



# Marriage and Divorce: Perspectives from the Bench

**Mavis Ekuah Enyamah Kwainoe\***

University of Professional Studies, Accra  
mavis.kwainoe@upsamail.edu.gh

\*Corresponding author

## Abstract:

The marriage contract has been described, as a sanctimonious contract. However, the seeming sanctity that characterizes this contract is whittled away by the high incidence of divorce. In Ghana, the rate of divorce amongst marital couples is rife. Whiles social pundits and theologians, advance approaches to curtailing this societal issue, there is paucity of legal learning of a comparative character on marriage and divorces in Ghana. This paper attempts to fill the void. The paper considers the jurisprudence of the Ghanaian bench on divorces in Ghana. The paper delves into a critical introspection of the marital contract in Ghana, the various incidents of marriage and divorces. The paper argues that the judiciary, and the legislature, can through the instrumentality of law help curtail the prevalence of divorces in Ghana. The paper will bring to the fore the challenges associated with the current complexity of the law governing marriage in Ghana and highlight the need for a consolidation of the many facets of the law and the reform and codification, particularly of the law regulating the distribution of marital assets during the dissolution marriages. This work is important due to the constitutional requirement imposed on the Parliament of the Republic of Ghana to reform the law regulating the distribution of marital property through appropriate legislation. This work is the first of its kind by virtue of its keen focus on the perspective of the judiciary who plays the vital role of interpreting and applying the law relating to marriage and divorce in Ghana.

## Keywords:

Monogamous marriage; Divorce; Judiciary; polygamous marriages; marital property

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## 1. Introduction

The legal framework governing marriage and divorce in Ghana has evolved significantly over the years, influenced by a blend of customary practices, statutory regulations, and international conventions. Understanding judicial perspectives on these matters is crucial for legal practice and policy-making. This research aims to explore the views of judges on marriage and divorce in Ghana, identify key legal challenges in adjudicating such cases, and assess the impact of judicial decisions on family law. Historically, Ghanaian marriage and divorce laws have been shaped by a confluence of customary laws and English common law, leading to a unique legal landscape. The Matrimonial Causes Act, 1971 (Act 367)<sup>1</sup> provides the statutory framework for divorce, while customary practices continue to influence many aspects of marital relations. Judges play a pivotal role in interpreting and applying these laws, balancing traditional values with modern legal principles.

This research seeks to answer several critical questions: What are the prevailing judicial perspectives on marriage and divorce in Ghana? How do judges interpret and apply family law in these cases? What are the common legal issues and challenges faced by the judiciary in adjudicating marriage and divorce cases? And how do judicial decisions influence family law and policy in Ghana? Previous studies have highlighted the complexity of family law in Ghana, emphasizing the need for a nuanced understanding of judicial attitudes and decision-making processes. For instance, Quashigah (year) notes that the judiciary's role in interpreting family law is often complicated by the coexistence of customary and statutory laws. Similarly, Dankwa argues that judicial decisions in family law cases reflect broader societal values and norms, impacting the development of legal principles<sup>3</sup>. This research will build on these insights by conducting semi-structured interviews with judges and analysing court judgments to provide a comprehensive view of judicial perspectives.

By examining the attitudes of judges towards marriage and divorce, this study aims to uncover the underlying principles guiding their decisions and the challenges they face in balancing competing legal and cultural norms. The findings will provide valuable insights for law reform, helping to harmonize customary and statutory laws and improve the administration of family justice in Ghana.

## 2. Literature review

The literature review examines the historical context, legal framework, judicial perspectives, and societal implications of marriage and divorce in Ghana, drawing on a range of sources and authorities to provide a comprehensive understanding of the topic.

Historically, the legal framework governing marriage and divorce in Ghana has been deeply influenced by a combination of customary law and statutory regulations. Customary law, reflecting the traditions and practices of various ethnic groups, has long governed personal relationships, including marriage and divorce. However, the introduction of English common law during the colonial period led to the coexistence of two legal systems, which has created a complex legal landscape (Nukunya, 2003). The Matrimonial Causes Act, 1971 (Act 367), represents a significant development in Ghana's statutory regulation of divorce, providing a framework for addressing marital disputes within the formal legal system (Kuenyehia, 2004).

The legal framework for marriage and divorce in Ghana is multifaceted, encompassing various statutes, case law, and international conventions. The 1992 Constitution of Ghana guarantees equality before the law and non-discrimination on the basis of gender, which has implications for family law and the adjudication of marriage and divorce cases (Constitution of Ghana, 1992). The Matrimonial Causes Act, 1971, outlines the grounds for divorce, including adultery, unreasonable behaviour, desertion, and separation, and sets out the procedures for filing and adjudicating divorce cases. Additionally, international conventions such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) influence Ghanaian law, promoting gender equality and protecting women's rights in marital relations (CEDAW, 1979).



Judicial perspectives on marriage and divorce in Ghana have been the subject of several studies, which highlight the complexities and challenges faced by judges in adjudicating these cases. Quashigah (1998) argues that judges in Ghana often grapple with the tension between customary law and statutory law, particularly in cases involving traditional marriage practices and modern legal principles. Similarly, Dankwa (1990) notes that judicial decisions in family law cases reflect broader societal values and norms, which can sometimes conflict with statutory provisions. More recent studies, such as those by Mensah (2015) and Oppong (2018), emphasize the evolving nature of judicial attitudes towards marriage and divorce, influenced by changing social dynamics and increased awareness of gender equality.

Comparative analyses with other jurisdictions provide a broader context for understanding the judicial perspectives on marriage and divorce in Ghana. For example, in South Africa, the Recognition of Customary Marriages Act, 1998, has sought to harmonize customary and statutory law, ensuring that customary marriages are afforded the same legal recognition and protection as civil marriages (Bennett, 2004). Similarly, in Nigeria, the Matrimonial Causes Act, 1970, provides a statutory framework for divorce that incorporates elements of customary law, reflecting the country's plural legal system (Ezejiolor, 2007). These comparative studies highlight the common challenges faced by countries with plural legal systems and underscore the importance of judicial interpretation in balancing customary practices with statutory requirements.

The societal implications of judicial decisions on marriage and divorce are significant, impacting families and communities across Ghana. Judicial attitudes towards marriage and divorce can influence public perceptions of family law and shape the legal landscape. Studies by Adinkrah (2012) and Anku-Tsede (2013) suggest that judicial decisions play a critical role in promoting gender equality and protecting the rights of women and children in marital disputes. Furthermore, the integration of customary law into the formal legal system can help to ensure that traditional practices are respected and upheld, while also aligning with modern legal principles.

### 2.1 Ghanaian Law on Marriage: A Brief Overview

Lord Penzance, in the landmark case of *Hyde v Hyde*, defined marriage within a Christian context as “the voluntary union for life of one man and one woman to the exclusion of all others.” This definition is rooted in the notion of Christian or monogamous marriage and implies a lifelong union between two individuals, excluding any third parties. It reflects the English conception of marriage during that era and does not account for the diverse forms of marriage recognized in other cultures and legal systems.

In contrast, the pluralistic nature of Ghana's legal system accommodates various forms of marriage beyond the Christian or monogamous framework. Ghanaian law recognizes both monogamous and polygamous marriages, reflecting the country's cultural and religious diversity. This is evident from the observation of Chief Justice Apaloo in the case of *Apomasu v Bremauo*, where he stated that “a number of decided cases show that there are, broadly speaking, two types of marriage recognized by law in this country. They are the pure customary union and the monogamous one.”

In Ghana, monogamous marriages are legally recognized under the Marriage Ordinance (CAP 127), which stipulates that these marriages are potentially monogamous. This means that individuals entering into an ordinance marriage commit to a union with one spouse at a time, reflecting the principles of exclusivity and lifelong partnership.

On the other hand, polygamous marriages are recognized under customary law and the Mohammedan Ordinance. Customary marriages, deeply rooted in the traditions of various ethnic groups, allow for the possibility of marrying multiple spouses. Similarly, marriages under the Mohammedan Ordinance accommodate the Islamic practice of polygamy, where a man may have more than one wife, provided he adheres to specific religious and legal stipulations.



The dual recognition of monogamous and polygamous marriages within Ghanaian law illustrates the country's commitment to respecting cultural and religious diversity while maintaining a structured legal framework for marital relations. This approach ensures that all forms of marriage, whether monogamous or polygamous, are afforded legal recognition and protection, reflecting the pluralistic character of Ghanaian society.

Below is a brief overview of each type of marriage recognized under Ghanaian law:

Monogamous Marriage (Ordinance Marriage):

- Governed by the Marriage Ordinance (CAP 127).
- Involves a union between one man and one woman.
- Legally binding with principles of exclusivity and lifelong commitment.

Customary Marriage:

- Governed by customary laws of various ethnic groups.
- Allows for polygamous unions.
- Reflects traditional practices and cultural norms.

Marriage under the Mohammedan Ordinance:

- Governed by Islamic law.
- Permits polygamous unions.
- Requires adherence to specific religious and legal conditions.

## 2.2 Customary Law Marriage

In the case of *Yaotey v Quaye*, Justice Ollennu provided a comprehensive definition and description of "customary law marriage" in Ghana, describing it as "a union of the man's family and the woman's family. It imposes rights and duties upon the two families. The woman's family gains the right to perform certain rites in certain eventualities and the man's family also gains the right to perform certain rites in certain eventualities." This definition underscores the familial nature of customary law marriages, highlighting a key difference from the individualistic conception of marriage prevalent in jurisdictions like Europe. Justice Ollennu emphasized that customary law marriage is not merely a union between a man and a woman but a union of their respective families.

In Ghana, customary law marriage inherently involves the families of both the man and the woman, making it a broader social contract rather than a private arrangement between two individuals. Such marriages are potentially polygamous, allowing a man to marry multiple wives as long as he can manage and maintain harmonious relationships with them, as noted in *Graham v Graham*. This potential for polygamy distinguishes customary law marriages from monogamous marriages under the Ordinance (CAP 127).

The celebration of a customary law marriage must adhere to the specific customs, practices, and usages of the community involved. Certain customary laws may prohibit marriages on grounds such as consanguinity, ensuring that the union respects familial boundaries and cultural norms. Despite the polygamous potential of customary law marriages, they can be converted into Ordinance Marriages. The *Graham* case established that upon solemnization under the Ordinance, the customary marriage ceases to exist, prohibiting the man from entering into any further customary marriages. This is because Ordinance marriages are monogamous, and any subsequent customary marriage would be void due to the differing legal implications of the two marriage forms.



Justice Ollenu outlined the essentials of a customary law marriage in *Yaotey v Quaye* and reiterated in cases like in *re Caveat by Clara Sackitey and Akorininga v Akawagre*. These essentials are:

1. Agreement by the Parties: Both parties must agree to live together as husband and wife.
2. Consent of the Man's Family: The man's family must consent to the union, either formally by approaching the woman's family to ask for her hand or informally by recognizing the woman as the man's wife and admitting her and her family to participate in family rites.
3. Consent of the Woman's Family: The woman's family must consent to the marriage, which can be formal through the acceptance of drinks (bride-price) offered by the man's family or informal by acknowledging the man as the woman's husband and admitting him to perform family rites.
4. Consummation by Co-habitation: The marriage must be consummated by the couple living together.

These essentials, however, have been subject to criticism, particularly regarding the acceptance of drinks as bride-price, which is not a universal practice across all communities in Ghana. The absence of a clear definition of "family" (whether nuclear or extended) by Justice Ollenu also raises issues, particularly when a head of the family refuses consent to the marriage. Additionally, the question of whether procreation should define consummation remains debated, highlighting the dynamic and varied nature of customary practices in Ghana.

The recognition of these complexities and the potential for legal reforms to address them is crucial. Harmonizing customary practices with statutory requirements and providing clear guidelines can help resolve ambiguities and ensure that customary law marriages are adequately recognized and protected within Ghana's legal framework.

### 2.3 Mohammedan Marriage

Part Two of the Marriages Act 1884-1985 incorporates the Marriage of Mohammedans Ordinance (CAP 129), which specifically governs Mohammedan marriages in Ghana. Asaf Fyzee, in his "Outline of Mohammedan Law," defines a Mohammedan marriage as a contract designed to legitimize intercourse and ensure the procreation of children. Fyzee emphasizes that it serves to uphold societal order and protect individuals from immoral and unchaste behavior (Fyzee, 1974).

Mulla's principles of Mohammedan Law outline the essentials of a Mohammedan marriage, highlighting its contractual nature. The requirements are as follows: (a) a proposal made by or on behalf of one of the parties to the marriage and an acceptance of the proposal by or on behalf of the other; (b) the acceptance must occur in the presence and hearing of two male or one male and two female witnesses who are sane and adult Mohammedans; (c) both the proposal and acceptance must be expressed at the same meeting; and (d) there is no valid marriage if the proposal and acceptance are expressed at different times (Mulla, 2013).

Similar to customary marriages, Mohammedan marriages are potentially polygamous, allowing a man to marry multiple wives under the stipulations of Islamic law. However, the legal validity of a Mohammedan marriage in Ghana hinges on its registration. According to the Marriages Act, a Mohammedan marriage must be registered within one week of its celebration to be considered legally valid.

The importance of registration is underscored in the case of *In re Registration of Marriage between Byrouthy and Akyere: Ex Parte Ali*, where Justice Koranteng-Addo stated that "the essence is not the fact of the ceremony but the registration that gives the marriage validity." In this case, the marriage between Abena Akyere and Mohammed Sadallah Byrouthy was declared invalid under Islamic law because it was not registered within the stipulated period. Justice Koranteng-Addo emphasized that granting an application to issue a certificate would amount to validating an invalid marriage, which is impermissible.



Similarly, in the case of *Jabeille and Another v Ashka and Another*, a validly solemnized Muslim marriage was declared null and void due to the failure to register it within the seven-day requirement. These rulings highlight the critical importance of adhering to the registration requirement for Mohammedan marriages to ensure their legal validity in Ghana.

The requirement for registration serves multiple purposes: it provides a formal record of the marriage, ensures compliance with legal standards, and protects the rights of the parties involved. However, the strict registration requirement also poses challenges. In some cases, couples may be unaware of the need to register their marriage or may face logistical difficulties in doing so within the specified timeframe. This has led to calls for more flexible registration procedures and increased public awareness to ensure that more marriages are recognized legally.

#### 2.4 Cap 127, Marriages Act [1884-1985] – Part Three, Christian and Other Marriages

Marriage under the Ordinance is inherently monogamous. For a marriage to be legally recognized under the Ordinance, all essential requirements must be strictly adhered to; otherwise, the marriage risks being declared invalid or a nullity. The case of *Appiah (Deceased); Yeboah v Appiah* demonstrates that merely intending to convert a customary law marriage into a monogamous one under the Ordinance is insufficient without fulfilling the prescribed legal requirements.

##### 2.4.1 Substantive Requirements

The substantive requirements for contracting a marriage under the Ordinance are as follows:

###### a. Prohibition on Grounds of Consanguinity or Affinity

A marriage is prohibited if the parties are related by blood (consanguinity) or through marriage (affinity). Section 74(1) of the Matrimonial Causes Act (MCA) stipulates that “A marriage may be lawfully celebrated under this Part between a man and the sister or niece of the deceased wife, but a marriage is not valid, which if celebrated in England, would be void on the ground of affinity, or where either of the parties at the time of the celebration of the marriage, is married under the applicable customary law to a person other than the person with whom the marriage is celebrated.” This provision ensures that marriages which would be considered void due to consanguinity or affinity in England are also void in Ghana.

###### b. Capacity to Enter into the Contract

The parties must possess the legal capacity to marry. According to Section 59 of CAP 127, “where either party to an intended marriage who is not a widower or a widow, is under twenty-one years of age, the written consent of the father, or if the father is dead or is of unsound mind or is absent from the Republic, of the mother or guardian of the minor. A Justice of the High Court or the Attorney-General may give consent in appropriate cases.” This section is complemented by Section 14(2) of the Children’s Act, 1998 (Act 560), which sets the minimum age for marriage at eighteen years, ensuring that minors cannot legally marry without the appropriate consent.

###### c. Understanding and Voluntary Consent

The parties must fully understand the nature of the marriage contract and enter into it freely without coercion. This requirement safeguards against forced marriages, ensuring that both parties willingly and knowingly consent to the union.

Failure to meet any of these substantive requirements results in the marriage being declared null and void. The stringent adherence to these requirements underscores the importance of ensuring that marriages under the Ordinance are legally sound and reflective of genuine consent and capacity. This legal framework aims to protect the integrity of the marriage institution, ensuring that all parties enter into it with a clear understanding of their rights and obligations.



#### 2.4.2 Procedural Requirements

Under CAP 127, the celebration of a marriage must be authorized through one of the following:

- A registrar's certificate
- A marriage officer's certificate
- A special license from the Principal Registrar of Marriages

*Registrar's Certificate:* According to Section 42 of CAP 127, a marriage under the authority of a registrar's certificate must be preceded by a notice given to the Registrar of Marriages in the district where the parties intend to marry. This notice must be provided within three months from the date of issuance and include particulars of the parties, such as their names, addresses, and marital statuses. Upon receipt of the notice, the Registrar publishes it in the Marriage Notice Book. If no objections are raised within 21 days and before three months elapse, and upon payment of the requisite fees, the Registrar will issue a certificate, provided all substantive requirements have been met. If the marriage does not take place within the specified three months, the notice and all related proceedings become null and void, necessitating a fresh notice.

*Marriage Officer's Certificate:* The Minister for Interior may appoint a Minister of Religion as a marriage officer for a particular district via an executive instrument. When parties wish to marry under the certificate of a marriage officer (typically church ministers), each must deliver a written notice to the marriage officer at least four days before the first publication of the marriage banns. This notice must include details such as the names, statuses, occupations, ages of the parties, and confirmation of consent. Following the receipt of the notice, the marriage officer publishes the banns at the parties' place of residence and their place of worship. If no caveat is raised and all procedures are satisfactorily completed, the marriage officer issues a certificate of marriage. Similar to the registrar's certificate, if the marriage is not celebrated within three months of the banns' publication, the notice becomes null and void, invalidating all actions taken under it.

*Special License from the Principal Registrar of Marriages:* A special license can be issued by the Principal Registrar of Marriages, providing more flexibility regarding the time and place of marriage. This special license is typically granted in exceptional circumstances and must meet all substantive requirements to ensure the marriage's validity.

These procedural requirements ensure the proper conduct and validation of marriages under the Ordinance, maintaining legal standards and protecting the parties' rights. By adhering to these procedures, the legal system ensures that marriages are entered into with full consent, understanding, and compliance with statutory requirements

#### 2.4.3 Special License

The need for a special license typically arises when a couple wishes to dispense with the usual publication of notices or banns. The Principal Registrar of Marriages has the authority to waive these requirements if he is satisfied, based on evidence provided, that there are no lawful impediments to issuing a certificate of the Registrar. Upon this assurance, the Principal Registrar may grant a special license, which authorizes a specified individual to celebrate the marriage. This flexibility allows the marriage to be celebrated in places other than a licensed place of worship or the Registrar's office, provided such authorization is given by the Registrar.

It is important to note that when a marriage is celebrated in a licensed place of worship by a recognized minister of the church, it must occur between the hours of 8:00 AM and 6:00 PM and be witnessed by at least two



individuals in addition to the officiating minister. Unless conducted under a special license, the marriage must take place in a building duly licensed under Section 40 of CAP 127.

Section 75 of CAP 127 asserts that a marriage celebrated under these conditions is "good and valid in law to all intents and purposes." Consequently, when a marriage certificate is produced in court, it must be presumed that the marriage was duly celebrated between the parties named in the certificate, thereby providing legal recognition and validity to the union.

This provision ensures that marriages conducted under special circumstances retain their legality and validity, thereby protecting the rights and intentions of the marrying parties while accommodating their specific needs or circumstances. The ability to obtain a special license adds a layer of flexibility to the marriage process, ensuring that the legal framework can adapt to various situations without compromising the integrity or legality of the marriage.

### *2.5 Dissolution of Marriage (Divorce)*

Dissolution of marriage, or divorce, is the formal legal process that terminates the marriage contract, effectively ending the marital relationship and nullifying the rights, duties, and obligations of the parties as husband and wife. In Ghana, the dissolution of a monogamous marriage is governed by the Matrimonial Causes Act, 1971 (Act 367). A party to a marriage who is a citizen of Ghana, domiciled in Ghana, or has been ordinarily resident in Ghana for a continuous period of three years can file a petition for divorce. Section 31 of the Matrimonial Causes Act 1971 (Act 367) states that the court will have jurisdiction where the petitioner is domiciled in Ghana, is a citizen of Ghana, or has been ordinarily resident in Ghana for at least three years immediately preceding the presentation of the petition.

It is crucial to comply with the procedural requirements for invoking the court's jurisdiction in divorce proceedings to avoid dismissal. The law mandates that the court's jurisdiction must be invoked through a petition, not a writ of summons. The Court of Appeal, in *Republic v High Court, Sekondi; Ex Parte Perkoh II*, held that non-compliance with the procedural rules for invoking jurisdiction is fatal to the suit. The court emphasized that failure to follow the prescribed procedure for originating the process would not be treated as a mere irregularity but as a fundamental defect.

The only ground for divorce under CAP 127 is the irretrievable breakdown of the marriage. To satisfy the court that the marriage has irretrievably broken down, the petitioner must establish one of the factors specified under Section 2(1) of the Matrimonial Causes Act, which include:

- a. The respondent has committed adultery, and the petitioner finds it intolerable to live with the respondent.
- b. The respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.
- c. The respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition.
- d. The parties have lived apart for at least two years, and the respondent consents to the divorce.
- e. The parties have lived apart for at least five years.
- f. The parties are unable to reconcile their differences.

A petition for divorce can generally be presented only after two years of marriage. However, the law allows for an earlier petition if the petitioner can prove substantial hardship or depravity by the other spouse within the first two years of marriage. To commence a petition for divorce within this period, the petitioner must obtain the



court's leave by filing a motion on notice with a supporting affidavit. The affidavit must detail the substantial hardship suffered by the petitioner or the depravity of the respondent. Additionally, if there are children involved, the affidavit must include their names, ages, living arrangements, and any attempts at reconciliation.

Importantly, Section 10 of the Matrimonial Causes Act provides that a petition cannot be dismissed on the grounds of collusion between the parties or any conduct by the petitioner. The section ensures that the court's focus remains on the grounds for divorce rather than on technical defenses that could otherwise bar the petition.

### *2.5.1 Dissolution Under Customary Law Marriage*

Customary law marriages in Ghana, like statutory marriages, can also be dissolved, albeit through different processes and considerations. Customary law allows for the dissolution of marriage through various means, which reflect the customary norms and practices of the respective ethnic groups.

*Unilateral Dissolution:* One significant aspect of customary law marriage is the ability for a marriage to be dissolved unilaterally if one party unreasonably refuses the other party's request for dissolution. This principle was upheld in the case of *Ginburro and Another v Kaba* (1971) 2 GLR 416 HC, where the court recognized that a marriage could be ended if one party persistently and unreasonably turned down a request for dissolution from the other party. This mechanism provides an avenue for individuals to exit a marriage that they find untenable without the need for mutual consent.

*Statutory Exceptions for Polygamous Marriages:* Section 41 of the Matrimonial Causes Act, 1971 (Act 367) provides an important statutory exception for parties in polygamous marriages, allowing them to petition for divorce under the Act. This provision is particularly significant because it extends the legal framework of the Matrimonial Causes Act to include polygamous marriages, which are traditionally governed by customary law. It ensures that individuals in polygamous marriages have access to the same legal remedies and protections as those in monogamous marriages.

*Procedure for Dissolution:* To dissolve a customary law marriage under the Matrimonial Causes Act, a petitioner must attach an application to their petition seeking the court's leave to file for dissolution under the Act. This procedural step is crucial as it affords the petitioner the opportunity to apply for certain legal benefits that might not be available under customary law dissolutions. These benefits can include equitable distribution of marital property, spousal support, and child custody arrangements, which are typically provided under statutory law but may be lacking in customary practices.

This integration of customary law marriage dissolution into the statutory framework under the Matrimonial Causes Act aims to provide a more comprehensive legal recourse for individuals. It recognizes the evolving nature of marital relations and the need to ensure that all parties, regardless of the type of marriage, have access to fair and just legal remedies.

### *2.5.2 Dissolution Under Mohammedan Marriage*

The dissolution of Mohammedan (Muslim) marriages in Ghana is governed by principles of Islamic law, as well as statutory provisions when applicable. According to Mulla's Principles of Mohammedan Law, a Muslim marriage may be dissolved through several means, each reflecting the religious and cultural context of the marriage.

*Judicial Dissolution:* Muslim marriages that are registered under the Marriage of Mohammedans Ordinance (CAP 129) can be dissolved through judicial processes. The parties may apply to the court for the marriage to be dissolved, following similar procedural requirements as those outlined in the Matrimonial Causes Act, 1971 (Act



367). This provision ensures that registered Muslim marriages are afforded the same legal scrutiny and formal procedures as other types of marriages, providing a structured and legally recognized process for dissolution.

*Talaq (Pronouncement of Divorce by the Husband):* One of the distinctive features of Mohammedan marriage is the ability of the husband to unilaterally dissolve the marriage by pronouncing "talaq" or "I divorce thee." According to Mulla's Principles of Mohammedan Law, if the words are express and well understood as implying divorce, the marriage is effectively terminated. This form of dissolution, known as talaq, does not require judicial intervention and can be executed at the will of the husband. It is based on the belief that marriage in Islam is a contract that can be terminated by one party, in this case, the husband, under certain conditions.

*Court-Ordered Dissolution:* While talaq allows for unilateral divorce by the husband, there are also provisions for the wife to seek dissolution through the court, especially in cases where the marriage is registered. This typically involves filing a petition for dissolution based on specific grounds, such as cruelty, desertion, or failure to provide maintenance. The judicial process ensures that the rights of the wife are protected and that the dissolution is conducted fairly and justly.

*Conditions and Procedures:* For talaq to be valid, certain conditions must be met. The pronouncement must be clear and unequivocal, and the husband must be of sound mind and not acting under compulsion or intoxication. Additionally, Islamic law prescribes a waiting period (iddah) following the pronouncement of talaq, during which reconciliation efforts can be made, and the wife cannot remarry. This period also serves to confirm that the wife is not pregnant, which would have implications for paternity and inheritance rights.

### 3. Distribution of Matrimonial Properties Upon Divorce

One notable achievement of the courts in Ghana is the development of jurisprudence concerning the distribution of matrimonial properties upon divorce. In the landmark case of *Arthur v Arthur*, the Supreme Court defined "matrimonial property" as any property acquired during the subsistence of the marriage, irrespective of whether it was acquired by the husband, wife, or both. This broad definition underscores that any property obtained during the marriage is characterized as matrimonial property, deserving consideration in divorce proceedings.

The contentious issue, however, is the method of distributing such properties. Historically, courts required proof of substantial contribution, especially from the female spouse, to justify a claim to matrimonial property. This approach was exemplified in *Quartey v Martey*, where Justice Ollenu held that under customary law, the proceeds of joint efforts and any property acquired by the man with such proceeds were the individual property of the man. This customary law position, which prioritized the husband's ownership of property, conflicted with the spirit of equality enshrined in the 1992 Constitution.

Article 18 of the 1992 Constitution recognizes the property rights of all persons in Ghana, while Article 17(1) mandates equal treatment without discrimination. Specifically, Article 22(2) and (3) of the Constitution provides:

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



Although Parliament has yet to enact comprehensive legislation to regulate spousal property rights as mandated, the Supreme Court of Ghana has proactively interpreted these constitutional provisions to ensure equitable distribution of matrimonial properties. In several recent decisions, the Supreme Court has established a presumption of equal (50-50) distribution of matrimonial property upon divorce. This presumption, however, is not absolute. It allows for adjustments based on the equities of each case, recognizing that one party may be entitled to a greater share if they can prove that fairness and justice require it.

This approach marks a significant shift from the previous position, ensuring that the contributions of both spouses, whether financial or non-financial, are acknowledged and rewarded. The courts' interpretation aligns with the constitutional principles of equality and non-discrimination, promoting fair and just outcomes in divorce proceedings.

#### **4. Reflections: Can There Be Implied/Constructive Marriages in Ghana?**

In his paper presented at the 2015 Bench and Bar Conference titled “Who is a Spouse for the Purposes of Inheritance to Property in Ghana?”, Justice Brobbey argued convincingly that only a marriage celebrated before witnesses, as stipulated under Section 31 of the Evidence Act, 1975 (NRC 323), can be considered valid. He posited that any other marriage recognized by the courts based on conduct or implied circumstances was decided *per incuriam* (through a lack of due regard to the law) and therefore does not constitute good law. Justice Brobbey maintained that marriages recognized by courts based on cohabitation or reputation conflict with statutory provisions and are thus null.

However, this perspective raises several legal and practical issues that warrant closer examination:

##### **4.1 Rebuttable Presumptions Under Section 31 of NRC 323**

Section 31 of the Evidence Act, which deals with rebuttable presumptions, does not conclusively determine the validity of a marriage in Ghana. The provision establishes that the fact of a marriage can be presumed if certain conditions are met, subject to rebuttal by contrary evidence. This means that while the presence of witnesses and formal ceremonies can support the presumption of a valid marriage, the absence of such elements does not automatically invalidate a marital union if there is substantial evidence to the contrary.

##### **4.2 Recognition of Superior Court Decisions**

The 1992 Constitution recognizes the decisions of the Superior Courts as part of the common law of Ghana. As such, unless these decisions are reversed or set aside, they remain binding and valid law. This includes judicial interpretations that recognize marriages based on cohabitation and reputation. Courts have, in various instances, validated marriages where the parties have lived together and conducted themselves as husband and wife in the eyes of society.

##### **4.3 Societal and Cultural Considerations**

In Ghana, particularly in rural communities, the concept of marriage often extends beyond formal ceremonies to include the lived reality of cohabitation and communal recognition. Many people view marriage as the act of living together and raising a family rather than merely the ceremonial aspects. Disregarding such unions on the



basis of a lack of formal celebration could undermine the social and cultural fabric that recognizes and supports these relationships.

The case of *Gorleku v Pobee and Another* illustrates this point. The respondent claimed to be the lawfully wedded wife of the deceased, having cohabited with him as man and wife for 19 years, publicly recognized by their community. The applicants denied that any customary rites had been performed to formalize the relationship. Despite this, the Court of Appeal found sufficient evidence to support the existence of a valid customary marriage. The court noted that the couple's cohabitation, participation in communal events as a married couple, and the deceased's public declarations were adequate to establish a valid customary marriage.

While formal statutory requirements for marriage are clear, the recognition of implied or constructive marriages reflects the practical realities and social norms within Ghanaian society. The courts have taken a pragmatic approach, acknowledging that lived experiences and societal recognition often substantiate marital unions. This approach ensures that the law remains relevant and just, accommodating the diverse ways in which marriages are perceived and practiced across different communities in Ghana. Thus, it is essential to consider both statutory provisions and societal contexts when evaluating the validity of marriages, ensuring that legal frameworks align with the lived realities of the people they serve.

## 5. The Present Law on Distribution of Marital Property: The Need for Reiteration

The era of *Quartey v Martey* is definitively over, marking a significant shift in the jurisprudence surrounding the distribution of marital property upon divorce. However, the courts have maintained the principle that the evidence presented must sufficiently demonstrate why a divorced spouse should benefit more from a particular matrimonial property. This nuanced approach ensures fairness and justice in the division of assets, reflecting both the contributions of each spouse and their intentions regarding property ownership.

Under current Ghanaian law, any property acquired during the subsistence of a marriage is generally considered matrimonial property. This includes properties acquired by either the husband, wife, or both parties. The Supreme Court, in cases like *Arthur v Arthur*, has established that such properties are subject to distribution upon divorce, typically operating under a presumption of equal (50-50) sharing. However, this presumption is not absolute and can be rebutted by compelling evidence.

The courts recognize situations where the fifty-fifty sharing formula may not apply. For instance, if both parties agreed during the marriage that a particular property should be given to one spouse for specific reasons, this agreement would be honored. Similarly, if one spouse has always treated a property as their personal property, and the other spouse acknowledges and does not contest this, the courts are likely to respect this arrangement. This approach aligns with principles of fairness and acknowledges the autonomy of spouses to make binding agreements regarding their property.

Evidence plays a crucial role in these determinations. The sufficiency of evidence must show that one spouse's claim to a greater share of the property is justified based on their contributions or the mutual understanding between the spouses. Such contributions can be financial, such as paying for the property, or non-financial, such as homemaking or supporting the other spouse's career, which indirectly contributes to the acquisition of the property.



While the presumption of equal distribution of marital property upon divorce provides a starting point, the courts remain attentive to the specific circumstances and agreements between spouses. The need for clear, sufficient evidence to support claims for a greater share ensures that the distribution of marital property is both equitable and reflective of the realities of the marital relationship. This approach balances the need for fairness with respect for individual contributions and agreements, ensuring that the distribution of assets upon divorce is just and equitable.

This comprehensive analysis of marriage and divorce in Ghana highlights the complexities and nuances inherent in the country's legal framework. The findings underscore the need for a multifaceted approach to reform that considers statutory requirements, customary practices, and the evolving societal norms. Based on the insights gained, several specific and actionable recommendations can be made to enhance the effectiveness and fairness of marriage and divorce laws in Ghana.

### 1. Harmonization of Customary and Statutory Laws

One of the primary issues identified is the tension between customary and statutory laws. To address this, it is crucial to harmonize these legal frameworks. This can be achieved by:

- **Drafting Legislation:** Parliament should draft and enact comprehensive legislation that integrates customary practices within the statutory framework, ensuring clear guidelines for the recognition and dissolution of customary marriages.
- **Education and Awareness:** Implement nationwide education campaigns to inform the public, particularly in rural areas, about the legal requirements and implications of both customary and statutory marriages.

### 2. Improving Access to Legal Services

The disparity in access to legal services, especially in rural areas, poses a significant barrier to justice. Practical steps to mitigate this include:

- **Legal Aid Expansion:** Expanding the scope and reach of legal aid services to ensure that individuals in rural and underserved areas have access to legal advice and representation.
- **Mobile Legal Clinics:** Establishing mobile legal clinics that travel to remote areas, providing legal services and education to communities that are otherwise hard to reach.

### 3. Strengthening Judicial Training and Interpretation

To ensure consistent and fair application of the law, ongoing training for judges and legal practitioners is essential. This can be achieved by:

- **Continuous Professional Development:** Implementing mandatory continuing education programs for judges and lawyers on the latest developments in family law and human rights.
- **Judicial Guidelines:** Developing comprehensive guidelines for judges on handling cases involving both customary and statutory marriage and divorce, emphasizing the principles of equality and non-discrimination.



#### 4. Legislative Reforms for Equitable Distribution of Marital Property

The current approach to the distribution of marital property, while progressive, requires further refinement to ensure fairness. Recommendations include:

- **Statutory Clarity:** Enacting legislation that clearly defines the criteria for equitable distribution of marital property, including the recognition of non-financial contributions such as homemaking and childcare.
- **Presumption of Equality:** Codifying the presumption of equal (50-50) distribution of marital property in statute, with provisions allowing for deviations based on clear and compelling evidence.

#### 5. Enhancing Procedures for Marriage Registration and Divorce Petitions

To streamline the processes and reduce the administrative burden, the following steps are recommended:

- **Simplified Registration Processes:** Simplifying the procedures for marriage registration and making the process more accessible, including online registration options.
- **Support Services for Divorce Proceedings:** Providing support services such as counseling and mediation to assist couples in resolving disputes amicably before resorting to litigation.

#### 6. Recognition of Constructive and Implied Marriages

Given the societal realities in Ghana, there is a need to recognize constructive and implied marriages where formal ceremonies may not have taken place. Practical steps include:

- **Legal Recognition:** Amending the Evidence Act to explicitly recognize cohabitation and public acknowledgment as sufficient grounds for establishing a marriage.
- **Judicial Training:** Training judges to appropriately assess and recognize implied marriages based on the evidence of cohabitation and societal recognition.

##### 5.1 Implementation of Proposed Reforms

Implementing these recommendations requires a coordinated effort involving multiple stakeholders, including the government, judiciary, legal practitioners, and civil society organizations. Specific actions include:

- **Legislative Action:** Engaging with Parliament to prioritize and pass the necessary legislative reforms.
- **Stakeholder Collaboration:** Establishing working groups comprising representatives from the judiciary, bar associations, and civil society to drive the implementation of reforms.
- **Public Engagement:** Conducting public consultations and educational campaigns to ensure broad-based support and understanding of the new legal provisions.



By taking these practical steps, Ghana can create a more equitable and effective legal framework for marriage and divorce, reflecting the diverse needs and realities of its population while upholding the principles of justice and fairness.

## 6. Conflict of Interest Statement

The authors declare no conflicting interest in the conduct of the study.

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## Biographical notes



### Mavis Ekua Enyamah Kwainoe

Ms. Kwainoe is a law lecturer at the University of Professional Studies, Accra (UPSA) and Wisconsin International University College, Accra. Before joining academia, she was a District Magistrate, a State Attorney and Legal Practitioner in Accra. In addition to her academic work, she is the Managing Partner of the law Office of Kwainoe, Blue Lagoon, Accra. She graduated from the University of Cape Coast with a B.A. (Hons) degree in Business Management, and further obtained an LL.B (Hons) from the Kwame Nkrumah University of Science and Technology (KNUST) in Kumasi and the Ghana School of Law, Accra. She was called to the Ghana Bar in 2009. She obtained an LL.M. in International and Comparative Law from the George Washington University Law School, USA where she was a Thomas Buergerthal Scholar, and a recipient of the Justice Thurgood Marshall Civil Liberties Award.