

# Women's Rights to Property in Marriage, Divorce, and Widowhood in Uganda: The Problematic Aspects

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**Abstract** This article examines women's rights to property in marriage, upon divorce, and upon the death of a spouse in Uganda, highlighting the problematic aspects in both the state-made (statutory) and non-state-made (customary and religious) laws. It argues that, with the exception of the 1995 Constitution, the subordinate laws that regulate the distribution, management, and ownership of property during marriage, upon divorce, and death of a spouse are discriminatory of women. It is shown that even where the relevant statutory laws are protective of women's rights to property, their implementation is hindered by customary law practices, socialization, and the generally weak economic capacity of many women in the country. The article delves into the even weaker position of women's rights to matrimonial property at customary and religious laws. In many homes, wives provide labor to support their husbands without having a stake in the use or monetary benefit from it. Under Islamic law regulating intestate succession to property, the entitlements for widows fall short of the constitutional standards on equality and non-discrimination. Polygyny is widely practiced by Muslims implying that the widows share the one eighth whenever there are children or one fourth in cases when there are no children. Radical reforms such as adopting an immediate community property regime instead of the present separate property regime are inevitable if women's rights to property are to advance.

**Keywords** Marriage · Women's rights · Matrimonial property

## Introduction

In the majority of cases, the property rights a typical Ugandan woman claims upon divorce or upon the death of a spouse arises from her rights over the same acquired

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by virtue of marriage. Women's rights to property during marriage, upon divorce, and death of a spouse is far from satisfactory and must be reformed to advance the status of women in the country. Equally unsatisfactory is the fact that in Uganda, partly owing to the phenomena of legal pluralism, even where the relevant statutory laws are protective of women's rights to matrimonial property, their implementation is hindered by customary law practices, socialization, and the generally weak economic capacity of many women in the country. The effect of this state of affairs is that the state must now endeavour to reform both religious and customary laws regulating rights to matrimonial property alongside the statutory laws. Presently, customary and religious laws, especially those influenced by the Islamic religion, recognize women's rights to property during marriage, upon divorce, and death of a spouse in a discriminatory manner, contrary to what the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>1</sup> prescribe.

Unsurprisingly, the CEDAW Committee, at its 575th and 576th meetings on 9th August 2002, when considering Uganda's third CEDAW periodic report expressed concern over the country's subordinate laws that conflict with both her 1995 Constitution and CEDAW commitments; concern was expressed over Uganda's slow progress in removing *de jure* discrimination and elimination of *de facto* discrimination against women. It is reported in the words of the CEDAW Committee that:

While noting that Article 33 (6) of the Constitution "prohibits laws, customs or traditions which are against the dignity, welfare or interest of women", the Committee notes with concern the continued existence of legislation, customary laws and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price, guardianship of children that discriminate against women and conflict with the Constitution and the Convention. The Committee urges the State party, in line with Article 33 (6) of the 1995 Constitution, to amend these laws and prohibit such practices.<sup>2</sup>

Close to 6 years after the comments were made, nothing has been done to change the situation. Furthermore, the CEDAW Committee, calling for a speedy law reform process, recommended that the country introduce public education and legal literacy campaigns relating to the CEDAW and the Constitution to raise awareness of its international and national commitment to the elimination of discrimination against women. All this is, however, yet to be done.

Admittedly, it is difficult for the Uganda government to improve women's rights to matrimonial property when state-made law has no monopoly over people's lives.

<sup>1</sup> The adoption of the CEDAW in 1979 set international standards for the protection of women's human rights including achieving equality between men and women in their rights to property during marriage, upon divorce, and upon the death of a spouse. Uganda ratified the CEDAW without any reservations on 22 July 1985. See <http://www.un.org/womenwatch/daw/cedaw/states.htm> (accessed 18 May 2007).

<sup>2</sup> See the CEDAW Committee concluding observations on Uganda at the 575th and 576th meetings at the Netherlands Institute of Human Rights website <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/0/6d2342925fbc7b41256dac00513b8d?OpenDocument> (accessed 28 May 2007).

This state of affairs notwithstanding, it is incumbent on the same government to assert its authority and ensure that all legal processes under its jurisdiction are fair to women. The benefits from reforming all the various family and succession laws and enhance women's rights to property cannot be enumerated; it is one way of emancipating women from poverty. Recent studies touching on women's ownership of property and land in particular are a cause for concern; women in Uganda produce 60% of cash crops and 80% of food production, yet only 7% of registered landowners in the country are women.<sup>3</sup> A Ministry of Finance study also reports that women have less property than men in Uganda. The study summarizes the situation of women as follows:

In Uganda women lag behind men in terms of education level and income earnings. Women have limited economic opportunities due to their societal roles and responsibilities, their low social status, relationships with men, lack of ownership and access to productive assets, low participation in decision-making and high workload.<sup>4</sup>

This is indicative of the fact that women's rights over matrimonial property must be reformed so as to alleviate poverty in Uganda. It is not tenable for government to remain complacent because the 1995 Constitution of Uganda is protective of women's rights to property when the concrete reality for many is far from satisfactory. To all intents and purposes, the plural legal system contributes to the violation of women's rights to property. Although the Constitution prohibits customs and traditions that are against the welfare of women and the Judicature Act expressly provides that statutory law prevails over custom and unwritten laws, the reality is different. Consequently, many women as regards property ownership are marginalized by oppressive customs. There is still a gap between the law contained in the statute books and the law in practice. Worse still, even where the generally outdated written laws have been amended to become more progressive, the lives of the majority of women do not change much. For example, it is not uncommon for women to lose land and their homes because their husbands have sold or mortgaged land without obtaining the spousal consent that is obligatory under the Land Act of 1998.

### **Women's Rights to Property in Marriage and Upon Divorce**

The 1995 Constitution of Uganda, which takes precedence over all other laws in the country, provides for fundamental freedoms and rights of the individual. The relevant rights include the right to property and protection from discrimination on interalia grounds of sex. As regards entitlement to equal rights on marriage, during

<sup>3</sup> Equality Now 'Uganda: exclusion of women from land ownership-the lost clause', a report about women's land rights available at <http://www.equalitynow.org> (accessed 18 May 2007).

<sup>4</sup> Government of Uganda 'Plan for Modernization of Agriculture: Eradicating Poverty in Uganda', a report available at <http://www.finance.go.ug/documents.html> (accessed 29 May 2007).

marriage and at its dissolution as well as the right to inherit property, Article 31 of the Constitution provides:

1. Men and women of the age of 18 years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage, and at its dissolution.
2. Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.

Uganda's Constitution has, in fact, many other provisions specifically designed to protect the rights of women. For example; Article 33(5) of the Constitution is to the effect that women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, traditions, or customs; Article 33(4) provides that women have a right to equal treatment with men and that that right shall include equal opportunities in political, economic, and social activities; and Article 33(2) provides that the state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement. Concerning equality and freedom from discrimination, Article 21(2) of the Constitution provides that 'a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability'. To discriminate is defined as: 'to give different treatment to different persons attributable only or mainly to their respective descriptions by sex, race, color, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability'.<sup>5</sup>

Despite the above constitutional protection, the subordinate laws regulating private rights continue to manifest sex discrimination. The flaw is that whereas Uganda's 1995 Constitution is protective of women's rights to property, the problem is that the Constitution is promissory and sets out rights in general terms. The Constitution requires enabling laws yet to be enacted to realize the rights it sets out. Uganda's present laws of marriage, divorce, and succession preceded, on the other hand, the 1995 Constitution and, therefore, with regard to rights of women, need to be reformed if they are to be made fully compliant with it. For example, the present Marriage Act came into force on 1st April 1904 and because Britain was Uganda's colonial master between 1896 and 1962, the said law was modeled on English law of the time. This is the reason why these laws should be amended now to comply with the new constitutional standards on the rights of women.

In Uganda, interests in property are not acquired or lost by marriage. Section 3 of the Succession Act provides that 'no person shall, by marriage, acquire any interest in the property of the person whom he or she marries nor become incapable of doing any act in respect of his or her own property which he could have done if unmarried'. Consequently, valuable matrimonial properties including land on which matrimonial houses are situated are usually registered in the names of the wage earning spouse—the husband.

<sup>5</sup> Article 21(3) Constitution of Uganda 1995.

Concerning contracting a valid marriage, there are several ways this can be done in Uganda, but each with its own legislation. There is the Marriage Act<sup>6</sup> to regulate secular marriages, the Marriage and Divorce of Mohammedans Act<sup>7</sup> for Muslim marriages, customary marriages are registered under the Customary Marriages (Registration) Act<sup>8</sup>, and the Marriages of Africans Act<sup>9</sup> regulates African marriages. None of these archaic laws, however, is concerned with how property should be shared so as to benefit women in the manner the relevant constitutional provisions now prescribe. What is common to Uganda's disparate laws of marriage is that there is more focus on procedural matters relating to how marriages are contracted than property sharing. Notwithstanding, alimony payments are provided for under sections 23–25 of the state-made 1904 Divorce Act<sup>10</sup> and maintenance for children is available under common law. Under section 26 of the Divorce Act, where a party's adultery has been the cause of a divorce, the court has the discretion to order that some property of the guilty party be forfeited for the benefit of the children of the marriage or the innocent spouse or both.

It is upon dissolution of a marriage that the issue of who owns what between the spouses arises. The power to vary settlements is provided for under section 27 of the Divorce Act, which states:

After a decree absolute of dissolution or of nullity of marriage, the court may inquire into the existence of ante nuptial or post nuptial settlements made by parties subject of the decree, and may make such orders with reference to the application of the whole or part of the settled property whether for the benefit of the husband or wife or of the children, if any, or of both children and parents, as seem fit...

Overall, in the course of marriage, the separate property regime prevails in all recognized marriages, though under the Divorce Act courts have discretionary powers to make orders for alimony<sup>11</sup> and vary property settlements as noted above. Unsurprisingly, neither the Marriage Act nor the Divorce Act sets out guidelines regulating property sharing at divorce or judicial separation. In practice, upon divorce the parties share property acquired through joint efforts but the courts must determine the contribution towards the acquisition of the assets. For example, in *Nakiyingi v Merkezidedeki (1978)*, the husband sought to evict the wife from their house and land. He maintained that the contributions made by her towards building the house and development of the land were made as a wife and this did not entitle

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<sup>6</sup> The Marriage Act, Chapter 251 Laws of Uganda that came into force on 1 April 1904.

<sup>7</sup> Marriage and Divorce of Mohammedans Act, Chapter 252 Laws of Uganda that came into force on 15 April 1906.

<sup>8</sup> Customary Marriages (Registration) Act, Chapter 248 Laws of Uganda that came into force on 1 October 1973.

<sup>9</sup> Marriage of Africans Act, Chapter 253 Laws of Uganda that came into force on 1 April 1904.

<sup>10</sup> Divorce Act, Chapter 249 Laws of Uganda that came into force on 1 October 1904.

<sup>11</sup> Alimony is an allowance paid to a person by that person's spouse or former spouse for maintenance, granted by a court upon a legal separation or a divorce or while action is pending.

her to anything. Both lower courts decided in favor of the husband. On appeal, however, the High Court held that:

[T]he house and land were beneficially owned by the husband and wife under a trust for sale, the trust for sale having arisen out of the substantial contribution by the wife to the development of the land and the building of the house and thus she could not be excluded from the enjoyment of their joint endeavours.

The problem with a separate matrimonial property regime<sup>12</sup> in both state-made and non-state-made laws of marriage and succession, and the reason why sustaining it makes women's rights to marital property weak, is because, in many cases, virtually all the valuable property belongs to the economically stronger party, usually the husband. There are no means, at least during the duration of the marriage, of enabling the economically weaker party, usually the homemaker wife, to buy as much property and exercise the same rights over it.

It should be recognized, however, that in Uganda not all divorce cases are entertained in the courts given the disparate laws under which marriages can be contracted. It is rare for customary law marriages or those contracted under practices inspired by Islam to end up in the High and Magistrate courts.

### **Uganda's Recent and Proposed Legislation Affecting Rights to Property in Marriage and Upon Divorce**

Recently proposed legislation affecting women's rights to property in marriage also leaves much to be desired. The problem is the aspiration by the legislature to accommodate all views, interests, religions, and vote winning issues when enacting laws. This indeterminacy is perpetuating Uganda's inability to make the various laws of marriage and succession compliant with her constitution and CEDAW commitments. This is another problem faced by Ugandan women. One example will suffice to illustrate this view. In 2003, a Domestic Relations Bill (DRB) was introduced in Parliament for debate. Contrary to what is desired to advance women's rights, the DRB does not propose equality between the spouses in the Islamic, customary, or state-made laws regulating rights to property during marriage and upon divorce. For example, instead of outlawing polygyny, the DRB proposes seeking permission from district officials before a man takes another woman. How such a requirement can be implemented in practice to ensure that men do seek approval before marrying again is debatable and yet many partners mean multiple claims leading to property fragmentation with more conflicts over the scarce resources.

The DRB proposes that cohabitation be recognized as a legal marriage after 10 years, so that each person's contribution can be compensated in case of separation. The debate on the bill has, however, stalled because Muslims and some Christians find it offensive to religion.<sup>13</sup> In sharp contrast with the indeterminacy exhibited in Uganda, in Tanzania, on the other hand, section 160 of the Law of

<sup>12</sup> Section 3 Succession Act, Chapter 162 Laws of Uganda.

<sup>13</sup> Halima Abdallah: "Is cohabiting cheaper?" in Weekly Observer Newspaper, 22 June 2006.

Marriage Act 1971 creates a statutory presumption of marriage in favor of reputed *de facto* unions and provides that the woman cohabitant and the children born of the union become legally entitled to apply to the court for economic support from the male partner (Rwezaura 1998).

The DRB is silent on issues of succession to property. The object of the DRB, according to its memorandum, is to consolidate the laws relating to marriage, separation, and divorce; to provide for the types of marriages recognized in Uganda, marital rights and duties, grounds for breakdown of marriage, rights of parties in dissolution of marriage, and for other connected purposes. Although the final form it will take is difficult to predict, debates about the DRB make it appear unlikely to give women equal shares with their husbands over matrimonial property. Not surprisingly, the Ugandan Parliament is yet to make it known when the stalled debates about the DRB are likely to be resurrected.

Although land is the most valuable property in Uganda, the laws regulating its ownership do not promote equality between men and women. For example, the Land Act 1998 provides that with regard to land held under customary tenure, which is the most dominant form of land ownership, given that most land is not registered, the family is the legal person, represented by the head of the family. The law provides that matters to do with land titling can be pursued by the individual or the household.<sup>14</sup> This law is silent, however, on who should be named on the certificate of title, if one is issued. In practice, given the lacuna in the law, the male person as household head always gets the certificate issued in his name. Furthermore, Uganda's Land Act has no explicit provision to the effect that women's rights to land are equal to those of men (Benschop 2002). Recent attempts to amend the Land Act 1998, through the Land (Amendment) Bill 2007, are also more geared at curbing rampart evictions from land than providing for equal rights to land.

As late as 2003, amendments were effected to the Land Act; however, a co-ownership clause to have both spouses registered on the land title was not considered. This notwithstanding, there is in the Land Act a provision requiring the consent of either spouse or children of majority age<sup>15</sup> before mortgages or planned transfers of land upon which the family lives and derives sustenance are effected. This is a progressive provision regarding access and use of land but does not amount to an equal right to land. Worse still, this provision only protects married women and the many in cohabitation are not protected. In Uganda, it is not uncommon for customary marriages to be contracted after monogamous marriages have been celebrated.<sup>16</sup> Unfortunately, the law does not recognize the second marriage, although the woman involved may not know this. The effect of this state of affairs is that such a subsequent woman's interest in land is not protected by the consent clause. The other problem is that, in some rural and urban settings, a family lives on a separate piece of land from that on which they derive sustenance. Inevitably, the consent clause protection is partial, for, if a spouse is to be protected, the land must be one and the same upon which they live and derive sustenance.

<sup>14</sup> Section 5 Land Act 1998.

<sup>15</sup> Section 40 Land Act 1998.

<sup>16</sup> Uganda Land Alliance *Perspectives of the Legal Fraternity on the Adequacy of the 1998 Land Act in Protecting Land Rights of Women and Tenants*—Research Findings Series No. 2 (Kampala, 2003) 9.

Furthermore, enforcing the consent clause is a difficult undertaking, given that there are no records of all marriages making it hard to establish whether any woman consenting to any transaction is the actual spouse. Even if the spouse were the actual one consenting, cases of undue influence cannot be brushed aside. The protection accorded under the consent clause is also unsatisfactory, because any person who is a registered landowner on the title has more rights than others with an interest in the land.

### Unsatisfactory Aspects of Uganda's Laws of Succession

Uganda's state-made laws regulating rights of intestate<sup>17</sup> succession to property are also wanting in many respects. Firstly, with the exception of the Constitution, other subordinate laws<sup>18</sup> regulating rights of intestate succession to property are archaic in as much as they were enacted before the Constitution of 10th October 1995. The implication is that much of the state-made law of succession must be amended to accommodate the new standards on women's rights set by the relevant provisions of the Constitution.

The above shortcomings aside, there are many laws governing rights of intestate succession to property that the applicable law in a particular case can be a combination of two or more legislations. The effect is that, in some cases, laws conferring superior rights upon widows are never invoked in the courts of law, depending on the shrewdness of the instructed solicitor. The law relevant to the regulation of rights of succession to property in Uganda is contained in among others, the following legislation: The Succession Act;<sup>19</sup> The Administrator General's Act;<sup>20</sup> The Administration of Estates (Small Estates) (Special Provisions) Act;<sup>21</sup> Resistance Committee Judicial Powers Statute 1988; and the Public Trustee Act<sup>22</sup>, which is only relevant to succession in as much as it empowers the Administrator General<sup>23</sup> to take over legacies of infants and lunatics. The rationale is to protect a category of people, especially the lunatics, who unavoidably include women, from being cheated of their entitlements.

Under the state-made law of intestate succession, provisions are made to ensure that those toward whom the deceased had a duty to support primarily widows or widowers, children, and dependant relatives are catered for. However, there are concerns given that some provisions of the law contradict the country's CEDAW commitments on women's rights. For example, under section 2(w) of the Succession Act, the definition of a wife is to the effect that at the time of the intestate's death she

<sup>17</sup> In terms of section 24 of the Succession Act, a person dies intestate in respect of all property which has not been disposed of by a valid testamentary disposition.

<sup>18</sup> Subordinate laws mean all laws in Uganda other than the 1995 Constitution.

<sup>19</sup> Succession Act, Chapter 162 Laws of Uganda.

<sup>20</sup> Administrator General's Act, Chapter 157 Laws of Uganda.

<sup>21</sup> The Administration of Estates (Small Estates) (Special Provisions) Act, Chapter 156 Laws of Uganda.

<sup>22</sup> Public Trustee Act, Chapter 161 Laws of Uganda.

<sup>23</sup> The Administrator General is an office established by the Administrator General's Act chapter 157 Laws of Uganda to ensure that estates of deceased persons are administered in accordance with the laws of succession.

has to be validly married to the deceased according to the laws of Uganda. Given that some women are not legally married even under customary law, it means their rights of succession to property are precarious. The maintenance of laws of succession that are not protective of women not legally married is a matter that deserves fresh consideration given the fact that many people in Uganda are now cohabiting. Ugandan law ought to accept the reality that many women now cohabit and protect the rights of both married women and those in cohabitation. As discussed hereafter, the CEDAW does not condone the distinctions between married and unmarried women.

In situations where the deceased dies intestate, the law sets out the relevant percentages entitled persons get from the estate<sup>24</sup>. Section 27(1) of the Succession Act, in a situation where an intestate is survived by a customary heir<sup>25</sup>, a wife, lineal descendants<sup>26</sup>, and dependant relatives<sup>27</sup>, excepting his principal residential holdings, provides explicitly that the customary heir shall receive 1%; the wife 15%; the dependant relatives 9%; and the lineal descendants 75% of the whole of the property of the deceased. Section 27(2) is to the effect that nothing shall prevent the customary heir from taking a further share in the capacity of a lineal descendant if entitled to it in that capacity.

Although lineal descendants, normally children of the deceased, receive the largest share, a widow acquiring her 15% of the whole of the estate, coupled with what she holds in trust for her children, usually becomes the most suitable person to administer the estate of her late intestate husband because, under the Succession Act, administration of an estate is granted to a person entitled to the greatest proportion of the estate.

The assumption of a widow administering the deceased's estate would hold otherwise, however, if the widow in question were not the mother of all the deceased's children, as normally happens where the deceased male was polygynous. Section 202 of the Succession Act provides that 'subject to section 4 of the Administrator General's Act, administration shall be granted to the person entitled to the greatest proportion of the estate under section 27'. The Administrator General's Act, referred to above, provides in section 4(1) that:

when a person dies in Uganda, the agent of the area in which the death occurs shall, upon receiving notice of the death or upon the death coming to his or her knowledge, forthwith institute inquiries to ascertain whether the deceased left any, and if so what, property in Uganda and shall report the death with full particulars as to property, as far as ascertainable, to the Administrator General.

Furthermore, section 4(3) requires the Administrator General to apply for letters of administration of the estate of the deceased, where the deceased has left a will

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<sup>24</sup> Estate means the movable or immovable property of any person.

<sup>25</sup> Customary heir means the person recognized by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person.

<sup>26</sup> A lineal descendant means the children of the deceased.

<sup>27</sup> Dependant relative includes a wife, husband, a son, or daughter under 18 years of age or a son or daughter of 18 years of age who is wholly or substantially dependent on the deceased. It also includes a parent, brother or sister, or grandchild who, on the date of the deceased, was wholly or substantially dependant on the deceased for the provisions of the ordinary necessities of life.

without appointing executors<sup>28</sup>, or persons named as executors in the will have predeceased the testator<sup>29</sup>, or renounced probate<sup>30</sup> of the will.

Uganda's state-made law of intestate succession does not promote equality between men and women in accordance with the Constitution because it awards surviving spouses negligible shares in their deceased spouse's estate. For example, a widow who makes various contributions to the development of her deceased spouse's estate is prejudiced by awarding her, as noted, a mere 15% of the estate in her own right. This is too small a percentage given the time and financial input she may have invested in the estate. Moreover, in situations where there is more than one widow, this 15% diminishes further because it has to be shared equally among them. It is, on the other hand, very rare to find more than one widower sharing the said 15% equally among themselves because polyandry<sup>31</sup>, unlike polygyny<sup>32</sup>, is not prevalent.

In patrilineal<sup>33</sup> societies, as is the case in Uganda, it is unlikely that dependant relatives can come up with a distribution scheme that prioritizes the interests of widows. Surprisingly, section 27(3) of the Succession Act allows the distribution of an intestate estate according to the wishes of the dependants, provided the court approves of the distribution. Despite the sanctioning of the distribution by the courts, this is no bar to dependant relatives of the deceased granting small shares of the estate to widows who, in many cases, do not go to the courts to seek approval of the distribution.

Under section 2(r) of the Succession Act, a personal representative is a person(s) appointed by law to administer the estate or any part thereof of a deceased person, and only holds the property in trust for the beneficiaries. Section 25 provides that 'all property in an intestate estate devolves upon the personal representative of the deceased upon trust for those persons entitled to the property under this Act'. Ideally, this law is a safeguard for widows who may be cheated of their entitlements by personal representatives. The practice, however, is that customary heirs who are normally males are chosen as representatives of the deceased and often abuse the confidence bestowed in them by wasting the property to the detriment of the widows and other beneficiaries. Although there are remedies to address this situation, in practice, the institutions that avail these remedies are not easily accessible and prescribe generally costly and complicated procedures to be followed before granting a remedy. A progressive law of succession should confer more rights on surviving spouses rather than personal representatives.

Under section 27(1)(b) of the Succession Act, where an intestate is survived by a customary heir, wife and dependant relative but not lineal descendant, with the exception of the principal residential holding, the customary heir receives 1%, the

<sup>28</sup> Executor means a person appointed in the last will of a deceased person to execute the terms of the will.

<sup>29</sup> Testator refers to a deceased person who passed away having executed a valid will prior to his demise.

<sup>30</sup> Probate means the grant by court of competent jurisdiction authorizing the executor named in the testator's last will to administer the testator's estate.

<sup>31</sup> Polyandry is the practice of a woman having more than one husband or male sexual partner.

<sup>32</sup> Polygyny is a practice where a man has more than one female sexual partner or wife at the same time.

<sup>33</sup> Patrilineal societies are those that inherit or determine descent through the male line.

wife receives 50%, and the dependant relative receives 49% of the remaining property of the intestate. Although the state-made law of succession restricts the entitlement of the customary heir to only 1% of the estate, in practice, many families give them more property than what the law offers in accordance with the traditional perception that customary heirs symbolize the deceased. Under the Succession Act, section 2 (e), a customary heir is the person recognized by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person. The clan appoints the customary heir but, given that all societies in Uganda are patriarchal<sup>34</sup>, males are favored to females (Percy et al. 2001).

It should be recognized, however, that in some situations, especially monogamous relationships where there are no children surviving the deceased, the law favors surviving spouses. For example, under section 27(1)(c) of the Succession Act, in situations where an intestate is survived by a customary heir, wife, or dependant relative but not a lineal descendant, the customary heir receives 1%, the wife or dependant relative receives 99% of the whole property of the intestate. However, Uganda's population is growing rapidly, implying that it is rather unusual to find a married couple without children, in which case the widow would get a bigger share of the estate as above.<sup>35</sup>

There have been some reforms to the law, albeit through the courts. The Constitutional Court of Uganda<sup>36</sup> on 5th April 2007 declared sections of the Succession Act relating to occupancy rights of the matrimonial homes discriminatory and, accordingly, null and void. The repealed law was to the effect that, whereas a widower had an indefinite right to occupy a matrimonial home, the widow's rights were conditional and ceased upon her remarriage. Furthermore, the court found that section 27 regulating the distribution of property on the death of a male intestate, section 29 regulating the reservation of a principal residential holding from distribution, section 43 regulating testamentary guardians, and section 44 regulating statutory guardians were all inconsistent with the constitution and, therefore, null and void. Unfortunately, Parliament is yet to amend the law of succession to bring it in conformity with the Constitution.

Concerning rights of separated spouses, section 30(1) of the Succession Act provides that 'no wife or husband of an intestate shall take any interest in the estate of an intestate if, at death of the intestate, he or she was separated from the intestate as a member of the same household'. Under section 30(3), however, on application by such a wife or husband, the court may declare that subsection (1) shall not apply to the applicant. The problem is that section 30(3) above, although it makes it possible for separated spouses to make claims and share in the intestate's estates, requires relying on court discretion rather than a basic set of guidelines and rules to resolve disputes. Ideally, the act of separation as opposed to judicial separation or divorce should not be a bar to any surviving spouse sharing in the intestate's estate,

<sup>34</sup> Patriarchal societies are forms of social organizations in which men head and control family units.

<sup>35</sup> By 2005, Uganda's population, which doubles every 20 years, was 27 million people. See report available at <http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html> (accessed 7 August 2005).

<sup>36</sup> See Law & Advocacy For Women in Uganda vs. Attorney General, Constitutional Petitions Nos 13/05& 05/06.

especially if the relationship has lasted for a long time. It is possible for a spouse who is not aware of this law or lacks the money to afford legal representation to lose his or her entitlements to property he or she helped to accumulate. Litigation, moreover, even that which is eventually settled before trial, is often time consuming and ruinously expensive to the parties involved in it.

Uganda's state-made law regulating rights of intestate succession to property has a few strong points, as discussed above, but there are a number of unsatisfactory aspects that need to be addressed. As regards testate<sup>37</sup> succession, section 36(1) of the Succession Act provides that 'every person of sound mind and not a minor may by will dispose of his or her property.'

The law regulating testate succession, however, requires a provision for the maintenance of dependents to be made in every will. This is a useful provision of the law that protects beneficiaries against disinheritance. Accordingly, section 37 of the Succession Act provides that 'notwithstanding section 36, where a person, by his or her will, disposes of all his or her property without making reasonable provision for the maintenance of his or her dependent relatives, section 38 shall apply'.

Section 38(1) of the Succession Act relates to the power of the court to order payment out of the estate of the deceased for the maintenance of dependents. It prescribes that:

where a person dies domiciled in Uganda leaving a dependent relative, then, if the court, on application by or on behalf of the dependent relative of the deceased, is of the opinion that the disposition of the deceased's estate effected by his or her will is not such as to make reasonable provision for the maintenance of that dependent relative, the court may order that such reasonable provision as the court thinks fit shall, subject to such conditions or restrictions, if any, as the court may impose, be made out of the deceased's estate for the maintenance of that dependent relative.

Testamentary freedom is, therefore, not absolute but regulated to balance conflicting interests, principally related to the wishes of the individual testator and the well being of his or her family and society. Consequently, under section 38 of the Succession Act above, when a person dies testate but does not make reasonable provision for the maintenance of a dependent relative, the High Court may order that reasonable provision be made out of the deceased's estate for the maintenance of that relative. The term dependent relative, which includes a spouse, is, however, given a very generous definition under section 2(g) of the Succession Act, as follows:

"dependent relative" includes:

- (a) a wife, a husband, a son, or daughter under 18 years of age or a son or daughter of or above 18 years of age who is wholly or substantially dependent on the deceased;
- (b) a parent, brother or sister, a grandparent, or grandchild who, on the date of the deceased's death, was wholly or substantially dependent on the deceased for the provision of the ordinary necessities of life suitable to a person of his or her station'.

<sup>37</sup> Testate succession re is a situation where a person dies having made a valid will prior to his demise.

The definition of a dependent relative is unsatisfactory because the class of people who qualify to claim entitlements from the deceased's estate is too large and needs to be restricted to the immediate family.

Under section 39 of the Succession Act, a dependant relative who has not been provided for in the will must, except with permission from court, make an application to the High Court not later than 6 months after a representative to the estate has been appointed. There are however many difficulties, such as the use of the English language, that dependant relatives encounter when accessing the High Court to enforce this entitlement. Moreover, widows ignorant of this law and those financially unable to pursue their entitlements in the High Court, given that it is the only forum with power to amend wills, are left in a distressed situation. Besides, a widow's past misconduct can adversely affect her entitlement. Section 38(5) of the Succession Act provides that:

[T]he court in considering all relevant applications shall have regard to: any past, present or future capital or income from any source of the dependent of the deceased to whom the application relates; conduct of the dependent in relation to the deceased; and any other relevant circumstances.

Besides the above, in accordance with the law, the requirement for testate succession is a valid will. The word will has two meanings: the first refers to the total declaration of what the testator wishes to happen at his or her demise; and the second meaning refers to the document itself implying that a will in the ordinary sense must be in writing and be signed by the testator or someone in his presence and at his direction. The signature must be attested and under section 50 of the Succession Act there must be two or more witnesses, each of whom must have seen the testator sign or affix his or her mark to the will. The above requirements of the law, though designed to prevent fraud, appears demanding to ordinary people not used to executing wills, let alone writing. The present situation leaves some widows in distress when their husbands bequeath property to them in what they may perceive to be valid wills that are subsequently challenged by other dependent relatives and are declared invalid for non-compliance with the rules. Uganda ought to seek ideas on simplifying the execution of testamentary documents, for example, from Scotland.

Scots law has adopted, since the Requirement of Writing (Scotland) Act 1995,<sup>38</sup> a liberal position towards testamentary documents. They need to be subscribed by the grantor; however, in terms of section 2(4) thereof, other legislation may prescribe more lax formalities. Section 2 provides that validity is achieved merely by the granter subscribing the will without further formality. Subscription means signature at the end of the last page, excluding any annexations.<sup>39</sup> It does not matter whether the text of the will is in the testator's handwriting. However, although the will achieves validity merely by signature, it remains necessary to establish that the signature is that of the testator. A presumption that the will was in fact subscribed by the testator arises if, in addition to the subscription at the end, the document bears

<sup>38</sup> See Requirements of Writing (Scotland) Act 1995 c 7 as appendix 7 in Rennie and Cusine (1995).

<sup>39</sup> See Requirements of Writing (Scotland) Act 1995, section 7.

the signature of not two but only one witness (aged 16 or over) to the testator's subscription, and has been signed by the testator somewhere on each separate sheet of the will (Meston 2002). The point is that Scots legal regulations for the execution of wills are less demanding than the relevant laws of Uganda that require two witnesses to validate a will.

As regards women's rights under Uganda's disparate customary laws, what is common to all of them is that males are given preference over females with regard to rights of succession to property. In one way or another, clans, the in-laws, and extended families affect women's rights when they determine what is a fair distribution of property upon the death of a husband. Moreover, in many cases, when state-made and non-state-made laws of succession conflict, the latter tend to prevail to the prejudice of the women beneficiaries. For example, in some instances, wills may provide entitlements for widows on paper but the clan distributes the property according to its own schemes under the umbrella of custom, to the detriment of such widows. Given that customary law regulates people's lives on a daily basis, challenging it is easier said than done. This explains why some widows succumbing to family pressure trade off their rights, such as a vigorous pursuit of their rights to property under the state-made laws of succession, for the sake of family harmony (Butegwa 1994). The clan and family (above) constitute what has appropriately been described as the semi-autonomous social fields: unwritten rule generating and enforcing entities.<sup>40</sup>

The clan as a semi-autonomous social field meddles with women's rights of succession to property whenever it exerts pressure on the widow to accept the clan's distribution schemes of property lest the relatives of the deceased cease to interact and support her and the children. Decisions taken by the clan may or may not have the woman's input depending on what the particular clan perceives as family values and a fair property distribution scheme. The overall effect is that in her daily existence, a Ugandan woman is still subjected to more than one system of law, each with its own standards on rights of succession to property and not necessarily compliant with the country's constitution and CEDAW commitments.

At customary law, the majority of women have access but not rights in family property and as such cannot assert ownership rights. With regard to land, where communities are governed by communal land tenure, traditional customs and practices discriminate against women so that more women than men are denied effective land rights. In Uganda, women were traditionally restricted in their ownership and use of land because it was feared that clan land would fall into the hands of non-clan members through marriage. Clan membership was customarily the effective criterion on which usufructuary rights and control over land was based. Accordingly, land was allotted to men rather than women. However, even the men had no right to sell the land to a non-

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<sup>40</sup> J. Witteveen 'A self regulation paradox: notes towards the social logic of regulation' in the *Electronic Journal of Comparative Law*, Volume 9, 1 January 2005 at <http://www.ejcl.org/91/art-2.html> who notes that such entities generate defiance to the rule making and rule enforcing capacity coming from outside the field but are never completely autonomous and have to obey, at least partially, the outside rules or transform them into workable arrangements (accessed 1 July 2006).

clan member. Unfortunately, this is no longer the case as men now use the land as security for loans.<sup>41</sup> Restrictions on women's ownership of land are yet to change. Women are, therefore, prejudiced by the prevailing state of affairs. It is acknowledged, though, that customary law is dynamic and it is not uncommon to find some middle class and the generally educated families where parents and clans bequeath property equally to their sons and daughters.

### Unsatisfactory Aspects of Islamic Family Law as Practiced in Uganda

Muslim women exercise independent legal, economic, and spiritual identity. The *Qur'an* stipulates that women "shall be legally entitled to their share" (*Qur'an* 4:7) and that "to men is allotted what they earn, and to women what they earn" (*Qur'an* 4:32). Only if women choose to transfer their property can men regard it as lawfully theirs (*Qur'an* 4:4)<sup>42</sup>.

Although, as shall be discussed hereafter, Muslim women appear to be marginalized in matters of inheritance, this reduced inheritance rights are compensated by other means of wealth generation. These methods include a woman's equal access to purchase through earnings, endowments and gifts, and special supplements such as savings (from lack of financial obligations within the family), dower, and maintenance. Clearly, as regards property rights, Islam accords women a more egalitarian position than customary law and Christianity.

The above notwithstanding, some practices inspired by the Islamic religion continue to affect adversely women's rights to property in marriage, upon divorce, and upon the death of a spouse, regardless of what the Constitution prescribes to the contrary. There are explanations for this defiance; Islam is both a religion and a way of life making separation of the two in the life of any individual believer in the religion difficult. Moreover, Islam predates Uganda's new constitutional standards on rights of women, implying that Islam was embraced long before the latter was promulgated.

Islam spread to East Africa during the 19th century, first through teachers and religious leaders from Hadramaut in Yemen and from the Comoro Islands, and then later through expansion of the slave trade inland from the coast. Most Muslims in the East African region where Uganda is situated belong to the *Sunni* sect.<sup>43</sup>

Concerning matrimonial property rights, marriages contracted under Islam are evidenced by a marriage agreement that imposes specific obligations and ensures rights for each partner. Among the significant rights and obligations are those that concern obedience, regulation of the marriage agreement, dower, and maintenance. The cause for concern, however, is that Islam requires only maintenance for the woman during her *Iddat* (waiting period after divorce) during which time she is precluded from remarriage. There is, therefore, a very limited duty to maintain

<sup>41</sup> Florence Butegwa, 'Using the African Charter on Human and Peoples Rights to secure women's access to land in Africa' supra note 30, 500.

<sup>42</sup> See also United Nations Human Settlements Programme (UN-HABITAT), 2005: Muslim Women and Property at [www.unhabitat.org/downloads/docs/3546\\_30551\\_ILP%205.doc](http://www.unhabitat.org/downloads/docs/3546_30551_ILP%205.doc) (accessed 20 October 2008).

<sup>43</sup> An-Naim (2002), 40 who notes that by 2000, Muslims constituted 10% of Uganda's population.

divorced wives under Islamic family law. Moreover, Islam is supportive of a separate property marital regime and, therefore, neither spouse acquires interest in the property of the other because of the marriage. Whereas this is the case, Islam sanctions early marriages of girls denying them thereby the opportunity to pursue studies and probably the ability to earn and purchase their own property.

Islam allows polygyny. Several arguments have been advanced in support of polygyny among Muslims: that it avoids a situation where a woman is kept as mistress with no right or legal claim on the man concerned. Islam forbids extramarital relationships (Hussain 1999). The first wife is not abandoned when the husband marries a younger woman; he has an ongoing obligation to maintain and care for her. A second wife can help the first when the first is disabled by ill health or old age, and unless he is allowed to take a second wife, a man may be led into adultery to satisfy his natural biological needs. All the arguments in favor of polygyny do not have any consideration of women's emotional needs and the complications it poses to Uganda's compliance with her constitution and CEDAW commitments on equality and non-discrimination. Presently, Ugandan law assumes that all marriages entered into by Muslims are governed by *Sharia* and allows for polygyny whatever the couple's individual preference may be. Manifestly, by tolerating Islam-inspired practices, Uganda is in breach of her equality of the sexes standards.

Whereas polygyny is permitted in Islam, it was never meant as an unrestricted license for any man to marry as he wishes, contrary to what many Ugandan Muslims practice. Before a man can take a second, third, or fourth wife, he should prove that he has sufficient income and assets to be able to make financial provision for them; be capable of treating all his wives equally and justly; have a good reason for wanting to take an additional wife, such as that the first wife is too old or ill to perform household duties or her marital obligations; that she cannot have children or is of unsound mind; and obtain consent of his first wives.<sup>44</sup> These injunctions are followed more in theory than in practice in Uganda with the result that when poor men marry more wives, the property available to the women upon the husband's death is very meager.

Although Islam recognizes testamentary devolution of property, only one third of the estate can be bequeathed by will. The effect is that a testator does not have unrestricted authority over her or his property, which means she or he cannot disinherit her or his beneficiaries. Accordingly, the bulk of the estate is distributed under intestacy rules, as prescribed by the *Qur'an*, to the beneficiaries who are the widows/widowers, father, mother, and children of the deceased. According to the *Qur'an* in *Sura An-Nisaa*, 4:7, 11, and 12, the scheme of property distribution is based on the following principles: males and females are each entitled to a share of inheritance regardless of the size of the estate; a daughter's share is to be half of that of the sons; if there are only daughters, two or more are to share two thirds of the estate; if there is only one daughter, she receives one half; both mother and father are each entitled to one sixth, if there are children, but if there are no children and the parents are the only heirs, the mother receives one third. If the deceased left brothers

<sup>44</sup> Jamila Hussain *Islamic Law and Society*, supra note 34, 72.

and sisters, the mother receives one sixth; a husband is entitled to a half share of his wife's estate, if there are no children; if there are children, the husband's share is one quarter. A wife is entitled to a one-quarter share of her husband's estate, if there are no children; if there are children, she receives one eighth; if the deceased has left neither ascendants or descendants but has a brother and sister who survive him, each gets one sixth, but if there are more than two, they share a third of the estate.<sup>45</sup>

The problem therefore is that, under Islamic law regulating intestate succession to property, the entitlements for widows are inadequate. The provision for a surviving widow falls short of the constitutional standards on equality and non-discrimination of the sexes. The situation is compounded further if the deceased husband was polygynous and was survived by several children. Polygyny is widely practiced by Muslims in Uganda, implying that the wives share the one eighth whenever there are children or one fourth in cases when there are no children.

It should be recognized that, under Islamic law, greater economic responsibility is on the men, whereas the women's role is economically lighter (Yamani 1996). A female does not have social and family obligations to maintain other relatives. The obligation to support the women of the family is placed upon males: fathers, sons, brothers, and even uncles. In theory, a wife, sister, or daughter would almost never have to support herself and therefore the argument goes she can always of right call upon a male relative to provide for her. What is unsatisfactory with this situation is that the widow is left dependent on the goodwill of her children and male relatives. In an ideal Muslim family, there would be no reluctance on the part of the children and relatives to contribute to the widow's support; however, in practice, many families fall short of this ideal.

It should be appreciated that Islam permits a husband or father to make provision for his wife and daughter after death by making gifts to them during his lifetime. There is no limitation on this power of gift; while gifts can compensate for the small entitlement a widow gets upon the death of her husband, gifts are not mandatory and therefore the power to make gifts cannot be relied upon to enhance women's rights of succession to property.<sup>46</sup> The fact that gifts, like bequests, are not mandatory means that, in the majority of cases, the widow's survival is still dependant on the goodwill of her male relatives whose entitlements are more than hers under Islamic family law. Moreover, if a person on his deathbed makes a gift, such a gift is treated as a bequest and cannot exceed one third of the estate. It is also subject to the consent of the heirs, since it should not deprive the heirs of their legitimate rights.<sup>47</sup> The problem is that, owing to Islam's restriction of testamentary bequests to only a third of the estate, the bulk of the estate is distributed in a manner that does not favor widows.

Under Islamic family law, a widow is also entitled to receive her deferred dower (*mahr*) on her husband's death. Receipt of *mahr* ought to make financial provision for her. However, in cases where amounts of dower paid are small and paid promptly, this provision is also not useful to widows.

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<sup>45</sup> Jamila Hussain *Islamic Law and Society*, supra note 34, 104.

<sup>46</sup> Jamila Hussain, *Islamic Law and Society*, supra note 34, 113.

<sup>47</sup> Jamila Hussain, *Islamic Law and Society*, supra note 34, 114.

The problem, therefore, is that the government is reluctant to make Islamic family law compliant with its CEDAW obligations and yet, in Uganda, many women profess the Islamic faith and Islamic law governs their marriages, divorce, and rights of succession to property. About 16% of Ugandans are Muslims though the exact percentage of women who profess Islam is unknown.<sup>48</sup>

In summing up, Uganda's state-made, customary, and Islamic laws of marriage and succession do not award female spouses a substantial share in the estate consistent with equality of the sexes. Although each of Uganda's 56 ethnic groups has its own customary law, what is common is that, owing to patriarchy, men rather than women have superior rights to property during marriage, upon divorce, and upon the death of a spouse. The fact that customary law is not written, subject to variation, and largely enforced by men does not advance women's rights to property. As a general rule, division of matrimonial property under customary law for the benefit of estranged wives was, and still is, not recognized nor is maintenance payable to a wife after divorce (Wengi 1997).

Under the state-made laws, marriage has no legal effect on a spouse's ownership of property. Anything owned before marriage or acquired during it remains the property of the owner and is under his or her management and control while the marriage continues. In the event of a marital dispute and the parties want to divorce and the matter goes to the state courts, financial contribution must generally be proved so as to claim a share in the other spouse's property. Moreover, the work housewives engage in, such as child raising and looking after homes, is neither monetized nor evaluated. It had been proposed under the Domestic Relations Bill (DRB) to compensate each of the spouses for their non-monetary contribution to matrimonial property when being distributed upon divorce or separation. The Uganda Government, however, let the women down when it encouraged Parliament to shelve the DRB at its third reading instead of passing it saying it was controversial and more consultations were needed (Nakayi et al. 2005).

The CEDAW committee has warned that non-financial contributions by the wife often enable the husband to earn an income and increase matrimonial assets, and ideally financial and non-financial contributions should be accorded the same weight.<sup>49</sup> Uganda violates women's human rights whenever it fails to enact and enforce laws that cater for both financial and non-financial contributions when sharing property upon divorce or death of a spouse.

Whereas the state-made laws of testate succession give courts power to protect widows against disinheritance by amending wills, unfortunately, few people in Uganda write wills. Moreover, husbands can still give away whatever domestic property they want *inter vivos*<sup>50</sup> and courts do not have powers to reverse such transactions, even if done with the purpose of defeating the interests of the surviving

<sup>48</sup> See <http://www.worldfactsandfigures.com/religion.php> (accessed 17 October 2008).

<sup>49</sup> General Recommendations of the CEDAW Committee No 21 (13th Session) on Equality in Marriage and Family Relations paragraph 32. These recommendations are available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21> (accessed 20 January 2006).

<sup>50</sup> *Inter vivos* gifts arise when the owner hands property as a gift to another person and the gift takes effect during the lifetime of the parties involved.

spouse. The courts' powers under the Succession Act are restricted to distributing the net estate of the deceased among all dependant relatives.

Evidently, despite Uganda's imperative constitutional obligations, the current state of women's rights to property under both the state-made and non-state-made laws of marriage, divorce, and succession is unsatisfactory.

### **Some Reform Proposals to Enable Uganda Improve Her Women's Rights to Property in Marriage, Upon Divorce, and Death of a Spouse**

As noted, under the state-made laws regulating rights to property in marriage and upon divorce, where there is any semblance of reparation on divorce, this is rarely a matter of fixed rights to property but is guided by judicial discretion. Although judicial discretion under Uganda's state-made laws of marriage, divorce, and succession allows each judge to do justice in each individual case, it needs to be based on fixed rights to property so as to avoid unpredictability in the outcome of any particular case. Presently, it is not uncommon for different courts, as shown in the *Nakiyingi v Merekizedeki*<sup>51</sup> case, to come to quite different conclusions based on similar facts. It is, therefore, desirable that Uganda adopts a matrimonial property regime that advances certainty and clarity in the laws regulating the sharing of the parties' resources upon divorce. Certainty and clarity would enable the parties to have an understanding of what to expect on divorce and, as well as reducing acrimony, it would enable the parties to reach settlements more easily. It would also reduce the time courts take to resolve disputes and the costs of litigation. It would enable judges to make decisions quickly and reduce the backlog of cases. Finally, it would promote consistency in the division of property throughout the country and between courts and individual judges.

There should be no discrimination against unmarried men and women in cohabitation. Objectively, in function, there is no difference between a stable cohabitation and a stable marriage. Similarly, in both marriage and cohabitation, it is difficult to prove contribution to property acquired in the relationship after a long period of time. Accordingly, section 2(w) of the Succession Act, which provides that a wife at the time of the intestate's death has to be validly married to the deceased according to the laws of Uganda, should be amended to include cohabitants.

The most adverse effect of Uganda's unbridled right to use one's property as one wishes is that, by the time of divorce or death, the net property available for sharing between the married parties is often meager, usually to the disadvantage of the homemaker wife. This is the reason why a reform of the laws of succession that would advance women's rights to property must be preceded by, or effected concurrently with, the adoption of a marital property regime that restricts the powers of the spouses over family property. This is probably the only way to avoid a peculiar situation where amended laws confer upon widows' rights of succession to household property, which husbands under the laws of marriage can unilaterally sell without any hindrance. Given the unsatisfactory situation that prevails in Uganda, an

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<sup>51</sup> *Nakiyingi vs Merekizedeki*, supra, note 11.

immediate community property regime is worth adopting because under it, the spouses own the property equally regardless of contribution. Under the immediate community property regime, marriage creates a community: a body of property that is automatically jointly owned (regardless of apparent paper or registered ownership) (Cook et al. 2005). Both parties have the power to manage and control the community property; in many cases, neither can dispose of it without the other's consent.

Short of adopting the above community property regime, Uganda should at the very least, protect women's rights over matrimonial homes. English law is instructive enough; the rights of occupation of a spouse who has no proprietary, contractual, or statutory interest in the matrimonial home of another are secure under the English Family Law Act 1996 (hereinafter called the FLA). Sections 30(1) and (2) of the FLA are to the effect that if a spouse is entitled to occupy a dwelling house and the other spouse is not, the non-entitled spouse has the following matrimonial home rights: if in occupation, a right not to be evicted or excluded from the dwelling house or any part of it by the other spouse except with leave of the court given by an order under section 33; and if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling house.<sup>52</sup>

Furthermore, section 30(3) provides that "if a spouse is so entitled to occupy a dwelling house or any part of a dwelling house, any payment or tender made or other thing done by that spouse in or towards satisfaction of any liability of the other spouse in respect of rent, mortgage payments, or other outgoings affecting the dwelling house is, whether or not made or done in pursuance of an order of the court, as good as if made or done by the other spouse".<sup>53</sup> These are the laws that Uganda should adopt.

A dependent relative, with a right to seek a share in the deceased's estate when disinherited by the deceased's will, should be re-defined to include only the surviving spouse, children of the parties, the deceased's parents in law, and the parents of the deceased. In Uganda, because there is no state social security, it is mainly children who support their parents in old age, hence the need for them and the said dependent relatives to claim a share from the deceased's estate.

The power to amend wills that at present vests in the High court under the Succession Act, such as to make provision for the dependant relatives should be taken over by the subordinate Magistrate courts that are more accessible.

Proper interpretation and enforcement of Islamic law of marriage is long overdue. It is only a proper interpretation and enforcement that would ensure that before a polygynous Muslim man takes another wife, he can prove that he has sufficient income and assets to make financial provision for his wives: there should be the same property available to all the women upon divorce or the husband's death. Furthermore, the government should appoint a committee of judicial officers with representatives from the Uganda Muslim Supreme Council to monitor and ensure

<sup>52</sup> See section 30(1) and (2) FLA 1996 at <http://www.westlaw.co.uk> (accessed 30 November 2005).

<sup>53</sup> See FLA 1996, *supra* note 44. Under section 63, a dwelling house includes any building, or part of a building, which is occupied as a dwelling, any caravan, houseboat, or structure occupied as a dwelling, and any yard, garden, garage, or outhouse belonging to it and occupied with it.

that Islamic law does not contravene principles of gender equality and non-discrimination.

It is proposed that at the very least, the overarching principle of a reformed customary law of succession is that where the deceased had more than one wife, all the surviving wives should share equally in his estate. The definition of estate should exclude the various matrimonial homes and their household properties or the respective residences of each wife. Similarly, in her respective matrimonial home, each wife should be entitled, in addition to the matrimonial home, to all its household property. To avoid competition over resources, before a man marries another wife, the law should ensure he has acquired another furnished home for her.

Ideas to reform customary law marriages in Uganda can also be borrowed from South Africa. Under her Recognition of Customary Marriages Act (RCMA)<sup>54</sup>, if a husband wishes to be a party to a polygamous union, he is required to apply to court to have a written contract approved. The contract regulates the future matrimonial property system of his marriage. The law provides: "when considering such applications court must in the case of a marriage, which is in community of property: (a) terminate the matrimonial property system which is applicable to the marriage, effect a division of the matrimonial property; (b) ensure an equitable distribution of the property; and (c) take into account all relevant circumstances of the family group, which would be affected if the application was granted. Furthermore, the court may: (a) allow further amendments to the terms of the contract; (b) grant an order, subject to any condition it may deem just; and (c) refuse the application if, in its opinion, the interests of any of the parties involved would not be sufficiently safeguarded by means of the proposed contract."<sup>55</sup>

Under section 7(8) RCMA "all persons having a sufficient interest in the matter, particularly the existing spouses or spouses must be joined in the proceedings". What this means is that in South Africa men can no longer contract a polygynous relationship as freely as they used to do in the past. These are ideas Uganda ought to incorporate in her laws.

It could be that some women accept polygyny as a coping strategy to deal with poverty (WLSA 1994). This is the greater reason why women's poverty alleviation must become a priority to the Uganda government if it is to make restrictions on polygyny practical. The government should, therefore, at most institute social welfare schemes, but at the very least extend considerable interest-free credit facilities to women under a program of affirmative action. Loans, if well utilized, may go a long way in addressing the financial needs of women. Furthermore, there is a need to adopt a national employment policy promoting equal opportunities for both sexes.

The government, using the mass media, and especially radio programs, should institute awareness campaigns about women's property rights in marriage. The Uganda Law Reform Commission should seek ideas from the public and involve them in the debate towards adopting a unified legal system. There are many problems emanating from the legal pluralism presently in force. The varied nature of

<sup>54</sup> The Recognition of Customary Marriages Act No 120 of 1998 at [http://www.acts.co.za/custom\\_marriages/index.htm](http://www.acts.co.za/custom_marriages/index.htm) (accessed 14 March 2004).

<sup>55</sup> Section 7(7)(b) RCMA.

the cultural, ethnic, and linguistic composition of the 56 ethnic communities or tribes that constitute Uganda means that both the written and unwritten or living customary laws differ from community to community. The same is true of religious laws. While the present article has proposed that customary and Islamic family law should be restructured to comply with the constitutional standards on equality, a better approach is a uniform legal system.

The proposal is that the Uganda Law Reform Commission should initiate discussions on having a uniform law regulating rights to property in marriage and upon the death of a spouse by extolling the virtues of a uniform legal system. However, clothing this solution with acceptance in a multi-ethnic and multi-religious country faces many obstacles. Granted state-made legislation, including the constitutional bill of rights, takes precedence over customary and Islamic family laws, however, translating this principle from paper into practice has proved elusive.<sup>56</sup> Accordingly, the Constitution should be amended to do away with legal pluralism.

Finally, in Uganda, some land is communal, implying that even the male owners have no certificates of titles. That some of Uganda's land is not registered poses a further problem; it becomes difficult to promote joint ownership and registration of spouses on the land titles. Successful implementation of the immediate community of property marital regime requires the government to initiate a nationwide land registration exercise. Initiating such a land registration program is, however, fraught with problems: land registration procedures are time consuming and demanding; and skilled people must be paid to carry out surveys, verify cadastral plans, prepare legal documentation, keep and update records, and arbitrate in disputes. Given that the Ugandan government has launched a war against corruption in public offices, it should divert some of the financial resources recovered from the corrupt to reform land ownership in the country. This is crucial if the matrimonial property rights of women, as far as they relate to land, are to become anything more than theoretical. It is equally important that Government does whatever it takes to pass the Land (Amendment) Bill 2007 currently in Parliament into law. The principal objective of the proposed amendment is to enhance security of tenants on registered or customary land.<sup>57</sup> The said Bill, therefore, intended to protect tenants from unlawful evictions is protective of many women who have been victims of illegal evictions. The prevailing tenure insecurity, moreover, generally deters productivity and other forms of investments in land.

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<sup>56</sup> Although Uganda's Constitution provides in Article 129(1)(d) that Parliament shall enact a subordinate law to establish and regulate *Khadhis* courts, such a law has not been enacted; however, *Khadhis* courts exist and regulate rights of succession to property.

<sup>57</sup> See also Julia Schwartz: What should be done to enhance tenure security in Uganda and further development?—The Land (Amendment) Bill 2007, its shortcomings and alternative policy suggestions, April 2008 at [www.fesuganda.or.ug](http://www.fesuganda.or.ug) (accessed 20 September 2008). She avers however that, among others, it is equally important to have a functioning land administration and registration system if the law is to be effective.

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