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Gendering citizenship and decolonising justice

in 1960s Ghana:

revisiting the struggle for family law reform

I. Introduction

In her analysis of attempts at family law reform in 1960s Ghana, the American sociologist Dorothy Vellenga posited a connection between the demise of colonial rule, the attainment of national sovereignty, and ‘intensified debate on the relations between the sexes’ across sub-Saharan Africa. Ghana was the first sub-Saharan colony to attain Independence in 1957. Soon, post-Independence governments across the continent were being ‘bombarded by various groups seeking a revamping of the marriage laws’, resulting in ‘more governmental action in matters affecting the family’.[[1]](#footnote-1)But Vellenga also recognised that heightened popular expectations of post-Independence African governments did not in themselves explain why particular people lobbied for particular measures, or why some proposals were rejected whilst others succeeded.

This article picks up where Vellenga left off. It asks why it was possible to secure the passage of a Maintenance of Children Bill in Ghana in 1965, whilst repeated attempts to pass a Marriage, Divorce and Inheritance Bill had ended in failure. As we shall see, in spite of vocal opposition from some male parliamentarians in the governing Convention People’s Party (CPP), women parliamentarians pushed a child maintenance law through the stages of drafting, redrafting, cabinet approval and parliamentary debate. These women parliamentarians, however, were not the first people to highlight the difficulties that Ghanaian mothers experienced in obtaining material support from the fathers of their children; nor were they the first to propose legal measures to tackle the issue. They built upon the evidence gathered by professional social workers and reiterated by some of the demands made over the previous decade by non-partisan voluntary associations.

A simple assertion of the ‘agency’ of these women will not suffice to explain the particular forms and goals of their political action, nor their specific combination of successes and failures. Indeed, Lynn Thomas has recently argued that whilst a scholarly emphasis on ‘agency’ has been important in countering racist and sexist denials of African women as fully formed historical subjects, ‘agency’ in and of itself does not provide sufficient analytical purchase. This article therefore follows Thomas’ appeal for closer attention to the ‘form, scale and scope’ of agency – as exercised by particular groups of women who sought reform to family law in Ghana.[[2]](#footnote-2)

The task is complicated, first by the fragmentary nature of the evidence, and second by the positionality of those who interpret it. The CPP won elections in 1951, 1954 and 1956; led the Gold Coast (Ghana) to Independence in 1957; and remained the party of government until it was overthrown in a coup in 1966. By 1960, when a new republican constitution was introduced, the country was moving towards a *de facto* form of single-party socialism that was formalised by constitutional amendment in 1964. But the CPP did not bequeath to historians a full or systematic archive of its ambitions and activities. The records of some of the relevant government departments (particularly Social Welfare) are still only partially catalogued in the Ghana national archives. The media was also subject to increased governmental control in this period – although this did not preclude lively debates on matters of marriage and the family, in the newspapers and other popular cultural forms.[[3]](#footnote-3) Recent scholarship on post-Independence Ghanaian politics in general, and on women’s mobilisations in particular, has been increasingly attuned to transnational and Atlantic diasporan dynamics.[[4]](#footnote-4) Archives located outside Ghana are casting new light on the organisational and ideological dimensions of the CPP (party and government), and on those who supported or sought to influence it.[[5]](#footnote-5)

In this article, however, I refer to records generated inside Ghana: key court cases, a commission of inquiry, parliamentary debates, and the papers of a voluntary association that campaigned for legal reform. In order to read the ‘form, scale and scope’ of women’s agency within these sources, I position them against three bodies of literature: social histories of marriage and the family in colonial Ghana; feminist and other critical analyses of the ideological and organisational orientations of the CPP; and the substantial legal scholarship that explains how colonial rule gave rise to ‘deep legal pluralism’, and the particular ways in which this was tackled in the republican constitution of 1960. A synthesis of this literature will allow us to identify the post-Independence implications of the gendered legal struggles that social historians of the colonial era have explored. It will also help us to understand why debates about reforms to family law were consistently framed in terms of ‘preserving custom’ versus ‘adaptation to modern conditions’, how women could establish their authority to speak on these issues, and why they could legitimate some reforms but not others.

In reading primary and secondary sources, I have been wary of treating ‘women as a category of analysis’.[[6]](#footnote-6) In a powerful critique of western feminist scholarship on so-called ‘third-world women’ during the 1980s, Chandra Mohanty cautioned researchers against assuming ‘women as a coherent, already constituted group’ that is placed into ‘kinship, legal and other structures’ in a subordinate position.[[7]](#footnote-7) According to Mohanty, the twin assumptions of coherence between women, and their generalised subordination, had defined ‘third-world women as subjects *outside* of social relations’, and construed power in binary terms – as something that men had and women did not.[[8]](#footnote-8) This obscured the ways in which multiple categories of women were *produced through* social relations, and implicated in the ubiquitous everyday circulation of power.[[9]](#footnote-9) Mohanty concluded that the most promising source of political action was not western feminist insistence on the coherence of ‘third-world’ women’s interests, but the contradictions that African and Asian women identified in their own experiences.

This has implications for historical scholarship too, insofar as it is also concerned with the relationship of ‘woman’ - a ‘cultural and ideological composite Other constructed through diverse representational discourse’ - to ‘women’ as ‘real, material subjects of their collective histories’.[[10]](#footnote-10) The presumption of *generalised* female subordination is clearly a problematic starting point for an enquiry into the struggles of *particular* groups of women to reform aspects of family law. And since it is obvious that none of these women was passive or un-thinking, a mere assertion of their agency will not take our analysis very far. More interesting is the imbrication of newly organised groups of women in the ‘diverse representational discourse’ of post-Independence Ghana, *and* their simultaneous identification of contradictions.

As different groups of Ghanaian women organised themselves to articulate demands for new legislation, they entered into legal, sociological and political discourses that defined women in terms of their ‘object status’ – that is, ‘the way in which they [women] are affected…by certain institutions and systems’.[[11]](#footnote-11) Would-be reformers began to speak of ‘the status of women’ under customary law – a language not dissimilar from that employed by the predominantly male jurists and lawyers who defended male privileges and opposed substantive legal reform. Sociologists and professional social workers wrote about ‘the impact on women’ of socio-economic change. Nationalist politicians expatiated on ‘the role of women’ in nation-building and national development. This strand of nationalist discourse established the ‘importance’ of women, and the need for them to ‘play their part’ in nation-building and national development, but it did not fundamentally challenge the ‘object status’ through which other discourses had defined them.

As advocates of and campaigners for reform, specific groups of women were imbricated in and constrained by legal, sociological and political discourses. But this article will also show how they also worked creatively with contradictory experiences and representations of marriage, motherhood, politics and the law. They mobilised new forms of social-scientific welfare expertise to authorise their own advocacy for a specific intervention in the moral and physical wellbeing of the citizenry. And they fashioned a new ideal of the ‘responsible citizen’, whose gendered obligations would be consistent with ‘African custom’, but enforced through ‘modern’ institutions, according to national statutes.

The article proceeds as follows. The first part establishes the historical conditions under which national legislation was conceived as the necessary solution to ‘problems’ of marriage and the family. Beginning with an outline of the specific form of legal pluralism that was introduced to Ghana through British colonial rule, the article approaches the social historical literature on marriage and the family in colonial Ghana, through the lens of the ascertainment of customary law. This provides the context for demands for the reform of laws pertaining to marriage and the family, as articulated by elite voluntary associations of women at the end of the colonial period. Two 1959 court cases will exemplify the key controversies around the recognition and rights of ‘lawful wives’ and ‘legitimate children’ in the years immediately after Independence, and the arguments made by a commission of inquiry to oppose substantive reform.

Next, the article examines post-Independence attempts to tackle colonial legacies of law. The legal scholarship suggests that whilst provisions in the republic constitution of 1960 were intended to ‘decolonise’ the justice system, they also gave the Ghanaian courts (and thus Ghanaian judges) considerable scope in the ascertainment, application and future development of customary law. This had the potential to cut across the ideological and organisational orientations of the CPP, which announced itself as a vanguard party and claimed for itself the right to determine the balance between the preservation of custom and advancement to socialist modernity. A small but rapidly developing literature on women and the CPP makes clear that the party authorised and encouraged the mobilisation of Ghanaian women as part of this broader vision, whilst simultaneously directing and constraining them. Women were successful in preventing the passage of a Marriage, Divorce and Inheritance Bill whose terms they opposed; but, possibly because colonial legal frameworks had produced distinct categories of women with competing interests, there was no easy consensus on an alternative.

Ironically, the failure of the Marriage, Divorce and Inheritance Bill in the early 1960s kept these issues at the heart of popular, political and scholarly debates in Ghana.[[12]](#footnote-12) By contrast, little has been written about the Maintenance of Children Act of 1965. During the 1970s and 1980s, a handful of sociologists explored the operation of child maintenance law in various regions of Ghana.[[13]](#footnote-13) But many questions about this legislation remain unanswered: how it became law in the first place, how it sat within a broader agenda for family law reform, or what this might tell us about the ‘form, scale and scope’ of women’s agency under a single-party socialist government in a newly-independent African nation. The final section of this article therefore pays close attention to the ways in which women parliamentarians sought to legitimate the Maintenance of Children Bill during its crucial second reading in May 1965.

II. ‘Deep legal pluralism’

Gordon Woodman defined ‘legal pluralism’ as a situation in which ‘a category of social relations is in the field of operation of two or more bodies of legal norms’.[[14]](#footnote-14) ‘Deep legal pluralism’ he defined more specifically as a situation in which state law co-exists with customary law, and the two are of different origins and derive their legitimacy from distinct sources. British colonial Africa in general was characterised by ‘deep legal pluralism’. In his work on *Imperial Justice*, Bonny Ibhawoh explained this in terms of a familiar tension between ‘imperial universalism’ - that is, ‘maintaining fundamental principles of British justice thought to be crucial to legitimizing the Empire’ – and the ‘local exceptionalism’ through which colonisers underscored their difference and distance from the colonised.[[15]](#footnote-15)

Thus in British West Africa, ‘reception statutes’ of the later nineteenth century expressed a universalising ambition, for they ‘sought to extend to the colonies (in so far as was practicable) the same standards of law and justice as prevailed in England’.[[16]](#footnote-16) Colonisers bestowed the ‘gift’ of their law through the stipulation in early court ordinances ‘that the Common Law, the Doctrines of Equity, and Statutes of General Application would be enforced…as they were in England on the date of each colony’s obtaining its local legislature’.[[17]](#footnote-17) But, having asserted the primacy of English law in the colonies, these ordinances went on to establish the conditions under which customary law would apply to colonised subjects.

The Gold Coast was proclaimed a British colony in 1874, although British authority and administration expanded piecemeal over the next four decades, from the Gold Coast districts closest to the Atlantic coastline, through Asante, the Northern Territories, and British Togoland, and thus to the whole of the future Ghana. Following the establishment of an executive and legislative council on the Gold Coast, the Supreme Court Ordinance of 1876 introduced the ‘received’ (English) law. Section 19, however, conferred upon the Supreme Court the right to observe, and to enforce the observance of, any law or custom ‘not being repugnant to natural justice, equity and good conscience nor incompatible either directly or by necessary implication with any enactment of the Colonial legislature’.[[18]](#footnote-18) This enabled Gold Coast subjects to continue to have their cases judged according to their own laws and customs.

The Supreme Court Ordinance simultaneously made the status of customary law as a binding set of rules dependent upon ‘the fulfilment of certain conditions laid down by the received English law…. In other words, the legitimacy of the indigenous customary traditions depended on a validation by the imported endogenous English law’.[[19]](#footnote-19) In addition to the so-called ‘repugnancy test’, the ordinance stipulated that customs observed and enforced by the courts must already have been existence in the Gold Coast at the time the said ordinance was introduced. The distinction between a common socially endorsed practice, and a customary law, thus rested partly on the proof of its longevity amongst a particular group of Gold Coast people (in colonial parlance, a ‘tribe’ – although this term is no longer used by historians of Africa).

III. Marriages under ‘received’ and ‘customary’ law

The Supreme Court Ordinance established a default position that marriages, and indeed most other relationships between Africans, fell within the realm of customary law. However, in 1884 a Marriage Ordinance was introduced, and Gold Coasters could opt to contract their marriages under it. The ordinance was ‘based largely on the English Marriage Acts prior to that date’, and was amended several times in accordance with changes to the marriage laws of England during the colonial period.[[20]](#footnote-20) The ordinance envisaged marriage as a monogamous life-long union, and those who contracted under it could obtain a divorce only under a narrow set of conditions.

When a spouse who had married under the ordinance died intestate and was survived by a spouse or child of the ordinance marriage, his or her estate was to devolve according to the English Statutes of Distribution. When a wife died, her husband inherited her property. When a husband died, his wife and the children of their ordinance marriage (that is, the ‘conjugal family’) were the beneficiaries of the estate. In both cases, this excluded the family into which the deceased person had been born (his/her matrilineage, if reckoned through the mother’s line, or patrilineage, if reckoned through the father’s line). In 1909 the Marriage Ordinance was amended so that one third of an intestate spouse’s estate was to be inherited according to customary law (which benefitted the deceased’s lineage), and the remaining two thirds was to be distributed to either the widower, or the widow and the children of the ordinance marriage.[[21]](#footnote-21)

Marriages contracted under customary law were complex bundles of rights and duties, subject to negotiation and re-negotiation by couples and their respective families, as well as to variation between the different districts, and change over time. It is therefore impossible – and indeed misleading - to define an archetypal customary marriage in simple contradistinction to an ordinance marriage. Three generalisations, however, seem to hold good for most of Ghana through most of the colonial period. Firstly, no customary law marriage entailed a community of property between spouses as a matter of default – although some forms of property could be transferred between spouses as gifts *inter vivos*, or by bequests in a written will or an oral statement of wishes.[[22]](#footnote-22) Secondly, all customary law marriages were *potentially* polygynous - although in some cases spouses committed to monogamy, and in other cases first wives could negotiate with husbands about the latter’s subsequent marriages. Thirdly, each spouse retained an interest in assets that were owned collectively by his/her lineage, particularly land – although the extent to which married individuals could use or otherwise benefit from these assets was contingent on a range of factors.[[23]](#footnote-23)

Disputes relating to marriage, divorce, inheritance and the raising of children were often subject to forms of arbitration convened by lineage elders, after which cases could be heard in native tribunals (presided over by chiefs or other ‘traditional authorities’) or in the colonial courts (presided over by magistrates and judges who were trained in English law). The court system, however, was not rigidly bifurcated.[[24]](#footnote-24) Whilst it was typical for native tribunals to adjudicate cases between Africans according to customary law, verdicts were often appealed, and cases therefore moved from native tribunals (re-organised and renamed ‘native courts’ in 1944) to colonial courts. The colonial courts applied customary law to cases between Africans, except under particular conditions – for example, when they were convinced that parties had entered an arrangement with the intention that it should be regulated according to English law.

The picture was further complicated by the various churches that were established as African pastors and priests assumed leadership of congregations established by missionary societies. Writing of the Presbyterian church, which grew out of Basel mission, Stephan Miescher notes that the church regulations of 1929 recognised two forms of marriage: ordinance marriages and customary law marriages that were blessed in church. The church regulations also indicated that when one of their male members died intestate, his estate should be divided into three equal parts, for his wife, his children, and his lineage (a rule similar to that set out in the 1909 amendments to the marriage ordinance).[[25]](#footnote-25) Thus whilst those who contracted their marriages under the ordinance tended to be Christians, not all Christian marriages were contracted under the ordinance, and the churches often established their own forums for the hearing and resolution of members’ marital, parental and inheritance disputes.

A somewhat similar situation arose among Muslims. The Marriage of Mohammedans Ordinance of 1907 required spouses and other participants to register a Muslim marriage ceremony with the colonial administration.[[26]](#footnote-26) This stipulation was frequently ignored, with Muslims working out many of their disputes outside of the colonial courts, according to combinations of Islamic and customary principles. Ordinance marriages remained the exception, not the norm, throughout the colonial period. This meant that when disputes arose and reached the courts, they were most often decided according to customary law.

IV. The ascertainment of customary marriage laws

Legal historians have commented at length on the ascertainment of customary law in colonial Africa – that is, the means by which the existence and content of particular customs was determined, and the criteria for distinguishing common socially endorsed practices from rules that had been enforced through sanctions prior to the ‘reception statutes’. In his seminal study of colonial Zambia and Malawi (respectively Northern Rhodesia and Nyasaland), Martin Chanock argued that the nineteenth century was a ‘time of violent and rapid change and a succession of conquest states’. There was no ‘traditional world in which custom reigned’ in Central Africa, and there was no nineteenth-century institution that bore any strong resemblance to the ‘native authority courts’ subsequently established through British indirect rule.[[27]](#footnote-27) Published just two years after Eric Hobsbawm and Terence Ranger’s influential edited collection on *The Invention of Tradition*, Chanock’s *Law, Custom and Social Order* concluded that customary law did not *precede* colonialism, but was *produced* by it.[[28]](#footnote-28)

Chanock located native authority court cases in the context of upsurges in labour migration to the South African and Copperbelt mines, new forms of agricultural production for regional and international markets, and the attendant spread of cash through the rural areas of colonial Zambia and Malawi. The courts in general, and marriage cases in particular, became arenas for struggle over ‘the control of reproduction and of work and the appropriation of the surplus’.[[29]](#footnote-29) In the absence of a stable baseline of pre-colonial tradition, and in the light of profound struggles over social reproduction, testimony about what had prevailed in the past shaped colonial officials’ understanding of marriage and child rearing, underwrote courts’ decisions, and gave rise to a body of customary law.

Participation in this process became a key means through which African ‘people confronting new capitalist relations of production’ could ‘work to exercise both actual and moral control over the [economic] processes that were reshaping their world’.[[30]](#footnote-30) Heavier penalties on women for the commission of adultery, schemes for the registration of marriages, calls for increases in bridewealth payments, and demands that fathers rather than mothers should have custody of children upon divorce, were all justified in the name of custom.[[31]](#footnote-31) Taken in combination, they also tended to strengthen the control of fathers over daughters and husbands over wives.

Social historical research on various parts of colonial Ghana has identified some points of similarity with Chanock’s analysis. In his study of the LoDagaa in the Northern Territories, Sean Hawkins found that:

Before the arrival of the British, the LoDagaa did not have chiefs, let alone courts, for the resolution of potentially violent disputes that fell outside of the authority of the households or localities…. There was no wider political structure through which a household could prosecute a rival household which had taken a wife from it; direct retaliation would have been the only recourse. Colonial rule quickly changed these dynamics by substituting summonses for retaliation.[[32]](#footnote-32)

Since this area of northern Ghana supplied migrant labour to cocoa farms, mines and urban centres further south, district commissioners were keen to protect the interests of migrant labourers. Courts therefore returned errant wives to men who could prove that they were the first husband, and imposed ‘coercive sanctions’ on men who sought to seduce other (often absent) men’s wives. ‘Customary law’ thereby narrowed the scope that LoDagaa women had previously enjoyed to leave unsatisfactory husbands and seek alternatives.[[33]](#footnote-33)

In their study of the matrilineal forested region of Asante, Jean Allman and Victoria Tashjian agreed with Chanock that native tribunals did not simply enforce ‘continuity with a precolonial past’, but rather became forums in which ‘colonial change was brokered’.[[34]](#footnote-34) They were sceptical, however, of customary law as an *invention*.[[35]](#footnote-35) The unusually dense body of written sources for nineteenth-century Asante, substantial studies by colonial-era anthropologists (particularly R. S. Rattray in the 1920s and Meyer Fortes in the 1940s), a wide array of native tribunal and colonial court records, and the oral histories collected by Allman and Tashjian themselves, all permitted a detailed analysis of how pre-colonial norms, practices, rules and sanctions were *adapted*.

In Asante, as more broadly through other parts of Ghana’s southern and central Akan-speaking forested zone, the production of cocoa for export increased substantially during the colonial period. Many Asante farmers migrated in search of land on which to establish new cocoa farms – an endeavour that required significant inputs of labour. But whereas earlier forms of intensified agricultural production for export in West Africa had been accomplished through enslaved labour, colonial rule brought with it new prohibitions on trading in slaves, and the end of the legal recognition of the status of slave.[[36]](#footnote-36)

Allman and Tashjian noted that pre-colonial marriages between Asantes had entitled a husband to exclusive sexual access to his wife – and thus to adultery fines from any other man who had sex with her.[[37]](#footnote-37) In marriages between a free man and a free woman, there were expectations of economic co-operation and support, negotiated and renegotiated by spouses and their respective families over the course of time. Pawn marriages, on the other hand, were usually contracted when a husband made a loan to the elders of his wife’s family. Until the loan was repaid, the husband had full control of the labour of his wife.[[38]](#footnote-38) Although pawnage was formally abolished in Asante in 1908, Allman and Tashjian argued that as marriage payments became monetised, there was a gradual blurring between the *tiri nsa* (head drinks) that were required from the family of the prospective husband by that of his prospective free wife, and the *tiri sika* (head money) that was transferred from the husband to his wife’s family at the onset of a pawn marriage.[[39]](#footnote-39)

The monetisation of marriage payments meshed with the new profit motive attached to the establishment and maintenance of cocoa farms that produced for the world market. Asante husbands thus increasingly asserted their rights over the labour of their nominally free wives. Since these marriages did not entail a community of property, the *ownership* of the cocoa farms on which wives *laboured* rested with the husband. Although free wives were entitled to keep the proceeds of their *own* enterprises, husbands’ demands upon their time could curtail their opportunities for independent accumulation.

The women whom Allman and Tashjian interviewed had strategized variously – and sometimes, although not always, successfully - to mitigate the opportunity costs attached to marriage. Their situations were complicated by the simultaneous ‘monetization of fatherly care’.[[40]](#footnote-40) Whilst it had been common for Asante fathers to transmit their own crafts or skills to their sons, the rapid spread of formal schooling, and the strongly perceived correlation of schooling with upward social mobility through the twentieth century, meant that fathers’ contributions increasingly came in the form of cash for school fees. This monetisation justified a strengthening of the rights of fathers in their children - even though in practice some fathers did not actually pay the school fees. Children remained members of their mother’s (not their father’s) matrilineage and were therefore not entitled to inherit their father’s property.

Allman and Tashjian’s unusually detailed reconstruction of specific adaptations in Asante marriages and child-rearing arrangements rests on a dense base of primary source material which is reflective of the particular conditions for the ascertainment and application of customary law in Asante. In native tribunals across colonial Ghana, customary law was treated as a matter of law – that is, the presiding chiefs and elders were presumed to know what was customary and the rules that had been enforced through sanctions prior to formal colonisation. And in Asante, unlike in the LoDagaa case further north, there was a history of court judgment of disputes concerning marriage. But in the colonial courts, where native tribunal verdicts were often appealed, customary law had to be ‘pleaded as a fact’ unless or until it had been proven so frequently as to be deemed ‘notorious’, when the court was obliged to take ‘judicial notice’ of it.[[41]](#footnote-41)

In practice, customary law could be ‘pleaded as a fact’ in three ways. Firstly, ‘fact’ could be established through witnesses whom disputing parties called to attest to the content and longevity of a particular custom. Secondly, it could be identified by ‘native assessors’ who were appointed to assist the colonial courts in a role akin to that of an ‘expert witness’ (although not strictly defined as such).[[42]](#footnote-42) Thirdly, colonial courts could call upon texts authored by anthropologists – for example, R. S. Rattray, a barrister, who was appointed by the colonial administration in 1921, and published a book on *Ashanti Law and Constitution* in 1929.

Africans who trained in Britain, in English law, were also critical players in the field of customary law. In the southern districts of the Gold Coast, they were early researchers of customs. John Mensah Sarbah’s 1897 *Fanti Customary Laws* became a common reference point in colonial courts, followed by J. B. Danquah’s 1928 *Gold Coast: Akan Laws and Customs*.[[43]](#footnote-43) In addition to the production of these texts, African lawyers also pursued their clients’ cases through the colonial courts of the Gold Coast, to the West African Court of Appeal, and sometimes as far as the Judicial Committee of the Privy Council in London, in order to test the ascertainment or application of customary laws.[[44]](#footnote-44)

Written information about custom could be obtained more easily in southern and central colonial Ghana than in the northern districts. This imbalance in written information was related to the particular interest of district commissioners, magistrates and judges, litigants and lawyers, and social anthropologists, in documenting matrilineal practices among Akan-speaking peoples in the forested and coastal districts.[[45]](#footnote-45) Colonial-era anthropologists were preoccupied with the functioning of marriage, and the supposedly problematic positioning of the biological father, in a kinship ‘system’ which determined the belonging and inheritance rights of children according to their mother’s line.[[46]](#footnote-46)

Gordon Woodman pointed out, however, that anthropologists tended to think differently from lawyers about custom.[[47]](#footnote-47) For whilst anthropologists were interested in the social logic behind widely endorsed practices, and their enforcement through social and spiritual sanctions, this was not a sound basis from which a lawyer could advise a fee-paying client. African lawyers, like lawyers elsewhere, had an interest in the establishment of a set of predictable rules that would govern the inheritance of moveable and immoveable property, for this is what would enable lawyers to advise with confidence on the likely outcomes of their clients’ cases, should they reach the courts.[[48]](#footnote-48)

Through the first half of the twentieth century, disputes relating to intestate succession flooded the native tribunals, the lower colonial and appellate courts, and the forums of arbitration established by Christian churches. Disputes over inheritance increasingly turned on a keenly felt distinction between lineage property and self-acquired property. Lineage property was understood to belong to the lineage as a whole: it could be used but not alienated by individual members. Self-acquired property was understood to be property that an individual had acquired during his/her lifetime through his/her own efforts. It was over the disposal of the latter that individuals could exercise the greater discretion, by making gifts *inter vivos* or bequests in a written will or oral statement of wishes. But in the absence of such instructions, and in the absence of solemnisation ceremonies that ‘proved’ a gift had been made and accepted, an intestate’s self-acquired property was inherited by his/her lineage.[[49]](#footnote-49)

The distinction between lineage and self-acquired property was not specific to matrilineal societies. It also came to be recognised among people who practised patrilineal forms of inheritance. However, the nature of men’s self-acquired property changed through the first half of the twentieth century, and the value of some men’s self-acquired assets increased – often including houses that had been constructed in expanding towns and cities, as well as productive cocoa farms.[[50]](#footnote-50) In this context, intestate succession in matrilineal societies was increasingly associated with frequent and bitter disputes that pitted *wives and biological children* (the ‘conjugal family’) against the deceased’s *matrilineal kin* (including his uterine siblings, and his uterine sisters’ children). The former sought recognition for the contribution of their labour to the deceased’s acquisition of property; the latter defended their customary claims to his assets.

As we have seen, the 1909 amendment to the Marriage Ordinance had introduced a compromise, by enabling one third of a deceased spouse’s estate to devolve according to customary law. The Presbyterian church regulations proposed a similar compromise in 1929. In order to implement its broader policy of indirect rule, the colonial administration had also recognised councils of chiefs and elders in each of the ‘native states’ (that is, the areas and people whom they believed to have been under the authority of particular chiefs during the pre-colonial era). Between 1933 and 1948, several of these councils passed regulations to ensure that a portion of a deceased man’s estate was reserved for his wife/wives and children.[[51]](#footnote-51) This points to malleability in understandings of wealth creation and ethics of wealth transfer, and a willingness of some chiefs to adapt practices of inheritance to better fit with shifting ideas about equity.

In the famous case of Kosia & Others v. Nimo [1948-51], the Juaben native court and the Asante king’s appeal court both decided that a wife who had evidently contributed to the establishment and maintenance of her husband’s cocoa farm should inherit a share of it upon the death intestate of her husband. But when the case was appealed to the Supreme Court and heard by a British judge, this decision was overturned on the grounds that the Asante Confederacy Council (‘native state’) regulations had not been formally approved by the Governor-in-Council and thus lacked legal force.[[52]](#footnote-52) The judge condemned the invocation of equity to rectify what was perceived as an injustice to the wife. He argued that the duty of the courts was ‘to administer the law as they find it’.[[53]](#footnote-53) This pointed to an increasingly potent understanding of customary law as fixed through time, rather than emerging from on-going evaluation of everyday norms and practices.

V. The case for reform

The National Federation of Gold Coast Women was established in July 1953 as a voluntary and non-partisan association of women’s groups. Its membership was largely literate, urban and Christian, and in some cases very elite.[[54]](#footnote-54) The founder and general secretary of the federation, Evelyn Amarteifio, was a member of the Convention People’s Party (CPP) but believed that the federation should take a non-partisan position and work with the government of the day.[[55]](#footnote-55) Amarteifio came from a family of social workers, and thus envisaged a close co-operation between the federation and the government’s Department of Social Welfare and Community Development.[[56]](#footnote-56) Her papers are now held by the Historical Society of Ghana, but they are not yet fully catalogued due to constraints on resources.[[57]](#footnote-57)

At its annual general meeting in December 1955, the federation passed a resolution on the ‘legalisation of native customary marriages’.[[58]](#footnote-58) The terminology was peculiar because, as we have seen, the reception statutes of the later nineteenth century had provided for courts to observe, and to enforce the observance of, customs not being ‘repugnant to natural justice’. Marriages contracted under customary law were therefore already perfectly legal. The federation’s campaign material, however, makes clear what was intended by ‘legalisation’. The federation argued that ‘the good native customary marriages of our great grand parents, both economically and socially, do not fit with our age’. The thrust of this argument was that modern socio-economic conditions were undermining customary marriages. The scrutiny of elders, and the sanctions that had prevailed upon couples in former times, had now lost their force in the context of labour migration, urbanisation, and relationships between people from different districts who had different understandings of custom. The result was that customary marriages had become ‘loose’, leading to broken homes and juvenile delinquency.

The federation wanted ‘happy and respectable homes’, and it believed that this could be best achieved through the tighter regulation of customary marriages, and the clarification of obligations upon contracting parties. It proposed a system of registration for all marriages, the establishment of divorce tribunals, and ‘domestic proceedings as in the United Kingdom’. The federation also called for councils of chiefs in the so-called ‘native states’ to ‘lay down the essentials of native customary marriages’ in their area; update ‘the existing books written by Sarbah, Dr Danquah and Dr Fields’ so as to ‘suit modern standards’; take steps ‘to make the people of the country to know their legal rights’; and make bye-laws to ensure that a deceased’s man wife and children should inherit ‘a certain percentage of his property’.[[59]](#footnote-59) The federation also called for the strict enforcement of ‘existing laws making a father responsible for his children’.[[60]](#footnote-60)

In February 1956, members of the federation petitioned the Minister of the Interior, who advised them to undertake public education on the issues. They also met with the then Prime Minister, Kwame Nkrumah, and the Attorney General. In the same year, the federation formed a national Marriage Guidance Council in order to tackle the linkage that it perceived between juvenile delinquency and broken homes.[[61]](#footnote-61) Whilst the first aim of the council was to ‘re-adjust’ the homes of couples ‘on the verge of breaking up’, the duties of its local branches would include ‘advis[ing] couples on their legal and customary rights when arbitration fails’. Where possible, the council would also ‘help to arrange for the maintenance of the children involved’.[[62]](#footnote-62) The federation was therefore concerned not only with the cases of intestate succession that frequently reached the courts, but with the many disputes between *living* mothers and fathers that did *not* reach the courts.

VI. The recognition and rights of ‘lawful wives’ and ‘legitimate children’

The attainment of Independence from colonial rule in 1957 had little immediate impact on the nature and volume of cases reaching the courts. Two cases that reached the courts in 1959 will exemplify the controversies. Quartey v. Martey & Anor was a case of intestate succession in a patrilineal community.[[63]](#footnote-63) H. A. Martey and Evelyna Quartey had lived together for some 25 years. When H. A. Martey died without leaving a will, Evelyna Quartey issued a writ of summons to two of his family members. She claimed some expenses that she had incurred in connection with the deceased’s funeral, and a one-third share in his various assets (which included cash, cattle, and a house in the capital city of Accra). The defendants began by denying that Evelyna Quartey had been married to the deceased under customary law. They also denied that the house in Accra was self-acquired property, arguing that it had been constructed with profits that H. A. Martey had derived from his father’s cocoa farm, and should thus be treated as family property.

Upon hearing this case in the High Court in Accra, Justice Ollennu concluded that, after 25 years of residing together openly, as man and wife, Evelyna Quartey’s claim to be married to H. A. Martey under customary law was valid. Justice Ollennu also concluded that the house in Accra was indeed constructed out of the proceeds of a cocoa farm that had belonged to H. A. Martey’s father, and therefore belonged to Martey’s patrilineage. Since the house in Accra was not deemed to be self-acquired property, Evelyna Quartey could not claim any share of it.

Turning to her claim to a one-third share in her late husband’s other assets, Justice Ollennu ruled as follows:

by customary law it is the domestic responsibility of a man’s wife and children to assist him in the carrying out of the duties of his station in life…. The proceeds of that joint effort of the man and 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.

On this basis, and despite the 25-year marriage, Evelyna Quartey was not entitled to any share of the assets. Quartey’s only compensation was that, ‘by customary law, a widow’s right is the right to *maintenance* by the family of her deceased husband’ [my emphasis]. This maintenance was to be paid first by the head of the deceased man’s family (that is, his lineage), and thereafter by a selected male member, who would become the widow’s *de jure* husband.

The case of Quartey v Martey made clear that a wife’s labour in the marital home, and any forms of non-financial support she offered for her husband’s endeavours, were to be considered as the basic duties of a wife in a customary law marriage. The husband’s corresponding duty was to *maintain* his wife, not to share his property with her. The clear implication was that if women who married under customary law wished to own property, they needed to acquire it through their own efforts, in whatever time they had left after their domestic duties and the other forms of non-financial support that they *owed* to a husband.

In the same year, another important case, Coleman v. Shang, highlighted a different but related set of issues.[[64]](#footnote-64) Coleman had married first under customary law. With his first wife, he had three children. After her death, Coleman had remarried under the ordinance – a marriage which produced a further five children. But whilst married under the ordinance, Coleman had sustained a long relationship with another woman, and had ten children with her. After the death of the ‘ordinance wife’, he had then married the ‘concubine’, Madam Shang, under customary law. When Coleman died intestate, the thorny question of inheritance arose, pitting the one surviving son of the ordinance marriage against his father’s third wife and other children. The case was heard in the Ghana Court of Appeal, and finally in the Judicial Committee of the Privy Council.[[65]](#footnote-65)

For advocates of monogamous marriage, Coleman v. Shang highlighted the problem that whilst ordinance marriages were in theory exclusive, in practice, men often had ‘outside wives’ and ‘outside children’. These situations begged the question of ‘legitimacy’. The granting of equal inheritance rights to all of a man’s children was seen to undermine the benefits of an ordinance marriage, because if all of a man’s children shared equally in the portion of the estate that was set aside for his children, this had the effect of reducing the amount available to the children of the ordinance marriage.

Coleman v. Shang also begged Vellenga’s question, ‘who is a wife?’, for whilst Madam Shang could not rise above the status of ‘concubine’ so long as Coleman’s ‘ordinance wife’ was alive, she could and did enter into a customary law marriage with Coleman once he became a widower.[[66]](#footnote-66) Thus whilst the ordinance provided a framework for the division and distribution of Coleman’s estate, this did not prevent a well-publicised controversy about who counted as a ‘lawful wife’ and a ‘legitimate child’ for purposes of inheritance. This revealed how plural legal frameworks of marriage had produced distinct categories of women (‘ordinance wives’, ‘customary law wives’, ‘concubines’) with competing interests; and an attendant distinction between ‘legitimate’ and ‘illegitimate’ children.

For legal scholars, Coleman v. Shang highlighted a ‘conflict of laws’ that arose from the colonial legacy of deep legal pluralism.[[67]](#footnote-67) Coleman had once married under the ordinance, and since he was survived by a child of the ordinance marriage, the ordinance dictated that his estate had to be distributed according to its terms. But Coleman had also married both previously and subsequently under customary law, suggesting that, when he died, he had customary law as his personal law. Ultimately, Madam Shang secured recognition as a ‘lawful wife’ for the purposes of inheritance. The children of Coleman’s first marriage were also recognised, but those whom Madam Shang had conceived with Coleman during the course of his ordinance marriage were still deemed to be ‘illegitimate’. Since Coleman had belonged to a *patrilineal* community, however, and since he had acknowledged paternity of all the children he had conceived with Madam Shang, the latter could still benefit from the one-third share of the estate that was to devolve according to customary law – in this case, upon his patrilineal kin. Had Coleman belonged to a matrilineal community, however, his ‘illegitimate’ children would have been excluded from *any* share in his estate.

This prolonged and bitter case revealed that although Ghana was now an independent African nation, the hierarchical relation between the received English law and the indigenous customary law had not been thoroughly tackled. This was the context in which the CPP government, under the leadership of Kwame Nkrumah, appointed Justice Ollennu to chair a commission of inquiry into inheritance – a commission on which the Federation of Gold Coast Women (now the National Federation of Ghana Women) was represented. In her 1971 analysis of attempts to reform the laws on marriage, divorce and inheritance, Vellenga wrote that the federation’s representative had refused to sign the commission’s report, which was ‘never published and is now hardly available’.[[68]](#footnote-68) Fortunately, however, some commission minutes and a draft of its report have recently surfaced in the Evelyn Amarteifio papers, held by the Historical Society of Ghana. This allows for some insights into reasoning of those who opposed substantive legal reform.

VII. The Ollennu commission

Following public hearings in the towns of Tamale, Cape Coast, Kumasi and Ho, and the compilation of a series of questionnaires, the commission felt equipped to summarise public opinion on the issues, and to locate them against the existing customary and statutory law, so as to make recommendations. Dealing first with the existing customary law, the commission noted the distinction between family (lineage) property and self-acquired property, pointing out that ‘any changes in the rules affecting the inheritance of self-acquired property’ will make ‘the distinction between the two kinds of property more important’.[[69]](#footnote-69)

The draft report also drew a strong distinction between patrilineal and matrilineal inheritance. The cases of Quartey v. Martey, and Coleman v. Shang, which reached the courts in the same year that the commission sat, rather suggest that inheritance was *not* a straightforward matter, even in patrilineal communities. But according to the commission’s draft report, there was no popular demand for the reform of patrilineal inheritance, because *children* belonged to their father’s lineage and could thus benefit from either his self-acquired or his lineage property. The commission conceded, however, that matrilineal inheritance left wives and children in a vulnerable position.

The draft report went on to argue that since the churches and the councils of the native states had introduced regulations to divide the self-acquired property of an intestate between his wife (or wives), children and lineage, some people now believed that these practices were indeed customary and would be enforced in the courts. This, according to the commission, was erroneous. Echoing the conclusions of the British judge in Kosia & Others v. Nimo, the report insisted that the council and church regulations were not ‘the true customary law as enforced in the courts’.[[70]](#footnote-70) The commission also expressed the view that whilst people often seemed to accept the principle of *sharing* an intestate’s self-acquired property between his wife (or wives), children and lineage, they had not appreciated that the *division* of a farm or a house into thirds could necessitate its *liquidation* into cash shares.[[71]](#footnote-71)

Thus whilst the commission believed that widows and children should be protected from the want that was evidently occasioned by their exclusion from a husband and father’s estate, it also concluded that it would be inconsistent with custom, and ultimately unpopular, to allow wives and children to inherit their portion of the deceased’s estate absolutely. As in Quartey v. Martey, Justice Ollennu emphasised that the customary rights of widows and children were to *maintenance*. In the case of widows, these rights terminated upon remarriage, since it would then become the customary obligation of the new husband to maintain his wife. In the case of children, their maintenance was ‘subject to good behaviour’ - a condition which clearly left them at the mercy of their father’s successor, who was to administer the estate and provide the maintenance.[[72]](#footnote-72)

The commission’s draft report explained that if the logic for widows inheriting absolutely was that their labours had contributed to the husband’s acquisition of property, then a new problem would arise. Whereas older and long-serving wives might be deemed deserving of a share of their husband’s property, younger second or third wives would simply ‘enjoy’ the fruits, without having put in a comparable period of service. The commission felt that such a possibility precluded the principle of absolute inheritance by widows, and it recommended instead that widows should have a *life interest* in one third of a deceased’s estate, from which they could be *maintained*. The property would be absorbed by deceased’s lineage upon the remarriage or death of the widow(s).[[73]](#footnote-73)

It is clear from the minutes of the commission that Evelyn Amarteifio absented herself from many of the meetings, and indeed refused to sign the chairman’s report on behalf of her federation. On 17 December 1959, the Minister of Local Government offered Amarteifio an opportunity to make a further representation on behalf of her federation.[[74]](#footnote-74) In her response, Amarteifio claimed that the chairman had been rude and dismissive to witnesses who had attended the public sessions to air their troubles. Being ‘a Judge of Law [he] was all the time interpreting the law rather than listening to what the witnesses had to say’. He had pursued his own interest in the ‘building up of Family [lineage] Property’, telling people that the breaking up of property into shares would ‘mean the end of a family’s name’. Meanwhile witnesses were reporting that the customary successors who administered the deceased persons’ estates had ‘become dishonest’ and could not be relied upon to maintain a widow or her children.

Amarteifio insisted that the position of her federation was that the widow’s share should be given to her entirely and without conditions, and that whilst *any* of a man’s children should be *maintained* out of the estate, only those who were conceived legitimately should *inherit* his property. This, she claimed, was not recommended through lack of sympathy for the children of ‘concubines’, but rather because it was important to incentivise women ‘to marry properly’.[[75]](#footnote-75) The implication was that a reduction in the disadvantages suffered by children of concubines would amount to a reduction in the incentives for adult women to contract ‘proper’ marriages.

In effect, Amarteifio recommended that marriages could best be stabilised and strengthened through a combination of the carrot and the stick. For woman-qua-wife, the carrot was a direct stake in her husband’s property, and the security that came from the right to inherit a portion of it absolutely. The stick came in the form of legal disabilities upon children born outside of wedlock. And whilst this was not spelled out explicitly, the implication of the federation’s larger set of recommendations was that men too would respond to the carrot and the stick. For man-qua-husband, the carrot was the improved loyalty and commitment of a wife and children who had a direct stake in the wealth that he acquired with their help. The federation’s preferred stick came in the form of the registration of marriages and the introduction of divorce tribunals that would render the fudging or evasion of husbandly and fatherly obligations much more difficult.

VIII. Decolonising justice and adjudicating advancement

In examining the 1960 constitution, and the legislation which gave effect to its provisions, political historians have tended to focus on the establishment of presidential powers, and the curtailment of the autonomy of the chiefs. Together, these enabled a *de facto* shift towards single-party socialism, which was formalised by constitutional amendment in 1964. Legal scholars, on the other hand, have identified in the 1960 constitution, Interpretation Act and Courts Act an important change in the nature of legal pluralism. As we saw earlier, the 1876 Supreme Court Ordinance had established the conditions for the ascertainment and application of customary law, including the ‘repugnancy test’. The 1960 constitution aimed to eliminate this hierarchical relation by putting customary, common and statutory law on a par. Whilst these three forms of laws were of different *historical* origin, they now derived their *legitimacy* from the same source – they were all laws of Ghana under the republican constitution.[[76]](#footnote-76)

Several changes followed from this. Firstly, the ascertainment of customary law was no longer to be treated as a question of fact, to be proved by litigants. It was now a question of law, which it was the responsibility of the courts to know, decide or establish via the inquiry procedure elaborated in section 67 (2) and (3) of the Courts Act of 1960.[[77]](#footnote-77) Since the Courts Act also did away with older distinctions between ‘native’, ‘local’, and ‘British’ courts, and established a single unified court system throughout the country, the burden was placed on judges and magistrates to either learn or formally ascertain the customs of the various districts to which they were posted. Secondly, the Ghana Court of Appeal was reconstituted as the Ghana Supreme Court, ‘the court of last resort’, which would *not* be bound to ‘follow the previous decisions of any court on any question of law’.[[78]](#footnote-78) From now on, the ascertainment and application of customary law in Ghana was to be purely a matter for the Ghanaian courts.

Thirdly, the new constitution envisaged developments in common law and its relationship to customary law. From 1960, courts in Ghana were empowered to refer to ‘any exposition’ by ‘a court exercising jurisdiction in any country’ in order to determine ‘the existence or content of a rule of the common law’.[[79]](#footnote-79) This provision liberated courts from the continued interpretation of common law according to English precedents. It thereby severed the previously tight connection between Ghana’s common law and that of its former colonial power, allowing for the influence of local opinions, and practices in other countries, in the setting of future precedents. The constitution also created the potential for a new body of common law to emerge – that is, law which was derived from ‘custom’ and thus originated with specific ethnic groups, but which over time had proved to be so frequent and widespread as to be deemed ‘notorious’, and thus suitable for general application across the population of Ghana.[[80]](#footnote-80)

In a bid to ‘decolonise’ the legal system of Ghana, the republican constitution had strengthened the status of customary law and the role of the courts in ascertaining, applying and developing it. And yet, as John Harrington and Ambreena Manji have recently argued, President Nkrumah knew that the legal profession in Ghana comprised elite African men, whose families had been able to afford the costs of their education in Britain.[[81]](#footnote-81) He therefore feared the conservatism of the very people whom the constitution had empowered. There were two ways out of this dilemma.

The first route entailed a democratisation of the legal profession itself. Thus with Attorney General Geoffrey Bing, President Nkrumah advocated new forms of training that were intended to eliminate the need to travel abroad; reduce the emphasis on litigating for a small number of wealthy individual clients; open up cheaper services to a wider range of clients in need of assistance; and support the government through the provision of technical expertise for planned development, trade treaties, and matters of public and private international law.[[82]](#footnote-82) Speaking at the opening of the Ghana Law School in January 1962, Nkrumah praised Africa’s indigenous traditions of law, whilst rejecting the mutation of those laws under the influence of capitalist penetration, colonial indirect rule, and British legal traditions. In an independent and socialist Ghana, he concluded, ‘the law must represent the will of the people and be so designed and administered as to forward the social purpose of the state’.[[83]](#footnote-83)

This points to a second way out of Nkrumah’s dilemma. As a vanguard party, the CPP could claim back for itself the dominant role in balancing the preservation and valorisation of African customs against advancement to socialist modernity. By passing progressive bills through the parliament, and establishing unambiguous statutes of nationwide application, the party and the government could curtail the scope of judges to embed through precedents their more conservative interpretations of customary and common law.

IX. CPP women

Most accounts of the CPP (party and government) have acknowledged Nkrumah’s special interest women – as mass mobilisers of the vote in election campaigns, and as agents of national development.[[84]](#footnote-84) Recent studies have also noted that Nkrumah nominated Ghana’s first woman judge, Annie Jiagge, for the United Nations Commission on the Status of Women in 1962, and supported an international conference of Women of Africa and African Descent, organised by Evelyn Amarteifio’s organisation in Accra in July 1960.[[85]](#footnote-85) Nkrumah thereby contributed to the creation of spaces in which Ghanaian women could engage in a comparative transnational discussion of discriminatory laws, and become pioneers in international bodies for legal reform.

Critical analyses of the CPP, however, have added three further points. Firstly, governmental measures to broaden women’s opportunities for waged employment and to reduce maternity discrimination went hand-in-hand with sexist and patriarchal attitudes among party members, officials and workers.[[86]](#footnote-86) Secondly, whilst the CPP passed a Representation of the People (Women Members) Act in 1959 in order to bring women into parliament, it did so by creating a woman’s seat in each of the administrative regions, and a male-dominated CPP parliamentary selection committee chose the women candidates.[[87]](#footnote-87) Thirdly, the new cohort of women parliamentarians joined with CPP General Secretary Tawia Adamafio to implement Nkrumah’s desire to see all women’s groups brought together under the national party machinery.[[88]](#footnote-88)

In September 1960, Nkrumah inaugurated the National Council of Ghana Women (NCGW), as the women’s wing in the CPP. The scope for women to organise themselves voluntarily, and articulate demands for legal and other reforms on a non-partisan basis, was drastically curtailed. Even longstanding women party activists, such as Hannah Kudjoe, found that their activities were monitored and their autonomy was reduced.[[89]](#footnote-89) Thus by the time the government had issued its White Paper on Marriage, Divorce and Inheritance in 1961, it had already made a series of moves, first to win over various groups of women as allies, and then to absorb those who were not already CPP activists into the party machinery, so as to bind them into the party agenda.

In a 1991 discussion of women under the CPP, Takyiwaa Manuh commented scathingly on the record of the NCGW. She argued that, like the CPP itself, the NCGW had become petty bourgeois in character, and had allowed itself to be diverted into ‘the nebulous task of “nation-building” ’.[[90]](#footnote-90) More recently, Adwoa Opong concluded that the NCGW ‘could not push any agenda in the interests of Ghanaian women that were at odds with the priorities of the CPP government’.[[91]](#footnote-91) Whilst the broader points of Manuh and Opong are well taken, the following analysis of governmental proposals points to some narrow cracks between the party line and the actions of the party women.

X. White Paper, Work and Happiness

The 1961 government White Paper was not quite a carbon copy of the controversial Ollennu commission report, but it reproduced several of its key recommendations.[[92]](#footnote-92) Firstly, it upheld a strong distinction between family [lineage] property and self-acquired property.[[93]](#footnote-93) Secondly, it recommended that in the case of intestate succession, a surviving spouse should have a *life interest* in one-third of the deceased’s self-acquired property but not inherit it absolutely. Upon the death of the surviving spouse, the children that he/she had conceived with the other deceased spouse would inherit this portion. The other two-thirds of a deceased person’s self-acquired property would be inherited absolutely by his/her children. The White Paper rejected Amarteifio’s proposed distinction between children according to the marital status of their parents, and specified that inheritance rights were to be extended to ‘every child recognised by the deceased as his’.[[94]](#footnote-94) The White Paper paid lip service to the old Federation of Gold Coast Women’s campaign for divorce tribunals and proceedings. But it watered these down by insisting that when a court received a petition for divorce, it should ‘appoint an ad hoc panel of four from the inhabitants of the locality….whose wisdom and experience were respected’. The hearing would be ‘in chambers’ with no lawyers allowed. Reconciliation was to be the first goal, with divorce treated as a last resort.[[95]](#footnote-95)

Most controversial of all was the proposal that marriages should be registered with the government, and that a man should register *only one wife*. The point of this was not exactly to enforce monogamy, for ‘if a man registers a wife and marries or has issue with another woman, this will not constitute an offence nor will the latter action constitute grounds for a divorce’.[[96]](#footnote-96) The point was that *only a registered wife* would benefit from the inheritance provisions described above. The proposal for the registration of only one wife was a clumsy attempt to rectify an earlier controversy over whether bigamy, in the context of ordinance marriages, should be a criminal offence.[[97]](#footnote-97) But it met with uproar, and pleased none of the categories of women who had been produced through colonial-era plural legal frameworks of marriage.

‘Ordinance wives’ would automatically become ‘registered wives’, according to the White Paper. But this diminished the rights they held under the ordinance, by removing their husband’s adultery as a ground for divorce, and by forcing their children to share their inheritance with the children of ‘concubines’. ‘Customary law wives’ married to polygynous men would be forced to compete with one another to become the only registered wife, leaving the unsuccessful women with the sense of being demoted. ‘Concubines’ recognised that when men were married under customary law, their own status could potentially be upgraded to that of ‘wife’, whereas under a new system of ‘one wife registration’, they risked becoming stuck forever in an inferior status (although their children would be guaranteed inheritance rights). According to Vellenga, many women opposed the bill on various grounds. The secretary of the National Council of Ghana Women insisted that the proposals would give men freehand to be ‘mischievous’ and that there should rather be a law to enforce a man’s responsibility ‘for the proper upkeep of any child he has with any woman’.[[98]](#footnote-98)

In the spring of 1962, President Nkrumah directed that the draft bill that was based on the White Paper should be re-examined so as to ensure that prospective legislation would be ‘in line’ with the new party Programme for Work and Happiness.[[99]](#footnote-99) The party programme reminded Ghanaians that the country was on a path to socialist modernity: ‘…the Party stands for complete equality between the sexes and complete equality is, strictly speaking, incompatible with polygamy.’[[100]](#footnote-100) The party programme regarded monogamy as the preferable form of marriage, and the one associated with ‘advanced industrialised nations’.

But recognising that ‘existing polygamous marriages will not disappear with the enforcement by law of monogamy’, the programme was also unambiguous in its opposition to ‘legal or social discrimination against children in the form of illegitimacy which is completely alien to our African custom’. Thus whilst the preference for monogamy was justified through an assertion that it was more ‘advanced’, the rejection of the concept of ‘illegitimacy’ was justified in terms of ‘our African custom’. Despite its indication that polygyny was incompatible with complete equality between the sexes, the party programme stopped well short of a commitment to enforce monogamy.

In May 1962, the Leader of the House appointed a parliamentary committee to examine the provisions of the draft Marriage, Divorce and Inheritance Bill. The text that the Minister of Justice presented to the cabinet in November 1962 retained the commitment to the registration of only one wife, but specified that the spouse of an intestate should have a life interest in only one-sixth of his/her estate.[[101]](#footnote-101) This text appears to have met with resistance from CPP women parliamentarians who had been appointed to the parliamentary committee, for its report indicates that Mrs Susanna Al-Hassan, Miss Regina Asamany, Miss Comfort Asamoah and Mrs Cecilia Bukari had absented themselves from all four meetings, whilst Mrs Sophia Doku had ceased to attend after the first meeting.[[102]](#footnote-102)

In her recollections of this episode nearly a quarter of a century later, Justice Annie Jiagge suggested that women had made use ‘of the political parties’ organizational set-up’ to communicate about the contents and disadvantages of the bill, and she described the following scene:

On the day the Bill was to be debated, women from all over the country descended on Accra and grouped themselves at the market; from there they marched on Parliament House beating on pots and pans and demanding the withdrawal of the Bill….This strategy may seem unorthodox but it worked.[[103]](#footnote-103)

The ‘form, scale and scope’ of women’s agency under the CPP was certainly shaped by the shift to single-party socialism, and constrained by demands for party loyalty. But, if Annie Jiagge’s recollections are accurate, this did not preclude a few small cracks within which party women could manoeuvre. In the final section of this article, we shall see how women parliamentarians worked with the party’s stated commitment to *all* children, shifting the political debate from questions of marriage, divorce and inheritance to those of parental responsibility, so as to finally secure the passage of a child maintenance law.

XI. Doves, hawks and responsible citizens in the debate over child maintenance

First debated in parliament in April 1963, and seen as a reform closely related to the Marriage, Divorce and Inheritance Bill, the Maintenance of Children Bill had subsequently slipped down the political agenda.[[104]](#footnote-104) In February 1965, however, Mrs Susanna Al-Hassan, the Minister for Social Welfare (and the first woman in Ghana to be appointed to a ministerial position), obtained cabinet approval to bring a revised version of the bill back to parliament.

Vellenga’s analysis highlights the weaknesses of the revised bill. It retained the mechanism by which a mother could apply to the Minister of Social Welfare for intervention in cases in which a father had failed to maintain his child. But the minister would only have powers to ‘request’ a father to pay up to five Ghana pounds per month in maintenance, and if the father refused, the mother would have to pursue the matter in court. In instances where a mother had named a man who was not her husband as the father of her child, she could apply to the courts for an affiliation order. Section 21 of the bill empowered a court to make an ‘attachment order’, meaning that maintenance payments would be deducted directly from the salary or pension of a father, where this was a viable option. But this was not viable for the large numbers of men who were not formally employed, and since the proposed sanction of prison for non-payment did not feature in the text of the 1965 bill, Vellenga concluded that it was a weak piece of legislation that left the burden of enforcement on the mother.[[105]](#footnote-105)

Arguably, then, the bill succeeded because it had already been watered down to the point where, having given it cabinet approval, key members of the government could count on party discipline to secure its passage through parliament. The weaknesses of the bill notwithstanding, the parliamentary debates are important because they constitute a fragment of ‘people’s discourse on their own social world’, and they allow a glimpse of sexual-political subjects in the making.[[106]](#footnote-106) More specifically, they enable us to see how women distanced themselves the competitive subject positions of ordinance wife, customary law wife, and concubine; navigated the binary of ‘custom’ and ‘advancement’; and appealed to sociological expertise to legitimise the experiences of *mothers* as a basis for legal reform.

At the crucial second reading in May 1965, Mrs Al-Hassan introduced the bill. Her starting point was ‘custom’: fathers should ‘recognize their responsibility towards their children, as they had traditionally done in the past’.[[107]](#footnote-107) This was uncontroversial, to the extent that no member of parliament dared to venture that fathers in the past had not maintained their children, or that they had not been under any obligation to do so. The challenge for the minister was to persuade her fellow parliamentarians that whilst maintenance was ‘customary’, it could no longer be left in the realm of customary arbitration between couples and their respective lineages but must rather be defined in an Act of Parliament.

The first part of the argument was straightforward. The Department of Social Welfare was handling more than a thousand cases per year ‘of children who exist at subsistence level only’.[[108]](#footnote-108) These cases were documented in departmental offices in regional and district capitals. The information was then used in training junior social welfare officers (at the Accra School of Social Welfare), and in reporting on social problems and departmental responses to the relevant government minister.[[109]](#footnote-109) Social welfare officers concluded that the growing number of requests for their involvement in child maintenance disputes were indicative of the failure of familial arbitration to resolve them. Hence the need for a statute that would render paternal obligations unambiguous and enforceable.

The minister anticipated the objection that such a statute would effectively empower women against men – that is, it would enable a mother to enforce her entitlement to maintenance for children whilst separating the father’s obligation to pay from his own assessment of his other obligations (for example, towards his parents or siblings) and of the mother’s relative merit. The minister, however, was conciliatory on this point: ‘where fathers are exercising their normal responsibility without any lapses, there is no intention to penalise those fathers.’[[110]](#footnote-110) And in situations where mothers had used the legislation to secure a payment order from a court, they too would incur an obligation to use the monies towards ‘nourishment, shelter, and clothing for the child concerned’.[[111]](#footnote-111)

According to the minister, then, this was not a matter of empowering women against men, or of using new statutes to undermine customary relations. It was rather a case of mobilising the power of parliament to define citizens’ gendered responsibilities in a manner consistent with custom, and to render them enforceable by the courts so as to deal with modern-day laxity. This argument enabled the minister to reposition the bill as means by which responsible citizens of both sexes could prevent other citizens from behaving irresponsibly.

Insofar as the neglect of children contributed to poor attendance and performance at school, low standards of behaviour, delinquency, or failure to obtain gainful employment, this was a matter of national interest rather than a cause for conflict between the sexes:

We are all parents, and, as such, expect that the future of this country will very soon pass into the hands of our offspring. Any contribution we can make, therefore, for the upkeep and maintenance of these children so that they may be prepared in every way possible to develop their skills and talents for the service of our Nation, is worthwhile.[[112]](#footnote-112)

The minister thus highlighted the connection between measures to ensure the proper maintenance of children and the future success of the ‘national reconstruction programme in our Socialist Ghana’.[[113]](#footnote-113) She went on to remind her fellow parliamentarians: ‘…principle 2 of the Geneva Declaration of the Rights of the Child of 1924 says, “The child shall enjoy special protection and shall be given opportunities and facilities by law and by other means to enable him to develop...” ’[[114]](#footnote-114) Support for the Maintenance of Children Bill was befitting , she suggested, ‘because we all recognise the need to be up-to-date with our social legislations in this country in order to guarantee the interest of all children….and also to maintain the respect of this country at all times.’[[115]](#footnote-115) The minister pointed out that the state was doing its part through the increased provision of medical care and fee-free education, but this ‘will be of no use unless we bring up our children with the greatest care’.

These bids for consensus, however, were quickly undermined. Mrs Victoria Tagoe (third member from the Northern and Upper Regions) praised the Minister of Social Welfare for introducing the bill. In her view, it would solve a problem that had been around for a long time. Angered by her statement that ‘the men are doing it’ [neglecting to maintain their children], E. Nee Ocansey, Minister for Parks and Gardens, argued on a point of order that only *some* men were doing it: ‘I am not doing it; I am looking after my children, and if her boy friend is not doing so then she should say so.’ He denounced the bill as ‘imperialist’ and demanded that it be ‘taken away’.[[116]](#footnote-116) Ocansey was quickly reprimanded by the Leader of House – not for the personal remark, but for using the term ‘imperialist’ to describe a bill that had been presented to parliament by the government of Ghana. Undeterred, Mrs Tagoe insisted that a bill was necessary so that men would understand the maintenance of their children as a non-negotiable obligation, and not just another expense which they could weigh up against ‘going to night clubs’ and ‘other unnecessary things’.[[117]](#footnote-117)

Citing the constitutional prohibition on ‘distinction in sex, race or religion’, she implied that the absence of a child maintenance law amounted to discrimination against women, because it left them with little choice but to fill all the gaps as best they could through their own toil and with their own resources. When this was not enough to make ends meet, the result was an increase in child neglect:

It means that we the other citizens are going to pay higher income tax for the maintenance of such irresponsible men in the society. We the women Members of Parliament are going to see to it that this Bill is passed…We the women of Ghana cannot sit down and see our men taking undue advantage over us.[[118]](#footnote-118)

Questioning her figures on cases of child neglect in 1964, and implicitly rejecting her argument that men who could not afford to maintain children should delay marriage or stick to just one wife, Mr B. F. Kusi (member for Atwinma-Nwabiagya) demanded to know whether Mrs Tagoe ‘thinks it is right when her husband divorced his first wife to marry her’ – a comment which met with much laughter.[[119]](#footnote-119) Again undeterred, Mrs Tagoe insisted that such arguments were irrelevant: ‘the child is the man’s child, if even he is no longer marrying the woman.’[[120]](#footnote-120)

Mr J. D. Wireko (member for Amansie-East) was one of the fiercest opponents of the bill. In his opinion, it gave ‘an open licence, to some women in this country, to go about hawking, hawking themselves to men’.[[121]](#footnote-121) Ignoring a series of pleas from members for him to withdraw this ‘unparliamentary’ remark, he elaborated on the how the bill would allow a new form of trade: women could be unfaithful, ensconce themselves with new partners (whom they would of course choose with a view to securing their own comforts), and still claim maintenance for their children from whichever man they named as the father. Whereas Mrs Tagoe had insisted that the reluctance of women to take matters outside of family arbitration and into the courts was contributing to the growing problem of child neglect, Mr Wiredu argued that the over-empowerment of women through the courts would lead to a moral breakdown.

Railing against the ‘one-sidedness’ of the bill, Mr Wireko also pointed out that whilst it would empower women to collect maintenance from *living* fathers, it did not solve the problem of how children were to be maintained out of an estate when their father *died* – a matter which would have been addressed in the failed Marriage, Divorce and Inheritance Bill. Alluding, perhaps, to Mrs Al-Hassan’s earlier decision to absent herself from the parliamentary committee on that bill, and the widespread opposition of women to it, he implied that the issues were all inter-related and should have been addressed together in a comprehensive legal reform.[[122]](#footnote-122) In spite of these objections, the Maintenance of Children Bill was voted through parliament and became Act 297 of the Republic of Ghana.

Conclusion

Over the past three decades, poststructuralist legal scholars have argued that ‘the law is a particularly powerful discourse because of its claim to truth’.[[123]](#footnote-123) This reconceptualisation of law-as-discourse has problematised feminist scholars’ legal activism: whereas previous generations studied women’s ‘real life’ experiences in order to reveal and challenge the sexist and patriarchal assumptions and workings of the law, poststructuralists have argued that experience cannot be known outside of established meanings. The ‘project of making experience visible’ is thought to contain at least two related risks.[[124]](#footnote-124)

Firstly, a privileged group of women claim the authority to know and represent diverse others, and thereby obscure difference via an underlying claim to same-ness. This in turn obscures ‘the workings of the ideological system’, because it treats ‘categories of representation’ (including ‘women’) as ‘fixed immutable identities’.[[125]](#footnote-125) The question for poststructuralist feminists, then, is no longer, ‘How do women experience the law?’ or ‘How could the law better respond to the needs and interests of women?’ Instead, they ask how legal discourse produces particular categories of virtuous and deviant women (‘faithful wives’, ‘bad mothers’) – all of which ultimately rest on a prior biological definition of woman in contradistinction to man, and reproduce powerful gender ideologies via the ‘legalisation’ of everyday life.[[126]](#footnote-126)

These debates are relevant to historians, for poststructuralism has also challenged our quest to know and understand the experiences of historical subjects, and it has questioned the ways in which we appeal to evidence in order to confer authority on our analysis.[[127]](#footnote-127) For the historian of women’s campaigns for legal reform in early independent Africa, the dilemma is particularly acute because the related historiographical fields have valorised ‘agency’, and the politics of knowledge production are highly charged. It would be bitterly ironic if a crude or mechanical poststructuralist reading of African women’s campaigns for legal reform finished by representing the participants as mere occupants of the subject positions produced for them by hegemonic legal discourse.

In this conclusion, then, I will return to problem of ‘the form, scale and scope’ of women’s agency, rethinking it, as Kathleen Canning suggests, as a ‘site of mediation between *discourses* and *experiences*’.[[128]](#footnote-128) At first sight, law-as-discourse offers an easy explanation for the failure to achieve consensus on reforms to the marriage, divorce and inheritance laws in early independent Ghana: women reformers and parliamentarians could not transcend the mutually-competitive subject positions of ‘ordinance wives’, ‘customary law wives’ and ‘concubines’ that had been produced by the very same legal frameworks that these women aimed to reform. But such an explanation would over-simplify and over-determine, for we have also seen that the discursive binary of ‘custom’ (enshrined in customary law) versus ‘advancement to modernity’ (enshrined in a socialist party programme) presented several avenues of critique.

The legal category of ‘ordinance wife’ was readily identifiable as an epiphenomenon of colonialism, and ordinance marriage was therefore never accepted as a natural condition of woman in Ghana. Women reformers and parliamentarians sometimes appeared to reify ‘the good native customary marriages’ of their ancestors. But they also recognised that contemporary interpretations of customary marriage often worked to devalue the labour of women as wives, even as these same interpretations retained the possibility that women as sisters might benefit from the absorption of deceased brothers’ property into a lineage.

This brings us back to Mohanty’s argument that it was not a prior coherence of interests, but reflection on *contradictions*, which gave rise to women’s political action.[[129]](#footnote-129) Ghanaian women reformers and parliamentarians of the 1950s and 1960s appear to have been well aware that new categories of woman had been produced through the plural legal frameworks that purported to regulate social relations. And it is not at all clear that these women accepted the truth claims of the law – not least because ‘the law’ in this context was so obviously unstable, multi-authored and tainted by colonialism. In my analysis, then, legal discourses cannot figure as a ‘fixed hegemonic systems without the intervention of agents who render them contingent and permeable’ – not least because legal discourses were multiple, and co-existed uneasily with other political and sociological discourses.[[130]](#footnote-130)

Nonetheless, the possibility of using legislation to direct social behaviour remained very attractive. A handful of bold individuals argued explicitly in the Ghana parliament that the Maintenance of Children Bill would rectify an injustice between the sexes and thereby serve the interests of women. But the responses to such arguments – and indeed the prior history of revisions to the bill – suggest that it passed for a different reason. Speaking as *mothers*, women could claim their authority as defenders of the best interests of the child and thereby assert themselves as responsible citizens with a special stake in the nation’s future. This enabled them to persuade a handful of powerful men that the bill, albeit in a weakened form, would establish an important point of principle and (to paraphrase Nkrumah) ‘forward the social purpose of the state’. This line of argument should not be hastily dismissed as ‘naturalising motherhood’ for women, appealing to binary biological difference, or pleading within the confines of patriarchy. It merits a further close and careful reading, in the light of a long and contentious historical debate about meanings of motherhood in African societies.[[131]](#footnote-131)

1. Dorothy Dee Vellenga, ‘Attempts to change the marriage law in Ghana and the Ivory Coast’ in Philip Foster and Aristide R. Zolberg (eds), *Ghana and the Ivory Coast: Perspectives on Modernization* (U Chicago Press 1971), 125. [↑](#footnote-ref-1)
2. Lynn Thomas, ‘Historicizing Agency’ (2016) 28 (2) Gender and History 324, 325. [↑](#footnote-ref-2)
3. Studies of popular cultural forms (newspapers, fiction, theatre and music) have emphasised their dialogical nature, and the ways in which authors, artists, performers and audiences worked through many of the same issues that troubled the minds of lawyers, judges and would-be reformers. See John Collins, ‘The Jaguar Jokers and *Orphan Do Not Glance*’ in Karin Barber, John Collins and Alain Richard (eds), *West African Popular Theatre* (Indiana UP 1997); Stephanie Newell, *Ghanaian Popular Fiction: ‘Thrilling Discoveries in Conjugal Life’ and Other Tales* (James Currey 2000); Catherine Cole, *Ghana’s Concert Party Theater* (Indiana UP 2001) ch 6; Audrey Gadzekpo, ‘The hidden history of women in Ghanaian print culture’ in Oyérónké Oyěwùmí (ed), *African Gender Studies: A Reader* (Palgrave Macmillan 2005). [↑](#footnote-ref-3)
4. Adwoa Kwakyewaa Opong, ‘Rewriting Women into Ghanaian History 1950-1966’ (MPhil thesis, U Ghana 2012); Naaborko Sackeyfio-Lenoch, ‘Women’s International Alliances in an Emergent Ghana’ (2018) 4 (1) Journal of West African History 27. [↑](#footnote-ref-4)
5. Kevin Gaines, *American Africans in Ghana: Black Expatriates and the Civil Rights Era* (U North Carolina Press 2006); Jean Allman, ‘Phantoms of the Archive: Kwame Nkrumah, a Nazi Pilot named Hanna, and the Contingencies of Post-Colonial History Writing’ (2013) 118 (1) American Historical Review 104; Jeffrey Ahlman, *Living with Nkrumahism: Nation, State and Pan-Africanism in Ghana* (Ohio UP, 2017). [↑](#footnote-ref-5)
6. Chandra Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1988) 30 Feminist Review61, 65. Although there is an obvious comparison to be made between ‘women as a category of analysis’ and ‘gender as a category of analysis’, Mohanty did not reference Joan W. Scott, ‘Gender: A Useful Category of Historical Analysis’ (1986) 91 (5) American Historical Review1053. This is possibly because Mohanty focused on contemporary sociological rather than historical analyses of ‘third-world’ women. [↑](#footnote-ref-6)
7. Mohanty (n6) 80. [↑](#footnote-ref-7)
8. Ibid 80. [↑](#footnote-ref-8)
9. Mohanty’s understanding of power is broadly Foucauldian – see in particular 79. [↑](#footnote-ref-9)
10. Ibid 62. [↑](#footnote-ref-10)
11. Ibid 66. [↑](#footnote-ref-11)
12. Akua Kuenyehia, ‘Women and Family Law in Ghana: An Appraisal of the Property Rights of Married Women’ (1986) 17 U Ghana L J 72; Kofi Awusabo-Asare, ‘Matriliny and the New Intestate Succession Law of Ghana’ (1990) 24 (1) Canadian Journal of African Studies 1; Takyiwaa Manuh, ‘Wives, Children and Intestate Succession in Ghana’ in Gwendolyn Mikell (ed), *African Feminism: The Politics of Survival in Sub-Saharan Africa* (University of Pennsylvania Press 1997). [↑](#footnote-ref-12)
13. Pearl Jones-Quartey, ‘The Effect of the of the Maintenance of Children Act on Akan and Ewe notions of Paternal Responsibility’ in Christine Oppong (ed), *Domestic Rights and Duties in Southern Ghana* (Institute of African Studies 1974); Michael Lowy, ‘Establishing Paternity and Demanding Child Support in a Ghanaian Town’ in Simon A. Roberts (ed), *Law and the Family in Africa* (Mouton 1976); Gwendolyn Mikell, ‘Pleas for Domestic Relief: Akan Women and Family Courts’ in Mikell (ed), *African Feminism* (n 12). [↑](#footnote-ref-13)
14. Gordon R. Woodman, ‘Legal Pluralism and the Search for Justice’ (1996) 40 (2) J Afr L152, 157. [↑](#footnote-ref-14)
15. Bonny Ibhawoh, *Imperial Justice: Africans in Empire’s Court* (Oxford UP 2013) 53. [↑](#footnote-ref-15)
16. Ibid 16. [↑](#footnote-ref-16)
17. Ibid 53. [↑](#footnote-ref-17)
18. As cited in Joseph B. Akamba and Isidore Kwadwo Tufuor, ‘The Future of Customary Law in Ghana’, in Jeanmarie Fenrich, Paulo Galizzi and Tracy E. Higgins (eds), *The Future of African Customary Law* (Cambridge UP 2011) 204 and footnote 8. [↑](#footnote-ref-18)
19. Ibid 205. [↑](#footnote-ref-19)
20. W. C. Ekow Daniels, ‘Towards the Integration of the Laws Relating to Husband and Wife in Ghana’ (1965) 2 (1) U Ghana L J 20, 25. [↑](#footnote-ref-20)
21. Gordon Woodman, ‘The Rights of Wives, Sons and Daughters in the Estates of their Deceased Husbands and Fathers’ in Oppong (ed), *Domestic Rights and Duties* (n 13) 281-2. [↑](#footnote-ref-21)
22. For an intriguing example of the difficulties of fitting Asante understandings of family relationships and entitlements into the conventions of English-language will writing, see T. C. McCaskie, ‘The Last Will and Testament of Kofi Sraha: A Note on Accumulation and Inheritance in Colonial Asante’ (1999) 2 Ghana Studies 171. [↑](#footnote-ref-22)
23. This summary necessarily compresses a wide array of variations and complicating factors. Ghanaian legal scholars have elaborated on these at length. Particularly useful is Ekow Daniels, ‘Towards the Integration’ (n 20) The culmination of Ekow Daniels’ many years of work has recently been published as *The Law on Family Relations in Ghana* (Black Mask Limited 2019). [↑](#footnote-ref-23)
24. The Supreme Court Ordinance of 1876 said nothing about the tribunals that were already operating in the Gold Coast. In 1883, the Native Jurisdiction Ordinance established a framework under which existing native tribunals could obtain from the governor formal recognition of their powers to hear cases and enforce sanctions. But many native tribunals continued to function without this formal recognition. It was not until 1927 that the Native Administration Ordinance clarified the membership and authority of the divisional tribunals and the paramount chief’s tribunal in each of the ‘native states’ of the Gold Coast. (Separate but comparable ordinances were introduced for Asante, the Northern Territories and British Togoland.) The native tribunals were reformed again under the Native Courts (Colony) Ordinance of 1944, which established a series of native courts graded at A, B, C and D, and clarified the rights of appeal into the colonial courts. See Harrison A. Amankwah, ‘Ghanaian Law: Its Evolution and Interaction with English Law’ (1970) 4 (1) Cornell Int L J 37; N. A. Ollennu, ‘The Case for Traditional Courts under the Constitution’ (1970) 7 (2) U Ghana L J 82. [↑](#footnote-ref-24)
25. Stephan Miescher, ‘Of Documents and Litigants: Disputes on Inheritance in Abetifi – a Town of Colonial Ghana’ (1992) 29 (39) J Legal Pluralism 81, 95. [↑](#footnote-ref-25)
26. Ekow Daniels, ‘Towards the integration’ (n 20) 24-5. [↑](#footnote-ref-26)
27. Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge UP 1985) 10. [↑](#footnote-ref-27)
28. Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge UP 1985). [↑](#footnote-ref-28)
29. Chanock (n 27) 12. [↑](#footnote-ref-29)
30. Ibid 12. [↑](#footnote-ref-30)
31. Ibid 192-216. [↑](#footnote-ref-31)
32. Sean Hawkins, ‘ “The Woman in Question”: Marriage and Identity in the Colonial Courts of Northern Ghana 1907-1954’ in Jean Allman, Susan Geiger, and Nakanyike Musisi (eds), *Women in African Colonial Histories* (Indiana UP 2002), 121. [↑](#footnote-ref-32)
33. Ibid. [↑](#footnote-ref-33)
34. Jean Allman and Victoria Tashjian, *‘I Will Not Eat Stone’: A Women’s History of Colonial Asante* (Heinemann, James Currey, David Philip Publishers 2000) xxxvii. [↑](#footnote-ref-34)
35. In this respect, Allman and Tashjian concurred with the argument made by Roger Gocking, ‘Colonial Rule and the “Legal Factor” in Ghana and Lesotho’ (1997) 67 (1) *Africa: Journal of the International African Institute* 61.  [↑](#footnote-ref-35)
36. There is a substantial literature on the production and marketing of cocoa in the Gold Coast and Asante, and the implications of this for the ownership of land, political authority, new forms of capital and consumption, and the recruitment and reward of labour. This literature is too large to be considered in detail here, but key works include: Polly Hill, *Migrant Cocoa-Farmers of Southern Ghana* (Cambridge UP 1963); Sara Berry, *Chiefs Know their Boundaries: Essays on Property, Power and the Past in Asante, 1896-1996* (Heinemann, James Currey, David Philip Publishers 2000); Gareth Austin, *Land, Labour and Capital in Ghana: From Slavery to Free Labour in Asante, 1807-1956* (U Rochester Press 2005). [↑](#footnote-ref-36)
37. Allman and Tashjian (n 34) 60. On the involvement of the state in the regulation of marriage through adultery fines, see T. C. McCaskie, ‘State and Society, Marriage and Adultery: some considerations towards a social history of pre-colonial Asante’ (1981) 22 (4) *Journal of African History* 477. [↑](#footnote-ref-37)
38. Allman and Tashjian (n 34) 51; see also Beverly Grier, ‘Pawns, Porters and Petty Traders: Women in the Transition to Cash Crop Agriculture in Colonial Ghana’ (1992) 17 (2) Signs: Journal of Women in Culture and Society 304. [↑](#footnote-ref-38)
39. Allman and Tashjian (n 34) 70-73. [↑](#footnote-ref-39)
40. Ibid 89. [↑](#footnote-ref-40)
41. Ibhawoh (n 15) 64, referring to the case of Angu v. Attah that was appealed from the Gold Coast to the Judicial Committee of the Privy Council. Angu v. Attah [1874-1928] Privy Co Judg 43 (Ghana 1916). [↑](#footnote-ref-41)
42. Ibid 73. Ibhawoh notes that ‘native assessors’ were more commonly appointed in criminal rather than civil cases, 65. [↑](#footnote-ref-42)
43. John Mensah Sarbah, *Fanti Customary Laws* (first published 1897, William Clowes and Son 1904); J. B Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (G. Routledge & Sons Limited 1928). [↑](#footnote-ref-43)
44. Ibhawoh (n 15) ch 3. [↑](#footnote-ref-44)
45. The Akan-speaking peoples include Fante, Akwapim, Akyem, Brongs and Ahafos. [↑](#footnote-ref-45)
46. Meyer Fortes, ‘Kinship and Marriage among the Ashanti’ in A. R. Radcliffe-Brown and Daryll Forde (eds), *African Systems of Kinship and Marriage* (first published 1950, Oxford UP 1975). [↑](#footnote-ref-46)
47. Gordon R. Woodman, ‘Some Realism about Customary Law - the West African experience’ (1969) Wisconsin L R 128. [↑](#footnote-ref-47)
48. Ibid 141-3. [↑](#footnote-ref-48)
49. Allman and Tashjian (n 34) 107-10 comment on the evolution of the distinction between lineage and self-acquired property, and the importance of solemnizing gifts *inter vivos*. [↑](#footnote-ref-49)
50. On the expansion of cities, and increases in the value of urban real estate, see T. C. McCaskie, *Asante Identities: History and Modernity in an African Willage 1850-1950* (Edinburgh UP, Indiana UP 2000); and John Parker, *Making the Town: Ga State and Society in Early Colonial Accra* (Heinemann, James Currey, David Philip Publishers 2000). [↑](#footnote-ref-50)
51. Manuh (n 12) 83. [↑](#footnote-ref-51)
52. Ibid 83. See also Woodman, ‘Some Realism about Customary Law’ (n 47) 140 and footnote 63. Kosia v. Nimo [1948-51] DC (Land) 239 (1950). [↑](#footnote-ref-52)
53. As cited in Allman and Tashjian (n 34) 121. [↑](#footnote-ref-53)
54. Takyiwaa Manuh, ‘Women and their organisations during the Convention People’s Party period’ in Kwame Arhin (ed), *The Life and Work of Kwame Nkrumah* (Sedco, Africa World Press 1991). [↑](#footnote-ref-54)
55. Opong (n 4) 46. Opong’s careful research in Evelyn Amarteifio’s personal papers unearthed her CPP membership card. [↑](#footnote-ref-55)
56. Ibid 47. [↑](#footnote-ref-56)
57. I will refer to the Evelyn Amarteifio papers as EAP. Some papers were placed into labeled thematic files by Amarteifio, whilst others have been placed into groups by researchers who have picked their way through the boxes. Other papers are simply gathered together in unlabeled boxes. [↑](#footnote-ref-57)
58. EAP, file labeled ‘Marriage, Inheritance and Family Life’, document titled ‘Our campaign for the legalization of native customary marriages’ (n.d.). [↑](#footnote-ref-58)
59. The books by John Mensah Sarbah and J. B. Danquah are cited above. The other book to which the federation referred here was Margaret Field, *Social Organization of the Ga People* (Crown Agent for the Colonies 1940). [↑](#footnote-ref-59)
60. EAP. File labeled ‘Marriage, Inheritance and Family Life’, document titled, ‘Our campaign for legalization of native customary marriages’ (n.d.). [↑](#footnote-ref-60)
61. EAP, file labeled ‘Marriage Guidance’, document titled ‘Federation of Gold Coast Women Marriage Councils’ (n.d.). [↑](#footnote-ref-61)
62. Ibid. [↑](#footnote-ref-62)
63. Quartey v. Martey [1959] Ghana L R 377. I am grateful to Nana-Anna Abaka-Cann of the University of Cape Coast, for providing me with a full text of the judgment and explaining its significance to me. [↑](#footnote-ref-63)
64. [1959] Ghana L R 390. [↑](#footnote-ref-64)
65. [1961] AC 481. [↑](#footnote-ref-65)
66. Dorothy Dee Vellenga, ‘Who is a Wife? Legal Expressions of Heterosexual Conflicts in Ghana’ in Christine Oppong (ed), *Female and Male in West Africa* (George Allen and Unwin 1983). 144-155. Vellenga does not discuss Coleman v. Shang in detail here, but does so in her other work, including ‘Attempts to change the marriage laws’ (n 1). [↑](#footnote-ref-66)
67. Ernest K. Bankas, ‘Problems of Intestate Succession and Conflict of Laws in Ghana’ (1992) 26 Intl Law433. [↑](#footnote-ref-67)
68. Vellenga, ‘Attempts to Change the Marriage Laws’ (n 1) 139. I was not able to find an official copy of the commission’s report in the Ghana national archives in Accra (Public Administration and Records Department, hereafter PRAAD), although finding aid ADM 5/3 contains the reports of many other commissions. The government’s 1961 White Paper on Marriage, Divorce and Inheritance does, however, state that the ‘report of the Commission has received close study by the Government’ (para. 19). [↑](#footnote-ref-68)
69. EAP, file labelled ‘Marriage, Inheritance and Family Life’, Ollennu Commission draft report, 2. [↑](#footnote-ref-69)
70. Ibid 6. [↑](#footnote-ref-70)
71. Ibid 9. [↑](#footnote-ref-71)
72. Part I, 9, and Second Instalment 2. [↑](#footnote-ref-72)
73. Second Instalment 2. [↑](#footnote-ref-73)
74. EAP, file labeled ‘Marriage, Inheritance and Family Life’, letter from Permanent Secretary, Ministry of Local Government, to Evelyn Amarteifio, 17 Dec 1959, followed by Amarteifio’s response. [↑](#footnote-ref-74)
75. EAP, file labeled ‘Marriage, Inheritance and Family Life’, letter from Evelyn Amarteifio to Permanent Secretary, Ministry of Local Government, (n.d. but probably late December 1959). [↑](#footnote-ref-75)
76. Woodman, ‘Legal Pluralism’ (n 14). [↑](#footnote-ref-76)
77. Kwamena Bentsi-Enchill, ‘Choice of Law in Ghana since 1960’ (1971) 8 (2) U Ghana L J 59, 60. [↑](#footnote-ref-77)
78. Ibid 59, referring to article 42 (4) of the 1960 constitution. [↑](#footnote-ref-78)
79. Bentsi-Enchill (n 77) 60, referring to section 17 (4) of the 1960 Interpretation Act. [↑](#footnote-ref-79)
80. Bentsi-Enchill (n 77) 60-1. [↑](#footnote-ref-80)
81. John Harrington and Ambreena Manji, ‘ “Africa needs many lawyers trained for the need of their peoples”: struggles of legal education in Kwame Nkrumah’s Ghana’ (2019) 59 (2) Am J Legal Hist 149. [↑](#footnote-ref-81)
82. Kwame Nkrumah, speech given at the opening of the Accra Conference on Legal Education and the Ghana Law School, 4 Jan 1962, and subsequently published as ‘Ghana: Law in Africa’ (1962) 6 (2) J Afr L103. The speech is also cited in Harrington and Manji (n 81). [↑](#footnote-ref-82)
83. Nkrumah, ‘Ghana: Law in Africa’ (n 82) 103, and also cited in Harrington and Manji (n 81). [↑](#footnote-ref-83)
84. Edzodzinam Tsikata, ‘Women’s political organisations 1951-1987’ in Emmanuel Hansen and Kwame Ninsin (eds), *The State, Development and Politics in Ghana* (CODESRIA 1989); Takyiwaa Manuh (n 54); Mansah Prah, ‘Chasing Illusions and Realising Visions: Reflections on Ghana’s Feminist Experience’ in Signe Arnfred (ed), *Gender Activism and Studies in Africa* (CODESRIA 2004); Eric Sakyi Nketiah, ‘A History of Women in Politics in Ghana, 1957-1992’ (MPhil thesis, University of Cape Coast 2005); Jean Allman, ‘The disappearing of Hannah Kudjoe: Nationalism, Feminism, and the Tyrannies of History’ (2009) 21 (3) Journal of Women’s History 13. [↑](#footnote-ref-84)
85. On Annie Jiaggie, see D. E. K. Amenumey, *Outstanding Ewes of the 20th Century* (Organization for Research on Eweland 2002) ch 8; and Deborah Atobrah and Albert K. Awedoba, ‘A trail-blazer, an outstanding international jurist, a humanitarian, an ecumenical Christian, and more….the life of Justice Annie Jiagge (née Baëta)’ in Mercy Akrodi Ansah and Esi Sutherland-Addy (eds), *Building the Nation: Seven Notable Ghanaians* (Institute of African Studies 2018). On the conference of Women of Africa and African Descent, see Opong (n 4) and Sackeyfio-Lenoch (n 4). [↑](#footnote-ref-85)
86. Ahlman (n 5) particularly ch 3 (on the Builders’ Brigades) and ch 5 (on the pan-African workplace). [↑](#footnote-ref-86)
87. Dzodzi Tsikata, ‘Affirmative Action and the Prospects for Gender Equality in Ghanaian Politics’ (Abantu, Women in Broadcasting, and Friedrich Ebert Stiftung 2009). The notes of the selection committee can be found in the Ghana national archives, PRAAD, SC BAA 126, Women MPs. [↑](#footnote-ref-87)
88. Tawia Adamafio, *By Nkrumah’s Side: the labour and the wounds* (Westcoast, Rex Collings 1982) 113-20. [↑](#footnote-ref-88)
89. Allman, ‘The disappearing of Hannah Kudjoe’ (n 84). [↑](#footnote-ref-89)
90. Manuh, ‘Women and their Organisations’ (n 54) 129. [↑](#footnote-ref-90)
91. Opong (n 4) 95. [↑](#footnote-ref-91)
92. Republic of Ghana, ‘White Paper on Marriage, Divorce and Inheritance’ (Government Printer 1961). [↑](#footnote-ref-92)
93. Ibid s 17. [↑](#footnote-ref-93)
94. Ibid s 19. [↑](#footnote-ref-94)
95. Ibid s 11-15. [↑](#footnote-ref-95)
96. Ibid s 7. [↑](#footnote-ref-96)
97. This controversy is summarized in s 4 and 5 of the White Paper. [↑](#footnote-ref-97)
98. Cited in Vellenga, ‘Attempts to Change the Marriage Laws’ (n 1) 143. [↑](#footnote-ref-98)
99. PRAAD, ADM 14/6/10, Office of the President: Future Legislation, 1962. Minutes of a meeting of the cabinet held on 17 April 1962. [↑](#footnote-ref-99)
100. CPP, *Programme for Work and Happiness* (1962) 34-5, as cited in Vellenga, ‘Attempts to change the marriage laws’ (n 1) 143-4. The subsequent quotations from the programme are also as cited by Vellenga. [↑](#footnote-ref-100)
101. PRAAD, ADM 13/2/98 Cabinet Agenda. Cabinet Memorandum by the Minister of Justice, 20 Nov 1962, and accompanying text of Marriage, Divorce and Inheritance Bill. [↑](#footnote-ref-101)
102. PRAAD, ADM 13/12/98. ‘Report from the Parliamentary Committee on Marriage, Divorce and Inheritance to the Leader of the House’. [↑](#footnote-ref-102)
103. Annie Jiagge, ‘The State, the Law, and Women’s Political Rights’ (1986) 7 (1) Canadian Journal of African Studies 43, 44. [↑](#footnote-ref-103)
104. The parliamentary debate of 1963 is discussed in detail in Dorothy Dee Vellenga, ‘Changing Sex Roles and Social Tensions in Ghana: The Law as Measure and Mediator of Family Conflicts’ (PhD dissertation, Columbia U 1975) ch 10. [↑](#footnote-ref-104)
105. Ibid. [↑](#footnote-ref-105)
106. Karin Barber, *I Could Speak Until Tomorrow: Oriki, Women and the Past in a Yoruba town* (Edinburgh UP 1991), 2. [↑](#footnote-ref-106)
107. Parliamentary Debates, 19 May 1965, column 40. [↑](#footnote-ref-107)
108. Ibid. [↑](#footnote-ref-108)
109. Jones-Quartey (n 13). [↑](#footnote-ref-109)
110. Parliamentary Debates, 19 May 1965, column 40. [↑](#footnote-ref-110)
111. Ibid, column 42. Penalties for the misapplication of payments were indeed set out in s 17 of the bill. [↑](#footnote-ref-111)
112. Parliamentary Debates, 19 May 1965, column 41. [↑](#footnote-ref-112)
113. Ibid, column 40. [↑](#footnote-ref-113)
114. Ibid, column 43. [↑](#footnote-ref-114)
115. Ibid, column 43. [↑](#footnote-ref-115)
116. Ibid, column 45. [↑](#footnote-ref-116)
117. Ibid, column 47. [↑](#footnote-ref-117)
118. Ibid, column 47. [↑](#footnote-ref-118)
119. Ibid, column 48. [↑](#footnote-ref-119)
120. Ibid, column 49. The use of the present continuous tense (‘no longer marrying the woman’) was probably deliberate. It is indicative of an understanding of marriage as an ongoing relationship based on mutual obligations and expectations. [↑](#footnote-ref-120)
121. Ibid, column 52. [↑](#footnote-ref-121)
122. Ibid, column 54. [↑](#footnote-ref-122)
123. Carol Smart, ‘Law’s Power, the Sexed Body, and Feminist Discourse’ (1990) 17 (2) J L and Soc 194, 195. Smart acknowledges that Michel Foucault himself did not identify law as a discourse which claimed to be a science (196). However, in the specialised language and method of the law, Smart sees ‘sufficiently similar’ claims to truth and deployment of power (197). [↑](#footnote-ref-123)
124. Joan W. Scott, ‘The Evidence of Experience’ (1991) *Critical Inquiry* 17 (4) 773, 778 [the phrase seemed pertinent, although Scott was not referring specifically to feminist legal activism]. [↑](#footnote-ref-124)
125. Scott (n 124) 778, also cited in Kathleen Canning, ‘Feminist History after the Linguistic Turn: Historicizing Discourse and Experience’ (1994) 19 (2) Signs: Journal of Women in Culture and Society 368, 375. [↑](#footnote-ref-125)
126. Carol Smart, ‘The Woman of Legal Discourse’ (1992) 1 Social and Legal Studies 29, particularly 36-8. [↑](#footnote-ref-126)
127. See Scott (n 124), and a counter-critique by Canning (n 125). [↑](#footnote-ref-127)
128. Canning (n 125) 378, but my emphasis. [↑](#footnote-ref-128)
129. Mohanty (n 6). [↑](#footnote-ref-129)
130. Canning (n 125), 377. [↑](#footnote-ref-130)
131. To take but two of many possible examples: Lorelle D. Semley, *Mother is Gold, Father is Glass: Gender and Colonialism in a Yoruba Town* (Indiana UP, 2011); Cherryl Walker, ‘Conceptualising Motherhood in Twentieth Century South Africa’ (1995) 21 (3) Journal of Southern African Studies 417. [↑](#footnote-ref-131)