University of Ghana, Legon, in a conversation with me said they receive at least 30 "petitions" per academic term of roughly 3 months from students wanting "to change their names," which means dropping their foreign name. In fact, I dropped mine, "Stephen," in 1971 when I was an undergraduate there.
- 40 Bartels, op. cit., at p. 49.
- 41 Enclosure in Governor Arnold Hodgson's letter to Malcolm MacDonald, Secretary of State for the Colonies, dated Accra, October 6, 1937 in Adm. 1383/31, 2/3, Archives, Accra, Ghana.
- 42 Ibid.
- 43 Chinua Achebe, Things Fall Apart (London: Heineman Educational Books, 1962), p. 192.
- 44 So that despite evidence that Ghana's economic dependence upon one sole crop, cocoa, necessitated diversification, the suggestion that manufacturing be pursued was dismissed because the climate was "too enervating to make industry feasible." See Report of the Commission of Enquiry into Disturbances in the Gold Coast, 1948 (Watson Commission), paras. 298-320, esp. 299.
- 45 Letter from C.D. Trotter to the Secretary for Native Affairs, Gold Coast, dated August 13, 1917 on "Criticisms and Suggestions Regarding Native Tribunals and Native Marriages," para. 16, in Adm. 11, Case No. 51/1917, Archives, Accra, Ghana.
- 46 See e.g. Frantz Fanon, Black Skin White Masks (1952; 1968 edition translated by Charles L. Markman; New York: Grove Press Inc.), passim.
- 47 The proposals are published in (1974) 6 R.G.L., pp. 169-172.
- 48 The Marriage of Mohammedans Ordinance, Cap. 129, Laws of the Gold Coast (1951 Rev.) for Muslims, and the Marriage Ordinance, Cap. 127, the subject of this paper.
- 49 N.A. Ollennu, The Law of Testate and Intestate Succession in Ghana (London: Sweet & Maxwell, 1966), p. 67; A.R. Radcliffe-Brown and D. Forde (eds.) African Systems of Kinship and Marriage (London: Oxford University Press, 1950, 3rd edition, 1956), p. 43.
- 50 A.N. Allott, Essays in African Law with Special Reference to the Law of Ghana (London: Butterworths, 1960), p. 227.
- 51 Quoted in Peter Omari, Marriage Guidance for Young Ghanaians

(London: Nelson & Sons, 1962), p. 5.

- 52 K.S. Carlston, op. cit., p. 125. One should not infer from this aspect of family organization that persons not within the lineage group have no significant interests in family property. As an illustration we find that in most patrilineal tribes in Ghana, the property of women devolves on their children. In matrilineal tribes the paternal relationship is usually a basis of entitlement to residential rights and upbringing, including education and use of a father's land, and sometimes succession to certain offices involving acquired skills such as that of linguist (spokesman). In both types of community also, the opposite relationship is usually important for determining prohibited degrees of marriage. See K. Bentsi-Enchill, Ghana Land Law (London: Sweet & Maxwell, 1964), pp. 25-26; also J.M. Sarbah, Fanti Customary Laws (London: Frank Cass, 1893, 3rd ed., 1968), p. 50 and the cases cited therein.
- 53 "With us marriage, and the parental (or 'biological') family based on it, is a fundamental social institution. With the Akan marriage is an essential institution, but one subordinate to the abusua or family which every Akan has entered at birth." - Allott, op. cit., at p. 227. See also L. Harris, "Christian Marriage in African Society," in A. Phillips (ed.), Survey of African Marriage and Family Life (1953), op. cit., Pt. III, p. 329 esp. at p. 385.
- 54 See R.S. Rattray, op. cit., p. 22. According to Fortes, 80% of the married women in Agogo in Ashanti which he surveyed were living in their matrilineal family group: Meyer Fortes, "A Demographic Field Study in Ashanti," in F. Lorimer (ed.) Culture and Human Fertility (Paris, 1954), p. 270. Esther Goody says that among the Gonja of the Northern Region of Ghana, "residence with her own kin remains a real possibility to women throughout their early and middle age, even while they are married": Contexts of Kinship: An Essay in the Family Sociology of the Gonja of Northern Ghana (London, 1973), p. 303.
- 55 See e.g. Kwame Opoku, op. cit., esp. pp. 12 and 29; Ollennu, supra note 49, esp. at p. 240; M.J. Field, Social Organization of the Ga People (London: Crown Agents, 1940), pp. 54-57, and Akim Kotoku (London: Crown Agents, 1948), p. 115.
- 56 Yaotey v. Quaye [1961] G.L.R. 573; Asumah v. Khair [1959] G.L.R. 353.
- 57 Quoted in S.N.C. Obi, op. cit., p. 162.
- 58 S.14(2) of the Ordinance fixes the requisite age for marriage at 21 unless the legal guardian's consent is sought. No fixed minimum age is prescribed for customary law marriages. The priests of all the churches interviewed however agreed that they will not "marry any two people whose families do not consent to the marriage" whether under the Ordinance or under church

regulations.

- 59 We therefore agree with Robert Winch when he says that: "Where marriage has functions that are important to persons other than the spouses themselves, the relevant consideration in the selection of mates tends to be those that pertain to the interests of the families of the spouses. It is consistent with such a conception of marriage that the mate should be chosen by a responsible member of the society rather than by the young, inexperienced, person to be married." The Modern Family (New York: Holt, Rinehart & Winston, rev. ed., 1963), p. 651.
- 61 For a further discussion of the rights and duties of the Akan husband and wife inter se, see Fortes, op. cit., at p. 280; J.B. Danquah, Akan Laws and Customs (London: Routledge & Sons, 1928), pp. 15-154; Rattray, op. cit., esp. at p. 26.
- 62 Ollennu, op. cit., pp. 211-235; Opoku, op. cit., at p. 62. But contra, Allott, op. cit., at p. 230 who says a "husband is required to provide his wife with food, clothing and housing, if she has none" (emphasis mine). Why the learned author decided to qualify the husband's obligation in this regard is difficult to tell because he is himself aware that such a position is contrary to the authorities of Fortes, op. cit., at p. 280, Rattray, op. cit., at p. 26, and Danquah, supra at p. 154, all of whom he cites. We humbly submit that there is no legal basis for the qualification. In my own field research, I was pleasantly surprised to learn, even from university-educated wives, that they expected their husbands to give them money to buy lunch during the day when they were in their respective places of work! My research, however, confirmed Allott's other view that "a husband should give his wife one cloth a year." Allott, supra ibid. My only minor "disagreement" lies in emphasis for it is expected that at least one cloth be given to the woman a year, usually at Christmas, whether she is the wealthier partner or not. Many young males are rebelling against this obligation in situations which make it wholly unjustifiable, but the social expectation coupled with the prevalent Ghanaian male chauvinism predicts the continuance of the practice for at least the immediate future. See also s.79(1) of the Criminal Code, 1960 (Act 29) which states that "A man is under a duty to supply the necessities of health and life to his wife..."
- 63 Allott, supra ibid.
- 64 Description of the Gold Coast of Guinea, p. 172 in Ollennu (1966), op. cit., at p. 224.
- 65 Op. cit., pp. 35-36. But contra Fortes at p. 280; Danquah at p. 154; Rattray at pp. 26 and 31. Allott at pp. 232-33 is also aware of the conflict in opinion here. We humbly agree with his view that a husband is not liable for the debts of his wife, but not because, as he was inclined to believe, the law has changed.

In all his relevant discussion he significantly omitted reference to Sarbah's statement, which would have supported his position. Leaving that aside, we submit that what all the learned authors seem to miss is the fact, founded in social circumstance, that even though a man may 'legally' not be liable for his wife's debt, he cannot stand the public humiliation of his wife which indirectly is a humiliation for him too, if the wife cannot pay her debts. As Rattray found, public ridicule is "the strongest deterrent known to Ashanti law" and a husband will feel compelled to pay to avoid a public humiliation of his wife.

- 66 Sarbah, op. cit., at p. 50 and the cases noted therein.
- 67 In A Study of Contemporary Ghana, the authors say on the pattern of residence that "Among the Gas [i.e. the people indigenous to Accra] the expected pattern is separate residences for the spouses. The women cook and send food to their husbands' houses during the day and go there to sleep during the night." Birmingham, Neustadt and Omaboe (eds.), Vol. II, "Some Aspects of Social Structure" (Evanston: Northwestern University Press, 1967), p. 213. Allott, supra, at p. 230 says, "...many young wives choose - especially in the rural areas - to continue to live with their families, and they will always return to their mothers when expecting a baby"; see also note 54 supra.
- 67A The 1970 Population Census of Ghana lists customary law marriages as representing 86% of all marriages.
- 68 About 1% of all marriages, according to the 1970 Census.
- 69 Such use of statutory law in similar circumstances it seems, is happening in Nigeria too. See Rionne Aig-Ojehomon-Ketting, "Modern Marriage in Benin City, a Power Struggle Between Men and Women" in (1975) Kronick Van Afrika, No. 4, p. 60. Leiden: Afrika Studiecentrum.
- 70 This does not falsify our point that family influence is strong for as Obi, op. cit., at p. 164 observes, "The consent of the spouses themselves was not essential in the traditional society. But since it must have been realized quite early in the history of marriage that making an unwilling horse drink was child's play compared with making a wife out of an unwilling bride, it was common practice to consult the wishes of the bride-to-be as well as those of the prospective husband before any bride price was asked for or paid.
- 73 Sarbah, op. cit., p. 102; Ollennu, op. cit., p. 143; Quarshie v. Aryeetey [1959] G.L.R. 60.
- 74 New Nations (University of Chicago Press), p. 226, emphasis mine.
- 75 See Minority Report of the 1905 Marriage Commission Inquiry.

Daniels says it was "the intention of the Ordinance that children of a monogamous marriage...organize their family lives on the same lines as those of their parents." W.C. Ekow Daniels, "Marital Family Law and Social Policy," in Essays in Ghanaian Law (Accra: Ghana Publishing Corporation, 1976) 92 at p. 108.

- 76 See s.14(4) of the Ordinance.
- 77 Re Isaac Ametifi (1889) Red. p. 157 at p. 160, per Hutchinson, C.J. See also Qureshi v. Qureshi [1971] 1 All E.R. p. 325 at p. 333.
- 78 Per Francis Smith, Ag.C.J. in Ackah v. Arinta (1893) Sar. F.L.R. p. 79 at p. 81.
- 79 Marriage Ordinance (Cap. 127) s.36.
- 80 Compare s.9 of the Kenya African Christian Marriage Ordinance (1962 Rev.) now Cap.212: "Do I understand that you A.B. and you C.D. have been hereto before married to each other by native law and custom, and that you come here for the purpose of binding yourself to each other as man and wife so long as you shall live?" This looks more realistic. Still on these incongruous provisions, see the explanation of Phillips & Morris (eds.) Marriage Laws in Africa (London: Oxford University Press, 1971) especially at p. 170.
- 81 [1975] 1 G.L.R. 359.
- 82 (1967) C.C. 59.
- 83 This view is also implicit in Professor Ekow Daniels' note attacking the rationale for the award of the exorbitant damages to the plaintiff wives in these cases. See (1976) 8 R.G.L. 55.
- 84 Felix Pena throws some light on this when he observes: "Most [developing] countries generally are new countries that have not yet consolidated their national integration processes or built up stable political systems. Seen from this point of view, 'nationalism' is an inevitable power force. The problem is one of reconciling 'nationalistic' requirements with the need to link up with the existing international system and its transmission of goods and ideas." Erb and Kallab (eds.), Beyond Dependency: The Developing World Speaks out (Washington: O.D.C. Publication, 1975), p. 68, footnote 14.
- 85 In a bid to remain faithful to a lingering sense of traditional custom, compound names are given to many children in these circumstances. Thus the name of the child's biological father is combined with that of some great ancestor in the family after whom ordinarily and in accordance with tradition, the child would have been named.
- 86 The customary law is clear on the point that all the property acquired through the effort of husband, wife and children during the

- marriage is "the individual property" of the man. Quartey v. Martey & Anor. [1959] G.L.R. 377 at p. 380; Clerk v. Clerk (1968) C.C. 99 and the comment on this by Dr. Fiadjoe in (1969) 1 R.G.L. 66-70.
- 87 Of course, she is entitled to maintenance from proceeds of such property if she "continues the marriage" with her husband's successor.
- 88 Which is often the case considering the considerable age difference between husband and wife, for it is not unusual to find 50-year old men married to teenage girls.
- 89 See Matrimonial Causes Act, 1971 (Act 367) esp. s.2(1).
- 90 "Expert evidence" of the Chief linguist (spokesman) of the Berekum Paramount Chief.
- 91 This view was confirmed by the Government Officer in charge of marriage records at the Registrar General's Dept., Accra, Ghana.
- 92 See Richard L. Abel, "Law Books and Books about Law" being a review of Max Rheinstein's Marriage Stability, Divorce and the Law in (1973) 26 Stanford Law Rev., p. 175.
- 93 Under the Maintenance of Children Act, 1965 (Act 297), a child's mother or legal guardian can apply for an order making the child's father responsible for his upkeep. In the Akan conception, since children do not belong to their fathers, the latter generally feel little inclined, where the couples are separated or divorced, to spend money on the children. Mrs. Jones-Quartey inquired into the working of the Act and drew the conclusion that it appears to have been wholly ineffective in charting a new course in the Akan man. See P.D. Jones-Quartey, "The Effects of the Maintenance of Children Act on Akan and Ewe Notions of Paternal Responsibility," Legon Family Research Papers, No. 1 (Institute of African Studies, University of Ghana, Legon, 1974), p. 292.
- 94 See Wolf Bleek, "The Position of Marriage in Kwahu" (unpublished, 1974), a discussion paper at a seminar on "New Directions in African Family Law," Leiden, 30th September-4th October, 1974.
- 95 E.g., Asumah v. Khair [1959] G.L.R. 359; Yaotey v. Quaye [1961] G.L.R. 573; Re Caveat by Clare Sackitey [1962] 2 G.L.R. 180.
- 96 A.K.P. Kludze, "Problems of Intestate Succession in Ghana" (1972) 9 U.G.L.J. 89, passim.
- 97 Op. cit., note 81 supra.
- 98 Thus said the Court of Appeal (the highest court) in the Afrifa case supra at 364: "The impression that customary marriages require very little ceremony and are only a shade above concubinage must be

decried...There are clear lines of cleavage...between concubinage, friendly alliances, engagement or betrothal and marriage."

- 99 As the court in the above case, *ibid.*, recognised, "In Ghana there are various forms of marriage within the various ethnic groups. In Ashanti...there appears to be at least six forms of a valid customary marriage...[and] various forms of Ga customary marriage exist."
- 100 Official statistics from the Registrar General's Dept., Accra, show the following number of marriages over the 11 year period from 1960-1970 for which the records were said to be complete:
- | <u>Year</u> | <u>Total No. of Marriages</u> |
|-------------|-------------------------------|
| 1960        | 666                           |
| 1961        | 564                           |
| 1962        | 589                           |
| 1963        | 493                           |
| 1964        | 638                           |
| 1965        | 628                           |
| 1966        | 488                           |
| 1967        | 570                           |
| 1968        | 569                           |
| 1969        | 600                           |
| 1970        | 751                           |
- 102 As Sumner, *op. cit.*, at pp. 94-95 has said, "The leading classes, no matter by what standard they are selected, can lead by example ...It suggests standards of elegance, refinement and mobility and the usages of good manners from generation to generation are such as have spread from the aristocracy to other classes."
- 103 To give us an idea of the situation, Date-Bah, *op. cit.*, at pp. 64-65 found that among her 14 Ghanaian university lecturer-respondents only one had a customary marriage. The rest had either used the Ordinance or had had a "church wedding." On the other hand, in another study by the same author of 38 factory workers in Accra, only two were married under the Ordinance.
- 104 Meyer Fortes, *op. cit.*, at p. 283; K.A. Busia, The Position of the Chief in the Modern Political System of Ashanti (London: Oxford University Press, 1951), esp. pp. 125-28.
- 105 Warrington, Minutes of the Ashanti Confederacy Council (1941), quoted in Busia *supra* at p. 126.
- 106 *Ibid.*, at p. 127.
- 107 Meyer Fortes, *supra* note 104, *ibid.*
- 108 This is the situation even though under s.48(3) of the Ordinance the person before whom the parties are to be married, is required to explain the intestate succession provisions to them. This seems to



be rarely done, for many priests admitted they did not know the provision. Others who said they knew "forgot to do it."

- 109 Vide Jones-Quartey, op. cit. See also M.J. Lowy, "Establishing Paternity and Demanding Child Support in a Ghanaian Town" (unpublished, 1976) seminar paper for "New Directions in African Family Law," Leiden, 30th September-4th October, 1974, Afrika Studiecentrum, passim.
- 110 Wolf Bleek, "Marriage, Inheritance and Witchcraft: A Case Study of a Rural Ghanaian Family," Research Papers (Leiden, Afrika Studiecentrum, 1974), passim.
- 111 K.A. Busia (1962), op. cit., esp. Ch. 3.
- 112 Cited Ollennu, op. cit.
- 113 (1898) Red. 201. See also Re Isaac Anaman (1894) Sar. F.C.L. 84.
- 114 (1926) D.C. 1926-29, 84 at p. 86.
- 115 [1959] G.L.R. 390.
- 116 Aitken, J. in Akwapim v. Budu, D.Ct. 1931-37, 89 at p. 90.
- 117 See W.C. Ekow Daniels, The Common Law in West Africa (London: Butterworths, 1964), p. 383.
- 118 (1869) Sar. F.C.L. 118 at p. 119.
- 119 Criminal Code, 1960 (Act 29) ss.264 and 265.
- 120 R. v. Mensah (1922) F.Ct. 22, 61.
- 121 Matthew, 19:5, The New Testament (New York: American Bible Society Version, New York).
- 122 Survey of the Church in Ghana: Marriage and Family, conducted under the aegis of Pro Mundi Vita by C. Hulsen, S.M.A. and Fr. Mertens, S.V.D., esp. at p. 9. It also concluded at p. 27 that 9 out of 10 Catholics of marriagable age were excluded from full participation in the activities of the church because their marriages were outside what the church prescribes.
- 123 Ibid., at p. 32.
- 124 Interview with the High Court Registrar, Cape Coast, October 20, 1976.
- 125 G.R. Woodman, "Land Law and the Distribution of Wealth," in Essays in Ghanaian Law (A Faculty of Law Publication: University of Ghana, Legon, 1976), 158 at p. 176.

- 126 Lyndon Harris, "Christian Marriage in African Society," in A. Phillips (ed.) Survey of African Marriage and Family Life (London: Oxford University Press, 1953 for the International African Institute), 327 at p. 329.