

The consultative process in social policy legislation: the experience of Ghana in the Property Rights of Spouses Bill¹

*Estelle Appiah*²



Introduction

The genesis of the Ghana Property Rights of Spouses Bill 2009 is the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*. The Convention was adopted on the 18 December 1979 and entered into force as an international treaty on 3 September 1981.

It was the culmination of more than 30 years of work by the United Nations Commission on the Status of Women, a body established in 1946 to monitor the situation of women and promote women's rights. The spirit of the Convention is rooted in the goals of the United Nations, fundamental human rights and equal rights for men and women.

Article 2 of the Convention stipulates as follows:

“State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and to this end undertake—

- to embody the principle of equality of men and women in their national constitutions or other appropriate legislation, if not yet incorporated therein and

¹ This is an edited version of a paper given at the CALC Africa Region Conference held in Nigeria in April 2010.

² Director of Legislative Drafting, Attorney-General's Department, Ministry of Justice, Ghana

to ensure through law and other appropriate means, the practical realisation of this principle,

- to adopt appropriate legislative measures, including sanctions where appropriate, prohibiting all discrimination against women, and
- to establish legal protection of the rights of women on equal basis with men and to ensure through competent national tribunals and other public institutions, the effective protection of women against any act of discrimination.”

Article 16 of the Convention provides that:

“States Parties shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women ...’.

The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration”

The CEDAW was domesticated in the 1992 4th Republican Constitution of Ghana. Article 22 in the Chapter on Fundamental Human Rights requires Parliament to enact laws to ensure that the property rights of spouses are guaranteed on dissolution of marriage and that jointly acquired property is distributed equitably. Article 22 (2) provides that—

“(2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses”

Another source of international law that supports article 22 is the African Charter on Human and Peoples Rights.

The Constitution came into force on the 7 January 1993 and several attempts were made after that to prepare legislation on the property rights of spouses to deal with the rights of spouses to jointly acquired property on separation and divorce.

The first major legal pluralism legislation was the *Intestate Succession Act* (PNDCL 111) enacted in 1985. This legislation has recently been reviewed to deal with anomalies that have become apparent after more than 20 years because of changes in the Ghanaian family system and the shift in focus to the nuclear family from the traditional extended family system.

The major challenge with legislation on intestacy and property rights in a subsisting marriage system stems from the plural legal system in the country. Law as a tool for social change is complicated by the pluralistic legal system in Ghana.

Article 11 of the Constitution includes common law in the laws of Ghana. The article defines common law as comprising the rules of law generally known as the common law, the doctrines of equity and the rules of customary law. For purposes of the article, customary law means the rules of law which by custom are applicable to certain communities in Ghana. The import of this is that various customary laws determined by ethnicity or locality apply to the populace.

The dilemma for legislative counsel

The dilemma is how the legislative counsel can craft a unified law to regulate property rights of spouses which will apply regardless of different customary law.

The *Marriages Act, 1884 – 1985* CAP 127 recognises customary marriages which may be registered under the Act as well as Muslim Marriages. The Act also applies to Christian and other marriages.

National legislation that currently deals with matrimonial property can be found in the *Matrimonial Causes Act, 1971* (Act 367). Section 41 of the *Matrimonial Causes Act, 1971* (Act 367) makes it possible for those married under other systems to apply its provisions as regards the dissolution of marriage and the law has some provision on financial settlement after divorce. The rules on the distribution of property on divorce are not sufficiently far reaching to satisfy the Constitutional requirement.

Different sets of rules using different principles and concepts have been used to determine the property rights of spouses. The lack of clear standard provisions fashioned on the philosophy of the Constitutional provisions has led to disparaging court decisions.

Under customary law, there is a concept of separateness of identity and of property acquisition. The issue of defining what joint property is in this context becomes an issue where a spouse, generally the vulnerable wife, makes a form of contribution to the acquisition or improvement of the property of the other spouse. In this context what is the beneficial interest to be given to the spouse who contributed? What is the situation where multiple wives contribute to the property of a husband such as in a Muslim or customary marriage both of which may be polygamous? What is the situation where there is cohabitation and no marriage but where the spouses are capable of being married to each other? What about gifts and money given by a husband to a wife to trade, referred to as “seed money”, is this a gift? What is joint property?

The courts in Ghana have attempted to deal with these complex issues but the decisions vary and lack consistency. The drafting of the Property Rights of Spouses Bill presented a difficult task and was only able to be brought to fruition because of the consultative process it went through. The Bill is an example of social change by legislation. The Bill reflects law by the emergence of social and economic factors.

The importance of achieving a national consensus

It was important to achieve a national consensus on the desirability of the law in order to prevent a situation in which the law is likely to be ignored in many parts of the country.

The techniques for a research report recommended by Ann and Robert Seidman and Abeyesekere in their book “Legislative Drafting for Democratic Social Change” propose a template for effective legislation for social change that can be applied to the consultative process in social policy legislation.

The first step is to identify the difficulty in the subject matter some of which have been

mentioned. The second stage is an analysis of the causes of the difficulty. The legislative counsel must systematically propose and test alternative explanatory hypotheses concerning the causes of the difficulty, in this case the peculiar cultural factors. The next stage is the proposal of a solution and the final stage is the monitoring and evaluation of the system.

These four steps formed the roadmap for the Property Rights of Spouses Bill.

How Ghana succeeded in meeting its constitutional requirement

On the basis of proposals submitted by an NGO in October 2000, the Legislative Drafting Division of the Attorney-General's Office prepared a draft Bill on the Property Rights of Spouses which was completed during the latter part of 2002. The Bill was sponsored by the Attorney-General and Minister for Justice because its source was the Constitution. However, the proposals were sketchy and so the Ministry of Justice sent letters to the Law Reform Commission, the Ministry of Women and Children's Affairs, Civil Society groups like the Federation of Women Lawyers FIDA (Ghana) and Alumnae Incorporated another women's NGO group for proposals on the subject matter. A law professor also prepared and presented a paper to the Ministry of Justice. Following a formal request by the Ministry of Justice in 2005, the Law Reform Commission submitted a final report on Law and Poverty Reduction. This report incorporated some proposals in respect of the property rights of spouses.

However, there was a need for further proposals to enable the Attorney-General's Department of the Ministry complete work on the draft Bill. Requests in this regard were sent to the Minister for Women and Children's Affairs in January 2006. An additional report was received from the Law Reform Commission in December 2006.

In order to obtain fresh insight from other sources conversant with family law, the Attorney-General's Department requested proposals from legal practitioners and the National House of Chiefs, the apex institution of traditional rulers.

The first consultative workshop was organised by the Ministry of Women and Children's Affairs on the 18 April 2007. At this forum the Director of Legislative Drafting gave a presentation on the draft Bill.

As a result of a bilateral agreement between the Government of Ghana and the Government of Germany, the German Development Co-operation (GTZ) provided assistance to the Ministry of Justice and Attorney-General's Office. This was for the consultative process of the Bill as part of co-operation between the Good Governance Programme and the Office of the Attorney-General and Minister for Justice in the framework of technical co-operation on legal reforms, in particular those concerned with legal pluralism.

The Law Reform Commission was requested to provide information to help with the preparation of a questionnaire to be distributed to a cross section of people from the public and private sector with the help of the GTZ which engaged the service of two legal assistants as researchers.

A meeting was held in September 2007 to discuss the questionnaire. In attendance were legal

academic representatives from civil society and the Commission on Human Rights and Administrative Justice and public officers including the Director of Social Welfare.

In August 2007, the Judicial Secretary was requested to compile a list of judicial officers in a position to assist with answering the questionnaire to enhance the draft Bill. The questionnaire was distributed but the number of responses was disappointing.

To further enhance the draft Bill, the Ministry of Justice and the Ministry of Women and Children's Affairs with the support from the GTZ proposed a two-day expert hearing on the draft Bill in September 2007. The aim of the meeting was to learn from the Benin experience in the drafting and passage of their Benin Family Code and to enrich the Draft Bill on the Property Rights of Spouses. The expert was Professor Abraham Zinzindohoue, a former Minister of Justice, Chief Justice and Member of Parliament of Benin.³

There were four sessions with focus groups made up of an average of 25 participants. The first group consisted of the Ministry of Women and Children's Affairs, gender advocates, civil society and faith based groups. The second group was for representatives of traditional authorities. The other two groups comprised Parliamentarians and the Judiciary and legal practitioners.

There was a facilitator who gave a general overview of the programme. The Director of Legislative Drafting gave the background of the draft Bill. The inadequacies in the existing law were mentioned and the need to create uniformity in the various types of marriages and to recognise the contributions of non-working spouses and the vulnerable spouse who may sacrifice education, employment opportunities for the family was emphasised.

The comparison with a legal system rooted in the *Napoleon Civil Law of 1958* and the dualism with customary law was compared to the situation in Ghana. The recommendations from the workshop on the conditions for cohabitation, the matrimonial home, premarital agreements, contribution and distribution were noted. Alternative dispute resolution before court process was also recommended.

The next stage in the consultative process occurred when the Director of Legislative Drafting was invited by a women's NGO in October 2007 to give a presentation on the draft Property Rights of Spouses Bill.

This was followed by a National Consultation on the draft Bill in November 2007 organised by the Ministry of Women and Children's Affairs. Presentations at this forum were made by representatives of the Legislative Drafting Division in local languages.

To further enhance the draft Bill and involve other stakeholders in the consultative process, it was decided that it would be necessary to embark on a nation-wide dissemination exercise a "Road Show" to create awareness about the Bill and make it more practicable and accessible to the

³ Benin is a francophone country in the West Africa Sub-region.

citizenry.

To assist with the process, organisations such as the National Commission on Civic Education and the Information Services Department and other stakeholders such as NGOs were invited in November 2007 to discuss the modalities for the Road Show scheduled to take-off in January 2008. This however stalled due to lack of funds.

A meeting was held in December 2007 with NGO groups “on the way forward”. The GTZ Good Governance Programme Director mentioned that the technical assistance that her organisation had provided was to facilitate the process of participatory law making so that those affected would have ownership. Knotty issues were reviewed and settled. It was agreed that a vital tool for the advocacy programme would be the preparation of guidance notes to the Bill so that those concerned would speak with one voice. The guidance notes were also to be used for the training of trainers and were subsequently prepared by the Legislative Drafting Division.

There was a consensus that the best way forward was to form a coalition of NGOs for a public sensitisation programme before and after the enactment of the Bill. The coalition was to advocate for the passage of the Bill and push for implementation of the law.

A legal experts meeting was held in January 2008 to consider the draft Bill which was now looking promising. In attendance were representatives from the Ghana School of Law and the law faculties from two universities. The others came from the Ghana Bar Association and the Judicial Service and there were other legal experts on land, family law and Islam. This meeting was particularly useful and greatly enriched the proposals.

Apart from these processes, the Muslim Family Counselling Services was engaged as a consultant by GTZ to provide comments on the Bill and ensure that Islamic law was adequately considered. They organised consultative fora in different parts of the country for the purpose in January and February 2008.

Legislation from other Commonwealth jurisdictions like Jamaica, Tanzania and South Africa were reviewed. This was considered appropriate as Commonwealth jurisdictions have much in common and the selected countries have plural legal systems.

In May 2008, GTZ sponsored a 10 day study tour to South Africa on the Property Rights of Spouses Bill. The tour was to obtain expert advice from a country with long standing experience with matrimonial property legislation in a situation of legal pluralism including Islamic law. The tour was also to enable the participants from the Legislative Drafting Department, the Judiciary, Parliament and the Law Reform Commission gain insight into the experience of South Africa in respect of the Bill. Topics for discussion for the tour were prepared by the Legislative Drafting Division prior to departure.

The Bill was laid before Parliament in the last meeting of the session in 2008. Unfortunately it was not passed before the general elections in December 2008 and therefore lapsed although discussions at the committee stage had started. The Bill was laid in Parliament on the 3rd November 2009 and was referred to a joint Committee; the Constitutional, Legal and

Parliamentary Affairs Committee and the Gender and Children Committee for consideration and report. After several Committee meetings, in February 2010, it was decided that Parliament itself should embark on a nationwide consultation because this legislation is far reaching and ground breaking. The consultative process to be organised by Parliament is scheduled to take place during the long parliamentary recess before the next meeting of Parliament commencing in October this year. It is expected that the Bill will be passed before December 2010.

The Property Rights of Spouses Bill has been prepared for resubmission in the first session of the Fifth Parliament in 2009 after some final revision to fine tune the language for clarity.

Conclusion

The genesis of this important social policy Bill has been a classic case of consultation, education and consensus building. The assistance provided by GTZ greatly facilitated the research and consultative process. Vulnerable spouses and human rights activities are anxiously waiting for the enactment of this ground breaking legislation which will provide unequivocal rules for the distribution of property between spouses on separation and divorce. The successful implementation of the Bill when enacted will be a testimony to the collaborative process and hopefully will be a piece of human rights legislation that the people of Ghana can be proud of even if the law has taken 17 years to be enacted.

Abbreviations

CEDAW Convention on the Elimination of All Forms of Discrimination against Women.

FIDA International Federation of Women Lawyers

GTZ German Technical Cooperation

NGO Non-Governmental Organisation

PNDCL Provisional National Defence Council Law

References

1. CEDAW 29th Session 30th June – 25th July, 2003 introduction.
2. Access to Justice Series, Attorney-General and Ministry of Justice, GTZ Legal Pluralism and Gender Pilot Project.
 - No. 6 Property Rights of Women in Ghana
 - No. 7 Marriage forms and Matrimonial Property Rights in Ghana
 - No. 8 Seed Money in Marriages in Ghana
3. Legal Drafting for Democratic Social Change
 - Manual for Drafters
 - Ann Seidman
 - Robert B. Seidman and

- Walin Abeysekere
-