Marriage, the Law and Pluralism in Ghana

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Introduction

Marriage holds a special place both socially and legally in Ghana. Marriage is regarded as the receptacle of culture, tradition and values deemed essential for social cohesion and stability. There are three types of marriage: Customary, Islamic and Ordinance. Each system determines the legal formalities, consequences, and nature of the marriage. This chapter will first provide an overview of the different marriage systems in Ghana; the challenges inherent in the operation of a plural marriage system; and finally, what might be the future for the legal regulation of marriage.

Legal Pluralism and Marriage

The plural family law system is a consequence of colonialism and the policy of indirect rule.[1] English common law was transplanted to the colony so that the colonial administrators would be regulated by their own laws and not customary law. A total imposition of common law was deemed to be inimical to the preservation of order, so English family law could not be foisted on the colonised subjects and customary law would continue to regulate family life.[2]

There are three types of marriage recognised by law:[3]

[1] Sandra F Joireman, 'Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy' (2001) 39(4) Journal of Modern African Studies 571; Werner Menski, *Comparative Law in a Global Context – The Legal Systems of Asia and Africa* (2nd edn, CUP 2006) 450-453; Martin Chanock, 'Neither Law Nor Legal: African Customary Law in an Era of Family Law' (1989) 3 IJLPF 72. Indirect rule was defined as 'adapting for the purposes of local government the institutions which the native peoples have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited (moulded or modified as they may be on the advice of British Officers) and by the general advice and control of those officers': see Henry F Morris, 'The Framework of Indirect Rule in East Africa' in HF Morris and James S Read, *Indirect Rule and the Search for Justice – Essays in East African Legal Tradition* (Clarendon Press 1972) 3, 3-40.

[2] Other areas of law had common law imposed upon them.

[3] These were consolidated into the Marriage Acts 1884-1985.

1) Customary marriage is regulated in part by the Customary Marriage and Divorce (Registration) Law 1985 (PNDCL 112)[4]
2) Islamic marriage is regulated by the Marriage of Mohammedans Ordinance, 1907 (Cap 129)
3) Civil marriage is regulated by the Marriage Ordinance 1884 (Cap 127).

Each marriage has different rules for establishing legal validity and for matters such as divorce. The one area which is uniform is intestacy, with the introduction of the Intestate Succession Law 1985 (PNDCL 111).[5] This was one of the most significant reforms in family law, as it was an attempt to modernise the law in light of changing family formation; from the extended model to a nuclear one. It was also an attempt to eliminate gender inequality in relation to the distribution of intestate's estate.[6] Prior to the 1985 reforms, widows were not beneficiaries of their late husband's estate under customary law. The new law remedied this by granting all surviving spouses a share of the estate.[7]

The most popular type of marriage is customary marriage. Registration is not compulsory for this form of marriage, in contrast to Ordinance and Islamic marriages. Despite the need for registration over 80 percent of marriages, including Muslim marriages, are not registered. This can pose challenges for the court when faced with the task of determining the validity of a marriage.[8] Irrespective of the type of marriage, the consent of both parties is required; the minimum age is 18 years; the consent of both parties is required, and child and forced marriage are criminal offences.[9] Marriage in Ghana is only for heterosexual couples, there is considerable hostility towards same-sex relationships.[10] In the past there was some tolerance

[4] Later amended by the Intestate (Amendment) Succession Law 1991 (PNDCL 264) to remove the requirement for customary marriages to be registered in order for the successors to avail themselves of the provisions of the Intestate Succession Law 1985 (PNDCL 111).
[5] Referred to as The Intestate Succession Law 1985.
[6] However, the legislation has failed to have the desired effect see Augustina Akoto, '"Why don't they change?" Law Reform, Tradition and Widow's Rights in Ghana' (2013) 21(3) Fem LS 263. See also Ama Hammond, 'Reforming the law of intestate succession in a legally plural Ghana' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* 114.
[7] Intestate Succession Law (P N DC L 111) 1985, s 4.
[8] Kweku Zurek, '80% of marriages unregistered in Ghana - 2021 census' *Graphic Online* (2 March 2022) <https://www.graphic.com.gh/news/general-news/80-of-marriages-unregistered-in-ghana-2021-census.html>> accessed 7 January /23
[9] The Children's Act 1998 (Act 560), s 1. Under s 14 it is a criminal offence to force a child under 18 to get married. The issue of child marriage merits a separate and detailed assessment so will not be discussed here.
[10] There has been increased hostility towards homosexuality as seen by the promulgation of the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill, 2021, s 11 which would render any same-sex marriage even if legally valid outside Ghana as void. https://www.hrw.org/news/2021/09/20/ghana-lgbt-activists-face-hardships-after-detention. This trend was foreseen by Bond who has argued that although the

of alternative marriage formations, such as woman-to-woman marriage.[11] In such marriages, typically an older child-free women would enter into a marriage with a younger woman who would bear her a child. She would be recognised as the 'father' of the child. The young wife could enter into a sexual relationship with either the husband of the commissioning wife or a partner of her own. Such unions served to provide children for a childless wife, there is no sexual relationship between them.[12] It is debateable whether such arrangements would be acceptable today where same-sex relationships are beyond the pale, regardless of whether there is a sexual component or not.

A Legal Transplant – the Marriage Ordinance 1884 (Cap 127)[13]

The Marriage Ordinance 1884 was introduced for the colonial administrators[14] as they did not have the legal capacity – nor the desire – to marry under customary law.[15] Ekow Daniels noted that Africans were not prohibited from contracting such marriages;[16] it was believed that their alleged 'superiority' would eventually result in them being preferred to so-called 'primitive' customary law marriages.[17] The Ordinance was based on English marriage acts, under which marriage were monogamous.[18] Other significant differences from customary marriages were the need for registration,[19] and for the parties to comply with statutory formalities.[20]

The criteria for a valid Ordinance marriage were:

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trend has worldwide been for the recognition of same-sex relationships, this may not translate well in a commonwealth African context: Johanna E. Bond, 'Culture, Dissent, and the State: The Example of Commonwealth African Marriage Law' (2011) 14 Yale Hum Rts & Dev LJ 1, 7. Only South Africa has legalised same-sex marriages, and only four countries have decriminalised homosexuality: Angola, Botswana, Mozambique, Lesotho and Seychelles.

[11] Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* (Zed 1987) 42.

[12] Supra 72.

[13] Sometimes referred to as common law marriage see William Offei, *Family Law in Ghana* (5th edn, Offei 2018) 57.

[14] Shirley Zabel, 'The Legislative History of the Gold Coast and Nigerian Marriage Ordinances: I' (1969) 13(2) J Afr L, 64. Zabel notes it took five years of drafting before it was finalised.

[15] Ken Y. Yeboa, 'Formal and Essential Validity of Akan and Customary Marriages' (1993-1995) XIX U Ghana LJ 133.

[16] WC Ekow Daniels, 'Marital Family Law and Social Policy' in WC Ekow Daniels and Gordon Woodman (eds), *Essays in Ghanaian Law 1876-1976* (Ghana Publishing Corporation 1976)

[17] As observed in *Ackah v Arinta* (1893) Sar FLR 99

[18] Tad Crawford, 'Ghana: Marriage and Divorce' (1971) 3 *The Journal of Legal Pluralism and Unofficial Law* 27.

[19] This was also a requirement for Islamic marriages under the latter Marriage of Mohammedans Ordinance 1907 Cap. 129.

[20] Ekow Daniels (n 19) 117, noted that it was essentially based on English marriage.

a) Agreement by the parties to be married and, if one of them was a minor, the consent of his/her parents;[21]
b) Celebration of the marriage within certain hours of the day[22] either in a place of worship or in a Marriage Registrar's Office in the presence of two or more witnesses and evidenced by the signing of a Marriage Certificate;[23] and
c) A Marriage Registrar's or Marriage Officer's certificate issued after certain formalities.[24]

These requirements differ considerably from those of customary and Islamic marriage, they introduced state oversight and bureaucracy where previously culture, tradition and religion reigned supreme. The case law regarding Ordinance marriages has largely been preoccupied with registration. On the ground Marriage Registrars are aware of the need to sign the certificate but many of the other requirements are not as well known.

A consequence of the marriage under the Marriage Ordinance was that intestate succession was governed by English rules of succession.[25] A widow would be entitled to one-third of the estate, which contrasted greatly with the position under customary law.[26] However, the exclusion of customary successors proved too controversial. The Ordinance was later amended to reflect customary norms on succession.[27] The remaining one-third would be devolved in accordance with the customary law applicable to the deceased had they not married under the Ordinance. This meant the wider family of the deceased were able to inherit a share of the estate.[28]

The drafters of the Ordinance were concerned with what were termed 'double decker' marriages, that is where the parties enter into a customary first, then purport to enter into an

[21] This has been superseded by the Children Act 1989, s 1.
[22] Between 08.00 and 18.00 hours.
[23] The certificate is confirmation that the marriage has taken place.
[24] The format for completing the certificate is set out in s 66(1) and the number of witnesses and the requirement for a copy to be sent to the District Registrar for marriage in s 67.
[25] According to the Marriage Ordinance s 80(1)(a) this would be the law in England in relation to the distribution of the personal property of an intestate in force on 19 November 1884.
[26] Where a person to whom s 48 applied died without leaving a spouse or issue from such a marriage, English law would not apply, and the estate would be devolved in accordance with customary law. Section 48 would also apply to the estate of the children of such a marriage regardless of whether they contracted a customary or Ordinance marriage.
[27] AKP Kludze, 'Problems of Intestate Succession in Ghana' (1972) 9 U Ghana LJ 89, 97. It was amended by the Marriage (Amendment Ordinance, 1909) (No. 2 1909).
[28] John G Esubonteng, 'Conflictual Insertion of Marriage Ordinances in British Colonial Africa: The Ghanaian experience' in Christian Green, Jeremy Gunn, and Mark Hill (eds), *Religion, Law and Security in Africa* (African Sun Media 2018) 317.

Ordinance marriage. The question then arises as to which regime the marriage falls under.[29] Zabel notes that issue preoccupied the drafters of the Ordinance and great efforts were made to ensure that if parties entered into a customary marriage, they would need to dissolve that marriage before entering into a new one. Nevertheless, courts were still faced with having to determine which law a marriage fell under.[30] In C*oleman v Shang*[31] it was held that a party who had contracted a marriage under customary law could not enter into an Ordinance marriage whilst the customary law marriage was still in existence. Crawford argued that a customary marriage would be subservient to a subsequent Ordinance marriage, but only if the Ordinance marriage had been registered[32] as per *Graham v Graham.*[33] Despite this, whether due to ignorance or wilful disregard of the law, such cases continue to be heard by the courts. The importance of ascertaining whether a couple had entered into a valid Ordinance marriage was considered in *Appiah (Decd): Yeboah v Appiah*[34] and *Appomasu v Bremawuo & Anor.*[35] The court held that both marriages were customary despite the fact that the weddings had taken place in a church. Mere intention did not constitute registration and therefore the legal formalities of an Ordinance marriage had not been satisfied.

Morris notes that although the Ordinance marriages were ostensibly for Europeans, African converts to Christianity were pressurised into marrying under it in order to prevent their marriages from being potentially polygamous, and it was hoped this would encourage the growth of monogamy.[36] The lack of awareness regarding the consequences of entering into a particular marriage meant that parties moved between regimes but were unaware of the consequences of non-compliance with the formalities.

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[29] Crawford (n 18) notes that this is important as the marriage determines the cause of action a spouse may take, for example damages for a breach of a promise to marry, see Henrietta J A. N. Mensa-Bonsu, 'The Action for Breach of Promise to Marry in Ghana: New Life to an Old Rule' (1993-1995) 19 Rev Ghana Law 41.
[30] Zabel (n 6) 14-17.
[31] [1959] GLR 390.
[32] *Genfi II v Genfi II* [1964] GLR 548 and *Setse v Setse* [1959] GLR 155.
[33] [1965] GLR 407.
[34] [1975] 1 GLR 465.
[35] [1980] GLR 278 also noted by Elijah Tukwarlba Yin and Jenna Marie Black, 'The Legal Anthropology of marriage in Ghana: Presenting Power Dynamics Through Legal Arenas' (2014) 6(12) *International Journal of Current Research*10696.
[36] Henry F Morris, 'The Development of Statutory Marriage Law in Twentieth Century British Colonial Africa' [1979] 23(1) J Afr L 37.

Marriage under the Ordinance had a number of advantages compared to customary law:[37] wives were entitled to financial support;[38] and their marriages could only be dissolved judicially. Despite wariness towards Ordinance marriages when they were first introduced, they did confer status and prestige; wives could use the title 'Mrs', and they also had practical advantages for middle-class women because of their monogamous nature.[39] Ordinance marriages tended to be more conjugal and nuclear in nature, therefore intervention by the wider family was minimal.[40] Class also played a key role in the choice of marriage, Ordinance marriages are the preferred choice for middle-class and educated women.[41] The popularity of Christianity has also seen an uptake in the number of Ordinance marriages as they are perceived to be Christian in nature.[42] Until the introduction of the Intestate Succession Law 1985, Ordinance wives were entitled to a more favourable distribution of the estate of their late husbands if they died intestate which was another attraction. But despite the supposed 'advantages' of Ordinance marriages they still remain in the minority. Esubonteng[43] notes the Ordinance was a deliberate departure from customary law norms on marriage, and its aim of setting itself in opposition to indigenous marriage still plays out in the present day, albeit with limited success.

Culture, tradition, and marriage – the preference for Customary law

The majority of the population marry under customary law, with each ethnic group having its own particular formalities.[44] The largest ethnic group is the Akan[45] who have tended to dominate judicial thinking on customary law much to the dismay of other ethnic groups. This

[37] Kofi A. Busia, *Report of a Social Survey of Sekondi-Takoradi*, (Crown Agents for the Colonies 1950) 41 where he found that educated women preferred Ordinance marriages as they believed it gave them more security. Arguably Ordinance wives were perceived as 'superior' to customary wives.
[38] Matrimonial Causes Act 1971, s 16.
[39] Akua Kuenyehia and Elizabeth Ofei-Aboagye, 'Family Law in Ghana and its implications for women' in Akua Kuenyehia (ed), *Women and Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (WalWa 1998). Such wives wear wedding rings as a sign of their status which distinguishes them from customary wives who typically do not.
[40] Busia (n 33). It was more difficult to obtain a divorce, hence it was a less favoured option. They were also perceived to be more 'western' than customary marriages, more demanding and less hard-working. Ordinance marriages which were monogamous were also considered to be, in the author's own words, 'alien' (43).
[41] Andrea Noll, 'Family Foundations for Solidarity and Social Mobility: Mitigating Class Boundaries in Ghanian Families' (2016) 66(2) *Sociologus* 135.
[42] Offei (n 9) 75 refers to Christian marriage although this is not mentioned in the legislation.
[43] Esubonteng (n 24).
[44] The main ethnic groups are: Akan, Mole-Dagbani, Ewe, Ga-Dangme, Gurma, Guan, Grusi and Mande - https://census2021.statsghana.gov.gh/ accessed 23 January 2023.
[45] Henrietta JAN Mensa-Bonsu, 'Avuugi v Abugri: Some Customary Law Issues' [1993-95] XIX Rev Ghana L 252.

has been characterised as the *Akanisation* of the law.[46] Customary law marriages are unions not only of the couple, but of their wider families as well as stated in *Re Caveat by Clara Sackitey,*[47] which set out the essentials of a valid customary marriage:

1) There must be agreement by the parties to live together as man and wife;
2) The man's family give their consent to the woman becoming his wife, by acknowledging that she is his wife;
3) The woman's family give their consent to the marriage by the acceptance of drinks from his family; or by the woman's family acknowledging the man as the husband;
4) There should be consummation of the marriage, that is that the man and woman are living together as man and wife.

Customary marriages are regarded as being inherently unstable, due in part to the involvement of the extended family. Couples can find their loyalties split between their conjugal family and their obligations to their wider family, so there is reluctance to pool resources. This is more pronounced in matrilineal groups such as the Akan, where inheritance passes through the female line so children inherit from their maternal uncle and not their father, which historically gave a great deal of authority to the uncle.[48]

In more recent times, the role of the wider family in marriage has been limited to ensuring that the applicable customary formalities are followed. Previously they had greater authority to the extent they could order the parties to end their marriage. Fortunately, this is no longer the case as in *Attah v Annan*[49] it was held that only the parties to the marriage have the power to end it. The extended family still play a key role in the formalities relating to the dissolution of marriage. It is they who are informed when the couple wish to end their marriage, they oversee the customary formalities such as the exchange of drinks to dissolve it. They can also serve as mediators when problems arise. Couples are often reluctant to seek outside help, as they cannot afford legal advice and also have limited knowledge of the law. Women in particular face challenges in accessing the law, with the result that the family are the first port of call in

[46] Kludze (n 23) has written about Ewe family law, Offei provides a comprehensive account of the formalities of each ethnic group and not solely the Akan (n 14) 33-56.
[47] [1962] 1 GLR 180.
[48] Linda Stone, *Kinship and Gender* (2nd edn, Waterview Press 2000) 121.
[49] [1975] 1 GLR 366; see also *Kombat v Lambim* [1989-90] 1 GLR 324.

resolving disputes.[50] As women may have to rely on the family for financial support in the event of divorce, they need to maintain good relations with them so they try to avoid any conflict.

As customary marriage reflects the patriarchal nature of Ghanaian society, there is no equality between the spouses; wives are economically dependent on their husbands and have little authority in the relationship. The threat of polygamy also serves to cow women into submission.[51] Under customary law there is no limit to the number of spouses a man may have[52] though it is usually no more than four – the same number as Islamic law. Polygamy is still practised despite the popularity of Christianity. Even though there is a decline in its uptake,[53] there appears to be no appetite for its abolition.

Arguably the adaptive and fluid nature of customary law means that it should be responsive to social and cultural changes. Decisions such as *Ginbuuro v Kaba*,[54] where it was held that Frafra customary law allows both spouses to initiate a divorce and a wife cannot be forced to return to her husband, are an example of this. But such reforms are incremental and specific to each ethnic group rather than having universal effect. As a result, state customary law and living customary law remain distinct entities and thus respond to social change in different ways.[55] Although the courts may uphold changes to customary law, this does not necessarily mean that such changes are reflected in practices on the ground.

Concern with gender discrimination in family law saw a number of reforms introduced such as the Intestate Succession Law 1985, and the Customary Marriage and Divorce (Registration) Law 1985 (PNDCL 112). One of the aims of these reforms was to encourage registration of customary marriage, so couples could benefit from the changes introduced by the Intestate

[50] Kwadwo Appiagyei-Atua, 'Alternative Dispute Resolution and it's Implication for Women's Access to Justice in Ghana – Case Study of Ghana', (2013) 1(1) *Frontiers of Legal Research* 36.
[51] Jeanmarie Fenrich and Tracey E Higgins, 'Promise Unfulfilled: Law, Culture, and Women's Inheritance Rights in Ghana' (2001) 25 Fordham Int'l LJ 349; Lorraine Bowan, 'Polygamy and patriarchy: an intimate look at marriage in Ghana through a human rights lens' (2013) 1(2) *Contemporary Journal of African Studies* 45; Elizabeth Archampong, 'Reconciliation of women's rights and cultural practices: polygamy in Ghana' (2010) 36(2) Comm Law Bull 325.
[52] Nukunya (n 1) 42-43.
[53] Tim B Heaton and Akosua Dankwah, 'Religious Differences in Modernization of the Family: Family Demographic Trends in Ghana' (2011) 32(12) *Journal of Family Issues* 1576.
[54] [1971] 2 GLR 416.
[55] Gordon Woodman, 'How State Courts Create Customary Law in Ghana and Nigeria' in Bradford W Morse and Gordon Woodman (eds), *Indigenous Law and the State* (Foris Publications 1991) 193.

Succession law. However, it soon became clear that parties were contracting customary marriages without registration due to the limited awareness of the requirement, the complexity of the registration process, and the poor administrative infrastructure for registration. Legislators and policy makers were concerned that widows in particular would not be able to access their rights, and shortly after, the legislation was amended, rendering registration optional and not compulsory.[56] This highlighted the challenges facing registration and customary law marriages. It also illustrated the limits of law in changing behaviour. Couples considered they were married with or without registration.

The Marriage of Mohammedans Ordinance – Islamic Marriage and Ignorance of the Law

Although Ghana is a secular state, it is a deeply religious country in which Christianity dominates,[57] followed by Islam.[58] The Marriage of Mohammedans Ordinance 1907 is the only legal recognition of Islamic law, but has been beset by dissatisfaction with its implementation and problematic rulings by the courts.[59] Under the Marriage of Mohammedans Ordinance 1907, registration is a pre-requisite for the marriage and its consequences to be governed by Islamic law.[60] The colonial civil service which drafted the law had little understanding of Islam or Islamic law and regarded Muslims as 'aliens and a nuisance'.[61] Hiskett has argued that there was no clear rationale for the introduction of the Ordinance, suggesting that perhaps it was to bring Islamic marriage in line with civil marriage. In drafting the law, little consideration was given to the need for an accompanying Islamic court system. This deficit in the understanding of Islamic law proved fatal to the effectiveness of the legislation and ensured that Islamic law was relegated to the private law sphere.[62] It has become a truism that Islamic family law has adapted to, and been integrated with, customary law. Anderson observes that: '[i]n every

[56] Customary Marriage and Divorce (Registration) (Amendment) Law 1991 (P.N.D.C.L. 263), s 2(a).
[57] Seth Tweneboah, *Religion, Law, Politics and the State in Africa – Applying Legal Pluralism in Ghana* (Routledge 2020).
[58] <https://statsghana.gov.gh/ghfactsheet.php> accessed 9 May 2023.
[59] Abdul B. Aziz Bamba, 'Accommodating Muslim Family Law in Ghana: Strategies and Challenges' in Henrietta J.A.N. Mensa-Bonsu, Christine Dowuona-Hammond, Kwadwo Appiagyei-Atua, Nii A. Josiah-Aryeh and Ama Fowa Hammond (eds), *Ghana Law Since Independence: History, Development and Prospects* (Black Mask 2007); JND Anderson, 'Colonial Law in Tropical Africa: The Conflict Between English, Islamic and Customary Law' (1960) 35(4) Ind LJ 433.
[60] Further amended in 1931 and 1951.
[61] Mervyn Hiskett, 'Commissioner of Police v Musa Kommanda and Aspects of the Working of the Gold Coast Marriage of Mohammedans Ordinance' (1976) 20(2) J Afr L 127.
[62] Allan Christelow, 'Islamic Law in Africa' in Nehemia Levitzon and Randall L Pouwels (eds), *History of Islam in Africa* (Ohio UP 2000) 373.

Muslim locality, it may therefore be said the "native law and custom" today represents an amalgam in which sometimes the customary law, and sometimes the Islamic precepts, preponderate'.[63]

Islamic family law is now often referred to as Muslim Customary family law[64] to reflect this framing.[65] This is not without problems.[66] Islamic law places greater emphasis on individual rights and obligations, and on observance to Islam. This is in contrast to customary law which is communitarian, with obligations being owed to your kinship group. The mistaken view that Islamic and customary marriage are the same is not true.

The requirements for a valid Muslim marriage under the Ordinance were detailed in *Barake v Barake*[67] as:

(i) A proposal made by or on behalf of the one of the parties to the marriage;
(ii) Acceptance of the proposal by or on behalf of the other;
(iii) Acceptance in the presence of two witnesses who had to be sane and adult Mohammedans; and
(iv) Both proposal and acceptance expressed at the same meeting.

Sections 6(1) and (10) require that the registration of any such marriage take place within one week after the celebration of the Muslim marriage. Such registration requires the attendance of the bridegroom, the bride's Wali or legal guardian, a registered Mohammedan 'priest', and the two witnesses to the marriage at the office of the District Commissioner.[68] However, there are few registered Islamic 'Priests',[69] the one week requirement for registration conflicts with the duration of marriage celebrations,[70] and the only way an extension could be obtained is through

[63] Anderson (n 55).
[64] Fulera Issaka-Toure, 'Application of Muslim Family Law as a Form of Customary Law in Accra, Ghana' (2020) *Islamic Africa II* 232; Nii Armah Josiah-Aryeh, *An Outline of Islamic Customary Law in Ghana* (2nd edn, Icon Publishing 2015).
[65] Christelow (n 58).
[66] Yuksel Sezgin, 'Undignified Jurispathy: Muslim Family Law at Ghanaian Courts' (2022*) Law and Social Inquiry* 1 provides a searing critique on this issue.
[67] [1993-94] 1 GLR 635.
[68] This refers to an imam who has been registered in accordance with s 3 of the Ordinance.
[69] Abubakari Yushawu, 'Marriage Under the Muhammadan Ordinance in Ghana: Knowledge and Perceptions of Muslims in Tamale in the Northern Region' (2022) 19(1) *Journal of Arts and Social Sciences* 175.
[70] Raymond A Atuguba, *The Registration of Islamic Marriages in Ghana's Plural Legal System – Challenges and Strategies for Improvement* (Legal Resources Centre 2003).

an application to the High Court.[71] The Registrars are unaware of their obligations and do not even have the correct forms.[72] Yushawu's study of Muslims in Tamale found that the participants argued that registration was not necessary, and most importantly was not Islamic.[73]

Barake also illustrated the problems inherent with the plural marriage regime, with 'double decker' marriages. The couple, a Christian wife and a Muslim husband, had contracted a marriage under the Marriage Ordinance. The wife petitioned for divorce on the grounds of adultery and bigamy, as the husband had married a second wife in line with Islamic law. The husband argued that prior to the registration of the Ordinance marriage they had entered into a Muslim marriage; due to his illiteracy at the time he believed that the registration was for a Muslim marriage. The court dismissed this on the basis that he was not illiterate at the time of their Ordinance wedding. The wife had produced the marriage certificate, and the respondent husband was fully aware of the implications of an Ordinance marriage. Therefore, the husband was guilty of bigamy as he could only marry one spouse under the Marriage Ordinance.[74]

The lack of judicial recognition of Islamic law is the subject of continuous debate. One of the most controversial decisions on this was the case of *Kwakye v Tuba.*[75] Ollenu J ruled that the estate of a Muslim man should be devolved in line with customary law as his unregistered Muslim marriage was not valid under the Marriage of Mohammedans Ordinance. He reasoned that the customary law of the deceased was patrilineal in nature and therefore not dissimilar to Sharia law. The seeming indifference of the courts to Islamic jurisprudence, and the judicial equation of this with customary law was alarming, and unfortunately set a precedent. Patrilineal rules on intestacy devolved the estate to the paternal brother of the deceased or the eldest son, this is not the same as the distribution of the estate under Islamic law. Later cases such as in *Re Marriage of Mohammedans Ordinance, Cap129 (1951 Rev); In Re Registration of Marriage between Byrouthy and Akyere; ex parte Ali*[76] served to highlight the problems with the need for registration. The court had to determine which was the applicable intestacy law to the estate of a deceased Muslim man. The applicant was his wife who had entered into a customary marriage according to Fante customary law, and wished to register the marriage so that it could

[71] s 6 (10)
[72] Segzin (n 62) 180 discovered this as well.
[73] Atuguba (n 66) had similar response in his research.
[74] Criminal Code 1960 (Act 29), s 264.
[75] [1961] 2 GLR 720; see also *Brimah v Ansa* [1962] 1 GLR 118.
[76] [1980] GLR 872.

be devolved in accordance with Islamic law. An Islamic marriage ceremony took place, but it was not registered. The wife was unsuccessful in attempting to obtain an order which would allow the District Chief Executive to register it as a Muslim marriage, so the estate was devolved in accordance with customary law.

As Bamba[77] observes, Muslims have little or no engagement with the formal legal system. Alternatives to the court have been created for resolving Islamic family law disputes. While they are not authorised by the State, they play an important role in Muslim communities. In *Abdul Rahman v Baba Ladi,*[78] another decision on intestacy, a daughter alleged gender discrimination as the estate was distributed in line with Sharia law, despite the introduction of the Intestate Succession Law 1985. The Supreme Court found that the Islamic Judicial Committee, which had reached a determination with reference to Sharia law, had no legal authority to do so, as Islamic law no longer applied in cases of intestacy. Further, the Committee's decision was unconstitutional as it was contrary to the non-discrimination principles enshrined in the 1985 Law – the distribution of the estate cannot be determined by gender. The Supreme Court was at pains to stress that Ghana is not a theocracy but is guided by the Constitution, therefore Islamic law could not be applied in this case.

As Muslims display a degree of wariness in using the courts, they prefer to use alternative forms of adjudication such as Islamic arbitration.[79] Faulk-Moore's[80] theory of semi-autonomous social fields is illustrative here, where the formal legal system, though theoretically permitting pluralism, only does so within the parameters of state approval.[81] Parties nevertheless navigate between the systems which are appropriate and familiar to them, with or without state recognition. Azit Bamba has argued that the state should adopt the principle of consensual accommodation in relation to the personal laws of parties, which already exists in relation to marriage.[82] A transformative accommodation would result in a more inclusive family law and would recognise the primacy and importance of Islamic law to its Muslim citizens. He points out that the Courts Act 1993 (Act 459)[83] permits the District

[77] Bamba (n 65).
[78] [2013] DLSC 2745. This has position has been extensively critiqued in Tweneboah (n 53).
[79] Josiah-Aryeh (n 60).
[80] Sally Falk Moore, 'Law and Social Change: The Semi-Autonomous Social Field As An Appropriate Subject of Study' (1973) *Law and Society Review* 719.
[81] What Griffiths termed 'weak' legal pluralism: John Griffiths. 'What is Legal Pluralism?' (1986) 24 J Legal Plur 1, 7.
[82] Bamba (n 65).
[83] As amended by the Courts (Amendment) Act 2002 (Act 620).

Court to make financial orders on the dissolution of a customary marriage. Furthermore, under section 41 of the Matrimonial Causes Act 1970, the High Court has jurisdiction to hear petitions regarding the dissolution of customary marriages, with reference to the applicable customary law in reaching its decision. This is a rarely used mechanism, but the law does permit it.

On such an analysis, the same should be allowed for Islamic family law. As Islamic law is treated as a sub-species of customary law, it should be applied by the courts regardless of whether the marriages have complied with the registration requirements. Bamba suggests that the state could establish Qadi courts to administer Islamic family law, with the obvious caveat that it should be in line with the Constitution, therefore ensuring that the rights of women would be protected.[84] He points to the fact that under section 39 of the Courts Act 1993, parliament can establish lower courts, and the Qadi courts could be legislated for in this manner. Alternatively, as is the case with customary law, a High Court judge could sit with an expert in Islamic family law to advise them when hearing such cases. He does acknowledge that there are likely to be few Islamic scholars with sufficient knowledge to act as advisers to justices or to administer Islamic law if there were to be Qadi courts, but this could be remedied with greater education and training.

Another approach would be to codify Islamic law so judges would have detailed and sufficient knowledge of Islamic law. However, codification is fraught with both controversy and complexity. This has been attempted in other African countries in relation to customary law and has had mixed results, with critics complaining of ossification and lack of adaptation which are the hallmarks of customary law.[85] The State could also put Islamic arbitration on a legislative footing, but again there are concerns regarding imbalances of power and potential conflict with non-discrimination articles under the 1992 Constitution. Secularisation is enshrined in legislation under the Avoidance of Discrimination Act 1957 (Act 38) which ensures that no religion is discriminated against in law, politics and public life. So although Islamic law has been granted limited recognition, family law remains heavily influenced by Judeo-Christian theology.[86] Sezgin is highly critical of this, arguing that 'Ghanaian courts

[84] Bamba (n 65) 492.
[85] Gordon Woodman, 'Unification or Continuing Pluralism in Family Law in Anglophone Africa: Past Experience, Present Realities and Future Possibilities' (1988) 3 Lesotho LJ 33.
[86] Elom Dovlo, 'Religion in the Public Sphere: Challenges and Opportunities in Ghanaian Lawmaking, 1989-2004' (2005) BYU L Rev 629, 633. Dovlo also argues that Islamic law has influenced the content of family law, though this is arguable.

almost exclusively engage in undignified killing against Islamic law'.[87] He argues – correctly – that the courts have deliberately and systematically refused to engage with Islamic law, using procedural rules such as the failure to comply with the 1907 Ordinance as justification for non-engagement due in part to a lack of registered Imams to administer the law under the Ordinance. He is also highly critical of the introduction of the Intestate Succession Law 1985, which, he suggested, failed to recognise the importance of Sharia law in relation to intestacy and was an attempt to nullify the utility of the Marriage of Mohammedans Ordinance.[88] Sezgin was particularly critical of Ollenu, whose thinking still influences the application – or not – of Islamic law. He also points to the difference in treatment between customary and Muslim marriages. The failure to register customary marriages in line with the registration requirements under the Intestate Succession Law 1985 resulted in amendments to the law. Contrast this with a similar situation in relation to Muslim marriages where he observes:

> the judiciary has failed to take a similar interest in the predicament of Muslim Ghanaians or show any sensitivity to their registration – and succession-related troubles. On the contrary, they have consistently invalidated Muslim marriages, turned a blind eye to the broken machinery, and subjected widows and children to native succession laws, even when Islamic law would have better protected their property rights.[89]

The ineffectiveness and disregard of the Mohammedan Ordinance by Muslims led to calls for change. In 2017 a draft Muslim Marriage and Divorce Bill was introduced but has yet to be put before parliament.[90] The Memorandum to the Bill, states that 'it is quite clear that Cap 129 as it currently stands has limited incentives to encourage compliance'[91]. It was proposed that section 10 should repeal the Intestate Succession Law 1985, and that intestate succession should be governed by Islamic law. The reforms were to provide a 'user-friendly institutional and regulatory framework for the registration of Muslim marriage and divorce.'[92] The new reforms would see the introduction of a Muslim Family Law Arbitration and Counselling Unit,

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[87] Sezgin (n 62) 3.
[88] Ibid 11.
[89] Ibid 19.
[90] See recent calls for its implementation: Emma Ankrah, 'Your marriage may be right in Allah's eyes but not lawful – Lawyer on Islamic marriages' *Joy Online* (19 March 2023) <https://myjoyonline.com/your-marriage-may-be-right-in-allahs-eyes-but-not-lawful-lawyer-on-islamic-marriages/> accessed 30 May 2023
[91] Memorandum Muslim Marriage and Divorce Bill (2017), 1.
[92] Ibid.

a potentially contentious innovation. There would foreseeably be conflicts with the Constitution and the relevant law of the Muslim Family Law Arbitration and Counselling Unit. Nevertheless, it is clear that the current law is not fit for purpose, as it is largely ignored, and alternative norms and structures are in place which are overseeing the regulation of Islamic marriages with no judicial oversight.

The future for marriage(s) in Ghana

These marriage laws operate within a complex network of competing legal and regulatory frameworks. They have been influenced and moulded by both the colonial and post-colonial legal systems, which embedded legal pluralism. Legal pluralism poses serious challenges to the promotion of gender equality, as customary law is often in conflict with it. This is important given the vast majority of marriages are customary, as couples' choice of law is heavily influenced by socio-economic and cultural factors.[93] The experience of the introduction and implementation of the Intestate Succession Law 1985 provides a salutary example of the difficulties inherent in law reform in a system where law is only one – and not necessarily the main – regulatory norm. Simply legislating for reform does not guarantee that this will lead to social and behavioural change. The problems with requiring registration for a regime that had operated well without it, does highlight the difficulties legal reforms of cultural practices. A legal centralist position of law is that it is the prime source of regulation, whereas the societal view is that culture, custom and religion are also important. When reforms are introduced, they have limited effect as awareness of the law is low because it has a tangential impact on family life. As can be seen with the small number of registered Islamic marriages, Muslim couples are more concerned that the marriage complies with Sharia law rather than State law. Customary law, despite its well documented criticisms, is still preferred as it is culturally responsive, based on widely known norms, and is easy to apply. Ordinance marriages in contrast are more expensive, require knowledge of the formalities and entail engagement with officialdom, which is not always accessible. One of the reasons why Ordinance marriages remain in the minority is because, as Van Hoecke argues, legal transfers are often not successful because they do not align with existing legal cultures.[94] The perception of Ordinance marriages being underpinned

[93] Jeanmarie E Bond, 'Gender, Discourse and Customary Law in Africa' (2010) 83 S Cal L Rev 509.
[94] Mark Van Hoecke, 'Family Law Transfers from Europe to Africa: Lessons for the Methodology of Comparative Legal Research' in John Gillespie and Pip Nicholson (eds), *Law and Development and the Global Discourses of Legal Transfers* (CUP 2012).

by Western notions of marriage, with emphasis on the conjugal family and little to no recognition of the extended family, conflicts with understanding of the family and are less attractive and relevant particularly to rural communities. In recent times Marriage Ordinances have benefitted from the belief that they are the most appropriate vehicle for Christian marriage which makes them especially attractive to the Christian middle class. However, polygamy remains the obstacle to any potential unification of the marriage laws. Both customary and Islamic law adherents would not countenance the abolition of polygamy despite there being calls for the state to do so.[95] Furthermore, Ordinance marriages are not immune from criticism relating to gender discrimination. There is no gender parity hence the introduction of recent legislation guaranteeing wives the right to be named on family property deeds,[96] as well as calls for the introduction of a community of property regime.[97]

Shortly after independence there were calls to unify the law. It was argued that modern laws were needed which would help to develop the country. Unification would provide consistency and would be easier to administer. In 1962 a draft Marriage, Divorce and Inheritance Bill[98] was introduced, which would have repealed the Ordinances and replaced them with a single system of registration. Whilst not abolishing polygamy, a party to a registered marriage would not be able to enter into a new marriage until the current one was dissolved. The bill never reached Parliament due to overwhelming opposition and was dropped. It was opposed because it was felt that unification was an attempt to impose monogamy which was contrary to traditional concepts of marriage. There was also concern that there had already been a dilution of what were considered Ghanaian values through the Marriage Ordinance and that unification would be based on Western concepts of marriage and not African ones. Similar concerns were raised in debates preceding the introduction of the Intestate Succession Law 1985 and also recent attempts to introduce the offence of Marital Rape.[99]

As the experience of the Intestate Succession Law 1985 has shown, uniformity does not necessarily engender social and behavioural change. Reform of intestacy without reform of

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[95] Bowan, Archampong and Feinrich (n 51) argue persuasively for this.
[96] Land Act 2020 (Act 1036).
[97] Priscilla Vitoh, 'Strengthening Women's Right to Property Acquired During Marriage: A Study of Ghana's Legal Framework' (2023) 8(1) CLR 133.
[98] Ghana, *White Paper on Marriage, Divorce and Inheritance* (Government Printer 1962)
[99] Renee A. Sitsofe Morhe, 'Marital Rape under Ghanaian Law', in Melanie Randall, Jennifer Koshan and Patricia Nyaundi (eds), *The Right to Say No – Marital Rape and Law in Reform in Canada, Ghana, Kenya and Malawi* (Hart 2020) 231.

marriage meant that changes to the law have not had the desired effect. Increased state intervention and regulation of family life would be needed for reforms to have greater impact, but the state has shown itself to be incapable, but more importantly, unwilling to do so.

It would seem unlikely that unification will take place. It is more likely that there will be a focus on education and campaigns regarding the respective legal formalities, and the consequences of entering into each type of marriage. When reforms to family law have been mooted they have often been bedevilled by controversy and delay. It is notable that the Intestate Succession Law 1985 was introduced when Ghana was ruled by a military regime which could brush off opposition as it did not have to face the electorate.[100]

One of the reasons that reforms are poorly received is due to the perception that they are being imposed by external actors, such as NGOs, or development partners imposing alien concepts with little regard to indigenous beliefs. This view can be seen in the proposed Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill 2002, where great emphasis was placed on that fact that it reflects African as opposed to Western values.[101]

The translation and implementation of constitutional norms into the law and also the living law operational in different communities has proved to be challenging for both law and policy makers.[102] The continued popularity of customary marriage and Islamic marriage, regardless of legal recognition, is reflective of the gap between what the State requires and what the populace desires. Notwithstanding the potential for internal conflict of laws, couples are attuned to the plurality, and that in principle they can chose a regime which best reflects their idea of marriage.

Conclusion

Ottenburg in the 1970s noted that one of the issues in relation to family law in Ghana and plurality is its class bias: a 'complex range of legal organisations, employing different

[100] A new intestacy bill has been drafted which would repeal the 1985 Act to address the criticisms of it and strengthen the entitlement of the surviving spouse.
[101] Though there is little discussion of what these African values are.
[102] Anthony N Allott, 'The People as Law-makers: Custom, Practice and Public Opinion as Sources of Law in Africa and England' (1977) 2(1) J Afr L 1.

procedures and having different aims; these reflect different socials and class interests'.[103] As such there is no desire at present for the reform of marriage, but reform may occur as a result of changes to ancillary areas such as intestacy or the division of assets on divorce. The choice of marriage would no longer be important, if there were to be a uniform system regarding the financial consequences of divorce as well as intestacy. The differences between the marriages would be largely related to the formalities for marriage and whether there is financial support during marriage. Constitutional provisions which prohibit injurious and harmful cultural practices can also be a mechanism for reform in the case of customary law and Islamic law. Though such amendments would likely result in changes to state customary law, the danger with this is that response to change would be slow and would quickly become out of date.[104]

Bond has suggested the State should be more interventionist by providing a statutory core of minimum rights for women in customary marriages. This would include property rights for women in marriage, equality between the parties and consent to the marriage.[105] Hor Vormavor notes that the Constitutional Commission Review in 2011 said the 1992 Constitution enables the protection of culture, but also enables progressive development where necessary.[106] Proposed changes to the Marriage of Mohammedans Ordinance may lead to a reconsideration of the Marriage Ordinance and customary law, but whether this ultimately leads to unification remains to be seen.

[103] Christine Oppong, *Domestic rights and duties in Southern Ghana* (Institute of African Studies, University of Ghana 1974) 367.
[104] Woodman (n 51).
[105] Bond (n 10) 52-54.
[106] Mawuse Hor Vormawor, 'In defence of *Yaotey v Quaye*: Redeeming a Confounded Approach to the Essentials of a Valid Customary Law Marriage' (2015) 3 *Ghana School of Law Student Journal* 95, 103.