

DIVORCE IN GHANA

By KWAME OPOKU

Whilst major reforms were being made in the family laws of the Francophone countries, the Anglophone countries in West Africa did not seem to be in a hurry to follow suit. Previous attempts at reform had failed in Ghana and the general impression, despite constant emphasis on the need for reform, was that much preparatory work would have to be done and that there should be no hurry. This general picture has been changed by the Matrimonial Causes Act of 1971¹. With the passing of this Act, English statute and case law cease to govern matrimonial causes in Ghana². Previously, English laws were automatically applicable to Ghana by virtue of section 17 of the Courts Ordinance which stated that the jurisdiction of the High Court in Probate, Divorce and Matrimonial Causes and proceedings shall be exercised in conformity with the law and practice for the time being in force in England³. Thus we had the remarkable situation in which laws made for a European, protestant and highly industrialized country were being applied in an African country with an entirely different economic, social and religious background. Changes in the law of England automatically affected Ghana without the Ghanaian legislator or the inhabitants being consulted.

Not only did it take the Anglophone countries sometime before making reforms but also they approached the problem in a different way: they made partial reforms. The Francophone countries logically consider marriage to have essentially two major aspects — formation and dissolution and therefore tended to consider them together. This was the case, for example, in Mali, Guinea and the Ivory Coast. Attention was paid not only to exits but also to entrances. Ghana and Nigeria, on the other hand, were more concerned with exits. There are various reasons for this. Common law tradition seems to favour partial but carefully planned reforms and moreover, recent major English reforms have been concerned with the dissolution of marriage. In the specific case of Ghana and Nigeria, concentration on the exits avoids difficult and fundamental questions about entrances. The issue of polygamy is by-passed and no protests are generated. It may also be that the present modes of formation of marriage satisfy most people. The present law of Ghana offers three possibilities to those who want to marry. They may contract a traditional law marriage according to the laws of their ethnic group or marry according to Islamic rites or finally, contract an Ordinance Marriage⁴.

This diversity of laws is, of course, a reflection of the pluralistic nature of Ghanaian society but it creates conflicts and endless disputes. The basic conceptions of the various laws are different, if not antagonistic. The received English law considers marriage as a voluntary union for life of one man and one woman to the exclusion of all others and attaches great importance to the consent of the parties to the

1 Act 367. Nigeria has passed a Matrimonial Causes Decree (1970) on which there are already some very good studies: C. U. Ilegbume, "A critique of the Nigerian Law of Divorce under the Matrimonial Causes Decree of 1970" 14 JAL (1970) 178—197; E. I. Nwogugu, "A Critical Analysis of the Grounds for Divorce under the Matrimonial Causes Decree, 1970", 5 Nigerian Law Journal (1971); J. O. Ijaodola, "Aspects of the Matrimonial Causes Decree 1970", 5 Nigerian Law Journal (1971) 144—158; S. A. Adesanya, "Separation, Non-Objection and Fault under the Matrimonial Causes Decree, 1970 of Nigeria — A Comparative Study with English and Australian Laws", 9 University of Ghana Law Journal (1972) 15—38.

2 S. 44 (1).

3 Cap. 4 Laws of the Gold Coast (1951), maintained by s. 154 (3) of the Courts Act, 1960. See also *Crabbe v Crabbe* [1971] 2 G. L. R. 164.

4 Cap. 127. Laws of the Gold Coast (1951).

marriage. Sanctions are provided against the violation of the principle of monogamy. On the other hand, traditional and Islamic marriages are potentially polygamous and the taking of other wives during the subsistence of a marriage is considered normal. The primary actors in a traditional marriage are not the spouses themselves but their parents and relatives. This is a consequence of the traditional society in which the basic unit is not the individual or the conjugal family but the extended family. The essential conditions for the formation of traditional marriage are different from those of Ordinance marriage.

Moreover the effects of marriage are not the same in both systems. Whilst the common law attempts to fuse the legal personalities of the spouses into one, traditional law maintains the separate identity of each. Ideas of community property are not favoured by traditional law which allows each spouse to keep his or her property.

This diversity of laws may not, in itself, have created too many problems. But the people of Ghana have not been content to let their legal relations be confined to one system and there have been relations between persons of different ethnic and social backgrounds. These divergent social, economic and religious factors have made themselves particularly felt in the area of family law, with the ensuing problems we would expect in a transitional period. For example, some couples go through a traditional law marriage and then contract an Ordinance marriage. Various questions arise. Can a couple marry twice? Was the first marriage valid? If so, can they still go through a second ceremony? Which law determines the validity of such marriages, and the rights and duties of the spouses?

Most of these problems could of course, from a juristic point of view, be reduced or made to disappear by simply introducing a uniform law of marriage, as has been done in the Ivory Coast. But legislating away a problem does not solve it. One merely shifts it from one field into another. Here, it would mean that such conflicts are no longer considered from a juristic point of view and are left to the sociologists. A combination of both sociological and juristic methods seems to be necessary⁵. It would be a pity, if by avoiding to get involved in the conflictual and complicated problems in this area, the jurists left the more important moral and intellectual issues to others and thus failed to contribute to a free and just society.

It is against the background we have briefly sketched, that we shall analyse the Matrimonial Causes Act, 1971, in its provisions concerning the basis of divorce (I) and divorce jurisdiction (II).

I. Basis of divorce

Undoubtedly, the most important innovation of the Act is the provision in section 1 (2) that proof of the break-down of the marriage is the sole ground for divorce. The previous grounds of divorce were based on the fault principle and the petitioner was required to prove the commission of a matrimonial offence by the respondent. Moreover, these grounds were specific and limited: adultery, desertion, cruelty, insanity and, (limited to the wife) that the husband was been guilty of rape, sodomy and bestiality. The requirement of proof of matrimonial

⁵ For a sociological analysis of marriage and divorce in Ghana, see Agnes Klingshirn, *The Changing Position of Women in Ghana*, Doctoral Dissertation, University of Marburg (1971) 68—115.

offence was contrary to what most ordinary people know about marital life: that the success or failure of a marriage depends on both parties and that it is seldom that one party can be blamed for an unhappy marriage. The new law recognises this mutual responsibility. Accordingly, the task of the court is no longer to pronounce one party guilty and the other innocent but to find out whether the marriage has broken down beyond all repair.

There is no invariable test for determining whether a marriage has broken down or not and the courts will have to consider all the relevant facts of the case. To help the courts in this delicate task, section 2 (1) provides as follows:

“For the purpose of showing that the marriage has broken down beyond reconciliation the petitioner shall satisfy the court of one or more of the following facts: —

- a) that the respondent has committed adultery and that by reason of such adultery the petitioner finds it intolerable to live with the respondent; or
- b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; or
- c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; or
- d) that the parties to the marriage have not lived as man and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce; provided that such consent shall not be unreasonably withheld, and where the court is satisfied that it has been so withheld, the Court may grant a petition for divorce under this paragraph notwithstanding the refusal; or
- e) that the parties to the marriage have not lived as man and wife for a continuous period of at least five years immediately preceding the presentation of the petition; or
- f) that the parties to the marriage have, after diligent effort, been unable to reconcile their differences.”

On reading this section, one may be tempted to think that the Act has merely replaced the old grounds with new ones. This would be a mistake for these are only guides to help the court and, unlike the old grounds, none of them is by itself sufficient unless it satisfies the court that the marriage has broken down beyond repair. Thus for example, proof of adultery does not automatically entitle the petitioner to a decree of divorce unless the court is satisfied that as a result of the adultery, the petitioner finds it intolerable to live with the respondent. Moreover, in determining whether the petitioner finds it intolerable to live with the respondent as a result of the latter's adultery, the petitioner is not entitled to rely on this fact if the parties have lived as man and wife for more than six months since the commission of the act.

The provision in section 2 (1) (b) dealing with cases where the behaviour of the respondent is alleged to be such that the petitioner cannot reasonably be expected to live with him or her is broad enough to cover all the cases which previously came under cruelty, and those in which one spouse is alleged to be insane. Henceforth, there will be no need to prove that the respondent had injured or threatened to injure the physical or mental health of the petitioner. In determining whether the petitioner cannot reasonably be expected to live the respondent,

the court will disregard any period or periods not exceeding six months in which the parties have lived together. It looks as if the Ghanaian legislator has decided that six months are long enough for a spouse to decide to end relations with the other spouse. This is doubtful, especially where the injured party is economically dependent on the other. One can imagine situations where the wife may be forced to continue relations with the husband even though she finds life with him to be insupportable. She may be waiting for a more favourable opportunity, when her finances may have improved, to end the marriage. But her toleration of the husband for more than six months would, following sections 3 (b) and 4, make it difficult for her to satisfy the court that she cannot reasonably be expected to live with the respondent. When one remembers the well-known patience (or is it resignation?) of most African women, six months seem to be rather too short for concluding that marital life was not intolerable⁶.

Desertion is retained by the Act as an indication of the breakdown of the marriage. The court must be satisfied that there has been desertion for at least two years immediately preceding the commencement of proceedings. In determining whether desertion has been continuous for at least two years, periods of less than six months in which the parties lived as man and wife shall be ignored⁷.

Consensual divorce has finally found its way into the law after it has been the practice of couples for many years. Under section 2 (1) (d) any couple wishing to divorce need only to separate for two years and consent to divorce in order to satisfy the court that the marriage has broken down. The main task of the court in this case is to ensure that consent has been freely given and that the respondent was fully informed about the consequences of his consent. The action may be dismissed if the petitioner, intentionally or otherwise misled the respondent about any matter which he or she took into account in deciding to consent to divorce. If such consent is unreasonably withheld, the court may notwithstanding such refusal, grant divorce⁸.

The broadest provision of all is section 2 (1) f) according to which, as proof of the breakdown of the marriage, the petitioner may show that despite diligent efforts, the parties to the marriage have not been able to reconcile their differences. All unhappy marriages may thus be dissolved, provided the courts is satisfied that there has been diligent effort at reconciliation and that this has been unsuccessful.

An important feature of the Act is its provision in section 8 on reconciliation. The petitioner or his counsel is required to inform the court about all efforts made before and after the commencement of the proceedings, to effect reconciliation. At any stage of the proceedings, the court may adjourn for a reasonable time to enable attempts at reconciliation. Reports on efforts of reconciliation are to be limited to a statement that the parties have or have not been reconciled. All other statements or actions of the parties or their representatives in connection with the reconciliation attempts are inadmissible in the divorce proceedings.

The provision for reconciliation is obviously in keeping with Ghanaian tradition but we are very sceptical about the need for such a provision and about its efficacy. It is also the tradition in Ghana not to take family matters to outsiders and it may be assumed that before a couple or one of them takes such

⁶ Brokensha records a case where a man sued his wife for adultery because she had a child with another man. The wife satisfied the court that her relations with the other man had begun only after 9 years of beatings and insults from her husband who finally told her to take a lover because he was impotent, *Social Change in Larteh, Ghana* (Oxford U. P. 1966), p. 231.

⁷ S. 5 (1).

⁸ S. 6.

matters to court, various attempts at reconciliation would have been made. In any case, divorce courts do not seem to be the best place for reconciliation. Moreover, judges and lawyers can lay no claim to any special qualification or quality for such a delicate task. On the contrary, we believe that by their training (emphasis on adversary tactics, formulation of precise rules and questions, fault finding *e.t.c.*), they are very unsuitable for the task⁹. If outsiders are of any help at all, it may be more appropriate to set up marriage counselling centres where couples can go for help and advice before their marriage reaches the point of breakdown.

To prevent divorces shortly after the celebration of the marriage, section 9 puts restrictions on petitions presented within two years of marriage. Such petitions are barred except where the petitioner would suffer substantial hardship or where the respondent has committed some deprave act. In determining whether to allow the presentation of a petition, the court will consider the interest of any child of the marriage and whether there is a possibility of reconciling the parties. Though section 9 follows the previous law in limiting such petitions, it reduces the waiting period from three to two years. Moreover, the exceptions have been changed from exceptional hardship and exceptional depravity to substantial hardship and depravity, enabling the courts to admit more easily other cases.

With the basic change from the fault principle to the breakdown principle, the various absolute and discretionary bars to divorce which related to the petitioners conduct, *i. e.* connivance, condonation, and collusion have lost their *raison d'être* and are therefore abolished by section 10 which states that no enactment or rule of law shall be taken as empowering the court to dismiss a petition on the ground of collusion between the parties or on the ground of collusion between the parties or on the ground of any conduct on the part of the petitioner. Divorce proceedings being now mainly concerned with the question whether or not the marriage has broken down, the guilt or innocence of a party is not decisive. In keeping with this change, section 12 eliminates the former mandatory requirement that where adultery is alleged, the adulterer or adúlteress must be made a party to the action. Henceforth, the joinder of the third party is at the discretion of the petitioner. The Ghanaian legislator has, quite correctly, refused to choose between monogamy and polygamy¹⁰. At the same time, under the influence of the westernized bourgeoisie, he feels that traditional law marriages have to be brought up to date and allowed to participate in the benefits of modern legislation. Accordingly, the Act which is mainly intended to govern monogamous marriages, may be extended to non-monogamous unions if one of the parties so desires¹¹. This extended application is subject to the

9 However, Goréki reports in his article "Divorce in Poland — A socio-legal study" in *Sociology of Law* (ed) V. Aubert (Penguin 1969) 110, that statistics from the Polish Ministry of Justice show that in 1959—63, 3.4 to 3.9 per cent of divorce trials in Poland were discontinued as a result of reconciliation by the courts. On further examination of those cases he concludes: "They suggest that this activity is far from being so effective as one might have expected from studying the statistical data of the Ministry of Justice; it is, however much more effective than is believed by the legal writers mentioned above who simply deny that this activity is of any value at all", p. 111.

10 The legislator has thus declined to follow the suggestion of Ollennu when he states that: "It would appear that in conformity with the trend of thought in the country, a revision of the law of marriage by the enactment of one law of marriage which is strictly monogamous and incorporating the best elements in all existing systems is necessary", "Family Law in Ghana" in *Le Droit de la Famille en Afrique Noire et à Madagascar* (ed) M'Baye, 1968, p. 190. When Ollennu writes about "the trend of thought in the country" one wonders how this was ascertained. Certainly, if attention is confined to the westernized elite in the towns, one is bound to conclude that the trend is toward monogamy and Ordinance marriage. However, if one considers Ghana as a whole, the picture is somewhat different. According to Klingshirn the 1960 Post Enumeration Survey revealed that 86 % of all people ever married had done so under customary law and in Northern Ghana this was as high as 92 %. *op. cit.* 86.

11 S. 41 (2).

requirements of justice, equity and good conscience, and the court is to have regard to the peculiar incidents of that marriage in determining appropriate relief, financial provision and child custody arrangements. It may also grant any form of relief recognised by the personal law of the parties either in addition to or in substitution for the matrimonial reliefs provided by the Act. The court may also take into account any facts recognised by the personal law of the parties as sufficient to justify divorce and in the case of traditional law marriage, the following additional facts:

- a) wilful neglect to maintain a wife or child;
- b) impotence;
- c) barrenness or sterility;
- d) intercourse prohibited under that personal law on account of consanguinity, affinity or other relationship;
- e) persistent false allegation of infidelity by one spouse against another.

The consideration of all these facts is once again, made subject to the requirements of justice, equity and good conscience¹². The extension of this Act to polygamous marriages is obviously aimed at preparing the ground for an eventual unification of traditional law and the received English law. By making its application dependent on the demand of one of the parties to the marriage, the legislator hopes to avoid some of the problems of enforcement which arise on the introduction of such new laws. In all probability, the legislator is under no illusion about the immediate acceptance of the new law. Most marriages will still be formed and dissolved in accordance with traditional law. There may now be more uncertainty about which law to apply in traditional law marriages in the higher courts since the application of traditional law can no longer be assumed but at least a step has been taken to modernize divorce law.

This process of modernization is not confined to the substantive law of divorce but extends also to jurisdictional matters.

II. Divorce Jurisdiction

The basis of jurisdiction in divorce actions has been domicile, and to a limited extent, residence but the Act introduces for the first time in Ghanaian law, citizenship (nationality) as another basis. Section 31 authorises the court to exercise jurisdiction under the Act where either party to the marriage is either a citizen of Ghana or has been domiciled in Ghana or has been ordinarily resident in Ghana for at least three years immediately preceding the action.

Domicile has been the basis of matrimonial jurisdiction in all common law countries but its definition has not been easy and many a student of private international law has been amazed by the inconsistencies in its application. Domicile may be defined simply as the place where a person has his home and intends to reside permanently. This combination of subjective and objective elements leaves room for all kinds of manipulations. It should be mentioned that the English courts have almost always found that an Englishman's domicile is in England and a contrary decision has always required very strong evidence. Proof of intention to reside permanently at a place has not been easy and the courts are forced to

¹² S. 41 (3).

rely on evidence relating to the person's home, family connections, occupation etc. The Act does not add anything new to the previous law. It simply adopts the concept of domicile as it is usually understood.

Residence is perhaps a much simpler basis for matrimonial jurisdiction. The new law requires that the party must have been resident in Ghana for at least three years. This is intended to prevent parties from establishing their residence in Ghana solely for the purpose of taking advantage of the easy divorce law. A noticeable change by the Act is that unlike the previous law which allowed only women to bring petition on the basis of residence, both men and women can now petition on this basis.

The most important innovation here, is of course, the introduction of the concept of citizenship into the area of matrimonial causes. Until this Act, the notion of citizenship had very little importance in the general principles of Ghanaian private law. Now it has made its way into an area in which most common law countries prefer to use the concept of domicile. The civil law countries have, as is well known, used the concept of nationality both for determining the applicable law and jurisdiction but even in those countries there has been criticism of the principle and there has been a movement from its rigidities and a rapprochement with the principle of domicile. It is therefore remarkable that Ghana should have decided to make nationality a basis for divorce action. It is not easy to see why this principle was adopted. Domicile and residence would seem to be sufficient bases of jurisdiction so far as most Ghanaians are concerned for there must be very few Ghanaians who are neither resident nor domiciled in Ghana, and would want to institute matrimonial proceedings there.

One group of Ghanaians who are likely to benefit from citizenship as a basis of jurisdiction are those domiciled and resident elsewhere and have no intention of taking up permanent residence in Ghana. But is it just that such persons should be allowed to resort to the Ghanaian courts for the dissolution of their marriage, particularly as it is likely that in such cases, one of the parties will be a non-Ghanaian? It is not clear that the introduction of nationality in matrimonial causes will serve any useful purpose. It is true that the idea of nation (according to those who believe that the nation-state is the only viable basis for both internal and international law) may be said to require additional support in some countries but surely, it should have no place in family law matters where the primary objective should be the welfare of the persons involved.

The danger of an unnecessary advantage being given to a Ghanaian married to a non-Ghanaian is increased by section 35 which directs that issues under the Act (except nullity cases) shall be determined as if both parties to the marriage were domiciled in Ghana at the commencement of the proceedings. This choice of law rule, framed in terms of jurisdiction, makes mandatory the application of Ghanaian law. Systematic application of the *lex fori* avoids various complications arising from the question whether foreign law or local law is to be applied in cases where one of the parties is a non-Ghanaian, domiciled and resident elsewhere. However, this rule could work injustice. It would be possible for a Ghanaian living in country X to marry a lady there under the local law and on a short trip to Ghana have the marriage dissolved under Ghanaian law. Whatever protection the lady may have enjoyed under the law of X would be thus reduced to nothing unless the marriage happens to be "a marriage other than a monogamous marriage" and the court decides to grant a "relief recognised by the personal

law of the parties¹³. It is true that section 32 states that for the purposes of determining jurisdiction, the domicile of a married woman shall be determined as if the woman were above the age of twenty-one and not married. But this will not prevent the situation we have envisaged from arising for the section merely enables the wife to establish a domicile, independent of that of the husband. Nothing in the section prevents the court from assuming jurisdiction on the basis of the husband's Ghanaian citizenship. It would be instructive to see how the courts interpret sections 31 a) and 32 in the determination of jurisdiction, especially where one of the parties is a foreigner domiciled and resident outside Ghana. Injustice would have to be avoided in the application of Ghanaian law to non-Ghanaians and one must bear in mind the various efforts made to harmonize the different systems of private law.

A contribution to this process of harmonization may be seen in the new rules for the recognition of foreign decrees. Section 36 of the Act provides that the court shall recognise a divorce decree obtained by judicial process or otherwise which is not contrary to natural justice and has been granted by a tribunal which had a significant and substantial connection with the parties to the marriage or, is in accordance with the law of the place where both parties were ordinarily resident at the time of the action. The section is general enough to allow the recognition of most foreign divorce decrees. "Natural justice" in this context must be confined to procedural matters, for it cannot be the intention of the legislator to request the courts to inquire into the justice of the substantive rules of foreign legal systems. The main question here is whether there is a significant and substantial connection between the parties and the court which granted the decree.

Conclusion

Divorce has been made easier by the new law. Couples will no longer need to advance fictitious grounds for divorce for it will be enough to prove that the marriage has completely and permanently broken down.

What the new Act has done, as far as the ground for divorce is concerned, is to bring the statutory law in conformity with traditional law. It is remarkable that the African jurists discovered the breakdown principle as basis for divorce only after the English had done so, even though it had for centuries been recognised by African traditional law. When the African jurists give up our admiration for European ideas and concepts, we may in the end come to the conclusion that, at least in family law, we do not have much to learn from Europe.

13 S. 41 (2).

The Elections of November 28, 1971 in Uruguay

By ERNST-J. KERBUSCH

The present situation in Uruguay is characterized by economic stagnation and the loss of consensus of a traditional political system. On the basis of the history and results of the November 1971 elections and the ensuing formation of the government, this paper tries to explore critical historical aspects of the institutional development of this country whose democracy once was considered a model for Latin America.

For more than a century only two political parties were realistic candidates for the formation of the government and they even anchored this system in the Constitution: The Partido Colorado (progressive, rooted in urban centers) and the Partido Blanco (conservative, strong in the countryside). Different factions, however, always emerge within the parties. They put up their own candidates and agree upon any one of them only after the election results are in. In Parliament they form coalitions which confront the Executive with an absolute majority. In 1971 for the first time a third party, the Frente Amplio, made up of the forces of the democratic left, participated in the elections. Election time was marked not only by this new development but also by the activities of the urban guerilla (Tupamaros) and the serious economic situation. The Colorado Party won a very narrow victory of 0,7 % over the Blancos. The Frente Amplio finished an unexpected poor third with 18,3 % of the votes.

The immobility of the traditional voting potential is being transferred to the process of government formation and translated into part situations between Executive and Parliament and a low potential for dynamic development. Thus, democratic structures of the western type appear unable to initiate a process of modernization. An alternative, quite unheard of only a few years ago, is now being seriously discussed: The military whose prestige has been enhanced by their political engagement during frequent applications of martial law, could be tempted to take over from the faltering politicians.

The Political Rights of Women in Argentina, a Historical Outline

By JUAN JOSE REYVEN

In 1862 for the first time a woman took part in a communal election held in San Juan, Argentina. But not until 1914 did the women achieve the franchise for provincial elections. Since then a tremendous amount of resolutions and bills on the political rights of women had passed parliament without success. There was an extensive discussion on which kind of qualifications should be insisted upon as a prerequisite for the franchise. Another question was, whether or not the franchise should be combined with the duty of military service. These various unsuccessful attempts to pass a piece of legislation which everybody thought to be necessary, show which kind of difficulties arise when new political structures are introduced into traditional society. The text of the 1947 Act on the political rights of women, with recent amendments, is also added.

Divorce in Ghana

By KWAME OPOKU

Until the passing of the Matrimonial Causes Act of 1971, English statute and case law governed the dissolution of Ordinance (English law) marriages in Ghana by virtue of the High Court Ordinance which stated that the jurisdiction of the High

Court in Probate, Divorce and Matrimonial Causes and proceedings shall be exercised in conformity with the law and practice for the time being in force in England. Changes in the law of England automatically affected Ghanaian divorce law.

Ordinance marriage differs from the traditional and Islamic law marriage in basic conceptions and effects. Whilst Ordinance marriage is strictly monogamous, the other forms of marriage are potentially polygamous. The grounds for divorce in English law are limited but traditional law seems to know of no such limitation.

Divorce in English law was based on the principle of fault and the party seeking to dissolve a marriage had to prove that the other party had been guilty of a matrimonial offence. The Matrimonial Causes Act of 1971 has changed the position by making proof of the breakdown of the marriage the sole ground for divorce. Henceforth, it will no longer be the task of the courts to pronounce one party guilty and the other innocent but to find out whether the marriage has broken down beyond all repair.

Conflict between Customary and Non-Customary Systems of Law:

Preliminary Observations

By I. OLUWOLE AGBEDE

This essay attempts to provide a better understanding of the statutory rules designed to resolve the conflict between customary and non-customary systems of laws in Nigeria. In particular it attempts to establish that under the statutory rules non-natives are amenable to customary law contrary to the view expressed in earlier cases. It also shows that the influence of customary law varies from one field of the law to another. For example, customary law is fully developed and still dominant in the fields of land transactions and family relations. It is rudimentary in the fields of tort and contract and practically silent in the fields of company law, banking, road traffic, bankruptcy, insurance, etc. and completely abolished in the field of criminal law and punishment.

The essay also shows that the choice of law rules only apply to the superior courts in which case the customary courts are not bound by them. Finally, it shows that the rules are, in the main, merely presumptions which may be rebutted in suitable cases. In short, the rules are not rigid or inflexible as the courts tend to make them.

The essay also highlights the lack of research work until lately in the area of internal conflict of laws in common law Africa generally in contrast to the intensive work done in this area by continental jurists.

Religion and the State in Israel

By ZE'EV W. FALK

The State of Israel attempts the combination of the ideas of a "Jewish state" with that of the freedoms of religion and conscience, parity of religious communities and protection of holy places. While non-Jewish communities enjoy religious