

## THE PURSUIT OF ACTUAL EQUALITY: WOMEN'S MATRIMONIAL PROPERTY RIGHTS IN GHANA SINCE INDEPENDENCE

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### Abstract

*Women's rights have been at the forefront of the development agenda of many nations since the establishment of the United Nations. Indeed, it has been the subject of much controversy and debate ever since the mid 1990's, following the Beijing Conference and its subsequent declaration and action plan. In Ghana for instance, there exists a legal and institutional framework within which Women's Rights are to be promoted and safeguarded. The 1992 Constitution of Ghana for instance, provides for the recognition and enforcement of Women's Rights. Coincidentally, 2016 marks exactly thirty years since Ghana ratified the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). However, it seems as though, issues concerning Women's Rights in general have all but been neglected in Ghana, and essentially relegated to the peripheries of national development. In particular, the property rights of women has been considered a slippery slope for far too long, as culture derived chauvinistic tendencies steeped within an overly patriarchal socio-economic landscape, has impeded progress. This chapter therefore presents an overview of the current state of affairs regarding the implementation of Women's Rights in Ghana, sixty (60) years after Independence and thirty (30) years since the ratification of CEDAW, with particular emphasis on women's property rights. More specifically, the chapter traces the development of women's property rights, by critically examining the jurisprudence of the courts in Ghana from independence to date. The chapter offers a comprehensive review and critique of the Property Rights of Spouses Bill, which has been pending in Parliament for a while now, and proffer some suggestions and recommendations towards improving the promotion and protection regime, regarding women's property rights in Ghana.*

# 1 Introduction

Human Rights in contemporary times have permeated almost all aspects of national development.<sup>1</sup> Governments all over the world therefore strive to adhere to Human Rights standards and doctrines when developing national policies and legislation.<sup>2</sup> Women's rights in particular have been at the forefront of the development agenda of many nations since the establishment of the United Nations.<sup>3</sup> It has indeed been the subject of much controversy and discussion ever since the mid 1990's, following the Beijing Conference<sup>4</sup> and its subsequent declaration and action plan.<sup>5</sup> In Ghana for instance, there exists a legal and institutional framework within which women's rights are to be promoted and safeguarded.<sup>6</sup> Thus, the 1992 Constitution of Ghana, which many scholars believe ushered in a new era of robust human rights protection for all persons in Ghana,<sup>7</sup> makes provision for women's rights.<sup>8</sup>

1 See generally, *Medium-Term National Development Policy Framework: Ghana Shared Growth and Development Agenda (GSGDA) II, 2014-2017*, December 2014. This policy document for example, encourages the adoption of 'legal, legislative and operational measures to reinforce the principle of gender equality and equity in personal status and civil rights; and the integration of a gender perspective in the development of all national policies, programmes, processes and structures'.

2 As above.

3 The Preamble of the United Nations Charter provides in part for the reaffirmation of faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) was thus adopted in 1979, and to date over 180 countries have ratified or acceded to this treaty, and are thus under an international obligation to adopt domestic policies and laws that conform to the standards of the CEDAW.

4 The Fourth World Conference on Women: Action for Equality, Development and Peace, took place in Beijing, China in September 1995.

5 As captured in the Mission Statement of the Beijing Declaration and Platform for Action, it is 'an agenda for women's empowerment. It aims at accelerating the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women and at removing all the obstacles to women's active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making'.

6 The 1992 Constitution of Ghana makes provision for the promotion and protection of human rights. There are also several institutions that safeguard women's rights in Ghana today, including: The Ministry of Gender, Children & Social Protection; The Commission on Human Rights & Administrative Justice (CHRAJ); the Human Rights Division of the High Court of Ghana, and the Gender Based Violence Courts within the Judiciary in Ghana.

7 Ghana has a chequered history in terms of enforcement of human rights since Independence, ranging from non-recognition of human rights provisions by the Courts in the 1960's, to the period of military sanctioned violence, torture, enforced disappearances etc. in the 1980's. Therefore, the new constitutional regime that the promulgation of the 1992 Constitution ushered in was a breath of fresh air to many; and has so far proved to be the longest period of democratic rule in the history of the country.

8 See Constitution of Ghana 1992, arts 22 & 27.

Coincidentally, 2016 marked exactly thirty years since Ghana ratified the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).<sup>9</sup> However, it seems issues concerning women's rights in general have all but been neglected in Ghana, and essentially relegated to the peripheries of national development.<sup>10</sup> In particular, the property rights of women has been considered a slippery slope for far too long, as culture derived chauvinistic tendencies steeped within an overly patriarchal socio-economic landscape, has impeded progress.<sup>11</sup> The focus of this chapter therefore is to present an overview of the current state of affairs regarding the implementation of women's rights in Ghana, with particular emphasis on women's property rights since independence.

Part 2 of the chapter therefore generally sets out and briefly examines the legal and institutional framework for the promotion and protection of women's rights in Ghana. Part 3 will then trace the development of women's property rights in Ghana, by examining the jurisprudence of the courts and thereby discuss some seminal cases, some of which have inhibited and others that have expanded the frontiers of this aspect of women's rights in Ghana since independence. Part 4 provides a review and critique of the Property Rights of Spouses Bill, which has been pending in Ghana's Parliament for over a decade now. Finally, in Part 5, some suggestions and recommendations are made towards improving the promotion and protection regime, regarding women's property rights in Ghana.

## 2 Legal framework

### 2.1 Legal framework

There exists today in Ghana, a myriad of domestic legislation and international treaties that provide for the promotion and protection of the rights of women. The most important of these for the purposes of this chapter are: the Constitution of Ghana; the Marriages Act; the Matrimonial Causes Act; the Intestate Succession Act; the Convention on

9 CEDAW was adopted in December 1979, and entered into force on 3 September 1981. Ghana however signed the treaty on 17 July 1980, and ratified it on 2 January 1986.

10 It must be noted here however that, a lot of progress has been made in the field of women's rights in Ghana over the years. That notwithstanding, the *Medium-Term National Development Policy Framework: Ghana Shared Growth and Development Agenda (GSGDA) II, 2014-2017*, December 2014 points out on page 153 that, there is a 'lack of national commitment to eliminate gender-based inequalities; low recognition of gender equity in public sector (public sphere); lack of gender responsive budgeting; inadequate representation of women and then participation in public life and governance; as well as insufficient procedures and tools to monitor progress.'

11 For example in 2014, during a discussion on the Intestate Succession Bill in Parliament, the Member of Parliament for Daboya Makarigu in the Northern Region of Ghana, Mr Nelson Abudu Baani, suggested that women deemed guilty of engaging in adultery ought to be stoned or hanged to death.

the Elimination of all forms of Discrimination Against Women (CEDAW); the African Charter on Human and Peoples' Rights (Banjul Charter); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol).

### *2.1.1 The Constitution of Ghana*<sup>12</sup>

The first post-independence Constitution of Ghana did not contain any noteworthy human rights provisions.<sup>13</sup> In fact, there was very little regard paid to fundamental rights and civil liberties in the post-independent era in Ghana.<sup>14</sup> Thus, when Ghana was to attain Republican status in 1960, the framers of the draft 1960 Ghanaian Constitution attempted to incorporate some fundamental principles, upon which the Constitution was to be based i.e. freedom and justice.<sup>15</sup> These fundamental principles made it into the 1960 Constitution as article 13, which provided as follows:

13. (1) Immediately after his assumption of office the President shall make the following solemn declaration before the people – On accepting the call of the people to the high office of President of Ghana I solemnly declare my adherence to the following fundamental principles – That the powers of Government spring from the will of the people and should be exercised in accordance therewith. That freedom and justice should be honoured and maintained. That the union of Africa should be striven for by every lawful means and, when attained, should be faithfully preserved. That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African unity. That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief. That Chieftaincy in Ghana should be guaranteed and preserved. That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country. That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of his freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law. That no person should be deprived of his property save where the public interest so requires and the law so provides. (2) The power to repeal this article, or to alter its provisions otherwise than by the addition of further paragraphs to the declaration, is reserved to the people.

Unfortunately, these fundamental principles (especially those on non-discrimination and the right of access to courts of law) were disregarded and infringed upon with impunity by the first President, whose duty it was

12 Reference to the Constitution of Ghana here encapsulates all formal post-Independence Constitutions that Ghana has had during specific periods of its constitutional evolution and development.

13 See, the Ghana (Constitution) order in Council, 1957.

14 The enactment of the Preventive Detention Act and the application of the Deportation Act served as fundamental stumbling blocks impeding the realisation of fundamental rights and freedoms in the immediate post-independence era.

15 See Constitution of Ghana 1960, art 13(1).

to uphold them in the first place, and given the judicial stamp of approval by the Supreme Court of Ghana in the now infamous case of *In Re Akoto and seven Others*.<sup>16</sup> The Court unanimously held in this case, per Korsah, CJ as follows:<sup>17</sup>

It is contended that the Preventive Detention Act is invalid because it is repugnant to the Constitution of the Republic of Ghana, 1960, as article 13(1) requires the President upon assumption of office to declare his adherence to certain fundamental principles ... This contention, however, is based on a misconception of the intent, purpose and effect of article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable ... In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts. On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of article 13(1) do not create legal obligations enforceable by a court of law. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration is through the use of the ballot box, and not through the courts.

Since then, subsequent Ghanaian Constitutions have prioritised the entrenchment of fundamental rights and freedoms.<sup>18</sup> For example, chapter 4 of the 1969 Constitution of Ghana is dedicated to the liberty of the individual i.e. fundamental human rights. Thus, it was no longer at the discretion of the President, whether or not to guarantee or adhere to these principles.<sup>19</sup> Also, the Constitution provided that Parliament had no power to amend the provisions of chapter 4 of the Constitution 'in any way that may detract or derogate from any such provision or the principles embodied in any such provision'.

In terms of women's rights, the 1969 Constitution was the first of its kind in Ghana to introduce explicit provisions in this regard. Article 13, on the welfare of the family, mandated Parliament to pass legislation that will ensure:

16 [1961] GLR 523.

17 As above 533-535.

18 All Constitutions of Ghana beginning with the 1969 Constitution, through the 1979 Constitution and the present 1992 Constitution have had extensive and entrenched human rights provisions.

19 This was a direct reaction to art 13(1) of the 1960 Constitution, and also the Supreme Court's decision in the *Re Akoto* case.

- (a) the rights of women and children to such special care and assistance as are necessary for the maintenance of their health, safety, development and well-being.

Also, article 25 barred Parliament from enacting any law that contained any provision that was discriminatory in itself or effect.<sup>20</sup> The word 'discriminatory' was defined to mean:<sup>21</sup>

Affording different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, sex, occupation or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

In addition to maintaining a whole chapter on fundamental human rights,<sup>22</sup> the 1979 Constitution of Ghana went a step further to make provision for equal rights of mothers, spouses and children.<sup>23</sup> Article 32(2) for instance safeguarded women's property rights as it provided that:

No spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate is testate or intestate.

The 1992 Constitution of Ghana also follows this trend and contains a chapter dedicated to Fundamental Human Rights and Freedoms.<sup>24</sup> Article 27 is captioned 'Women's Rights', and provides as follows:

- (1) Special care shall be accorded to mothers during a reasonable period before and after child-birth; and during those periods, working mothers shall be accorded paid leave. (2) Facilities shall be provided for the care of children below school-going age to enable women, who have the traditional care for children, realize their full potential. (3) Women shall be guaranteed equal rights to training and promotion without any impediments from any person.

This Constitutional provision, although captioned as 'Women's Rights' generally, only seems to deal with one aspect out of the whole spectrum of 'women's rights' i.e. labour rights of women.<sup>25</sup> The provision therefore recognises women as potential mothers, and thus mandates all employers to accord paid leave to their female employees before and after childbirth.<sup>26</sup> Also, it requires day care facilities to be provided in order to ease the total burden of child rearing off women so they are able to achieve their other life goals; but exactly whom the burden of providing these

20 This was arguable also a reaction to the 1960 Constitution.

21 See art 25 of the 1969 Constitution.

22 See chapter 6 of the 1979 Constitution of Ghana, specifically arts 19-35.

23 See art 32 of the 1979 Constitution of Ghana.

24 See chapter 5 of the 1992 Constitution of Ghana.

25 The provisions of art 27 make this quite clear, as it fails to enumerate the various other aspects of women's rights that are available.

26 See art 27(1) of the 1992 Constitution of Ghana.

facilities falls on, is not quite clear though.<sup>27</sup> Finally, article 27 imposes an obligation on all employers, public and private, to ensure equality between men and women in terms of capacity building and career advancement, without any inhibitions especially based on gender.<sup>28</sup>

In terms of women's property rights, article 22 of the Constitution captioned, 'Property Rights of Spouses' provides for this. This article provides that:

(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will. (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.

This provision is important for a number of reasons. Firstly, it provides generally for the property rights of all spouses, including women – whether as a result of the death of the other spouse, or upon the dissolution of a marriage. Secondly, and most importantly, the legislature is obliged to pass legislation that will regulate the property rights of spouses. Finally, it seems quite clear from the wording of article 22(2) that the framers of the Constitution must have envisaged the prolonged delay that was to beset the enactment of the law regulating the property rights of spouses. This is evidenced from the use of the words '*as soon as practicable*' in clause (2) of article 22'.<sup>29</sup> The failure of Parliament in enacting this legislation to date has created enormous problems for the effective implementation of women's property rights in Ghana, a theme that is explored further in this chapter.<sup>30</sup>

### **2.1.2 *The Marriages Act***

The Marriages Act of Ghana, 1884-1985 (Cap 127), provides for the various types and incidents of marriage permissible in Ghana. There are therefore three of such marriages: Customary Marriages; Mohammedan Marriages;<sup>31</sup> and Christian and Other Marriages. All these forms of marriages also have distinct means through which property is inherited either upon dissolution of the marriage or upon death of one of the

27 The reasonable assumption is that the burden is on both the State as well as the private sector, since chapter 5 itself of the Constitution is expressed to be applicable to all persons in Ghana, including legal entities.

28 See art 27(3) of the 1992 Constitution.

29 This is however not an excuse for Parliament's failure to pass the Bill into Law.

30 Part 4 of this chapter reviews the draft Property Rights of Spouses Bill.

31 The word 'Mohammedan' is used in reference to Islam/the Islamic religion, and Muslim marriages or those contracted under Islam and Muslim Law generally.

spouses. For example, section 15 of Cap 127 provides for the application of the Intestate Succession Act, 1985 (P.N.D.C.L. 111) to customary marriages, whether registered or unregistered. On the other hand Section 28 of Cap 127 provides that: 'On the death of a Mohammedan whose marriage has been duly registered under this Part the succession to the property of that Mohammedan shall be regulated by Mohammedan law'.<sup>32</sup>

### 2.1.3 *The Matrimonial Causes Act*

The Matrimonial Causes Act,<sup>33</sup> is an Act meant 'to provide for matrimonial causes and for other matters connected therewith'.<sup>34</sup> In terms of the property rights of women upon a divorce or dissolution of marriage, sections 19 and 20 of Act 367 are relevant. Section 19 states that:

The Court may, whenever it thinks just and equitable, award maintenance pending suit or financial provision to either party to the marriage, but no order for maintenance pending suit or financial provision shall be made until the court has considered the standard of living of the parties and their circumstances.

Similarly, section 20 provides as follows:

(1) The Court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable. (2) Payments and conveyances under this section may be ordered to be made in gross or by instalments.

These provisions ensure that both women and men, especially women,<sup>35</sup> are taken care of financially and property wise in the event of a dissolution of marriage. Thus, in matrimonial causes, the matrimonial court<sup>36</sup> is mandated to award maintenance to either of the parties, pending the determination of the matter or make an order for financial provision for the benefit of one of the parties, once it is fair, just and equitable to do so. However, any such decision must take cognizance of the general standard

32 What this means is that, property distribution upon the death of a Muslim spouse is done strictly pursuant to the dictates of Islam, as contained in the Quran or other Islamic edicts.

33 1971 (Act 367).

34 As above, Long Title.

35 This is because it is a notorious fact that women for decades have generally been discriminated against especially customarily, upon the dissolution of marriage or death of their husbands. The law was therefore intended as a corrective measure for this unjust state of affairs.

36 This refers to the court that is vested with jurisdiction for matrimonial matters, be it the District, Circuit or High Courts.

of living of both parties.<sup>37</sup> The court can also order one party to transfer on the other, movable or immovable property as settlement of property rights.<sup>38</sup> These provisions leave no doubt that women's property rights in Ghana are protected and safeguarded during and after divorce proceedings.<sup>39</sup>

#### **2.1.4 The Intestate Succession Law**

The Intestate Succession Law, 1985 (PNDCL 111)<sup>40</sup> regulates the devolution or distribution of the estate of any person who dies without leaving behind a will.<sup>41</sup> PNDC Law 111 was enacted 30 years ago to protect inheritance rights concerning women and children, as customary law often provided women unequal access to their late husbands' estate when there was no legal will in place. The Law provided a uniform intestate succession regulation in Ghana. In terms of the property rights of women whose husbands die intestate, sections 3, 4, 5 and 6 caters for this. For example, section 3 (captioned, 'Devolution of Household Chattels') provides that:

Where the intestate is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled absolutely to the household chattels of the intestate.

Section 4 (Spouse or Child or both to be entitled to one House) on the other hand states:

Notwithstanding the provisions of this law:—

- (a) where the estate includes only one house the surviving spouse or child or both of them, as the case may be, shall be entitled to that house and where it devolves to both spouse and child, they shall hold it as tenants-in-common;
- (b) where the estate includes more than one house, the surviving spouse or child or both of them as the case may be, shall determine which of those houses shall devolve to such spouse or child or both of them and where it devolves to both spouse and child they shall hold such house as tenants-in-common: 'Provided that where there is disagreement as to which of the houses shall devolve to the surviving spouse or child or to both of

37 This is important in order to avoid the court handing out decisions that are incapable of enforcement, as a result of the financial and other circumstances of the parties involved.

38 Thus, aside monetary settlement, the court can also order property (both movable and immovable) to be transferred to one party as part of financial settlement.

39 In theory and in practice, the legal regime ensured that women's property rights are protected in cases of dissolution of marriage.

40 PNDCL 111 was enacted to ensure equitable distribution of property upon the death intestate of an individual.

41 Therefore, even though an individual may die intestate, the law ensures that the estate of the deceased is distributed proportionally among his immediate and extended family.

them, as the case may be, the surviving spouse or child or both of them shall have the exclusive right to choose any one of those houses; except that if for any reason the surviving spouse or child or both of them are unwilling or unable to make such choice the High Court shall, upon application made to it by the administrator of the estate, determine which of those houses shall devolve to the surviving spouse or child or both of them’.

Section 5 (Intestate Survived by Spouse and Child) provides:

- (1) Where the intestate is survived by a spouse and child the residue of the estate shall devolve in the following manner:
  - (a) Three-sixteenth to the surviving spouse;
  - (b) Nine-sixteenth to the surviving child;
  - (c) One-eighth to the surviving parent;
  - (d) One-eighth in accordance with customary law:

Provided that where there is a child who is a minor undergoing educational training, reasonable provision shall be made for the child before distribution.

- (2) Where there is no surviving parent one-fourth of the residue of the estate shall devolve in accordance with customary law.

Section 6 (Intestate survived by Spouse only) of PNDCL 111 also provides:

Where the intestate is survived by a spouse and not a child the residue of the estate shall devolve in the following manner:

- (a) One-half to the surviving spouse;
- (b) One-fourth to the surviving parent;
- (c) One-fourth in accordance with customary law:

Provided that where there is no surviving parent one-half of the residue of the estate shall devolve in accordance with customary law.

Quite clearly, PNDCL 111 makes provision for women’s property and inheritance rights where their husbands die intestate. Although this law has been extremely helpful in advancing the property rights of women generally, proposals for reform of the law have over the years been mooted.<sup>42</sup>

### ***2.1.5 International obligations of Ghana***

Ghana has signed and ratified several international and regional treaties that impose legal obligations on the country. However, the legal effect and impact of some of these treaties are in doubt, as Ghana has consistently in the past failed to ‘domesticate’ such treaties, being a dualist state.<sup>43</sup> That

<sup>42</sup> There have been various proposals over the years for comprehensive reform of Ghana’s intestate succession law.

<sup>43</sup> See, MG Nyarko ‘The impact of the African Charter and the Maputo Protocol in Ghana’ in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 95.

notwithstanding, it is important that we briefly examine some of the relevant provisions of those treaties that bother on human rights, in particular women's property rights.

***Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)***

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was adopted in December 1979, but entered into force in September 1981.<sup>44</sup> Ghana signed this treaty on 17 July 1980, but only ratified it on 2 January 1986.<sup>45</sup> Article 16(1)(h) provides as follows:

- (1) States Parties shall take all 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, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

***The African Charter on Human and Peoples' Rights (Banjul Charter)***

The African Charter on Human and Peoples Rights, more popularly referred to as the Banjul Charter was adopted in 1981 and entered into force in 1986. Ghana ratified the Banjul Charter on 24 January 1989.<sup>46</sup> Article 14 of the Charter, which is on the right to property provides that: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'. Article 18(3) of the Charter makes provision for the elimination of discrimination against women and children: 'The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions'. However, it is important to note that Ghana has not explicitly domesticated most of the international and regional human rights instruments it has ratified including the African Charter and Maputo Protocol.<sup>47</sup>

44 Over 180 States have signed and ratified this treaty.

45 Although Ghana has a history of signing and ratifying international treaties, implementation of the provisions however has more often than not been delayed due to a myriad of reasons, ranging from lack of political will to weak enforcement and monitoring institutions.

46 See <http://www.achpr.org/instruments/achpr/ratification/> (accessed 20 November 2016).

47 African Commission 'Report of the promotion visit to the Republic of Ghana' (2008) para 58.

***The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)***

The Protocol to the African Charter on Human and Peoples' Rights in the Rights of Women in Africa (the Maputo Protocol) was adopted on 11 July 2003, and entered into force on 25 November 2005. Ghana signed the Maputo Protocol on 31 October 2003, and subsequently ratified it on 13 June 2007.<sup>48</sup> Article 7(d) of the Maputo Protocol, captioned 'Separation, Divorce and Annulment of Marriage' provides as follows:

States parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: ... In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 21 of the Protocol further provided for the right to inheritance. The provision is as follows:

(1) A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. (2) Women and men shall have the right to inherit, in equitable shares, their parents' properties.

### **3 The judiciary and development of women's matrimonial property rights in Ghana**

#### **3.1 Property rights of women from independence: The 'no-property rights' era**

The case of *Quartey v Martey*<sup>49</sup> was arguably the starting point for the 'oppression' of women in terms of their property rights in post-independent Ghana. The case involved the plaintiff (wife of the deceased) who sued her deceased husband's family, claiming *inter alia* a share of her deceased husband's property especially as she had assisted her late husband financially during his lifetime and had given active assistance to him in all the jobs he did. The court, presided over by the late Justice Ollenu, however held as follows:

... by customary law it is a domestic responsibility of a man's wife and children to assist him in the carrying out of the duties of his station in life, for instance, farming or business. The proceeds of this joint effort of a man and

48 See <http://www.achpr.org/instruments/women-protocol/ratification/> (accessed 20 November 2016).

49 [1959] GLR 377.

his wife and/or children, and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or children. The right of the wife and the children is a right to maintenance and support from the husband and father ... I must hold that, in the absence of strong evidence to the contrary, any property a man acquires with the assistance or joint effort of his wife, is the individual property of the husband and not joint property of the husband and the wife.

What this meant was that, women essentially were not entitled to inherit property from the estate of their deceased husbands, even if they assisted or contributed in the acquisition of same. As preposterous as this may sound, all that the law provided women during this era was 'maintenance and support'. It has been argued for example that, it was the patriarchal nature and system of ownership prevalent in Ghana that led to this inevitable conclusion.<sup>50</sup> Thus, this rule espoused by the court was for many years the standard that prevailed in terms of the property rights of women, especially those married under customary law.

However, in 1971, there was a glimmer of hope when the Matrimonial Causes Act (Act 367) was enacted. Section 20(1) of Act 367 is of paramount importance in terms of women's property rights. It provides as follows:

The Court may order either party to the marriage to pay to the other party such sum of money or to convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable.

### **3.2 The era of substantial contribution**

In the 1970's however, the courts began a movement towards the development of the principle of 'substantial contribution' as the primary determinant of the property rights of women upon the breakdown of a marriage, be it customary or otherwise. This development was due to the enactment of the Matrimonial Causes Act. Sections 19 and 20 referenced earlier are instructive as these provisions ensure that both women and men, especially women, are taken care of financially and property wise in the event of a dissolution of marriage. These provisions leave no doubt that women's property rights in Ghana are protected and safeguarded during and after divorce proceedings.

50 See EKA Yankah 'Four shades of equality: The jurisprudence of the Supreme Court on the distribution of marital property after divorce' (2016) 2 *GIMPA Law Review* 3.

Thus, the Ghana Law Reform Commission in its report entitled 'The Law Regulating Property Rights between Spouses' described the principle in the following terms:<sup>51</sup>

A spouse claiming a portion or all of the matrimonial property jointly acquired upon dissolution of the marriage must show either an agreement between the parties giving him/her a beneficial interest or evidence of contribution towards the acquisition of property, such as direct financial improvements, renovations, extensions, or, applying her income or time for the benefit of the family so as to enable the husband (or other spouse) to acquire the property in question.

In *Quartey v Armar*,<sup>52</sup> the parties had been married from 1950 to 1960, when the marriage was dissolved. The plaintiff thus sued the defendant for a declaration that she was the owner of two houses, and for an order for the defendant to deliver to her the original deed of conveyance in respect of one of the houses which was in his possession. Both parties claimed that they had bought both houses themselves, although evidence on the record suggested that both were bought in the name of the plaintiff i.e. House number one in her maiden name, and house number two in her married name. It was held as follows:

Having regard to the plaintiff's annual income and living circumstances, she was not of such financial means to be able to pay the lump sum of 4,000 Ghana pounds or the balance of 1,500 from her savings. It was more probable that the first house was actually paid for by the defendant ... If two or more persons purchased property and provided the money in unequal shares, the purchasers were presumed to take as tenants in common in shares proportional to the sums advanced. But where the persons involved in the purchase are man and wife, unless there is evidence to the contrary, it is presumed that they intended to own the property jointly. In this case the evidence showed that the plaintiff paid the initial deposit on the second house. The defendant must have paid the 800 but the balance of the purchase price was paid jointly by her and the defendant, although the defendant's contributions were greater. Since there was no evidence of advancement or intention that the house was to be held by them in separate shares, they were to own it jointly.

Subsequently in the case of *Abebrese v Kaah*,<sup>53</sup> Sarkodee J in distinguishing the present case from *Quartey v Martey* held that:

... the rule of customary law that property acquired by a husband with the assistance of his wife and children became the property of the husband alone took its root from the fundamental principle of customary law that the wife and children were dependent upon the husband. That was not the case here. Further, the size of the plaintiff's contribution was far in excess of the

51 See Ghana Law Reform Commission 'The law regulating property rights between spouses' (1999).

52 [1971] 2 GLR 231.

53 [1976] 2 GLR 46.

assistance contemplated by the customary law ... There is no doubt in my mind and I find that the plaintiff was a woman of considerable means.

Thus, it was held that the house in question was the joint property of the plaintiff and her husband.

However, in the cases of *Bentsi-Enchill v Bentsi-Enchill*,<sup>54</sup> on their divorce, there was the question of whether the wife had any beneficial interest in a house purchased by the husband out of his earnings during the subsistence of the marriage. The courts held that the wife had not contributed substantially or materially towards the acquisition of the property acquired by the husband during the marriage, and as such had no share or interest in the property. Also, in *Clerk v Clerk*<sup>55</sup> upon divorce, the wife applied to have the matrimonial home transferred to her. It was held that: 'the man has property and the wife has nothing, her only assets are her children who, according to the evidence, are well placed in life. A woman cannot ask for more'.

Despite the mixed results that this 'substantial contribution' doctrine was producing, the courts were clearly seen to be moving away from the *Quartey v Martey* era, where women could not even have a share of matrimonial property. Consequently, in *Yeboah v Yeboah*<sup>56</sup> the High Court essentially overruled the decision in *Quartey v Martey* by holding that no rule of customary law prevented joint ownership of property by spouses. The court thus took account of the wife's indirect contributions in the form of time and effort (such as supervising the construction of the house) towards the acquisition of the house. The court held that, although it was difficult to quantify such contributions in monetary terms, her combined direct and indirect contribution entitled her to an equal share of the house with the husband.

### 3.3 The era of substantial equality

As has already been noted, article 22 of the Constitution provides for the property rights of spouses and requires parliament to enact the relevant legislation in this regard. Regrettably, even though the Constitution sets out the broad framework for property rights and envisages statutory expansion, to date the legislature has failed to do so. Thus, the Property Rights of Spouses Bill has been pending in Parliament for about a decade now, with no indication as to when it may be actually enacted into law. In the absence of this, the Courts have since the late 1990's filled this vacuum, and expanded greatly on the 'substantial contribution' principle.

54 [1976] 2 GLR 303.

55 [1981] GLR 583.

56 [1974] 2 GLR 38.

The first case worthy of note is *Mensah v Mensah*,<sup>57</sup> where the applicant sought a share of the property on the basis that she had contributed equally in economic terms to the acquisition of property through her earnings at their stores. The Supreme Court in applying the ‘equality is equity’ principle, which seems to underpin article 22 of the Constitution, held as follows:

... the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage.

The Court in *Mensah v Mensah* therefore clearly favoured the equal sharing of joint property in all circumstances, provided it could be established for a fact that both parties contributed one way or the other towards the acquisition of the property. As Yankah puts it,

if it was established that the parties jointly contributed (financially) to the acquisition of the property, then the property should be shared equally because the courts would not reduce the marital relationship to a commercial arrangement and reduce the sharing of joint marital property to mathematical calculations.<sup>58</sup>

In the subsequent case of *Boafo v Boafo*<sup>59</sup> the Supreme Court modified and clarified the position of the law. It held that:

... The spirit of ... the judgment in *Mensah v Mensah* appears to be that the principle of the equitable sharing of joint property would ordinarily entail applying the equitable principle, unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership ... The question of what is ‘equitable’, in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are, therefore, fixed in accordance with the equities of any given case.

What can be deduced from this decision is that, although the case affirms the equality is equity principle as espoused in the *Mensah v Mensah* case, the Court further construed and gave meaning to provisions in the Matrimonial Causes Act, as well as article 22(3)(b). Consequently, the issue of proportions, interests and rights over matrimonial property was to be determined in accordance with the equities of each case i.e. on a case-by-case basis. So far, it is evident that the Supreme Court had begun its shift away from ‘substantial contribution’ to ‘substantial equality’.

57 [1998-99] SCGLR 350.

58 n 50 above.

59 [2005-2006] SCGLR 705.

Then came the case of *Gladys Mensah v Stephen Mensah*.<sup>60</sup> This case further broadened the scope of the 'substantial equality' principle, by re-interpreting the doctrine of 'substantial contribution' and outlining some of its constituent parts. The Court held thus:

... this Court is of the considered view that the Petitioner's contribution even as a housewife, in maintaining the house and creating a congenial atmosphere for the respondent to create the economic empire he has built are enough to earn for her an equal share in the marital properties on offer for distribution upon the decree of divorce. From the evidence on the record, this court will not permit the respondent to use the petitioner as a donkey and after offering useful and valuable service dump her without any regard for her rights as a human being.

In sum, this case ensured that women's property rights deriving from marriage were forever protected and enshrined in the law. The fact that the court boldly asserted that domestic chore, however menial or unquantifiable they may be, entitled women to an equitable share in marital property was a step in the right direction towards actual equality. Unfortunately, this victory was somewhat short lived, for the court subsequently produced another decision that some scholars have deemed as a step backwards for the protection of women's property rights in Ghana.<sup>61</sup>

In *Quartson v Quartson*<sup>62</sup> it was held that the decision in *Gladys Mensah v Stephen Mensah* was not to be misconstrued. The Court therefore warned that their earlier decision was 'not to be taken as a blanket ruling which afford spouses unwarranted access to property they were not entitled to'. Contrary to this, the court expected all cases to be decided on their merits thereof. However, it seems as though the court entangled itself and was caught in a catch 22 situation – for on the one hand the *Gladys Mensah* case had watered down the need for actual financial contribution in order to merit a share of matrimonial property, whereas on the other hand, the decision in the *Quartson* case failed to provide any legal basis for why the wife was not entitled to a share in the matrimonial home, the construction of which she had single-handedly supervised, albeit relying on funds sent from the husband who was outside the country at the time. Thus, non-monetary contributions as a determinant of interest in matrimonial property were in a state of flux following the *Quartson* case.

Fortunately, the Supreme Court in *Arthur v Arthur*<sup>63</sup> 'redeemed' itself. The case involved a couple that had been married for about a decade. The petitioner alleged that during their stay in France, where the respondent was a professional footballer, she had been prevented by him from taking

60 [2012] 1 SCGLR 391.

61 n 48 above.

62 [2012] 2 SCGLR 1078.

63 (2013) Civil Appeal No. J4/19/2013.

up gainful employment, as she was required to essentially drive him as well as their children everywhere. As a result of this arrangement, she alleged that they agreed that his earnings and any property that was acquired during the subsistence of the marriage were their joint property. The court re-affirmed its belief in the ‘equality is equity’ principle as espoused in the *Gladys Mensah* case. Thus, irrespective of any quantifiable ‘substantial contribution’ or not, the presumption in Ghanaian law now seems to be that all marital property acquired during the subsistence of marriage are *prima facie* deemed to be joint property, that ought to be shared equally upon dissolution of marriage.

## 4 The Property Rights of Spouses Bill

### 4.1 Overview of the draft Bill

As has been already noted, the Property Rights of Spouses Bill has long been on the agenda for Ghana’s Parliament. Unfortunately, it is still pending as there is no indication regarding when it may ultimately become law. This is so, notwithstanding the obligation in article 22 of the Constitution. The Memorandum to the draft Bill thus takes cognizance of this fact and suggests that ‘though the preparation of the Bill has been protracted, it is to fulfill the obligation of the supreme law that this Bill has been proposed in the best interest of spouses’.<sup>64</sup> It goes on further to state that:<sup>65</sup>

*Until now, the determination of the property rights of spouses by the courts has not sufficiently reflected the more equitable and just regime guaranteed by article 22 of the Constitution. Different sets of rules using different principles and concepts have been used to determine the property rights of spouses. This state of affairs is largely attributable to the lack of a general standard fashioned on the philosophy of the constitutional provision on property rights of spouses. This Bill establishes rules and workable standards for the courts and spouses for the realization of the provision of the Constitution on spousal property rights.*

The Bill is divided into four (4) parts: relationships; marital property agreements and related matters; property rights; and miscellaneous matters. The first part on Relationships reiterates the provisions of article 22 of the Constitution, and goes on further to define what a spouse means, as well as certain types of non-marital arrangements like cohabitation.<sup>66</sup> The second part on marital property agreements (MPA’s) is essentially the Ghanaian version of pre-nuptial agreements that exist elsewhere in the world. Under property rights, several concepts are explained, including

64 See the Memorandum to the Property Rights of Spouses Bill, Ghana.

65 As above.

66 For the avoidance of doubt, a spouse in Ghana is defined to mean a man married to a woman or vice versa.

'joint property', 'separate property', 'equal access' etc. Clause 10 defines joint property to include the matrimonial home if it is jointly acquired and other immovable property acquired by both spouses for the purpose of their marriage. Household property and other property acquired during the marriage also forms part of the joint property but separate property is excluded. The court is given power in this clause to restrain a spouse or third party from disposition of joint property.

Clause 11 excludes separate property from distribution and defines separate property. A spouse is given capacity to acquire and keep property during the subsistence of the marriage under the Bill. Separate property includes, among other things, property acquired before marriage or property acquired by bequest, devise, through inheritance or gift from a person other than the spouse. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship are separate property. The part of a settlement that represents those damages are also to be considered separate property. Property that the spouses have agreed is not to be included in the matrimonial property is obviously separate. Trust property is excluded except where it is a sham to deprive the vulnerable spouse of joint property. Per Clause 12, equal access includes the right to the use of, the benefit of and to enter the joint property and where there is agreement between spouses, to the disposal of the joint property. Finally, the Miscellaneous Matters part provides for maintenance orders, jurisdiction of courts, applicability of the Legal Aid Scheme Act, 1997 (Act 542), settlement by Alternative Dispute Resolution (ADR), Offences etc.

## **4.2 Critique of selected provisions**

Section 3 on Cohabitation provides in sub-section 1 that: 'Cohabitation refers to a situation in which a man and a woman hold themselves out to the public to be man and wife'. Section 3(2) then states: 'Persons who have cohabited for a period of five years or more shall be deemed to be spouses and have rights of spouses for the purpose of this Act'. Section 3(3) finally provides that:

The rights conferred by this section on cohabitees are available only to persons who (a) have the capacity to be married to each other under a marriage recognised under this Act; (b) are eighteen years and above; and (c) have held themselves out as husband and wife for a period of not less than five years.

The rationale for this provision as evidenced in the Memorandum is that, persons who cohabit tend to make contributions towards the acquisition of joint property during the subsistence of such relationships; and as such it will be unfair to deny such persons their rights to the joint property simply because they are not legally married. We can however extend this reasoning to cover pre-marital relationships not amounting to cohabitation

(PMR-NAC). It is a notorious fact that there are no timelines by which couples are to abide by in terms of when they legally get married. It is also a fact that some couples may be in relationships for a few years before deciding to get married. What then becomes of such couples, who are not cohabiting but yet contribute to acquire joint property, with or without the intention of one day cohabiting or getting legally married? Should such couples also, in the words of the Memorandum 'lose their property rights merely because they have not completed or formalized their union?'

It is suggested that, since the first part of the draft Bill is on Relationships, a provision is introduced to cater for PMR-NAC's, for example, since it is a form of relationship that is prevalent in contemporary times. Also, the requirement of cohabiting for five (5) years before being entitled to 'spousal' rights must be reviewed. This is because, in terms of acquisition of property, there is no hard and fast rule as to when it may be acquired. Thus, whereas some cohabitee couples may acquire joint property only after several years of cohabitation, it is perfectly foreseeable that others may acquire joint property right from the inception of their relationship. Therefore, to tie in spousal property rights with the length of time of cohabitation may rather be a hinder to the enjoyment of property rights generally for cohabitee couples, especially women. A much better way of going about this, in my opinion, is to only retain the requirement of holding yourselves out to the public as a couple, and allowing the courts to determine incidents of this on a case-by-case basis.

In terms of the Marital Property Agreement (MPA), the draft bill essentially reduces the contracting of marriage to commercial transactions if the parties so desire.<sup>67</sup> The form of the MPA can however be Oral or Written. It is suggested that, the Written MPA be encouraged over the Oral MPA's. This is because, unlike ordinary contracts, there has to be some 'extra' sanctity attached to MPA's by virtue of the nature of the marriage institution to which it relates. Thus, even though illiteracy levels in Ghanaian society is still significant and thus, numerous illiterate as well as semi-literate couples desirous of getting married may wish to have MPA's and by law should be entitled to it, it may be necessary to insist on the contents of the agreement being written down, for the avoidance of doubt. This point is further buttressed by section 6 of the draft Bill itself, which encourages potential couples, although not mandatory, to obtain independent legal advice before entering into an MPA. The fact that, the Bill includes such a provision in the first place, is indicative of the seriousness and thoughtfulness that must be attached to issues involving the MPA, and as such it is ideal that the agreement is evidenced in writing.

67 It must be noted that the Supreme Court in the *Mensah v Mensah* case held that: '... the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage'.

### ***Polygamous marriages***

Clause 20 is reproduced verbatim below to illustrate the impact of the Bill on polygamous marriages:

- (1) Where a husband has more than one wife in a polygamous marriage, the ownership of the property shall be determined as follows:
  - (a) joint property acquired during the first marriage and before the second marriage was contracted is owned by the husband and the first wife; and
  - (b) any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage.
- (2) Despite subsection (1)(b), where it is clear either by agreement or through the conduct of the parties of the polygamous marriage that each has separate matrimonial property, each wife owns that separate matrimonial property separately without the inclusion of the other wives.
- (3) A husband in a polygamous marriage who takes a subsequent wife or wives shall together with the existing wife or wives make a declaration as prescribed of their respective interest in the joint property ...

Clause 3 addresses the question of cohabitation by stating that persons who have cohabited for a period of five years or more shall be deemed to be spouses and have the rights of spouses for the purpose of this Act so long as they have the capacity to be married to each other under a marriage recognised under this Act, are eighteen years and above, and have held themselves out as husband and wife for a period of not less than five years.

It is unfortunate that the Legal and Constitutional Committee of the Parliament of Ghana, per a member of the committee and MP for Offinso South, Ben Abdallah Banda, who disclosed this to *Citi News*, said the decision to expunge the provision of cohabitation from the bill is in the supreme interest of the country. 'Within the context of the law, a spouse is someone who has been legally married so where do we place cohabitation ... at the end of the day, the consensus was that cohabitation should be expunged from the law and indeed cohabitation has in fact been expunged from the law'.<sup>68</sup>

## **5 Towards actual equality: Recommendations for action**

It is suggested that, in order to speed up the process towards actual equality for women in Ghana in terms of their matrimonial property rights, Parliament must immediately enact the Property Rights of Spouses Bill,

68 See <http://citifmonline.com/2014/12/22/cohabitation-provision-likely-to-be-expunged-from-spouses-bill/#sthash.vZAxd142.dpuf> (accessed 24 November 2016).

without further delay taking into consideration the suggested revisions. This legislation will ensure that the legal regime regarding spousal property rights is well regulated. The courts will thus be in a better position to skilfully guide the development of the law to cater for the needs of an ever changing and dynamic society.

Serious thought should be given to establishing a Women's Rights Commission, either through an Act of Parliament or by virtue of a Constitutional amendment. This Commission which will solely focus on women's rights issues nationwide will play a critical role in first and foremost educating women across the country on their rights. The Commission also has the potential of spearheading the movement to ensuring effective implementation of all the laws regarding women's rights in Ghana, as well as Ghana's regional and international obligations in this regard. If established, the Commission can serve as a critical tool for national development, as it will harness the energies of women, and work towards equality and equal standards and treatment of women, as compared to men in terms of all aspects and facets of national development.

Also, Ghana should seriously consider the enactment of a Women's Rights Act, or have women's rights feature prominently in the Affirmative Action Act, that was proposed by the Constitution Review Commission.<sup>69</sup> Although admittedly legislation on its own do not solve problems, it will nonetheless serve as a signal of intent, and be useful in ensuring that we comply with acceptable international standards and practices regarding the fulfilment and implementation of women's rights in Ghana. The practical impact this Act will make will be to first and foremost domesticate Ghana's international and regional legal obligations in relation to women's property rights. This will then provide the platform for the actual enjoyment of property rights by Ghanaian women, devoid of any ambiguities that the current state of affairs seems to present.

A process of codification of customary law in Ghana generally, and customary matrimonial property rights in particular must be embarked upon. This will have the tendency of bringing clarity to the issue of property rights, as several different regimes exist throughout the country. Codification will therefore ensure certainty, albeit diverse and peculiar to the different ethnic groups and regions of Ghana. This process of codification can be periodically revised to accord with changing societal needs and the exigencies of the times. In any case, codification will be based on the actual customs that although seemingly permanent evolves significantly over a period of time.

69 See the Report of the Constitution Review Commission.

All existing institutions (the special High Courts, DOVVSU, CHRAJ, etc.) that play a tangential role in the enforcement of women's rights generally and women's matrimonial property rights in particular, must be institutionally strengthened in order to effectively and efficiently carry out their onerous responsibilities. Also, the law must be enforced. One of the major problems in Ghana is the non-enforcement of laws. Thus, although there is a plethora of laws in existence, due to the lack of a culture of enforcement as well as inadequate and/or incompetent enforcement institutions and mechanisms, abuses are suffered. If these were to be done however in the field of women's rights for example, it is my belief that the pursuit of actual equality for women in Ghana, in terms of their property rights may be attainable in the not too distant future. Finally, public education/awareness creation will also play a pivotal role in terms of raising awareness regarding women's rights issues generally, and the property rights of Ghanaian women in particular.