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POLYGAMY AND PATRIARCHY: AN INTIMATE LOOK AT MARRIAGE IN GHANA THROUGH A HUMAN RIGHTS LENS

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Abstract

This paper examines polygamous customary marriage in Ghana, West Africa, in the context of colonial policy and legislation, which established the current plural legal environment in which Ghanaians negotiate their marriages and the dissolution of marriages. The human rights polemic between universalist advocates of individual rights and cultural relativist advocates of communitarian rights is activated in order to assess the efficacy of applying human rights principles to provide redress in family law cases. In doing so, the global north-south contention that the human rights movement is merely Western moral imperialism is tested. The paper demonstrates the way in which the more limited protection of rights afforded to women under customary law has been strengthened by the domestication of human rights treaties in the current constitution and legislation of Ghana, and the explicit application of human rights principles by judges in the judicial process.

Résumé

Cet article examine le mariage coutumier polygame au Ghana, dans le contexte de la politique et législation coloniale qui a établi le système juridique pluraliste actuel dans lequel les Ghanéens négocient les mariages et la dissolution des mariages. La polémique qui oppose les défenseurs universalistes des droits de l'homme et les défenseurs relativistes culturels des droits communautaires est déclenchée afin d'évaluer l'efficacité de l'application des principes des droits de l'homme pour fournir des mesures de redressement en matière de droit de la famille. Ce faisant, l'affirmation uniformisée qui soutient que le mouvement des droits de l'homme est simplement une sorte d'impérialisme moral occidentaux vis-à-vis de l'Afrique est testé. L'article démontre la manière dont la protection des droits accordés aux femmes en vertu du droit coutumier est plutôt limitée. Il démontre aussi

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que cette protection a aussi été renforcée par la réappropriation des traités de droits de l'homme dans la Constitution et la législation du Ghana, et l'utilisation explicite des principes des droits de l'homme par les juges dans le processus judiciaire.

Introduction

This paper will examine the competing claims of the human rights universalists, who champion individuals as equal rights bearers regardless of social context, and the cultural relativists, who argue that the collective may have an over-riding right to preserve unique and functional cultural values and practices which, from a western perspective, violate the rights of individuals. With regard to matrimonial matters, it has been the challenge of the legislature and courts of the West African Republic of Ghana to determine whether questions of rights and justice can best be redressed within either paradigm or by a balance to be struck between the two. In order to critically examine the dissenting claims of the cultural relativists, it seems fitting that an examination of the case for the canonization of the universal human rights movement for ideological sainthood should mirror the adversarial system of truth-seeking, employing the Devil's Advocate and the supporter, God's Advocate, to cross examine the witnesses. This paper will mirror Lord Penrose's dictum (found in *Adams v Thorntons WS and others*, 2005) for the taking of instructions as "a process … [that] should in most cases and at least in part, be dialectical with the lawyer as devil [*sic*] advocate."

Section 1 will consider the genesis of the post-war human rights movement, locating individuals as the subjects. Section 2 will explore the later cultural/peoples' rights presence in the developing human rights agenda. It will acknowledge the dissenting voices amongst the otherwise affirmative chorus of opinion on the unassailable claims of the modern human rights movement to be the means of achieving the goals of the framers of the *Universal Declaration of Human Rights*, 1948 (hereinafter, UDHR). Section 3 will shift the focus to a detailed analysis of the institution of marriage in the Republic of Ghana in order to establish the inherent complexity of the human rights landscape in a post-colonial society transitioning from political instability with a plural legal system. The purpose here is to anchor theoretical issues and conflicting perspectives in a specific society and by the dialectical process of examining the synthesis achieved

through the reconciliation of incompatibilities between Ghanaian cultural practice (including customary law) and Western-inspired human rights, to test the dissenting claim that the human rights movement, *arguendo*, is merely the emperor's new clothes of colonialism, Derrida's "white mythology"[1] and not the last runner carrying the baton for the saints of old. The conclusion will complete the movement from denying to affirming the action-guiding capacity of the universal international human rights system and the primacy of individual over collective rights.

1. The genesis of the post-war human rights movement

Whether we acknowledge the profound post-Holocaust dislocation of humanity's locus of certainties as the moment of conception of the human rights holy child, or the philosophical schools' "Plato said it first claim", or, following Sam Moyn (2010), see its genesis as the phoenix rising from the French Revolution's ashes, we have come to understand that the impetus for the Universal Declaration of Human Rights (UDHR) stemmed from the bellwether coalition of victors taking the helm and steering the ship of humanity away from the clashing rocks of despair. From the 1941 Atlantic Charter's legitimizing of human rights as an international discussion point, through the dissenting powers' (UK and USSR) accession to the apparently innocuous human rights clause of the 1945 Dumbarton Oaks Proposals to the 1945 San Francisco Conference's reaffirmation of faith in fundamental human rights, (McBeth, Nolan, & Rice, 2011), it was Western powers drawing on Western ideologies and subsequently universalizing them "for all peoples and all nations" (UDHR, 1948) that has attracted recent criticism of moral imperialism. De Sousa Santos (2002: 44) wonders how it could be that the issue is hotly debated, claiming, "As long as human rights are conceived of as universal they will… always be an instrument of… the struggle of the West against the rest." Balfour and Cadava (2004: 286) identify the universality claim as "lacking any meaningful correlative in actuality," and go on to quote Claude Lefort's ironically universal negation, "No one can be unaware of the fact that

[1] As Derrida's concept of 'white mythology' could be mistaken here for a racial reference when taken out of context, I offer his explanation of the concept to clarify and also because of its striking relevance to the point made above. ' What is white mythology? It is metaphysics which has effaced in itself that fabulous scene which brought it into being, and which yet remains, active and stirring, inscribed in white ink, an invisible drawing covered over in the palimpsest.' I employ this in the sense of colonialism, especially in its West African iteration, being the 'the fabulous scene' invisible in the palimpsest of human rights (Moore, 1974: p. 5).

over the greater part of our planet, the idea of human rights is either unknown – because it is incompatible with the communal traditions which in some cases date from time immemorial - or is furiously denied." (Lefort, found in Balfour and Cadava, 2004: p. 287). In defence of the universality principle, the language of the UN Charter emphasises that "human rights was a pre-existing and understood concept, not a creation of the drafting committee," (McBeth, Nolan and Rice, 2011: p.12). Further support is advanced by James Silk, (found in (Na' īm & Deng, 1990: p. 8) considering the debate arising from African claims of the dignity of the person as the antecedent of human rights. He warns that denying the universality provides an apology for the continent's poor human rights record based on the claim that:

> Africa cannot be held to standards that are culturally inappropriate and that Africans had no part in establishing. Also denying the universality of human rights may effectively destroy the meaning and value of the entire concept of human rights… The very significance of international human rights is in their universality.

Were Africans invited to the table in the framing of the International Bill of Rights, where they now sit as participants in the conversation, their mark would be observable in a more communitarian character based on the traditional value of *ubuntu*. Justice Yvonne Mokgoro of the Constitutional Court of South Africa has likened *ubuntu* to principles such as "human dignity, respect, inclusivity, compassion, concern for others and honesty," (*S v Makwanyane*, 1995). All societies have considered this concept but those with written epistemologies have been dismissive of those with oral epistemologies. In framing the UDHR exclusively in terms of the written, Western, liberal tradition and then taking the step that proclaimed that their document was universal, immutable and perennial, the victorious western powers post WWII sowed the seed for dissent amongst those societies whose cultural practices were now to be cast as 'non-compliant', 'denials' or even 'abuses' of so-called universal human rights. This took the already well advanced marginalising of geopolitically and economically powerless peoples into yet another dimension of negative evaluation; they were now, with regard to certain cultural practices, morally and ethically oppressors of themselves by virtue of systemic abuses of human rights as defined by a coalition of geographically and ideologically remote nations.

2. Individual and Collective Rights Perspectives

The tension between universalists who privilege human rights located in individuals and those cultural relativists who privilege the group as the locus of rights is the subject of this analysis of marriage practices in Ghana. Cultural relativism holds that one should not judge the customs, beliefs and values of one society by what is accepted in another society but rather seek an understanding of the function of such customs, beliefs and values within that particular society. As societies differ, there can be no universal value system that would be functional in all societies. A cultural relativist stance privileges the group over the individual and in terms of marriage, the group whose power, status and privilege are perpetuated through polygamy is men. Many religious and cultural traditions, such as polygamy[2], violate the lives of women and girl children, (Amor, 2009: p.181) in ways this paper will explore in the following section and yet, a country like France has accommodated polygamy as an exceptional right for immigrant, ethnic communities to practice in France where it is otherwise unlawful (Okin, Nussbaum, Cohen, & Howard, 1999: p.10). The purpose is to avoid erosion of these cultural practices, which is seen as a precursor to the loss of cultures in a globalizing world. However, the effect is to compromise the rights of individual women caught up in polygamy's inherently discriminatory web. Friction between feminists and universalists on the one hand supporting the right of women to live fulfilling and freely chosen lives available to men, and cultural relativists making a special claim for extraordinary rights for ultramontane cultural groups to continue to observe traditional practices on the other, hinges on the priority given in liberal, Western societies to individual over group rights.

The argument for preserving cultural diversity and integrity is clouded, in the African context, by the uncomfortable fit of the descriptor, 'indigenous' especially in West Africa where the model of European incursion was colonies of exploitation in contrast to the colonies of settlement model represented in Australia, New Zealand, Canada and South America, which reduced aboriginal populations to oppressed 'indigenous' minorities. Along the African Gold Coast, early attempts to station European military garrisons, slave castles, penal settlements and trading stations resulted in death rates so high that the 'White Man's Grave' epithet

[2] Although the term, *polygamy,* properly refers to the practices of both polygyny and polyandry, it is a distinction not observed in legal literature where it is commonly used as a synonym for polygyny. I am following this convention throughout using polygamy where the more exact choice would be polygyny.

became a negative tag West Africa is still to this day trying to counter in the western imagination (Christopher: 2010). Although it was spared the scope of dispossession of land and subordination suffered in colonies of settlement, Ghana, was subject to the imposition of colonial administration by the British common law judicial system as well as the rapacious exploitation of its human and natural resources and the relegation of its peoples, languages and customs to an inferior status. Appiagyei-Atua (2000: 190) argues that

> Colonialism came with its own administrative machinery and concepts of human rights and civil society which failed to recognise, and rather sought to replace, local political institutions.

This was the catalyst, Appiagyei-Atua argues, for the creation of a ruling elite, controlled by the colonial masters and the simultaneous degradation of "indigenous" peoples into deprivation, powerlessness and poverty in a "development-turned dependence structure," (p. 191). It is my contention that with colonialism, for the first time, men were relegated to join the rights-deprived portion of the population - the female gender and for the first time, the customary deprivation of women became the shared, lived deprivation and dependence of men's and women's experience of life. Colonisation and what followed cast Ghanaian men into the subordination they had themselves foisted upon women in the gender-imbalanced power structure on which traditional communal society depended. What remained intact throughout this upheaval was the traditional patriarchal ideology, one which, as Uberoi (2006, p.32) claims in the Indian context but which applies to the Ghanaian context as well

> Not only justifies the authority of the patriarch over women and juniors (both male and female) in the family but also, sad to say, influences notions of *entitlement* to household resources, to the material disadvantage of women and girl-children in particular.

Polygamy and patriarchy have long been comfortable bedfellows, and the rights of women had always been subordinated to the larger freedoms enjoyed by men and to the patriarchal perception of the good of the community.

The actualization of human rights for women in contexts of development is impeded by adverse circumstances of every kind: social, political, economic, religious, legal, and an over-arching gender imbalance in power and authority. Nnaemeka and Ezeilo (2005, p. 3) question the basic premises of the human rights movement based on the local realities of women's lives in Africa asking, "Is

international law an appropriate vehicle for enhancing and guaranteeing equality for women? What would women who were differently situated make of human rights laws?" The answer to Nnaemeka and Ezeilo's first question is affirmative, as evidenced in the case study of marriage in Ghana below. By tracing marriage from the colonial legislation instituting monogamous marriage, to a recent court judgement applying International Law, it is clear that human rights norms provide an effective vehicle for safeguarding women in society regardless of such differences. Other compelling evidence such as affirmative action is acknowledged but is beyond the scope of this paper.

The notion of power is one side of the coin; the obverse side is agency inherent in the concepts of choice and consent, the pivotal point in many of the violations of the rights of women and girls. Merry's (2009) examination of the so-called *Compo Girl Case* in Papua New Guinea provides a clear example of the clash of a feminist, individual rights-validated stance over a communitarian cultural rights stance. As a case in point for the dissenting voices against the universal conferring of human rights upon peoples as the gift of civilization, which has been likened to the civilizing mission of colonialism, the Devil's advocate would cite the case as lending support to questions of political autonomy raised by those dissenting voices against the human rights orthodoxy (Treanor: 2004):

> Some people in history have indeed claimed rights - but most have had their rights declared for them by others. They are not allowed to renounce these 'declared rights'. The idea that a person must accept all rights declared for them, clearly contradicts the idea of political freedom. The human-rights tradition includes no element of consent. It is these aspects, which make the doctrine of human rights a license for oppression.

The case concerned a Human Rights NGO in Port Moresby, which intervened on behalf of a young highlands girl nominated as part of a payment of pigs, money and a bride from one tribe to another in compensation for the murder of her father. The judge found that the local custom of trading in women violated her human and constitutional rights and was repugnant to general principles of humanity; the victim, rather than rejoicing, was torn between the two warring concepts of personhood represented in the struggle. She feared returning to her clan, having disrupted the system of kinship obligations in which her sense of her own personhood was embedded and was unable fully to imagine herself as the bearer of

constitutional and human rights with agency to choose her own marriage partner and life path as the court saw her (Merry 2009: p.3).

> Taking a human rights perspective, [the judge] claimed that compliance with customs violated her agency. She was, from this perspective, oppressed by custom and unable to make a free choice. Consequently, the judge forbade the marriage, thus denying her the option of choosing to conform to kinship obligations.

Ironically, this decision merely effected a shift from customary law to international law as the patriarchy determining her future, giving credence to Treanor's skepticism about the saintly character of the human rights movement. However, in the context of modernity, privileging the individual, this decision was a victory. Howard, (1990, p. 182) speaking of the same issue in the African context but with regard to the limitations of the communal perspective, effectively counters Treanor's thesis in concluding:

> The purpose of human rights is above all to protect people – individually or in groups – against the state. But it is also to protect people against other groups, if necessary against their own social group. Individuals are and always will be products and members of their own societies. But social change in the modern world implies… removal of many individuals from the restrictive social roles of the past. To deny Africans the protection that human rights can provide against both the state and other members of their society, because of fear of the individualism thought to be consequent to the breakdown of the old social order is both to ignore historical and sociological reality and to deny social justice in the modern world.

On balance, although the result in the *Compo Girl Case* placed the victim in a moral limbo, it is inconceivable that observers sensitized to the human rights framework would conclude that the world in which an adolescent girl can be bundled with pigs, cowry shells and *kinas* [a local currency] and paid to compensation claimants is a world in which "All human beings are born free and equal in dignity and rights," (UDHR, 1948 Article 1). Conscience demands the protection of the individual from the collective.

3. Marriage Practices, Law and Human Rights in Ghana.

At the intersection of the western human rights imagination and the legal

recognition of customary values in Ghana lies a site of struggle. On the one hand, the State encodes social institutions and constitutional rights in common with Western nations and most contemporary democracies; on the other hand, Ghanaians operate in a world founded on values that evolved out of specifically indigenous cosmologies, institutions and heuristic solutions to West African survival challenges. Marriage practices go to the heart of cultural identity and a number of human rights issues, namely those defined in Article 16, *UDHR*, (1948) and subsequent iterations in international instruments, come into focus in marriage and family fields of life. Appiagyei-Atua (2000) has explored foundational cultural values represented in Akan proverbs as the genesis for the African conceptualization of rights. Another manifestation of Akan philosophy is traditional cultural practice which, even when it becomes obsolete or limited in contemporary life, is nevertheless embedded in the cultural consciousness as a potentially resistant or oppositional force in the face of new influences, be they colonization or human rights. For this reason, I enumerate in this section, the changes instituted by the British colonial administration against the background of a survey of some cultural practices affecting women and girls from the past recorded by Danquah, (1928) despite the relevance and verisimilitude of some of the practices such as widow inheritance being contested by modern scholars. I then trace new protections afforded to women through legislative reforms and judicial decisions grounded in international human rights instruments.

There are three ways to be legally married in Ghana: under customary law, under the *Marriage Ordinance* (Cap127) 1884 (Elias, 1976), and under the *Marriage of Mohammedans Ordinance* (Cap129), the latter being outside the scope of this paper. Marriage under the *Marriage Ordinance* (Cap127) is monogamous, meaning that a man married under its provisions may not marry another woman, whether under the Ordinance or customary law. Most Ghanaian marriages are customary still and all customary marriages are potentially polygamous but the provisions of the *Marriage Ordinance* Cap 127, the first statute governing marriage in the then recently proclaimed British Crown Colony of The Gold Coast, illustrate the intrusion and claim for pre-eminence of western patterns.

The Supreme Court Ordinance (1876) establishing the substance of the laws to be administered in the colony provides that the common law, the doctrines of equity and statutes in general application in force in England on 24 July 1874 shall apply. By section 19, local laws and customs, which were "not repugnant to justice, equity and good conscience", were to be applied in suitable cases. This reflects the

intention not to interfere with native law and custom as regards "the natives who have not adopted the usages of civilization and Christian life" (Elias, 1976: p. 32) especially with regard to marriage, succession, land tenure and property. However, the enactment of the *Marriage Ordinance* (1884) bowing to pressure from Christian Missionaries ushered in legislative social engineering, designed to privilege English ideals and lead to the eradication of African social values. Such legislative intention epitomises the cultural imperialism that was the catalyst for the development of cultural relativism. According to Daniels (1976, p. 101) the chief objects of the Ordinance were:

a. To provide a machinery for the celebration of statutory monogamous marriage locally in accordance with the principles of English law;
b. To encourage persons ordinarily subject to customary laws to avail themselves of the provisions of the Marriage Ordinance;
c. To offer them and their offspring proprietary benefits in the event of death intestate of one of the parties to such a marriage;
d. To make it possible for persons already married under customary law to marry again under the ordinance and thereby convert that marriage into a statutory monogamous marriage;
e. To clothe the parties with a status superior to and unknown to customary law;
f. To make it virtually impossible for parties who are married under the Ordinance and their offspring to relapse into polygamy.

The prejudicial language, especially of (e) and (f), supports the paternalistic attitude of the statute and reflects the perceived moral superiority of monogamy encapsulated in the definitive statement on marriage delivered by Lord Penzance in 1866 in the English Courts of Probate and Divorce in *Hyde v Hyde* (1886):

> I conceive that marriage as understood in Christendom may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all others.
> There are no doubt countries peopled by a large section of the human race in which men and women do not live or cohabit together in these terms - countries in which this Institution and status are not known. In such parts, the men take to themselves, several women whom they jealously guard from the rest of the world, and whose number is limited only by consideration of material means. But the status of these women in no way resembles that of a Christian "wife".

One hundred and seventeen years after *Hyde v Hyde,* the African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa,* ratified by Ghana in 2007, in Article 6 requires States parties:

> To ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:
>
> (c) monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected;

The British colonial system of indirect rule fostered a local élite, the members of which became acculturated to British manners and customs but for the vast majority of Ghanaians, the lure of superior status through contracting a marriage under the Ordinance was shunned in preference for customary marriage. In practice, although exact figures are unavailable, between one third and slightly more than half of all customary marriages in Ghana today are polygamous. (Archampong, 2010)

Despite the Human Rights guarantees of Chapter 5 of the *Constitution of Ghana* (1992) and the impact of modernity diminishing some obsolete customs, a woman faces a raft of abuses through the inequalities and vulnerabilities imposed through customary, polygamous marriage. It is noteworthy that in Ghana, customary law is a question of law, not a question of fact. Nwauche cautions, however, that judicial misinterpretation of customary law can differ from the reality and that "because of the doctrine of judicial notice, it becomes possible that a wrong version of customary law… may become entrenched by the weight of precedent" (2010: p.44) or may reflect obsolete rules. A girl may, contrary to the law, be coerced to marry through the imposition of her father's will to give her away to satisfy his own obligations or self-interest as contemporary media reports and human rights cases handled by the Commission on Human Rights and Administrative Justice attest (*Daily Guide*, 2012 June 8). The question of consent and agency (discussed above in the Compo Girl Case) is reflected in the obsolete custom of female infant betrothal, (Danquah, 1928: p. 147), the now criminalized but still extant practice

of *trokosi*[3] (Fallon, 2003: p.543, 537), and the practice of widow inheritance on the death of a husband, whereby

> It lies within the successor's power to take the widow to wife personally or to give her away in marriage to a member of her late husband's family. But if the widow chooses to apply for divorce, she is free to do so. The divorce procedure in this case is as if the original husband was alive, (Danquah: p. 161).

Even the death of her customary law husband did not end her marriage nor her contractual obligations to his kinship group unless she divorced him after death. Widows were reportedly treated cruelly, sent to witch camps after being blamed for the husband's death, evicted from matrimonial homes and sexually exploited by the husband's family. Although these practices are no longer representative of the reality for most of today's Ghanaian girl-children and women, some, such as the forced marriage of minors by their fathers to elderly men persist. The Commission on Human Rights and Administrative Justice Annual Report (2010) documents the enslavement of seventeen girls to a fetish priest in the Volta Region and in the same year, intervened in the forced marriage between a fifteen year old girl and a seventy year old man in the Saboba District in the Northern Region (*Daily Graphic*, 2010). The *Protocol to the African Charter on the Rights of the African Woman* (2003) specifically addresses the status of women in Article 5 on the elimination of harmful practices, Article 7 on separation, divorce and annulment of marriage, and Article 20 on widows rights, not to address historic abuses and obsolete customs but to offer protection to women and girl-children because of the persistence of harmful cultural practices.

Although wives ought to be consulted or notified and compensated for the marriage to a new co-wife, it does not obviate the mental anguish of sexual jealousy, nor does it prevent the unequal sharing of material and emotional resources. Intimacy within polygamy exposes women to significantly increased risks with regard to diminished control over their reproductive choices, rape within marriage and HIV/AIDS (Archampong, 2010). Customary marriages, before the *Customary Marriage and Divorce Registration Law*, 1985 (PNDCL

[3] *Trokosi* is a type of ritual sexual servitude including non-consensual marriage on puberty, in which a family gives a girl child to a traditional fetish priest to atone for their sins.

112) could be conveniently repudiated. Failure to register the marriage under the Act is an indicator of the lack of awareness of rights protection through compliance targeted by NGOs such as Women in Law and Development in Africa (WiLDAF) in community awareness programs. Customary marriages can be declared null and void when evidence of a previous Ordinance marriage entirely unknown to the customary law wife, is tended in court generating much police and court business and stripping women of property rights and maintenance support for children. Justice Uuter Paul Derry's judgement in *Ernestina Boateng v Phyllis Serwah & 2 Ors* 2012 HRC/01/09 illustrates the parlous position of customary law widows when the 1st defendant, Phyllis Serwah's customary marriage was declared null and void, the home she lived in declared to belong to the plaintiff, Ernestina Boateng, and the sum of 10,000 Ghana Cedis awarded against her as damages for pain and mental agony:

> The 1st defendant led evidence corroborated by witnesses and pictures to show that a customary marriage was celebrated on 22-08-2000 between her and the late Mark Adu Prempeh. There is no doubt in my mind that such a ceremony took place and I would have thought that is a *fait accompli*. However, the late Mark Adu Prempeh, in his testimony in the divorce proceedings, [filed by Boateng against Prempeh which his accidental death cut short] denied that the 1st defendant is his wife although he admitted he had two children with her. Furthermore, the late Mark Adu Prempeh, in his testimony and his anxiety to always hide under documentary testimony, insisted that he married one Elizabeth Nyarko under the Marriage Ordinance, Cap 127 on 13-11-97. With this evidence from the late Mark Adu Prempeh, he could not have married the first defendant on 22-08-2000. So, the purported marriage between the 1st defendant and Mark Adu Prempah on 22-08-2000 is null and void. So the 1st defendant cannot claim to be the lawful widow of the late Mark Adu Prempeh.

Husbands and wives need not necessarily be co-resident, leading Danquah (1928, p. 153) to characterize traditional customary marriage as a "physical and not a spiritual union. Upon this principle is polygamy turned into a practical business transaction. The interests of the husband … are no part of the wife's business." This lack of partnership beyond procreation leads to the situation addressed by Atuguba, J S C (presiding) applying the principle of equity in a property dispute on divorce in *Owusu Afriyie Akoto v Adwoa Abrefi Akoto* (2010)

> In The Present Case The Facts Indisputably Show That The Appellant Has Dealt Most Inequitably With The Respondent As Regards Their Jointly Acquired Properties By Various Stratagems And Secret Dealings.

The legal system does not recognize *de facto* unions nor customary marriages where all the requirements, including the payment of *aseda*, a sum of money paid by the groom to the family of the bride, have not been met (Sam, 2012). Also not recognized are customary marriages made in addition to a marriage under the Ordinance in defiance of the requirement for monogamy, yet cases today come before the courts of intestacy when a man married under the Ordinance is found to have undisclosed customary marriages subsisting. A prominent case, *Mrs. Agatha Anagblah v Martin Bayalepath Anagblah & 3 Ors*, [4] is currently before the High Court in its human rights jurisdiction, evidence of the growing understanding amongst Ghanaians that the practice of polygamy violates the rights of spouses particularly in regard to equity in marital property and that the human rights court will adjudicate in a rights-compliant manner. It is only the locating of the individual as the bearer of human rights over and above the claims of the group or society to cultural rights that will provide a mechanism for redress when violations occur.

The effect of the colonial juridical legacy has been to erode the customary property rights of lineages, especially amongst the matrilineal Akan. Until the landmark case of *Mensah v Mensah* (2012) the formula guiding the courts in the devolution of property after the death intestate of a spouse dictated that two thirds of the property of the husband should be distributed in accordance with the laws in force in England in 1884 and one third in accordance with customary law which followed the principle expressed by Ollenu J in *Quartey v Martey* (1959), "The proceeds of this joint effort of a man and his wife and/or children and any property which the man acquires with these proceeds are by customary law, the individual property of the man." The patriarchy supports custom as it is aligned with, and perpetuates, male economic and social power. However, Sam (found in

[4] Jordan Anagblah, Vice President of the Ghana Football League, died intestate leaving two customary wives and an Ordinance wife who are now seeking redress in the human rights court. Press release acknowledges that the case highlights the plight of widows in Ghana. <http://www.ghanafootballtalent.com/portal/late-jordan-anagblahs-family-at-loggerheads-with-wife>.

Archampong, 2010) has argued that the religious and cultural justifications for the practice of polygamy "are not compelling reasons for granting women fewer rights than men in marriage. The idea of partnership and mutual gratification is completely lost in polygamy, as are principles of gender equity and justice" (Archampong, p.328). Sam adds, "[t]he non discrimination principles enshrined in Ghana's Constitution require either abolishing this male right or permitting women to have more than one husband" (Archampong, p.328).

Article 16 of the 1981 *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW) provides that:

> States Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women....
>
> (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

The 1992 *4th Republican Constitution of Ghana* domesticates on a partial basis certain provisions of the CEDAW. Article 22.3 (b) of the Constitution, for example, stipulates that "assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage". Article 22 (2) provides that, "Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses". Disappointingly, the *Property Rights of Spouses Bill* 2009 stalled in Parliament, as did other legislation like the *Domestic Violence Act* (Act 732) until it became law in 2007.

In a landmark decision in *Mensah v Mensah* on 22 February 2012, Akuffo JSC (Presiding), affirmed the decision of the Court of Appeal dismissing Stephen Mensah's appeal against the High Court awarding his wife a half share in property acquired during the marriage in her petition for divorce. The Supreme Court of Ghana applied CEDAW (Articles 2 and 5) which "adds a key concept to international equal protection analysis; the need to eradicate customary and all other practices which are based on the idea of the inferiority or the superiority of the sexes or on stereotyped roles for men and women." (*Mensah v Mensah*, 2012).

This decision is remarkable for wives who until now have had to prove substantial contribution to acquisition of property to get a share in joint property. Justice Akuffo's judgement signals its own future *stare decisis* significance.

> The time has come for this court to institutionalize this principle of equality in the sharing of marital property by spouses, after divorce, of all property acquired during the subsistence of a marriage in appropriate cases. This is based on the constitutional provisions in article 22 (3) and 33 (5) of the Constitution 1992 [and] the principle of Jurisprudence of Equality. The Petitioner should be treated as an equal partner … and must not be bruised by the conduct of the respondent and made to be in a worse situation than she would have been had the divorce not been granted. The tendency to consider women (spouses) in particular as appendages to the marriage relationship, used and dumped at will by their male spouses must cease.

Fallon's (2003) study of Ghanaian women's actualizing civil and political rights shows a recognition by one respondent of the importance of women being part of the law-making institutions of society, "If you want laws favorable to you, you should be part of it," - the bench gender ratio in this case was 3:2 in favour of women. Sylvia Wairimu Kang'Ara analyzes the diffusion of Anglo-American legal concepts in African jurisdictions and notes *apropos* that reform can be

> … entrusted to common law judges who will decide whether and how to expand these foreign doctrinal casings to accommodate local eccentric matters. They will also have the discretion to transfer more and more Western laws and schemes of legal thought into the customary realm. (Kang'Ara: 2012).

Conclusion

Michael Ignatieff, a prominent 'God's Advocate', to return to my introductory trope, has parried every conceivable argument from the Devil's Advocates against the transformative potential of the human rights movement in *Human Rights as Politics and Idolatry* (Ignatieff & Gutmann: 2001). Sainthood, either cannonized or acclaimed, originally meant a belief that is transformed and it is clear that the Human Rights Movement has transformed thinking about "what appears to be [the] universal way in which different cultures … impose similar constraints on the bodies of their members, especially [for the focus of this paper] when those

bodies are already marked by the sign of the feminine," (Nnaemeka & Ezeilo: 2005) and gifted it a language in which to stake its claims. As the disproportionate constraints are universal but the victims, individual, so the bearers of rights must be acknowledged as individuals whose lives find meaning in the context of the collective. In Ignatieff's words (2001: p.109):

> Moreover, it is precisely this individualism that renders human rights attractive to non-Western peoples and explains why the fight for those rights has become a global movement. The language of human rights is the only universally available moral vernacular that validates the claims of Rights doctrines, women and children against the oppression they experience in patriarchal and tribal societies; it is the only vernacular that enables dependent persons to perceive themselves as moral agents and to act against practices that are ratified by the weight and authority of their cultures. These agents seek out human rights protection precisely because it legitimizes their protests against oppression.

Deploying Human Rights instruments, its mechanisms and its mobilization of an imaginative, universal commitment to change has been the catalyst for legislative, judicial and attitudinal reform in Ghana. However, the persistence of deep-rooted social and communitarian values demonstrated in the robustness of the culture in the face of the internationally imposed model has in some instances delayed or thwarted the extension of human rights recognition for those marginalized in the patriarchal power structure, particularly women and girl-children. But it has also fostered a syncretic growth towards a Ghanaian common law and a dynamic society of hybrid institutions fashioned by expedient choices from the parallel cultures, the western and the tribal. But this has not been without generating some unique challenges for both individuals and the institutions and a legal system that protects their rights and provides the social order envisaged in Article 28 of the UDHR "in which the rights and freedoms set forth in this Declaration can be fully realized."

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