

5

NORTHERN REGION, GHANA

THE DAGOMBAS

(Savelugu, Tamale, Tolon, Yendi)

RESTATEMENT OF THE LAW OF MARRIAGE AND DIVORCE

by

ARTHUR NYLANDER, Ph.D.

(Research Officer, School of Oriental & African
Studies, London)

MARRIAGE (PAG-KPUGUBO)

I. CAPACITY AND CONSENTS

1. Personal Capacity.

(a) Age.

Capacity to marry is not determined by age but by physical development.

No person shall marry before the attainment of puberty.

(b) Physical Conditions.

Physical deformity, deafness, dumbness, blindness are not legal bars to marriage.¹

Leprosy (Konga) and mental disability i.e. insanity (Yinyare) are legal bars to marriage.

(c) Marital status.

A man may enter into any number of marriages.

No woman shall contract a marriage during the subsistence of a prior one.

Capacity to contract a customary marriage is independent of and is not affected by the requirements for contracting a statutory marriage.²

No person shall contract a customary marriage during the subsistence of a prior statutory marriage. (See s. 14(4) of the Marriage Ordinance, Cap. 127.).

2. Consents.

(a) Spouses.

The prior consent of both spouses is not essential to the validity of a marriage.

(b) Of the families of the spouses.

(i) Of the family of the man.

The consent of the man's family is essential to the validity of a marriage. The family is represented by the head of the man's family (Dogri-Kpema).

1. These may be social bars.

2. i.e., a marriage under the Marriage Ordinance, Cap. 127.

(ii) Of the family of the woman.

The consent of the woman's family is essential to the validity of a marriage. The family is represented by the head of the woman's family (Dogri-Kpema).

(iii) Of the first or senior wife (Paani).

The consent of the Paani is not necessary before the husband takes a subsequent wife.

3. Prohibited Degrees. (Chiha)

(a) Consanguinity (Zim).

With the exception of cross cousin marriages (see Dogri-Paga II. 1(b)(i) infra), a person shall not marry his/her blood relations.

Thus: A man may not marry any woman who is:

- (i) his direct paternal or maternal ascendant or descendant;
- (ii) his sister (full, consanguine or uterine)
- (iii) parallel cousin
- (iv) aunt or niece

(b) Affinity.

A man may not marry the following relations of affinity:

Ascendant or descendant of his wife;
The sister of his wife, divorced wife or dead wife;
The divorced wife or widow of his ascendant or descendant;
The divorced wife or widow of his brother.

(c) Fosterage.

A man may not marry:

His foster sister;
His foster mother;
Foster sister of his wife or divorced wife;
Mother of his foster mother.

(d) Unlawful Conjunction.

A man may not marry at the same time or successively two women, so related to each other by consanguinity, affinity or fosterage that they could not have lawfully intermarried with each other if they had been of different sexes.

Thus a man may not marry at the same time or successively two sisters¹ (whether full, consanguine, uterine or foster) or an aunt and her niece.

4. Other bars to Marriage.

(a) Ethnic.

There are no ethnic bars to marriage.

A Dagomba can marry a person from another ethnic group.

1. A Chief (Na) may, however, marry twin sisters.

(b) Religious.

There are no religious bars to marriage. A Muslim may marry a non-Muslim.

(c) Class/Occupational.

There are no occupational bars to marriage.

II. FORMATION OF MARRIAGE

1. Types of Marriage.

There is only one type of Marriage (Pag-kpugubo).

Of this, there are several forms.

(a) Non-arranged Marriage.

The man or the woman marries a person of his/her own choice.

(b) Arranged Marriage.

(i) Cross cousin marriage (Dogri-paga).

E.g. a union between a man and the daughter of his father's sister. The marriage payments are considerably less with this form of marriage.

(ii) Marriage of a person to another chosen by his/her head of the family (Dogri-kpema).

2. Marriage Negotiations.

(a) By Betrothal (Pag-pini)

The standard procedure for negotiating a marriage is by betrothal (pag-pini). This is initiated as follows:-

(i) In non-arranged marriages, the man takes the initiative of seeking a spouse. When he has obtained the woman's consent, she asks him to visit her female guardian (wumsira). The man then pays repeated visits to the wumsira presenting on each occasion gifts of yams, cola nuts, tobacco, firewood, straw shutters (karo) guinea fowls or small sums of money. These gifts are known as Diendi. After several visits the man informs the female guardian that he intends to marry the woman. The female guardian advises him to approach the head of the woman's family (Dogri-kpema). The man then makes several visits to the head of the woman's family presenting gifts (diendi) on each occasion. He tells the head of his intention to marry the woman. If the head of the woman's family approves of the union, he sends for the head of the man's family (Dogri-kpema). When the heads of the two families meet, the betrothal is announced. The head of the man's family then presents gifts (pag-puhugu, see III. 2 infra) as a confirmation of the betrothal.

(ii) In arranged marriages, the marriage negotiations leading to a betrothal are conducted by the head of the family (Dogri-kpema) of the man or the woman.

(b) By Elopement

Non-arranged marriages may also be negotiated by elopement. A man elopes with a woman and then informs the head of his family (Dogri-kpema). The Dogri-kpema then approaches the Chief (Na)¹ and asks him to intercede on the elopers' behalf with the head of the woman's family in order to obtain the latter's consent. When the consent is given, the head of the man's family then presents the Sandani i.e. a sum of money and cola nuts in lieu of all the marriage payments that should have been made.²

3. Betrothal (Pag-pini)

(a) At what time betrothal comes into effect.

Betrothal between a man and a woman comes into effect when the Pag-puhugu (see III. 2 infra) has been presented by the head of the man's family (Dogri-kpema) and accepted by the head of the woman's family (Dogri-kpema).

(b) Legal Consequences of Betrothal.

(i) On the betrothed parties inter se.

With the exception of the right of the female betrothed to marry the male betrothed, she acquires no legal rights by reason of the betrothal.

The male betrothed acquires certain legal rights by reason of the betrothal, viz:

The male betrothed has the right to marry the female betrothed. The male betrothed has a right to claim compensation from third parties for seduction of his betrothed. The male betrothed can sue the head of the woman's family for breach of promise of marriage. The compensation is the refund of all the expenses that have been incurred by the male betrothed and/or the head of his family.

(ii) On the families of the betrothed.

The legal rights of the family of the male betrothed remain unchanged.

The female betrothed is still under the guardianship of the head of her family (Dogri-kpema).

The legal rights of the family of the female betrothed are limited to the extent of the rights conferred on the male betrothed by the betrothal. (see II. 3(b) supra.)

(c) Termination of Betrothal.

Betrothal may be terminated in one of the following ways:-

(i) Repudiation by the man or the woman either expressly or by implication e.g. if the woman decides to marry some other person.

(ii) Marriage by the betrothed parties subsequently.

1. The Chief is paid a fee of not less than 12/-.

2. The Sandani includes the pag-suhugu (marriage consideration) (see III.3 infra).

(iii) Mutual agreement of the parties and/or the heads of their families.

(iv) Death of either of the betrothed parties.

(d) Effect of termination of Betrothal on Marriage Payments.¹

In the event of termination of the betrothal by the woman's repudiation, the marriage payments are recoverable.

In the event of termination of the betrothal by the man's repudiation, the marriage payments are not recoverable.

No marriage payment shall be recoverable in the event of termination of betrothal by mutual agreement or by the death of the parties.

(e) Effect of termination of betrothal on children.

Children conceived or born during betrothal where marriage does not follow, are affiliated to the man, if he was responsible for the conception.

If the conception was by a third party, children conceived or born during betrothal where marriage does not follow are affiliated to the woman's father.²

4. Marriage Ceremonies and Formalities.

The following marriage ceremonies and formalities take place:-

(i) The announcement of the betrothal by the heads of the two families.

(ii) The confirmation of the betrothal with the Pag-puhugu (See III. 2 infra) by the pouring of libation and the sacrifice with the white cock.

(iii) Saande - the hospitality given to the man and woman who accompanies the bride to the matrimonial home. They are welcomed with a drink of water and a hen is killed to provide food for them.

(iv) The presentation of cola nuts and some money (usually 6/- or 12/-) to the head of the bride's family, if the bride is chaste.³

5. Essentials of a valid marriage.

The essentials of a valid marriage are:

(a) Capacity.

The parties must have the capacity to marry each other. (see I.1, I.3 supra).

(b) Consent.

The families of the spouses must consent to the union. (See I.2(a), (b) supra).

1. See also Section III infra.

2. Such a child is known as Sheeje-bila (illegitimate child).

3. Usually 22, 40 or 100 cola nuts are presented. If the bride is not chaste, the cola nuts are still presented but one cola nut will be split to signify her unchastity. No money is presented in this case. These cola nuts and/or the money are not recoverable.

(c) The payment of the marriage consideration (Pag-suhugu).

III. MARRIAGE PAYMENTS.

The following marriage payments are made:

1. Diendi, Jembu or Pag-Bobu.

These are gifts of yams, cola nuts, tobacco, guinea fowls, firewood, straw shutters (karo) or small sums of money presented by the man or his Dogri-kpema on festival days or on visits to a girl's guardian (wumsira) and/or the head of her family. This is not essential to the validity of the marriage.

Return of the gifts.

On the termination of the betrothal. See II. 3(d) supra.

On the dissolution of the marriage.

The gifts are not recoverable on the dissolution of the marriage.

2. Pag-Puhugu (Betrothal gifts).

Character of the Pag-puhugu.

These are gifts presented for the confirmation of the betrothal. They consist of a pot of native beer (pito), a white cock, 42 or 100 cola nuts and a sum of money.

The gifts are not essential to the validity of the marriage.

Source of the gifts.

They are presented by the man or the head of his family (Dogri-kpema).

Time for presenting the gifts.

The gifts are presented after the head of the woman's family has agreed to the betrothal or as soon as possible after the announcement of the betrothal by the heads of the two families.

Distribution of the gifts.

The cola nuts and money are shared among members of the woman's family. The pot of pito is used for libation and entertaining members of the woman's family. The white cock goes to the head of the woman's family for sacrifice.

Return of the gifts.

On termination of betrothal. See II 3(d) supra.

On the dissolution of the marriage.

The gifts are not recoverable.

3. Pag-suhugu (Marriage consideration)

Character of the Pag-suhugu.

The pag-suhugu consists of cola nuts and money. It is usually 22, 40 or 100 cola nuts and 6/-, 12/-, 22/- or 40/- depending on the wealth of the man's Dogri-kpema. The Pag-suhugu is essential to the validity of a marriage.¹

1. In the case of marriage by elopement (see II. 2(b) supra), the pag-suhugu (marriage consideration) is included in the sandani.

Source of the marriage consideration.

The man or the head of his family is responsible for the payment of the marriage consideration.

Time for payment of the marriage consideration.

The marriage consideration is paid when the male betrothed is ready to perform the marriage ceremonies and to claim his bride. 1

Distribution of the marriage consideration.

The marriage consideration is distributed among members of the bride's family by her Dogri-kpema.

Effect of payment of the marriage consideration.

There can be no valid marriage without the payment of the marriage consideration. The marriage consideration is essential to the validity of a marriage.

The non-payment of the marriage consideration has no effect on the legitimacy of the children conceived or born during betrothal.

Return of the marriage consideration.

(i) Upon the death of either party.

The marriage consideration is not recoverable.

(ii) Upon Divorce.

In the event of divorce at the instance of the husband, the marriage consideration is not recoverable.

In the event of divorce at the instance of the wife, the marriage consideration is recoverable.

4. Funeral Dues (Dienbuni)

These are gifts in cash or in kind provided by a husband in the performance of the funeral ceremonies of his wife's relation. The amount is not fixed but depends on the relationship of the deceased to the wife.

Return of the gifts

On the dissolution of the marriage.

In the event of a divorce by the husband, these gifts are not recoverable.

In the event of a divorce by the wife, these gifts are recoverable.

On the death of either party, these gifts are not recoverable.

IV. MATRIMONIAL RIGHTS AND DUTIES

1. Residence.

Marriages are virilocal and the wife must live in the matrimonial home set up by her husband.

1. In cases of marriage by elopement (See II. 2(b) supra) the Sandani which includes the pag-suhugu is paid immediately the head of the woman's family has given his consent to the union.

2. Ranking of Wives.

The wives are ranked according to the order in which they are married.

3. Effect of ranking of Wives.

The first (or senior) wife (Paani) is in a privileged position. She divides the domestic duties among the other wives, and supervises the general running of the compound.
She keeps the grains for sowing.

4. Leaving the Matrimonial Home.

A wife may leave the matrimonial home temporarily with her husband's permission (implied or expressed);

- (i) To visit her parents and relatives;
- (ii) for the purposes of her business and employment;
- (iii) in the performance of her duties as a wife;
- (iv) for other reasonable purposes.

5. Guardianship of Wife.

On marriage, guardianship of a woman passes from her father to her husband. This:

- (i) gives the husband the right to institute or defend legal proceedings on the wife's behalf;
- (ii) makes the husband liable for the debts of his wife and for the payment of compensation in tort or contract on her behalf;
- (iii) gives the husband the right to advise her as regards her business transactions.

6. Maintenance.

A husband is under a duty to maintain his wife during the subsistence of the marriage, by providing clothes, food and other items necessary for the maintenance of the household. The duty to maintain ceases if the wife abandons the matrimonial home without just cause.

7. A wife's duties include:

- (i) preparation of food and maintenance of the household;
- (ii) bear and care for the children;
- (iii) obeying her husband's lawful commands and observing his taboos;
- (iv) sowing of seeds and harvesting.

8. Sexual Rights.

The husband has the sole right to have sexual intercourse with his wife.

There is a corresponding duty on the part of the husband to refrain from sexual intercourse with other women not married to him.

Sexual intercourse cannot be refused unreasonably by either husband or wife to each other.

9. Chastisement.

The husband has a right to chastise his wife for her misconduct. This right must be exercised reasonably.

10. Wife's Property.

See VI. A.5(b) infra.

V. MATRIMONIAL OFFENCES

1. Remedies for Immoral Practices (Datari)

There are three different remedies for matrimonial offences.

(a) Ritual ceremony.

This consists in the presentation of livestock for purification and ritual cleansing called datari. It is performed in cases of adultery where the male adulterer is related to the woman's husband.

(b) Monetary Compensation.

Formerly, compensation was made in coweries.

Monetary compensation is a modern development. The amount is not fixed. It is awarded by a Local Magistrate Court.

(c) Termination of the marriage by Divorce.

This could be done judicially or extra-judicially.

2. Matrimonial Offences.

(a) Adultery (Dargolim).

Any man who commits adultery with another man's wife is liable to pay a certain sum¹ and a sheep.

If the offender and the woman's husband are within the same family (dom) the offender is whipped and he has to perform a ritual ceremony "to drive away the dirt" called datari with fowls or a goat. The fowls or goat are eaten by the offender and the husband alone; the remnants should be buried.

Modern Development. An aggrieved husband may now sue the paramour for monetary compensation in a Local Magistrate Court.

Adultery is also a ground for Divorce.

(b) The following are matrimonial offences for which the offender was liable to pay compensation in coweries; and on the establishment of the Local Magistrate Court, is liable to be sued therein for monetary compensation:

- (i) Seduction of a married woman;
- (ii) Removing a betrothed girl (pag-bila) from her father's custody;
- (iii) Impregnating a betrothed girl (pag-bila);
- (iv) Death in childbirth as a result of the impregnation.

(c) For other matrimonial offences, see Grounds for Divorce, infra.

VI. DISSOLUTION OF MARRIAGE

A marriage can be dissolved by the act of the parties, e.g. by divorce or by death of one of the parties.

A. DISSOLUTION BY DIVORCE

1. Procedure for Divorce.

A divorce may either be arranged or agreed upon extra-judicially, or be granted by a court.

1. Usually 54,000, about 54/-.

(a) Divorce out of court. (extra-judicial divorce).

This is a unilateral dissolution of the marriage by either party. In the event of divorce by the husband the wife is taken back by a messenger (chemilana) to her father's house.

(b) Judicial Divorce.

Persons married according to customary law may have their marriage dissolved in the Local Magistrate Court. (see Court Acts, 1960)(C.A.9).

The Superior Courts of Ghana have no original jurisdiction to dissolve such marriages.

(c) Divorce by Mohammedan Law:

Any dissolution of marriage effected according to Mohammedan Law should be registered (see s. 7 of the Marriage of Mohammedans Ordinance (Cap 129, 1951 ed.)

2. Commencement of Divorce Proceedings.

Divorce proceedings (judicial or extra-judicial) may be commenced at any time, provided that no proceedings may be commenced by a husband when the wife is ill or pregnant.

3. Time at which Divorce becomes effective.

The time at which a divorce becomes effective and the woman becomes free to re-marry is as follows:-

- (i) in the case of an extra-judicial divorce by the husband, when the wife is taken back by a messenger (chemilana) to her father's home;
- (ii) in the case of an extra-judicial divorce by a wife, when she returns to her father's house without an animo revertendi;
- (iii) in the case of judicial divorce, when the decree of dissolution is pronounced by the court (provided there is no appeal);
- (iv) in the case of a Mohammedan divorce, at the time of the registration of the divorce.

4. Grounds for Divorce.

(a) Against the Wife.

- (i) Habitual Adultery
- (ii) Adultery during Pregnancy
- (iii) Breach of confidence, e.g. giving out family secrets
- (iv) Disobedience
- (v) Idleness and Laziness
- (vi) Theft
- (vii) Witchcraft
- (viii) Refusal to render conjugal rights without just cause
- (ix) Deliberately breaking the husband's food calabash (sagmani)
- (x) Surreptitiously taking the husband's food calabash (sagmani) outside the compound
- (xi) Striking the husband with a pestle (savuri).

(b) Against the Husband.

- (i) Impotence
- (ii) Failure to provide sufficiently for the wife
- (iii) Cruelty
- (iv) Habitual Adultery
- (v) Failure to perform the funeral ceremonies of a wife's relation
- (vi) Witchcraft
- (vii) Refusal of household to take food prepared by wife.

5. Effect of Divorce.

(a) On the marriage payments:

See Section III, supra.

(b) On property:

The self-acquired property of the wife and property given to her are under her care and control. She can take such property away on the dissolution of the marriage. Property given to the wife by the husband for use in the matrimonial home is under the control of the husband and belongs to him on the dissolution of the marriage.

(c) On children:

On divorce, the husband has a right to the custody of the children.

(d) On right to re-marry:

(i) On right of the husband:

A man may contract a further marriage whether or not a prior marriage has been dissolved.

(ii) On right of the wife:

A woman may re-marry only after the dissolution of her prior marriage has taken place.

(e) On maintenance:

(i) Of divorced wife:

There is no obligation on the husband to maintain a divorced wife.

(ii) Of children:

A father is obliged to maintain the issues of his dissolved marriage.

B. DISSOLUTION OF MARRIAGE BY DEATH

1. Death of either spouse.

The death of a spouse automatically terminates the marriage.

2. Effect of Death.

(a) On custody of the children.

On the death of either party, the husband (or the family of the deceased husband) has a right to the custody of the children of the marriage.

(b) On the marriage payments.

See III, supra.

(c) On property.

See Restatement on Succession.

(d) On right to re-marry:

(i) On right of the husband:

A man may contract a further marriage whether or not a prior marriage has been dissolved by death.

(ii) On right of the wife:

A widow may only re-marry after her prior marriage has been terminated.

VII. MARRIAGE UNDER STATUTORY LAW

1. The Statutes relating to Marriage.

The statutes relating to marriage are:-

- (a) The Marriage Ordinance (Cap. 127, 1951 ed.)
- (b) The Marriage of British Subjects (Facilities) Ordinance (Cap. 128).
- (c) The Marriage of Mohammedans Ordinance (Cap. 129).

2. Marriage under Caps. 127 and 128.

- (i) Any person may contract a statutory marriage recognized as valid throughout Ghana in accordance with the provisions of Cap. 127. Such marriage is monogamous in nature.
- (ii) Capacity to contract a statutory marriage is independent of and is not affected by prohibitions imposed by customary law, e.g. the payment of marriage consideration (pag-suhugu.).
- (iii) No person shall contract a statutory marriage during the continuance of a prior customary marriage (See S. 14 (4) of Cap. 127).

3. Marriage under Cap. 129.

- (i) Any person professing the Mohammedan faith may marry according to Mohammedan Law.
- (ii) Such a marriage should be registered. (Cap. 129 s.7.)