Women's Rights of Succession to Property in Uganda: Reform Propositions

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Abstract

Articles 2(a)-(f) and 16(1)(h) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) prohibit discrimination and enjoin State parties to ensure substantive equality between men and women in marriage and family relations. To ensure compliance with the CEDAW, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) examines State parties' periodic reports and makes pertinent observations.

In 1985 by ratifying the CEDAW without any reservations, Uganda willingly undertook to make her laws and institutions regulating rights of succession to property compliant with the CEDAW. On 9th August 2002 the CEDAW Committee, when considering Uganda's third periodic report at its 575th and 576th meetings, expressed concern over the country's state-made and non-state-made laws of marriage and succession that conflict with both her Constitution and CEDAW commitments. Uganda was called upon to remove, in family relations, among others, *de jure* discrimination and eliminate *de facto* discrimination against her women.

With the above concerns in mind, this dissertation primarily measures Uganda's laws and institutions regulating rights of succession to property with the standards set by Articles 2(a)-(f) and 16(1)(h) of the CEDAW. To clarify rights of succession to property, however, laws and institutions regulating rights to property in marriage and upon divorce are also juxtaposed against the said CEDAW standards. The dissertation suggests reforms with a view to making Uganda's said laws and institutions compliant with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

Whilst some of the law reform propositions are based on intuition, given that countries rarely improve their laws without looking at what other jurisdictions are doing, this dissertation has sought progressive ideas from the English, Scots and South African laws and institutions regulating rights to property in marriage, upon divorce and upon the death of a spouse.

While there is legal pluralism in Uganda's laws and institutions regulating women's rights to property in marriage, upon divorce and upon the death of a spouse, such pluralism should not prevail over compliance with Articles 2(a)-(f) and 16(1)(h) of the CEDAW, as an international legal imperative: women's rights to property in Uganda may be regulated by state-made, customary and Islamic family laws and institutions so long as compliance with Articles 2(a)-(f) and 16(1)(h) of the CEDAW is guaranteed.

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Chapter One

1.0 Introduction.

There are two principal reasons that justify embarking on the present research. Firstly, the Convention on the Elimination of All Forms of Discrimination Against Women (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;[1] secondly, 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:

> "The Committee expresses concern at the situation of rural women, who constitute the majority of the female population in the country. The Committee also expresses concern that customs and traditional practices prevalent in rural areas prevent women from inheriting or acquiring ownership of land and other property. The Committee urges the State party to pay increased attention to the needs of rural women so as to ensure that they benefit from policies and programmes adopted in all spheres, as well as participate in decision-making, have full access to education and health services and credit facilities. The Committee urges the State party to eliminate all forms of discrimination with respect to the ownership, co-sharing and inheritance of land. It also urges the introduction of measures to address negative customs and traditional practices, especially in rural areas, which affect the full enjoyment of the right to property by women.
>
> 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,

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[1]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 2 July 2005.

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. The Committee requests the State party to work with the relevant ministries and non-governmental organizations, including lawyers' associations and women's groups, to create an enabling environment for legal reform and effective law enforcement and legal literacy".[2]

Although the CEDAW Committee was concerned by the slow progress in removing *de jure* discrimination and preventing and eliminating *de facto* discrimination against women in Uganda, close to four 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".[3] All this is, however, yet to be done.

These concluding comments of the CEDAW Committee highlight three broad areas of concern that create the need to suggest reform of all institutions and laws regulating the rights of succession to property in the country if there is to be compliance with the CEDAW. Firstly, there is deprivation that disproportionately affects more women than men, especially in rural areas. The CEDAW Committee expressed concern about the situation of rural women who constitute the majority of the female population in the country and this is why the Committee urged Uganda to pay increased attention to their needs in order to ensure that they benefit from policies and programmes adopted in all spheres; these would include participating in decision-making, and having full access to education, health services and credit facilities.[4]

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[2]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/0/6d2342925fbe1c7b41256dac00513b8d?OpenDocument. Accessed 28 May 2005.

[3] *Ibid.*

[4] *Ibid.*

The CEDAW, by prescribing substantive as opposed to formal equality, has relevance to addressing the situation of rural women in Uganda, not least of all with regard to access to credit. Substantive equality between men and women in rights of succession to property, as propagated under the CEDAW, concerns all Ugandans and progressive change is a developmental issue. For example, equality between the sexes, especially where it extends to land, reduces poverty and economic deprivation, because widows, when they inherit land, are able to use it as security for loans and improve their lives.

Addressing women's rights of succession to property, particularly to land, is necessary and long overdue if the discriminatory land tenures in the country are to be eliminated. Presently, there are in Uganda three types of land rights: access rights, user rights and ownership rights. The gender structure of land rights varies across the country but women's rights are in general limited to access while men are more likely to have ownership rights. Thus, women's rights are less secure than men's and, without secure rights, women's abilities to participate in income generating activities by securing credit from banks and so forth are reduced. Land held in common between husband and wife improves security of tenure and productivity. Studies show that "women in Uganda produce 60% of cash crops and 80% of food production, yet only 7% of registered landowners in the country are women".[5]

A Ministry of Finance study also reports that women have less property than men in Uganda, hence the need to enhance their rights of succession to property. 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".[6]

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[5] See "Uganda: exclusion of women from land ownership-the lost clause", a report about women's land rights at the Equality Now website, http://www.equalitynow.org/english/actions/action_1701_en.html. Accessed 18 May 2005.

[6] See Government of Uganda, Poverty Eradication Action Plan at http://www.finance.go.ug/peap.html. See part two of Uganda's report on the implementation of the Beijing Platform for Action (1995) and outcome of the twenty- third special session of the UN General Assembly (2000) at http://www.cities-localgovernments.org/uclg/upload/docs/UGANDA_English.pdf. Accessed 29 May 2005.

This is indicative of the fact that socioeconomic rights of women must be revisited and that proposing substantive equality and non-discrimination between men and women in their rights of succession to property is a move in the right direction to address some of the CEDAW Committee's concerns and alleviate poverty in Uganda.

Since the 1990s, economic policy in Uganda has been dominated by the pursuit of economic growth through structural adjustment programmes defined and controlled by the World Bank and the International Monetary Fund. These programmes consist of short-term stabilization measures and long-term market reforms and liberalization of all key sectors of the economy.[7] It is not uncommon for the Uganda government, on the request of the World Bank, to direct district authorities or other government institutions in the country, to lay off "incompetent workers" or introduce user fees to reduce expenditure and raise revenue. As a result of these policies, Uganda has achieved some economic growth, infrastructure rehabilitation and many other related gains.

The structural adjustment programmes, have been accompanied by labour retrenchments, removal of subsidies and the escalation of user fees in basic services like water and electricity. Therefore, ironically, some of the reforms have promoted poverty and job insecurities. Women have been identified, however, as one of the groups suffering disproportionately from poverty after the reforms because women generally lack access to credit.[8] They control little land that they can use as collateral to get loans so as to survive when they have been retrenched from work or afford alternative social services when user fees are introduced as government departments or other institutions seek to raise revenue. In addition to their lower levels of involvement in waged work, women generally occupy lower positions in many organizations and, therefore, earn less money than men. It is therefore, not surprising that the CEDAW Committee at its 575th and 576th meetings expressed concern at "the limited information provided by Uganda on employment of women and noted the lack of statistical data disaggregated by sex".[9] It expressed concern "at the high rate of

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[7] See Jennifer McNulty, *A poverty reduction spin on failing economic principles: a study of poverty reduction strategy paper implementation* (March 2002) at, http://glenninstitute.osu.edu/washington/McNultyPaper.htm#_ftn1. Accessed 29 May 2005.
[8] See CEDAW Committee concluding observations on Uganda at the 575th and 576th meetings.
[9] *Ibid.*

unemployment among women, disparities between the wages of men and women even in the public sector, and disparities in social security".[10]

All the above factors render women more vulnerable to poverty than the men and hence the need exists for women to share equitably in whatever little their men may have acquired over time.[11] One way of achieving this is by advocating for the realization of substantive equality between men and women in their rights of succession to property.

The second and closely related area of concern raised by the CEDAW Committee at its 575th and 576th meetings is the prevalence of retrogressive non-state-made laws or norms as evidenced by customs and traditional practices, prevalent in rural areas that prevent women from inheriting or acquiring ownership of land and other property. There is discrimination against women and this is why Uganda was requested to eliminate all forms of discrimination with respect to the ownership, co-sharing, and inheritance of land. The CEDAW Committee was right on the mark in this observation because the people of Uganda are extremely diverse in terms of culture, values, attitudes, religious beliefs and economic power. The country has 56 tribes each with its own language and other characteristics.[12] With regard to their perceptions of rights of succession to property, Ugandans, although they inhabit one country, live in different centuries with some being ignorant of the need to have substantive equality between the sexes under the laws of succession. In some communities such as the *Baganda* who are the most populous tribe in the country, when a male property owner passes away intestate, "the bulk of the property is traditionally given to the customary heir, usually a male child of the deceased" even when the widow, who may have contributed to the acquisition of this property, is still

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[10] *Ibid.*, The Committee expressed concern that "the draft national employment policy that promotes equal employment opportunities for men and women had not been adopted". The Committee urged Uganda to "provide in its next periodic report information including as far as possible data disaggregated by sex, on women participation in the labour market and employment conditions including wages in, interalia, the private and informal sectors".

[11] See Roy. S. Canagarajah, "Uganda: integrating gender into policy action" in *Findings* No 249, April 2005, http://www.worldbank.org/afr/findings/english/find249.htm who reports that "in 2004 the government commissioned research papers on gender analysis of poverty which found that households headed by women particularly widows are poorer than others". Accessed 20 May 2005.

[12] See the Third Schedule to the 1995 Constitution of Uganda in *The Constitution of the Republic of Uganda* (Kampala, 2000).

alive.[13] This situation is promoted by the customs and traditional practices preserved under legal pluralism.

Legal pluralism is one of the principal setbacks to realizing substantive equality between the sexes in their rights of succession to property. In Uganda what counts as law is not only the legislation enacted by the national parliament or state-made law for that matter, but also non-state-made law whether recognized by the state or not, i.e., customary and religious laws such as those inspired by Islamic practices.[14] Ideally, customary and religious laws ought to comply with a higher legal order of state-made laws but this is more in theory than in practice. Given the prevalence of legal pluralism, it is very difficult to ensure that the different dispute resolution fora are compliant with the CEDAW. Legal pluralism has other problems though: some state officials may avoid applying state-made laws, which, although promoting rights of women, may seem to contradict customary or religious values that they may be holding sacrosanct. Given that women are usually excluded from many public and decision-making positions, they rarely participate in implementing the state-made laws that may address the problems they face.

The prevalence of legal pluralism and its adverse effects on women is the third area of concern that was implicitly raised by the CEDAW Committee at its 575th and 576th meetings. This is one of the reasons why the present study is advocating radical amendments in the various laws of succession that can bring all Ugandans at par with the equality demands envisaged under the CEDAW.

Closely related to the foregoing is the fact that in Uganda generally state-made and non-state-made laws and institutions regulating rights of succession to property are below the CEDAW standards and are in many aspects discriminatory. This must be the explanation why there is, as the CEDAW Committee noted, the continued existence of legislation, customary laws and practices on inheritance, land ownership, widow inheritance, polygamy, forced marriage, bride price and guardianship of

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[13]See Frank Kakinda Mbaaga, "Inheritance among the Baganda" in Tuhaise Percy et al, *The Law of Succession in Uganda: Women, Inheritance laws and Practices*, (Kampala, 2001),41-69at 53.
[14] See Jennifer Okumu Wengi, "Women and the law of inheritance" in Tuhaise Percy et al, *The Law of Succession in Uganda: Women, Inheritance laws and Practices*, 1-39 at 35.

children, all norms that discriminate against women and conflict with the Constitution and the Convention.

Practices such as polygyny, though legitimate under customary and religious laws, promote inequalities between men and women and increase women's insecurity and vulnerability to discrimination as married people. Furthermore, some men in Uganda, contracting monogamous marriages in Christian churches and before the Registrar of Marriages, unfortunately, contract thereafter other marriages with different women under customary laws.[15] Although the statutory laws forbid marrying again when there is a monogamous marriage that is still subsisting, many men involved in bigamy are not made to account for their actions owing to social acceptance of this vice.[16] This situation is unfortunate given that bigamy is criminal with lengthy periods of imprisonment upon conviction.[17]

Enforcing substantive equality between men and women in their rights of succession to property may not solve all the inequalities polygyny poses but will at least, ameliorate the situation by ensuring that each widow is accorded her due share of the property under the law. The present study advocates for substantive equality between men and women because such equality reduces dependency between the partners to the relationship during the subsistence of that relationship. Furthermore, it makes life easier for widows, who would consequently cease to look at their natal families or the male customary heirs for their survival. Therefore, substantive equality in the rights of succession to property would promote individuality and put an end to widow's embarrassing dependency indicated above.

Other than the various concerns raised by the CEDAW Committee about Uganda at its 575th and 576th meetings, the other principal reason that justifies embarking on the present exercise derives from the Constitution of Uganda Article 247,which reads:

> "Parliament shall–(a) by law establish an efficient, fair and expeditious machinery for the administration and management of the estates of deceased

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[15] L.Tibatemwa Ekirikubinza, *Women's violent crime in Uganda* (Kampala, 1999) 88.
[16] *Ibid.*
[17] Section 41 Marriage Act chapter 251provides for imprisonment not exceeding five years.

persons; and (b) under the law referred to in paragraph (a) of this article, ensure that the services of the department or organization established for the purpose are decentralised and accessible to all persons who may reasonably require those services and that the interests of all beneficiaries are adequately protected".

Reforming the laws, the institutions implementing them and imposing substantive equality between men and women in their rights of succession to property, as the present exercise proposes, is a humble contribution as to how the Uganda government can execute the above constitutional obligation. Enforcing substantive equality between men and women will be one of the ways of satisfying the standards the country must meet to comply with both her Constitution and the CEDAW.

Although compliance with the CEDAW is the main factor inspiring reforms in Uganda's laws and institutions regulating rights of succession to property, there are other subsidiary factors precipitating reforms that deserve to be discussed as well. They include: pressure from donors that Uganda improves her human rights record in all areas; the desire to integrate in both the revived East African Community and the recently created African Union; the increasing awareness of citizenship rights by Ugandans; the surge in feminist activism; and the HIV/AIDS scourges, to mention but a few.

While it is true that donors complement the fight against poverty in Uganda, they also indirectly precipitate law reforms, because donors define the areas that merit their funding, and it is now common for them to fund women's human rights programmes.[18] Donor intervention in the guise of fighting poverty pressures the government to reform laws and improve her human rights record in all areas including women's rights.

Other than the donor's influence, the desire for regional integration is also exerting pressure to reform Uganda's laws of succession. The East African Community (EAC) is the regional intergovernmental organisation of the Republic of Kenya, Uganda and

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[18] Donors, also called "development partners" include countries like Denmark, Sweden and the United Kingdom.

the Republic of Tanzania. The EAC was revived on November 30, 1999 when the treaty for its re-establishment was signed. The East African Court of Justice, one of the organs of the East African Community, established under Article 9 of the Treaty for the establishment of the EAC, has *inter alia* jurisdiction to hear and determine disputes on the interpretation of the EAC Treaty. The jurisdiction of the Court is to be extended, however, to appellate and human rights issues at a suitable date to be determined by the Council of Ministers. The EAC Council of Foreign Ministers, where Uganda is also represented, shall make policy decisions for the efficient and harmonious development of the Community. It is probable that at the appropriate time, if Uganda does not reform its succession laws, it may face the wrath of the East African Court of Justice on allegations of human rights violations under Uganda's laws and institutions regulating rights of succession to property. [19]

Similarly, a Pan-African Parliament, inaugurated on March 18, 2004 in Addis Ababa, Ethiopia, with representatives from Uganda, constitutes a further step towards the integration of the African peoples with a bearing on the human rights of women in Uganda. The Parliament is one of the organs of the African Union.[20] Besides, one of the objectives of the union is to promote and protect human and people's rights in accordance with the African Charter on Human and Peoples Rights, and other relevant human rights instruments.[21] Clearly the wind of change to promote human rights is blowing strongly, and it is unlikely that Uganda will be able to ignore it for long.

The above factors aside, there is also the phenomenon of the Human Immunodeficiency Virus (HIV) or the Acquired Immune Deficiency Syndrome (AIDS) epidemic in Uganda. It has created a fair share of widows in the country.[22] Although there is optimism that the government shall soon provide antiretroviral treatment, such treatment may not be free. It might be available at a subsidized fee.

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[19]See the East African Community website, http://www.eac.int, for details about the court, its mandate, composition and jurisdiction. Accessed 7 September 2004.

[20]See Article 5 Constitutive Act of the African Union, http://www.au2002.gov.za/docs/key_oau/au_act.htm. Accessed 30 July 2005.

[21]See Article 3(h) Constitutive Act of the African Union.

[22] See Human Rights Watch, *Just die quietly: domestic violence and women's vulnerability to HIV in Uganda* (part 3) at http://www.hrw.org/reports/2003/uganda0803/. Accessed on 29 September 2003. Human Rights Watch reports in this 2003 study that "there are more women than men affected by HIV/AIDS in Uganda".

The implication is that widows must have as much property as possible from their late spouse's estates to cope with the HIV/AIDS treatment, a situation which calls for reforms in the laws regulating rights of succession to property.[23] It is important to point out that the present study does not contend that the family or the laws of succession are the outstanding causes of poverty, infection and vulnerability of women to HIV/ AIDS in Uganda.

The present research is proposing that, as a social and legal response to HIV/AIDS, only an amended law of succession can provide a supportive legal environment to achieve the goals of prevention and mitigation of its effects among women. This is especially the case given that the government's and donor's efforts in Uganda have been directed at behavioural change, provision of condoms, and addressing the routes of infection without regard to the role archaic discriminatory laws of succession and practices play in exacerbating the pandemic disease among women. For example, customary and religious practices including those inspired by Islam, condoning polygyny, are insensitive to the effects of polygyny on women's property rights and the linkages between poverty and HIV/AIDS. The suffering associated with the HIV/AIDS pandemic in the absence of a cure, the prohibitive cost of palliative care and the reality that women are poorer but more affected economically than men, by HIV/ AIDS justify reform of the laws of succession regulating property rights in Uganda.[24] Moreover, it should be remembered that the laws presently in force were received at a time when HIV/AIDS, was unknown. This is the greater reason why laws regulating rights of succession to property must be reformed to address the adverse effects of contemporary phenomena such as the HIV/AIDS scourge in Uganda.

Women's contribution to property acquisitions in many relationships, both marital and extra marital, is rarely documented.[25] Under the CEDAW, as shall be discussed later, the state has an obligation to ensure the protection for all women's rights.

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[23] Contrary to the view that Uganda is successful story in the fight against HIV/AIDS, with official prevalence rate of 6%, an NGO reported that "the real picture is far worse with prevalence rates as high as 17% and there is bad access to anti-retroviral" See http://www.bbc.co.uk/2/hi/africa/3677570 of 21 September 2004.

[24] See Human Rights Watch, *Just die quietly: domestic violence and women's vulnerability to HIV in Uganda.*

[25] *Ibid., part iv.*

Women's work is usually in the private sphere of child rearing, wherewith, women suffer economic stagnation when they do not work like their male counterparts. Inevitably they tend to suffer more than the men if they do not benefit out of the laws of succession. The various feminist groups in Uganda are increasingly articulating these demands with calls for a new law to regulate rights of succession to property for both married and unmarried women in the country. Feminists groups, such as the Uganda Chapter of International Women Lawyers Association, continue to question the socially determined gender roles that undermine the status and potential of women in the Ugandan society.[26] Like other feminists some are explaining the subordinate status of women through the theory of patriarchy.

Patriarchy is defined as the "manifestation and institutionalization of male dominance over women and children in the family".[27] It is the manifestation and institutionalization of inequalities according to gender in terms of access to and ownership of property and material resources, status and authority.[28] Patriarchy moulds identities in the public and private domains.[29] In Uganda it is manifested through the male-headed family form, gender relations and sexist practices, lineage hierarchies and ideological systems of culture and religion.[30] Patriarchy does not mean that women are totally powerless or deprived of all rights, influence and resources. Patriarchy as a concept is a means by which the relationship between men and women can be analyzed. It is a theory on "the subordination of women by men in the family and workplaces".[31] This male dominance or patriarchy had "its origin not in the realm of public politics but in men's control over women's bodies", particularly, women's sexuality and their generative capacities.[32] Under conditions of patriarchy women must be consistent in demanding fundamental changes.[33] Radical

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[26] See Maria Mies, *Patriarchy and Accumulation on World Scale,* (London, 1998), 6 who notes that "feminists, men or women question the usually oppressive unequal man-woman relationships and advocate change".
[27] Helen Tierney(ed), *Women's studies Encyclopedi*a (G-P), (London, 1999), 1048.
[28] Ibid., 1049.
[29] See Maria Mies, *Patriarchy and Accumulation on World Scale*, 25.
[30]See Jennifer Okumu Wengi, "Women and the law of inheritance" in Tuhaise Percy et al, *The Law of Succession in Uganda: Women, Inheritance laws and Practices*, 1-39 at 8.
[31] See Maria Mies, *Patriarchy and Accumulation on World Scale,* 26.
[32] *Ibid.*, 25.
[33] See Maria Mies, *Patriarchy and Accumulation on World Scale,* 26. She notes that because of male dominance "democratic states with all their might are not capable of implementing basic rights for women and doubts states as allies in the struggle to eliminate male dominance in the family and work place".

reforms in the laws of succession providing for full equality and non-discrimination can only be the starting point in the fight against patriarchy in Uganda. The violation of women's rights in Uganda is possible owing to patriarchal institutions, structures and practices. These include personal status law, which define issues such as marriage, divorce and inheritance as private, and therefore violations of rights in this arena are not taken seriously by the state, therewith relegating women's rights to the private sphere.

Last but not least of the phenomenon precipitating reform of the laws regulating rights of succession is the civil war involving the Lords Resistance Army in Uganda. It continues to claim lives from both the national army and the rebel forces. This war has been raging on in the northern parts of the country since 1986. Given that more men than women are participating in it, the result has been the creation of more widows than widowers. This is the reason why the institutions and laws regulating rights of succession to property deserve to be amended to cater better for women's interests.

1.1 The aims and scope of the study

The present study aims to propose standards that Uganda's laws and institutions regulating rights of succession to property must adopt to comply with the CEDAW in order to achieve substantive equality between men and women. The study examines Uganda's present laws and institutions regulating rights of succession to property, and identifies their inadequacies, and proposes reforms to realize substantive equality and non-discrimination between men and women.

The existing multiple state, customary and religious laws and institutions regulating rights of succession to property do not in Uganda advance substantive equality between men and women; they are all contradictory, discriminatory and hinder the realization of the standards set out in both the Ugandan Constitution and the CEDAW.

In considering the way in which Uganda's laws may be reformed so as to fully comply with the CEDAW and that substantive equality and non-discrimination between men and women in their rights of succession to property may be accordingly

achieved, the English, Scots and South African laws and institutions regulating rights of succession to property are examined.

The provisions under the CEDAW, relevant to realizing equality between men and women in their rights of succession to property are contained in Articles 16(1)(h). The provisions that pave the way for the said Article 16(1)(h) are set out, however, in Articles 2(a)-(f). In that regard Article 2 of the CEDAW reads: [34]

"States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;
(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women".

[34] See CEDAW text, http://www.un.org/womenwatch/daw/cedaw/cedaw.htm. Accessed 2 July 2003.

The significance of Article 2(a)-(c) is that a state party is under the obligation not only to have laws promoting equality between men and women but also to put in place functionally relevant institutions that implement the law so as to benefit women.[35] A state party to the CEDAW should, therefore, adopt accessible and gender sensitive laws and institutions to regulate rights of succession to property if it is to meet its commitments under the Convention. Under Article 2(d)-(f) a state party is under the obligation to ensure that public as well as private authorities and institutions do not discriminate against women.

Discrimination against women is adverse to social and economic development and the preamble of the CEDAW states accordingly that it hampers economic growth and prosperity. Consequently, in Article 2(f) of the CEDAW, state parties are required not only to modify their laws but also to work towards the elimination of discriminatory customs and practices. This requires that obstacles other than legal ones are identified and eliminated, that is, a state party is responsible for any discrimination against women under the guise of customary and religious laws and practices in the country.[36] A state party is responsible for violations of women's rights through its lack of diligence to prevent, control, correct or discipline private acts through its executive, legislative or judicial organs.

Article 16(1)(h) of the CEDAW reads:

> "States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

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[35] See Rebecca J Cook, "State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women" in Rebecca J Cook (ed), *Human Rights of Women, National and International Perspectives,* (Philadelphia, 1995), 228-256 at 228 who notes that "violations of women's rights often go unrecognized and where recognized, go unremedied and are often defended as a necessary part of culture".

[36] See Abdullahi Ahmed An-Naim, "State responsibility under international human rights law to change religious and customary laws" in Rebecca J Cook (ed), *Human Rights of Women, National and International Perspectives,* 167-188 at 167 who notes that "it is state responsibility to remove any inconsistency between international human rights law binding on it, on the one hand, and religious and customary laws operating within the territory of that state on the other. This responsibility is consistent with the principle of state sovereignty in international law since it does not force any state to assume legal obligations against its will".

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

Furthermore, Article 5(a) requires "state parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."[37] It follows that all rules on rights of succession to property and institutions implementing these laws must comply with the CEDAW as much as they must ensure equality, otherwise they will be contrary to the purpose of Articles 2(a)-(f), 5(a) and 16(1)(h).

As well as its obligations under the CEDAW, there are other international human rights instruments binding Uganda with a bearing on rights of women. For example, Article 18(3) of the African Charter on Human and Peoples Rights of 1981 directs member states to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."[38] The Covenant on Economic, Social and Cultural Rights (1966) is also binding on Uganda.[39] By ratifying various human rights instruments promoting women's rights, Uganda has accepted the obligation of purging any form of discrimination against women and is expected to ensure the realization of equality between men and women in all life spheres including the rights of succession to property.

The focus on equality and non-discrimination between men and women in their rights of succession to property with the CEDAW as a reference point, rather than on the various other human rights conventions Uganda has ratified, is because the CEDAW constitutes the most contemporary and instructive standards that can be followed to

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[37] See Article 5 CEDAW.

[38] See Article 18(3) of the African Charter. Uganda ratified the African Charter on Human and People's Rights on 27 May 1986.See http://www.africaninstitute.org/eng/afSystem/afcharter/african_charter ratif.php. Accessed 28 May 2003.

[39] Uganda ratified the Covenant on Economic, Social and Cultural Rights which in Article 3 "prohibits discrimination in the enjoyment of economic, social and cultural rights" on 21 January 1987.See http://www.ohchr.org/english/countries/ratification/3.htm. Accessed 21 March 2003.

realize women's human rights.[40] The present study is based on the premise that the CEDAW is more conducive to the realization of equality and non-discrimination between men and women in the rights of succession to property than the other international conventions Uganda has thus far ratified, because in addition to being the most contemporary, the CEDAW extends state responsibility to include both the public and private spheres meaning that the state is responsible for acts violating women's rights by private individuals.[41] Furthermore, the CEDAW provides for special measures, that is, affirmative action in whatever form deemed appropriate.[42]

In the present study three broad areas are dealt with: (1) the interpretation of equality between men and women in their rights of succession to property under the CEDAW; (2) Uganda's laws and institutions regulating rights of succession to property, (3) the English, Scots and South African laws and institutions regulating rights of succession to property.

1.1.1 Formal and substantive equality

The principles of non-discrimination and equality, though not one and the same, are difficult to distinguish, more so in a human rights discourse relating to women's rights. The CEDAW defines discrimination against women in Article 1 as:

> "For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

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[40] This does not mean other conventions must be disregarded; Article 23 CEDAW provides that "nothing in the present convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained in the legislation of a state party or in any other international convention, treaty or agreement in force for that state".
[41] See Article 2(c) CEDAW.
[42] See Article 4 CEDAW.

The CEDAW does not define equality, however, given the above definition and additionally Article 4, which provides that temporary special measure or affirmative action in favour of women is not discriminatory, implies that not all different treatment constitutes discrimination, and equality does not mean treating everybody in the same way. It appears that any distinction that is clearly wrongful and contrary to the CEDAW is discrimination against women, while that which is perceived as compliant or appropriate is said to promote equality.

Discrimination against women is, however, very difficult to identify given that in some cases it is direct while in others cases it is hidden. In indirect discrimination, a rule seems fair because it applies to everyone equally but in fact it can be unfair to some people who are less able to comply with it. This is why in some cases laws that promote formal equality between men and women may be indirectly discriminatory of women.[43]

Formal equality judges "the form of a rule, requiring that it treat women and men on the same terms without favours on account of their sex or other considerations".[44] Substantive equality on the other hand "looks to a rule's results or effects".[45] Substantive equality demands that rules take account of the various differences between people to avoid gender-related outcomes that are usually unfair. It focuses on just outcomes. Formal rule equality often does not produce equal results because of significant differences in the characteristics and circumstances of women and men.

Substantive equality looks for "remedies for past discrimination, and social expectations and practices, such as those that steer women into lower-paying occupational categories, encourage their economic dependence on men" and lead them to be the primary caretakers of their children.[46] These more radical approaches attempt to reverse these expectations and practices or eliminate their costs.

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[43] See CEDAW Committee General Recommendation No 25 of the Thirtieth Session 2004, paragraph 7, at http://www.un.org/womenwatch/daw/cedaw/recommendations. Accessed 20 May 2005.
[44] See Anne Philips, *Which Equalities Matter?,* (USA, 1999), 24.
[45] *Ibid.*, Who observes that "equality does not mean treating all people in the same way".
[46] *Ibid.*

Formal rule equality principles will be sufficient to achieve fair and equal outcomes for the exceptional or "non-average" woman who can compete successfully for an opportunity on the same basis as the average man. Other more result-oriented approaches are required, however, "to protect the interests of women as a whole whose average characteristics would otherwise disadvantage them in relation to men".[47] For example, substantive equality might require rules for spousal support at divorce that favour women in order to balance the power between spouses, thereby preventing men from exploiting women's greater economic vulnerability.

It can be argued that the equality envisaged for women under the CEDAW is not merely formal but substantive equality. According to the CEDAW Committee General Recommendation No 25 at the Thirtieth session in 2004, the Committee at paragraph 8 clarified the meaning of *de facto* equality and the interpretation of Articles 1 to 5 thus:

> "...a purely legal or pragmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition the Convention requires that women be given an equal start and be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men rather biological as well as socially and culturally constructed differences between men and women must be taken into account. Pursuit of substantive equality calls for redistribution of resources and power between men and women".[48]

The CEDAW Committee General recommendations such as the above are relevant because they give an authoritative interpretation of the CEDAW and clarify what state parties are expected to do so as to comply with it.

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[47] See Margaret Davies, "Taking the inside out, sex and gender in the legal subject" in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law,* (Sydney, 1997), 25-46 at 30 who notes that "although the law is formally sex neutral, it is not gender neutral because it assumes a masculine actor and a masculine set of values and this gender neutrality results in actual as opposed to formal sex discrimination" because of the alienation of women.

[48] See CEDAW Committee General Recommendation No 25 of the Thirtieth Session 2004, paragraph 8, at http://www.un.org/womenwatch/daw/cedaw/recommendations. Accessed 20 May 2005.

With the above interpretation in mind, Uganda would be in breach of the CEDAW if either her constitutional or subordinate laws regulating rights of succession to property promote rather formal than substantive equality between men and women. Uganda's Constitution has many provisions designed to protect 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(6) provides that "laws, cultures, customs or traditions which are against the dignity or interests of women or which undermine their status are prohibited"; 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 realize their full potential and advancement".[49] It can be argued that the wordings of the above constitutional provisions envisage for women not just formal but substantive equality with regard to rights of succession to property.

Whereas Uganda's Constitution is compliant with the CEDAW, 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 succession preceded on the other hand, the 1995 Constitution and the CEDAW and therefore, with regard to rights of women, need to be reformed if they are to be made fully compliant with both the Constitution and the CEDAW. For example, the present Succession Act[50] came into force on 15th February 1906 and because Britain was Uganda's colonial master between 1896 and 1962 the said law was modelled on English law of the time.[51]

The present study, as noted, sets out to examine the subordinate laws regulating rights of succession to property to ascertain the extent to which they are not compliant or diverge from both the Constitution and the CEDAW, and suggest reforms to realise compliance.

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[49] See 1995 Constitution of Uganda at http://www.chr.up.ac.za/hr_docs/constitutions/docs/UgandaC(rev).doc. Accessed 10 April 2005.
[50] See the Succession Act chapter 162 in "Appendix 2".
[51] There was a 1972 amendment to the Succession Act, but this was before Uganda ratified the CEDAW in 1985.

1.1.2 The laws and institutions regulating succession to property in Uganda

The state-made laws and institutions are examined in order to ascertain whether and how far they advance substantive equality between men and women as envisaged under the CEDAW in relation to rights of succession to property. The state-made law of succession is the principal subject of study because it establishes in advance and in writing who takes over the property and responsibilities of a deceased person. It counteracts the disruptive effect of death on the integrity of the family, in this way, providing security against poverty.

As noted, Uganda's legal system is pluralistic; there are customary and religious laws that regulate rights of succession to property that are not state-made. These are analyzed but not in equal detail with state-made laws and institutions because customary laws are unwritten and, therefore, uncertain. They also vary from tribe to tribe and given that there are 56 tribes in Uganda, there would be too many customary laws and institutions to examine for the present study. The interpretation of religious laws, especially those inspired by Islamic practices, sometimes vary according to the religious sects and this also makes it difficult to analyse them in depth. Only the generally known principles of Islamic laws of succession are highlighted and discussed. Such complications make a detailed analysis of rights of succession under customary and religious laws difficult and less exhaustive than those made under state-made laws and institutions.

1.1.3 The laws and institutions regulating succession to property in England, Scotland and South Africa

As noted, the present study makes propositions for reform or adoption of new laws, procedures and institutions, to enable Uganda realize substantive equality between men and women in their rights of succession to property in accordance with the relevant CEDAW standards. The relevant English, Scottish and South African laws and institutions regulating rights of succession to property are studied with the intention of borrowing ideas as to how best to realize the above-proposed objective in Uganda.

Comparative law denotes "a method of study and research and not a distinct branch or department of the law".[52] There is no specific answer to "what this method or technique is" but the method called comparative law can be used for a variety of practical or scholarly purposes.[53] One of the purposes of comparative law research is "to avail a pool of models for law reform" given that legal systems rarely improve without looking at how other jurisdictions solve problems brought to their attention.[54]

With the above in mind, the reason for seeking reform ideas outside the Ugandan jurisdiction is based on the belief that in the chosen countries i.e., England, Scotland and South Africa, the laws of succession, at least those enacted by the national parliaments, have certain objectives and values to realize irrespective of religion, ethnicity and other cultural considerations of the people that populate the country. These values include achieving substantive equality between men and women in their rights of succession to property, eradication of dependency and need created by marriage, and recognition of the undocumented contribution by women to acquisition of property in extramarital relationships. England, Scotland and South Africa have laws and institutions of succession striving to attain these standards and in many respects have achieved more of these values than Uganda has done. This is the justification for seeking ideas from these jurisdictions.

In Uganda the state-made law of succession and the legal order were shaped by transplanting English common law principles during the era of British imperialism. Evidently the notion of legal transplants is not new to Uganda. Unlike Uganda, however, England has since amended its laws and institutions regulating rights of succession to property and in the process it has enhanced the property rights of women. It is, therefore, appropriate to study English law and the relevant institutions and seek reform ideas for Uganda. English law, more than any other law, is useful in predicting what state-made laws and institutions capable of realizing substantive equality between men and women should be like in Uganda.

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[52] See H.C Gutteridge et al, *Comparative Law,* (Cambridge, 1946), 1.
[53]Esin Orucu,"Unde venit,ouo tendit comparative law?" In Andrew Harding and Esin Orucu (eds) *Comparative Law in the 21st Century* (Kluwer, London/Hague/Newyork, 2002) 1-17 at 1/2.
[54] See Esin Orucu, *The Enigma of Comparative Law--variations of a theme for the Twenty-first century* (Leiden/Boston, 2004), 37.

Scotland has provisions against disinheritance in terms of fixed shares. These cannot be defeated by a will.[55] Furthermore, the Succession (Scotland) Act 1964 annulled the principle of male primogeniture that favoured the claim of the male first-born in matters of intestate heritable succession.[56] Studying such laws and institutions of succession provides possible alternatives to protecting women's property rights in the Ugandan law reform process.

South Africa, a hybrid system, is a mixture of English common law and civilian Roman Dutch legal traditions but is a country heralding many reforms in Africa.[57] This has been the trend since the demise of apartheid. South Africa is, however, a multi-cultured country where customary laws play a crucial role in inheritance matters. It has attempted to ameliorate the rigours of customary law through state legislation by extending state-made laws and institutions of succession to all black persons through its Amendment of Customary Law of Succession Bill (1998).[58] The Bill proposes to do "away with primogeniture, a principle applied at customary law, to determine who inherits upon intestacy".[59] The South African Law Commission, attempts in project 59 of 2003 to merge Islamic marriages and related matters with the 1996 South African Constitution whose bill of rights provides for equality of the sexes.[60] Insights and challenges poised by using state-made law to improve non-state-made law, i.e., customary and religious laws such as that inspired by Islamic practices, offer very instructive lessons for Uganda.

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[55] See Hillary Hiram, *The Scots Law of Succession,* (East Kilbride, 2002), 77 who writes that "the surviving spouse and children of a deceased person are always entitled to claim a share of the deceased spouse's or parent's estate". Lessons Uganda can learn from Scotland are discussed in Chapter Five.

[56] See Michael C.Meston, *Succession (Scotland) Act 1964,* (Edinburgh, 2002), 17.

[57] See David Carey Miller, "South Africa: a mixed system subject to transcending forces" in Esin Orucu et al (eds), *Studies in Legal Systems: Mixed and Mixing,* (London, 1996), 165-191 at 165 who writes that " South African substantive law is civilian while its adjectival structure is English".

[58] The purpose of the Customary Law of Succession Bill is "to extend the general law of testate and intestate succession embodied in the Wills Act of 1953 and Intestate Succession Act 81 of 1987 to all persons in South Africa, to repeal s 23 of the Black Administration Act of 1927,hitherto only applicable to blacks and to enact new provisions consistent with the Constitution". See NJJ Olivier et al, " Indigenous Law" in W. A. Joubert et al (eds), *The Law of South Africa,* Volume 32, paragraph 244, pp247-8.

[59] See SALRC Discussion Paper 93 Project 90 at http://www.law.wits.ac.za/salc/discussn/discussn.html. Accessed 7 May 2005.

[60] See Project 59 Islamic Marriages and Related Matters Report of July 2003 at http://www.law.wits.ac.za/salrc/report/pr59report.pdf. Accessed on 10 May 2004.

1.1.4 Focus of the study

Although the present study is concerned mainly with rights of succession to property, an analysis of rights to property during marriage and upon divorce is necessary in order to clarify the framework of family property. Moreover, it is deceptive to propose conferring on Ugandan women rights of succession to household property that their husbands can freely and unilaterally dispose of under the laws of marriage. This is the reason why in the present study, to the extent possible, women's rights to property in marriage and upon divorce have been examined and reform proposals advanced. Marriage, divorce and succession laws are closely interrelated and where there is, for example, a matrimonial community property regime, the laws of succession must be interpreted in such a way as to prohibit the testator from bequeathing more than his or her own property lest he infringes upon the rights of the other spouse. Furthermore, one of the tested ways of recognising wives' non-monetary contribution to property acquisition in a relationship is to impose a community property regime that ensures property is shared equally when the relationship terminates either by divorce or death. In the present study the target subjects are both married and unmarried women in extra marital cohabitation relationships.

1.2 Chapter outline

Chapter 1 introduces the study, discusses the aims and scope, formal and substantive equality and methodology issues.

Chapter 2 discusses the evolution and importance of the CEDAW to realizing women's human rights. It also discusses some of the factors that make Uganda's compliance with the relevant provisions of the CEDAW difficult.

Implicit in the CEDAW is that laws regulating rights to property in marriage and upon divorce must promote substantive equality between the spouses. Accordingly, a discussion of the various matrimonial property regimes is undertaken with a view to identifying what most complies with the CEDAW. It is important that laws regulating

rights to property in marriage are compliant with the CEDAW because they influence the laws regulating rights of succession to property.

The importance of the phenomenon of succession to property upon death and the need to harmonize Uganda's state-made and non-state-made laws of succession so as to realize substantive equality and comply with the CEDAW are also discussed.

In Chapter 3, to appreciate the phenomenon of legal pluralism, it is necessary in the first section thereof to discuss the history of and the imposition of the English and Islamic laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse and the subsequent conflict between the introduced laws and customary values of the local people in Uganda. The adverse effects of legal pluralism justify the need for reforms in the said laws and institutions as proposed in Chapter 7. This also gives credence to the choice of substantive equality as opposed to formal equality in the laws of marriage and succession in Chapter 1. Most importantly, by tracing the history of these laws and institutions it is shown that laws are mixed and legal transplants are, as proposed in Chapter 7, a viable historical phenomenon bound to be the norm in the future too. The second part of the Chapter examines the current Ugandan laws and institutions regulating rights of succession to property and, to the extent relevant, rights in marriage and upon divorce. The purpose of this examination is to determine to what extent Uganda has complied with the said CEDAW standards.

The current laws and institutions regulating rights of succession to property and how they affect women in Uganda are examined with a view to highlighting the need to reform not only the laws of succession and inevitably marriage and divorce, but also the procedures followed by the relevant institutions. There are many areas to look at: the contradictory multiple laws and institutions under the rubric of legal pluralism; the absence of state welfare and legal aid schemes; and structural barriers such as the complicated state-made court process largely perceived as adversarial, alien, slow and expensive to people accustomed to leading their lives under a multiplicity of religious and customary laws. Other areas highlighted are illiteracy, poverty and ignorance of the state-made laws. In sum, the difficulties in realizing substantive equality between Ugandan men and women in their rights of succession to property and, inevitably, rights to property in marriage and upon divorce are discussed in detail, illustrating that

other than the Constitution, the relevant subordinate laws and institutions are generally not well-tailored to comply with the CEDAW.

Chapter 4 discusses the strengths and weaknesses of the current English laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse. These are examined with a view of identifying any lessons Uganda can learn.

Chapter 5 discusses the lessons Uganda can learn from the Scottish laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse. The discussion also focuses on reform efforts in this area so as to highlight other ideas Uganda can borrow from the Scots.

Chapter 6 discusses the lessons Uganda can learn from the hybrid South African laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse. Where relevant, the historical development of these rights is traced although the emphasis is on the era after the demise of apartheid. The strengths and weaknesses of the current reform process of the South African laws and institutions regulating rights of succession to property are examined. Inevitably the difficulties of attaining compliance with the new South African Constitution of 1996 and the realization of substantive equality between men and women, especially black women in their rights of succession to property as demonstrated thus far by the ongoing reforms, are discussed. The problematic aspects of legal pluralism are discussed, as are the difficulties pluralism poses to the law reform process.

The various state-made and non-state-made laws that regulate rights to property in marriage, upon divorce and death of a spouse are examined to ascertain how appropriately tailored they are to enhance substantive equality between men and women in South Africa. The discussion examines reform efforts in the given private law area highlighting the success and failures. The discussion then deals with further protection under South African laws and institutions.

Chapters 4,5 and 6 examine the possible lessons Uganda can learn from the laws and institutions of England, Scotland and South Africa that regulate women's rights to property in marriage, upon divorce and death of a spouse. Such an approach is

necessary to lend credence to any criticisms of the relevant Ugandan laws and institutions regulating rights to property in Chapter 3 above and reform proposals in Chapter 7.

Chapter 7 sets out the proposals that could transform the laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse in Uganda so as to secure substantive equality between men and women and comply with the CEDAW. These proposals are based on pragmatism and lessons drawn from Chapters 4, 5 and 6.

Chapter 8 deals with the concluding remarks.

With the above in mind, it is now necessary to discuss the evolution and importance of the CEDAW and women's rights to property in marriage, upon divorce and death of a spouse.

Chapter Two

2.1 The evolution and importance of the CEDAW

In the preamble to the Charter of the United Nations (1945), the peoples of the UN set forth their determination to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small".[61] Article 1(3) of the UN Charter reads "one of the purposes of the United Nations is to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion."[62] It can be construed that the UN Charter creates an obligation for all member states of the UN to promote equality of the sexes. This obligation notwithstanding, in 1946, only one year after the establishment of the UN, a Commission on the Status of Women was appointed as a subsidiary of the UN Commission on Human Rights to address women's rights.[63]

The initial interest in women focused, however, on political and civil rights. For example, in 1952 the Convention on Political Rights of Women was adopted because "by the end of World War II, many women in the world had no right to vote".[64] This was followed by the Convention on Nationality of Married Women in 1957 to address women's loss of citizenship, residence or right to work outside the house.[65] These conventions were followed by the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages in 1962.[66] Clearly, the Commission on the Status of Women was responding piecemeal to documented denials of women's rights and was drafting international conventions to bestow upon women the denied rights. It was, however, necessary that a comprehensive approach be adopted.

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[61]See the Preamble to the Charter of the UN at http://www.un.org/aboutun/charter. Accessed 23 April 2005.

[62]See Article 1 of the UN Charter.

[63]See Katarina Tomasevski, *A Handbook on CEDAW: The Convention on the Elimination of All forms of Discrimination Against Women, (*Stockholm, 2000), 7.

[64] See Arlette Gautier, "Legal regulation of marital relations: an historical and comparative approach" in *International Journal of Law Policy and the Family,* (Oxford, April 2005), 5.

[65] See Katarina Tomasevski, *A Handbook on CEDAW: The Convention on the Elimination Of All Forms of Discrimination Against Women,* 7.

[66]See Short history of the CEDAW at http://www.un.org/womenwatch/daw/cedaw/history.htm. Accessed 23 April 2005.

When the UN attempted to address the need to secure all rights and freedoms for everyone, the cold war politics made it difficult, however, and the result was the emergence of "two separate and different treaties namely; the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights both adopted in 1966".[67] Unfortunately these two covenants contributed little to protecting women against the various forms of discrimination affecting them. The above mentioned 1966 conventions prohibited discrimination and included sex among the prohibited grounds of discrimination, but addressed women mainly as child bearers through special protection of motherhood.[68] They were, therefore, inadequate to cater for women's various needs and this is why, supported by the Commission on the Status of Women, a proposal for a Declaration on The Elimination of Discrimination against Women was adopted in 1967.[69] The commitment to transform the Declaration into a treaty, however, was to take another twelve years to be achieved.

The process of adopting the CEDAW was facilitated by the first global conference on women, the 1975 International Women's Year Conference in Mexico, which gave publicity to women's rights and highlighted the urgent need for the CEDAW.[70] The CEDAW was subsequently adopted in 1979 and came into force in 1981.[71] The preamble to the CEDAW explains it all; despite the existence of other human rights instruments, women still do not have equal rights with men and "extensive discrimination against women continues" to exist.[72] The preamble justifies the need for a separate convention for women. The CEDAW is, therefore, important as the most comprehensive and detailed international convention that seeks the advancement of women. It calls for action in nearly every field of human rights endeavour: politics, law, employment, education, health care and domestic relations that implicitly include women's entitlement to substantive equality in their rights of succession to property.

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[67] See Katarina Tomasevski, *A Handbook on CEDAW: The Convention on the Elimination Of All Forms of Discrimination Against Women,* 8.
[68] *Ibid.,* 8.She reports that much UN work at that time "addressed women and children as a single item somewhere at the bottom of the agenda".
[69] *Ibid., 9.*
[70] *Ibid.*
[71] See Short history of the CEDAW. The CEDAW has since been supplemented by the Beijing Platform of Action 1995, which though not creating new rights identifies rights specific to women.
[72] See preamble to the CEDAW at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#part1 Accessed 23 April 2005.

The CEDAW has many gender sensitive property rights clauses; if implemented by the state parties, they are designed to benefit women. In addition to the CEDAW provisions cited in Chapter One there is also Article 13 that relates to according men and women the same rights to family benefits, bank loans, mortgages and other forms of financial credit; Article 15 that relates to giving "women equal rights as men to conclude contracts and to administer property and treat both sexes equally in all stages of procedure in courts and tribunals".[73]

A property related concern that affects many women, addressed by the CEDAW, is the distribution of property upon divorce and death, and invariably General Recommendation No 21 on equality in marriage and family relations; the CEDAW Committee clarified that "legislation which grants men a greater share of property upon divorce is discriminatory, seriously affecting a woman's practical ability to divorce her husband, support her family and live in dignity as an independent person".[74]

One explanation for the unequal distribution of wealth can often be found in the neglect to take appropriate account of women's non-financial contribution such as child-care and homework when, upon divorce, the marital property is divided. The CEDAW Committee noted that non-financial contributions by the wife often enable the husband to earn an income and increase matrimonial assets, and that financial and non-financial contributions should therefore be accorded the same weight.[75] Uganda violates, therefore, women's human rights when it fails to enact and enforce laws that cater for both financial and non-financial contributions of women when sharing property upon divorce.

The CEDAW Committee also raised, in General Recommendation No 16, the question of women's unpaid work in urban and rural family enterprises; and in Recommendation No 17, the question of non-remunerated domestic activities of

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[73] See Articles 13 and 15 of the CEDAW.
[74] See paragraph 28 CEDAW General Recommendation No 21 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm. Accessed 23 April 2005.
[75] See Leif Holmstrom and Lena Karlbrink (eds), *General Comments or Recommendations adopted by United Nations Human Rights Treaty Bodies* Volume IV, Committee on the Elimination of Discrimination Against Women, (Lund, 1998), 52.

women was treated. The Committee urged state parties to make women's unpaid work visible, for example, in the gross national product and to take steps to safeguard social security and social benefits for women working without remuneration in enterprises owned by a family member.[76] The said social security benefits include medical care, unemployment benefits, old age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits and survivor's benefits.[77] The CEDAW Committee also recommended that state parties encourage and sustain research and experimental studies to measure and value the unremunerated domestic activities of women, for example, "by conducting time use surveys as part of their national household survey programmes and by collecting statistics disaggregated by gender on time spent on activities both in the household and on the labour market".[78]

State parties were also requested to include in their reports to the CEDAW Committee information on the research and experimental studies undertaken to measure and value unremunerated domestic activities as well as on the progress made in the incorporation of the unremunerated domestic activities of women in national accounts.[79] Evidently, despite its slow evolution, the CEDAW has become very important to achieving equality of the sexes and the elimination of discrimination against women as among others it requires state parties to recognize the economic and social contribution of women to the family and society.

The CEDAW addresses discrimination against women by recognizing the need for a change in attitudes through education of both men and women to accept equality of rights and responsibilities and to overcome prejudices and practices based on stereotype roles.[80]

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[76] See Leif Holmstrom and Lena Karlbrink (eds), *General Comments or Recommendations adopted by United Nations Human Rights Treaty Bodies* Volume IV, Committee on the Elimination of Discrimination against Women, 26.
[77] See Katarina Frostell and Martin Scheinin, 'Women' in Asbjorn Eide et al (eds), *Economic, Social and Cultural Rights,* (London, 2001), 331-352 at 342 who note that under CEDAW, Article 11 (2), there are grounds to request for need-based service such as childcare.
[78] See Leif Holmstrom and Lena Karlbrink (eds), *General Comments or Recommendations adopted by United Nations Human Rights Treaty Bodies,* Volume IV, 29.
[79] *Ibid.*
[80] See Article 10(c) of the CEDAW.

Among many state parties to the CEDAW, including Uganda, a formal marriage is a prerequisite to claiming status of a married person. Increasingly, however, in real life many women are becoming parties to extramarital cohabitation. The strict requirement of a marriage certificate does not acknowledge the specificity of women's circumstances and works against unmarried women who may wish to claim property from their partners when the relationship ends. Women in extramarital cohabitation tend to be ignored, yet they fall within the ambit of the CEDAW. Their irregular status does not mean their search for protection is not legitimate. Too often society tends to make a parallel between morally upright women and those who are not and are therefore in extramarital cohabitation. The laws of marriage and succession that favour married people when sharing property aggravate this hostile climate. All this is contrary to the CEDAW. The Committee has noted in General Recommendation No 21 at its thirteenth session that "in many countries, property accumulated during a *de facto* relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner."[81] The Committee recommended that "property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked".[82] There is, therefore, an obligation on state parties to the CEDAW to protect not only the rights of married women, but also the rights of women in *de facto* relationships.

Last but not least, the other importance of the CEDAW for achieving equality and eliminating discrimination against women is in its explicit recognition of the goal of actual equality in addition to legal equality.[83] It is the view of the present study that positive action with regard to rights of succession to property that benefit women requires radical measures. For example, in addition to amending all her laws of marriage and succession, Uganda should impose preferential treatment of women

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[81] See CEDAW General Recommendations, paragraph 33 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 30 July 2005.

[82] *Ibid.*

[83] See General Recommendations No 5 of the CEDAW Committee at its seventh session at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom5, where the Committee noted that: "In many state party reports, the introductory remarks and the replies by state parties reveal that while significant progress has been achieved in regard to repealing or modifying discriminatory laws, there is still a need for action to be taken to implement fully the convention by introducing measures to promote *de facto* equality between men and women". Accessed 17 June 2004.

with regard to employment, as a move in the right direction towards the realization of *de facto* equality between men and women. The CEDAW Committee has recommended that "state parties make more use of temporary measures such as positive action, preferential treatment or quota system to advance women's integration into education, the economy, politics and employment".[84]

From the foregoing it can be summed up that state party obligations under the CEDAW extend to four levels: (1) official recognition that all human rights and fundamental freedoms apply to women as they do to men; (2) prohibition of discrimination against women in the enjoyment of those officially guaranteed rights; (3) the creation of equal opportunities for women to exercise all rights and freedoms; and (4) identification and elimination of gender specific obstacles to equal enjoyment of rights and freedoms. These are the standards upon which Uganda's laws regulating rights to property in marriage, upon divorce and death of a spouse must be measured.

To monitor the extent to which state parties comply with the above-mentioned obligations that have been prescribed by the CEDAW, there is a requirement to present periodic reports to the CEDAW Committee.

2.2 State party reporting under the CEDAW

In terms of Article 18 of the CEDAW state parties must submit reports to the Secretary General of the UN on legislative, judicial and other measures taken in accordance and in compliance with the CEDAW. A state party must "submit its first report within one year after it ratifies the CEDAW and subsequent reports must be submitted at least every four years or whenever the Committee so requests".[85] By acceding to the CEDAW, the state parties accept a legal obligation to submit well-timed and comprehensive reports. These reports are considered by the CEDAW Committee established under Article 17 of the CEDAW to oversee implementation. After considering the reports, the Committee makes suggestions and

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[84] See Leif Holmstrom and Lena Karlbrink (eds), *General Comments or Recommendations adopted by United Nations Human Rights Treaty Bodies*, Volume IV, 8.
[85] See Article 18 (1)(a) and (b) CEDAW.

recommendations based on their consideration.[86] The Committee "reports annually on its activities to the General Assembly of the UN through the Economic and Social Council".[87]

Persons constituting the Committee must be of high moral standing and competence in the field covered by the CEDAW.[88] Members are drawn from a wide variety of professional backgrounds.[89] The breadth of experience in the Committee gives credibility to the process by which reports from state parties are examined. The Committee has also developed guidelines for reporting on how a country reports on political, legal and social frameworks and on general measures used to implement the CEDAW. This is followed by a detailed description of steps taken to comply with individual articles.[90]

Consideration of reports by the CEDAW Committee is, however, a tediously protracted process. Firstly, individual state parties submit a written report to the Committee. State representatives are then given the opportunity to introduce orally the report to the Committee.[91] These introductions tend to provide a general overview of the content of the reports. Secondly, after the introduction, the Committee makes "general observations and comments regarding the report's form and content".[92] In some cases the Committee will comment on any reservations to the convention made by the reporting state party. Thirdly, the Committee members ask questions relating to specific articles of the CEDAW. They focus on the actual position of women in society in an effort to understand the extent of the problem of discrimination.[93]

The state party representative may decide to answer some of these questions immediately and will usually provide other answers a day or two later. At this point

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[86] See Manfred Nowak, *Introduction To The International Human Rights Regime*, 87.
[87] See Article 21 CEDAW.
[88] See Manfred Nowak, *Introduction To The International Human Rights Regime*, 87.
[89] *Ibid.* He notes that "the Committee composed of mainly women, with open and constructive attitudes during state reporting, sets legal standards and practical steps to improve the status of women".
[90] See Katarina Tomasevski, *A Handbook on CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women*, 14.
[91] See Leif Holmstron and Lena Karlbrink (eds), "Fact sheet no 22: discrimination against women: the Convention and the Committee" in *United Nations Human Rights Fact Sheet 1-27*, (Lund, 2001), 469.
[92] *Ibid.*
[93] *Ibid* .

the CEDAW Committee may ask additional questions or request that further information be sent to the secretariat before the next report is due.[94] The Committee then prepares concluding comments on the report of individual state parties so that these comments can be reflected in the report of the Committee.[95] The comments deal with the most important points covered in a constructive dialogue, emphasizing both positive aspects of a state report and matters on which the Committee wishes the state party to report in its next report.[96]

The examination of state party reports is not an adversarial process; instead all efforts are made to develop a constructive dialogue between state parties and the CEDAW Committees members. The overall atmosphere of the Committee session is one of free exchange of ideas, information and suggestions. One negative aspect of this environment is that the Committee never formally pronounces a state to be in violation of the CEDAW but points out instead the state's shortcomings through a series of questions and comments.[97] This approach, coupled with the fact that there are no sanctions for non-compliance, means that the Committee does not put itself in a position to exert strong pressure on states that are in an outright violation of the CEDAW to change their policies and legislation.[98] Despite all these weaknesses, as the Committee follows, as highlighted above, a meticulous process when examining state party reports its comments are a clear indication of the extent to which a state party has complied with the CEDAW, and a state party with adverse comments ought to improve her record. To appreciate Uganda's compliance with the CEDAW, especially with regard to realizing substantive equality between men and women and the factors that make full compliance difficult to achieve, it is necessary to review the country's third periodic report submitted to the CEDAW Committee in 2002.

When Uganda, in accordance with the above narrated procedure, presented her third periodic report for consideration by the CEDAW Committee in 2002, the state representative reported that steps had been taken towards the development and

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[94] *Ibid.*
[95] *Ibid.*
[96] *Ibid.*
[97] See Katarina Tomasevski, *A Handbook on CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women*, 14.
[98] *Ibid.*

advancement of women in the political, social, economic and cultural fields. The steps included:

> "promulgation of a gender sensitive Constitution, establishment of a national machinery for the advancement of women, adoption of a National Gender Policy and National Action Plan on Women to guide development intervention for women's empowerment, inclusion of gender in the President's election manifesto of 1996, legislative reform and affirmative action in various fields, especially in decision making and education".[99]

It was reported that an enabling environment for the advancement of women had been built around the formulation of "a decentralization policy, economic recovery and around poverty reduction programs that highlight gender as a guiding principle for programs aimed at eradicating absolute poverty by 2017".[100]

In reply the CEDAW Committee commended Uganda for the promulgation in 1995 of "a new Constitution incorporating a gender sensitive approach to the definition of discrimination on grounds of sex, in harmony with the CEDAW".[101] The Committee welcomed the adoption of the 1997 National Gender Policy, and the formulation of the National Action Plan on Women in 1999 providing guidelines for the development of strategies and interventions for the empowerment of women.[102]

The CEDAW Committee observed that the Uganda report did not address, however, "the lag between the Constitution's prohibition of laws, cultures, customs or traditions that infringe upon the dignity, welfare or interest of women on the one hand, and the amendment of discriminatory legislation on the other".[103] The Committee noted that there was no excuse for the Government to avoid its responsibility to ensure that all laws fell in line with the Constitution and eliminated all forms of discrimination

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[99] See Uganda's Third Periodic Report to CEDAW Committee at http://www.un.org/News/Press/docs/2002/wom1355.doc.htm, where these issues are discussed. Accessed 24 May 2005.
[100] *Ibid.*
[101] Ibid.
[102] *Ibid.*
[103] *Ibid.*

against women.[104] In response, the state representative reported that among other challenges, whenever gender–related issues were brought to Parliament, there were often negative responses from members.[105]

Evidently from the foregoing, there are serious questions about the willingness and ability of the Ugandan government to reform the country's laws of marriage, divorce and succession to make them fully compliant with the CEDAW. The Committee expressed accordingly concern that, "although laws and customs, which contravene constitutional guarantees on equality, are considered void, mechanisms to enforce the constitutional provisions on non-discrimination are not widely known and are inaccessible to women".[106] It is evident that although Uganda has been a state party to the CEDAW since 1985, her compliance with it is unsatisfactory.[107] The question is what factors make Uganda's compliance with the CEDAW difficult?

Widespread ignorance of the CEDAW by ordinary people accounts for their inability to exert pressure on the government to fully implement it in all of Uganda's municipal laws. For example, the CEDAW individual complaints mechanism was only instituted in 2000 and is relatively unknown.[108] Under Article 2 of the Optional Protocol to the CEDAW, "individuals or groups of individuals are allowed to submit individual complaints to the CEDAW Committee... [Communications] may also be submitted, with their consent, on behalf of individuals or groups of individuals unless it can be shown why that consent was not received".[109] Given that this mechanism is not widely known by ordinary Ugandans, they are as individuals not in a position to make use of it to put government to task as to why it does not fully respect her CEDAW obligations. However, even if this mechanism were known, there would presently still be constraints in using it because all individual UN complaints procedures are optional and require the state party to the treaty to accept the jurisdiction of the monitoring body to entertain complaints from individuals or groups alleging violations of the rights protected by the treaty. In many cases, whereas a state may be

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[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*
[107] See Chapter One (1.0).
[108] The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women came into force in December 2000.See text at http://www.un.org/womenwatch/daw/cedaw/protocol/text.htm. Accessed 25 May 2005.
[109] *Ibid.*

party to a treaty accepting substantive obligations under it, it may "not necessarily have accepted the procedures in the treaty that allows individual complaints to be brought against it".[110]

As by April 2006, Uganda had not ratified the optional protocol to the CEDAW, a situation that does not advance women's rights in the country, given that Article 3 of the Protocol provides that "the CEDAW Committee will only consider an individual communication if it concerns a country that has become party to the protocol".[111]

Generally, whereas Non-Governmental Organizations (NGOs) may wish to lobby and articulate the concerns of those women whose rights are violated by a state party to a treaty, the knowledge that Uganda is a party to a treaty such as the CEDAW requiring it to report may not be widely known. Even those in the know may not be able to track the submission of government reports and the timetable for their consideration. National groups capable of exploiting these opportunities may know little about procedures and appropriate formats for submission of materials and how to lobby members of the committees to generate publicity. Little wonder that there have been, on the whole, few attempts by NGOs to bring women's issues before international bodies, especially "issues relating to economic, social and cultural rights or the responsibility of the state for rights violations by private individuals".[112]

It should also be appreciated that the reports submitted by state parties to the CEDAW Committee do not always accurately reflect the human rights situation of women in the country concerned nor do they always identify specific problem areas.[113] Peculiar to Uganda, some women may not even be aware of the difference between custom and law and the fact that "some customs are illegal under state-made laws" so as to

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[110] See Andrew Byres, "Towards a more effective enforcement of women's human rights through the use of international human rights law and procedures" in Rebecca J Cook(ed), *Human Rights of Women, National and International Perspectives,* 189-227 at 199.

[111] See the UN Division for the Advancement of Women website at http://www.un.org/womenwatch/daw/cedaw/protocol/sigop.htm for the CEDAW Protocol ratification register. Accessed 6 April 2006.

[112] See Andrew Byres, "Towards a more effective enforcement of women's human rights through the use of international human rights law and procedures", 210.

[113] See Raoul Wallenberg Institute of Human Rights and Humanitarian Law, *United Nations Human Rights Fact Sheets Nos 1-2, 6th* edition, (Lund, 1998),473.

challenge them.[114] Information from independent organizations is, therefore, useful for the CEDAW Committee to assess the situation in the individual state. It follows that in Uganda, where many NGOs are not in a position to avail of this information in time because they are not familiar with the activities of the Committee, non-compliance with the CEDAW tends to become the norm.

Crucial as it is to women, the CEDAW is wanting in some important aspects. For example, it assigns the CEDAW Committee monitoring implementation by state parties an annual meeting period of only two weeks.[115] Every human rights treaty body meets for a greater length of time than the CEDAW Committee. The Torture Committee, as an example, meets for four weeks a year and yet the Convention Against Torture has about half the number of ratifications.[116] This restricted time allotment to the CEDAW Committee impairs its ability to monitor the implementation of the CEDAW through timely and exhaustive consideration of all state party reports. Not surprisingly, at the 2002 meeting the CEDAW Committee urged Uganda as a state party to the CEDAW to "sign and ratify the Optional Protocol to the CEDAW and deposit as soon as possible its instrument of acceptance of the amendment to Article 20, paragraph 1 of the CEDAW, on the meeting of the Committee".[117] While this is the case, it takes some time before the CEDAW committee examines a state party report. Moreover, the report must be translated into six languages before consideration, which is a time consuming procedural requirement.

The CEDAW, while calling upon state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, does not define the terms marriage and family. The CEDAW Committee in General Recommendation No 21 on equality in marriage and family relations, clarified however, that:

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[114] See Florence Butegwa, "Using the African Charter On Human and Peoples Rights to secure women 's access to land in Africa" in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives,* 495-514 at 510.
[115] See Article 20 (1) CEDAW.
[116] See Appendix A in Rebecca J Cook (ed), *Human Rights of Women: National and International Perspectives.*
[117] See Uganda's Third Periodic Report to the CEDAW Committee.

"The form and concept of the family can vary from state to state and even between regions within a state. Whatever form it takes, and whatever the legal system, religion, custom or tradition within the country, the treatment of women in the family both at law and in private must accord with the principles of equality and justice for all people, as Article 2 of the Convention requires".[118]

The above clarification notwithstanding, realizing equality between men and women in their rights of succession to property as envisaged by the CEDAW continues to be difficult for Uganda. There are as explained above, many explanations for this situation; one peculiar example, the prevalence of extended families, as opposed to nuclear families, will suffice to account as to why Uganda finds it difficult to implement the CEDAW to the letter at least with regard to women's rights within the family. It could be that in practice the CEDAW is better suited to enhance rights of women in a nuclear and not extended family dominant in Uganda.

An extended family does not exclude relatives and includes generally the permanent members of the household such as the spouse and their immediate children and other relatives residing with them.[119] There are also adult married children of the spouses who live in distinct homes but are still members of the family and "have rights and responsibilities attached to the family membership".[120] In some cases a couple is joined by their adult daughters who may have failed in marriage and have decided to move back to stay with the parents, in some cases with their children. Evidently an extended family is a collective unit with many people enjoying rights, making it difficult for women to insist on equality and non-discrimination as envisaged by the CEDAW.

The extended family, moreover, has social and economic implications adverse to women's individualistic rights that the CEDAW promotes. While the "strong kinship ties, which permeate social relations, provide an effective framework for the

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[118]See Paragraph 13 of CEDAW General Recommendation No 21 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21 Accessed 21 January 2004.

[119] See Alice Armstrong et al, *Uncovering Reality: Excavating Women's Rights in African Family Law* Working paper No 7, (Harare, 1997), 6.

[120] *Ibid.*

organization and management of the household economy", kinship relations are hardly distinguishable from property relations and indeed tend to obscure them.[121] Article 16 of the CEDAW advocates on the other hand for individual rights of women in establishing a family, within the family and upon its dissolution. Evidently collective rights continue to conflict with what the CEDAW envisages for women.

While the above description of an extended family assumes that the husband has one wife the situation may be that there are two or more wives either residing in the same household or in separate accommodation. In this case the family will consist of a man and his wives along with the various relatives who may happen to be residing with them. In effect the phenomenon of polygamy tends to defeat what the CEDAW envisages for women. The CEDAW Committee continues to oppose polygamy and has in General Recommendation No 21 observed that:

> "State parties' reports also disclose that polygamy is practiced in a number of countries. A polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents, that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriages in accordance with personal or customary laws. This violates the constitutional rights of women and breaches the provisions of article 5(a) of the Convention."[122]

Although according to the CEDAW Committee polygamy should be discouraged and prohibited, its existence is, unfortunately, a reality and Uganda continues to tolerate it contrary to her obligations under the CEDAW. This is why when the CEDAW Committee was considering Uganda's third periodic report in 2002 it noted that "whereas the Constitution prohibited cultural practices which discriminate against

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[121] *Ibid., 7.*

[122] See Leif Holmstrom and Lena Karlbrink (eds), *General Comments or Recommendations adopted by United Nations Human Rights Treaty Bodies,* Volume IV, 47.

women, the state report stated nevertheless that a number of measures such as the legality of polygamy discriminated against women".[123]

Although there are many factors that make Uganda's compliance with the CEDAW difficult, it is not impossible for the country to fully comply. What is required among other measures is that the country adopts radical reforms of all her laws regulating rights to property in marriage, upon divorce and death of a spouse.

Women's rights of succession to property are closely related to their rights to property during marriage and upon divorce. This is why matrimonial property regimes that are compliant with the CEDAW should be adopted in Uganda for they promote equality between the spouses and advance rights of succession to property upon death. Compliance with the CEDAW requires, therefore, to determine which type of matrimonial property regime can best be relied upon to advance equality between the spouses. This is the reason for discussing the merits and demerits of the principal matrimonial property regimes.

2.3 Matrimonial property regimes

Equality of spouses in their rights to marital property has a profound effect on rights of succession to property as well. For example, a full community property regime at marriage that requires the spouses to share all property equally, whether acquired before or after marriage, promotes equality in the rights of succession to property as well.

There are two broad matrimonial property regimes to look at in the search for a specific regime most compliant with the CEDAW. Firstly, there is the separate property regime, in which each spouse possesses and manages his or her property as if she/he "were single".[124] The advantage is that none of the spouse's estate is at risk if one of them suffers a financial setback. It operates, however, unfairly against a

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[123] See Uganda's Third Periodic Report to CEDAW Committee at http://www.un.org/News/Press/docs/2002/wom1355.doc.htm, where these issues are discussed. Accessed 24 May 2005.

[124] See Judith Freedman et al, *Property and Marriage: An Integrated Approach*, (London, 1988), 18.

woman who forfeits earning an income for years while she stays at home to raise children or attend to other domestic commitments.[125]

Secondly, there is the community property regime "in which all or some of the spouses' property is community property subject to a special legal regime".[126] There are variations in the characteristics of community property regimes. For example, "in a full community regime, the regime applies in principle to all the spouses' property... in a regime of community of acquests, it applies in principle only to property acquired during the marriage".[127]

Some separate matrimonial property regime jurisdictions have undergone, however, many modifications to the extent that there are now rules that "protect a spouse's occupation of the matrimonial home... and there are also provisions for sharing property, or its value, between the spouses on divorce and some provision for the disinherited surviving spouse".[128] Evidently, therefore, there is now a tendency to ameliorate the rigours of separate property regimes by prescribing more distribution of the parties' resources when the relationship ends. What is characteristic of these modified separate matrimonial property rights regimes, though, is that "the redistribution of property when the marriage ends is at the discretion of court and is not a matter of fixed rights".[129]

The desire to address the disadvantages of the matrimonial property regimes has also created, in certain jurisdictions, "a deferred community or participation or deferred sharing systems out of the community property regime... spouses manage their own property during the marriage but share their property, or some of it, on the termination of the marriage".[130]

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[125] Scottish Law Commission, *Consultative Memorandum No 57,Matrimonial Property* March 1983 at 52/3
[126] *Ibid.*, 31.
[127] Ibid. See also Sylvie Ferre-Andree et al, "Work in hand for the reform of French family law" in Andrew Bainham (ed), *The International Survey of Family Law,* (Bristol, 2003), 163-186 at 164 who report that "in France, in the absence of a prenuptial agreement, the statutory matrimonial regime of community limited to acquests applies. Under it the spouse receives half the community property made up of assets acquired by the couple during their marriage and of their savings".
[128] Scottish Law Commission, *Consultative Memorandum No 57,Matrimonial Property* March 1983,32/50.
[129] *Ibid.*, 50.
[130] *Ibid., 32.*

From the above brief outline it is probable that a community property regime is, as envisaged under the CEDAW, better suited to realising equality of the spouses and non-discrimination. That being the case it is necessary to briefly discuss the merits and demerits of the full community property regime.[131] South Africa avails an instructive example of how a full community property regime described as community of property and of profit and loss operates in practice, and this is the reason why South Africa has been picked upon for that purpose. In sum, under this regime all the spouses' ante-nuptial and post-nuptial assets and liabilities are shared equally.

Cronje et al explain that "when parties marry in community of property, all ante-nuptial assets and all assets acquired post-nuptially are legally united in one estate, that is, divided equally between the spouses and their estates upon dissolution of the marriage."[132] The financial contribution of each partner is immaterial. They also emphasize that "all ante-nuptial debts and certain post-nuptial debts may be recovered from the communal estate during the marriage".[133]

In South Africa, this property regime is "the general or ordinary system that applies to all marriages, except marriages in respect of which it has been excluded either by all the parties by means of an ante-nuptial contract or by operation of law or after the marriage has been solemnized by an order of court".[134] It can be submitted that all South African marriages are in community of property, "unless an exception obtains with the result that any person who claims his marriage is subject to an exception must prove it".[135]

There are, however, exceptional circumstances where a marriage without an ante-nuptial contract is not regarded as one in community of property. This is where "the law of the matrimonial domicile determines that there is no community of property or excludes the community of property except where the parties introduce it by means of

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[131] South African laws are discussed in details in chapter 6.
[132] See D SP Cronje et al, "Marriage" in W. A. Joubert et al (eds), *The Law Of South Africa,* Volume 16, First Reissue, (Durban, 1998), paragraph 64, p82.
[133] *Ibid.*
[134] *Ibid.*, paragraph 63, p 80.
[135] *Ibid.*

an ante-nuptial contract".[136] The advantage under the community property regime for women is that those who contribute less financially all the same have an equal share of the estate.

There are a few exceptions to the community of property ownership rule, "such as property given to a spouse by a third party with a provision they should not fall into the community".[137] The revenue from such debarred property, however, also goes into the community.[138] Properties also excluded are certain policies and benefits such as "costs awarded against the husband in matrimonial proceedings".[139]

What is problematic with full community property regimes is that "the very limited nature of the power to depart from an equal division of all property seems calculated to lead to hard cases where all the property has been brought into the community by one spouse and where the marriage has been short."[140] To address this and related situations such as when one spouse maladministers community property "there is provision for termination of the community by court order" that either spouse may invoke any time to protect her/his property interests against another partner.[141] Courts also have the mandate "to suspend the power of either spouse with regard to administering the joint estate for either a definite or an indefinite period".[142]

Furthermore, whereas upon divorce the parties are entitled to share their community properties equally, it is possible for court to order forfeitures of benefits. The court has to consider, however, "whether having regard to the duration of the marriage, the circumstances which give rise to the breakdown of the marriage and any substantial misconduct on the part of either spouse, the one spouse will be unduly benefited if the order is not made".[143] Divorce courts have "wide discretion to award a full forfeiture, a partial forfeiture as determined by court or even refuse a forfeiture altogether."[144]

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[136]See D S P Cronje et al, "Marriage," paragraph 63, p 81.
[137] *Ibid.*, paragraph 68,p85.
[138]*Ibid.*
[139] *Ibid.*, p87.
[140] See Scottish Law Commission, *Consultative Memorandum No 57,Matrimonial Property* March 1983,36.
[141] See D S P Cronje et al, " Marriage," paragraph 89, p113.
[142] *Ibid.*, paragraph 74, p100.
[143] *Ibid.*, p112.
[144] *Ibid.*

Upon death, ante-nuptial debts not paid during marriage must be paid and the executor can claim half the price of the debt from the other spouse's estate. Debts are deducted from the joint estate, and the remainder of the property is shared between the spouse who takes half the net estate and the rest is given to the heirs of the predecessor.[145] However, collation may take place between survivor and heir "if the child received in the course of the marriage an advance from his parents to set him up in a business".[146] At death the survivor must make an inventory of all the joint estate. The debts paid out by the executor must be credited and debited properly, and where a redistribution of immovables is necessary, the executor transfers them directly to the parties entitled.[147]

Where a spouse dies intestate, half of his net estate or a quarter of the joint estate falls to his heir on intestacy, but the surviving spouse receives a preference share that varies depending on whether the deceased leaves descendants or not.[148] Where the deceased dies testate the will prevails; however, if he purports to dispose of the other spouse's share in the joint estate, the surviving spouse must choose whether to retain her property or take benefit under the will.[149]

In South Africa, spontaneous legislation has eventually eliminated the husband's authority in matrimonial matters involving his wife that are usually associated with community property regimes. For example, the Matrimonial Property Act of 1984 "abolished the husband's marital power over the person of his wife and the joint estate".[150] The said law was subsequently reinforced by the General Law Fourth Amendment Act 1993.[151] As a result of all these legislation "restrictions usually placed upon the wife's capacity to contract and litigate have been done away with".[152] With regard to the modified community property regimes, there are two main types to consider: community of acquests and the deferred community property regime.

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[145] *Ibid.*, paragraph 83,pp105/6.
[146] See M De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa,* Volume 31, paragraph 200,p120. They note that "collation favours a surviving spouse who was married to the deceased in community of property".
[147] See D S P Cronje et al, "Marriage" at p106.
[148] See M De Waal et al, "Wills and succession, administration of deceased estates and trusts" paragraph 216, p132.
[149]See D S P Cronje et al, "Marriage," paragraph 84,p106/7.
[150]*Ibid.*, paragraph 69, *p* 90.
[151] *Ibid.*
[152] *Ibid.*

(a) Community of acquests

Under this system there is separate ownership of property that the spouses bring to the marriage, however, all property obtained during marriage is shared equally.[153] Freedman clarifies that "the content of the community is the acquests made by the two spouses together during the marriage, originating from their personal industry as well as from the economies made from the fruits and revenues of their separate property... any property brought separately to the marriage, as well as that through inheritance, bequests or donation are excluded from the community and where there is doubt about the property's status, the rebuttable presumption is that it is part of the community. "[154]

The problem with this regime is to know "what is covered by the respective definition of community property and separate property".[155] It is not easy to ascertain when income from a spouses' separate endeavour becomes community property.

The community of acquests terminates upon divorce or death of a spouse. Either spouse, to protect her/his interests from a reckless partner, is also at liberty to terminate the regime by petitioning court for the relevant orders.[156] Upon dissolution of the community the assets that form the community are determined. After paying the community debts, "there is recompense of any funds which has been enriched at the expense of another... For example, if improvements to a house owned by the husband at the time of the marriage have been paid for out of community funds, his funds will have to make due compensation to the community before the community assets are divided equally".[157] It is possible that upon "divorce a spouse may also have a claim, depending on the ground of divorce, for damages... available only to the innocent spouse in a divorce for fault or a compensatory payment to adjust differences in the spouse's living conditions caused by the breakdown of the marriage".[158]

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[153] See Judith Freedman et al, *Property and Marriage: An Integrated Approach,* (London, 1988), 21 who clarify that "a community of acquests means property brought to the marriage remains the property of the spouse who originally owned it, while almost all property acquired during the marriage is shared". France has a community of acquests regime.
[154] *Ibid.,* 21.
[155] Scottish Law Commission, *Consultative Memorandum No 57,Matrimonial Property* March 1983 at *37.*
[156] *Ibid.,* 39.
[157] *Ibid.,* 39.
[158] *Ibid.*

It may be deduced that the strength of the community of acquests regime, lies in the redistribution of assets acquired by the parties in the course of the relationship thereby reinforcing the view that marriage is a relationship of equals.[159]

(b) Deferred community property regime

What is characteristic of this property regime is that the joint ownership of the property of husband and wife is postponed to the termination of the marriage.[160] It may be summed up that, under this regime, "the ownership of the property is unaffected by the marriage until the marriage breaks down... It is then and then only that the idea of community comes into play and there is a sharing of property or gains".[161]

A scheme comparable to the deferred community was initiated in Scotland through section 10 of the Family Law (Scotland) Act 1985 providing that "the net value of the matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances". In England, through case law such as *White* v *White,*[162] where it was held that "in seeking to achieve a fair outcome at divorce, there is no place for discrimination between husband and wife and their respective roles", courts have established a system resembling the deferred community regime.[163] Section 25 of the Matrimonial Causes Act 1973, however, unlike section 10 of the Family Law (Scotland) Act 1985, makes no mention "of an equal sharing of the parties assets even their marriage related assets".[164]

The key features of a deferred community regime such as that of Sweden are that "each spouse owns and manages his or her assets... Certain assets are, however, divided equally on the termination of the regime. These include most assets owned at

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[159] *Ibid.*
[160] See B. Hale et al, *The Family, Law and Society, 5th* edition, (London, 2002), 156 who note that "the deferred community of property is based on the idea that there should be separate ownership of property during marriage and an equal distribution of property on divorce".
[161] See Scottish Law Commission, *Consultative Memorandum No 57,Matrimonial Property* March 1983 at 43.
[162] See *White* v *White* (2001) 1 AC 596.
[163] See B. Hale et al, *The Family, Law and Society, 5th* edition, 157.
[164] See B. Hale et al, *The Family and Society, 5th* edition, 321.

the time of the marriage or acquired during it but do not include strictly personal rights such as pension rights".[165] The authority to manage one's property as one likes is, however, constrained by the legal requirement of seeking the other spouse's consent before alienation of assets that the spouses enjoy jointly. It is permissible for any of the parties to the marriage to petition court to bring the regime to an end whenever there is evidence that one of them is dealing with their property in a manner prejudicial to the interests of the other.[166]

When the relationship comes to an end "the court has power to depart from equal sharing if an equal division would be manifestly unfair in view of the economic circumstances of the spouses and the duration of the marriage".[167]

The difficulties with community property regimes generally are marrying shared property with "equal powers of management for the husband and wife... There are three basic solutions: joint management, separate management, and concurrent management".[168] Accordingly, when property is managed jointly the other spouse must approve any alienation of the community property. Where the spouses adopt separate management, either party has absolute control of whatever assets that she/ he owns be it used jointly or not. The notion of separate control of property, however, is not helpful to a homemaker spouse with little property and earnings.[169] As regards concurrent management "either spouse can deal with any part of the community property... combined with a requirement that the consent of both spouses is necessary for certain important transactions such as those relating to immovable property".[170]

From the foregoing, although separate property regimes have been modified in some countries to provide for redistribution of property on divorce, protection of surviving spouse on death and protection of the spouse's interest in the matrimonial home, community regimes are, in comparison, much better with regard to equal sharing of property or its value on the breakdown of the marriage. Uganda should adopt a matrimonial property regime compliant with the CEDAW standards on equality of the

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[165] Scottish Law Commission, *Consultative Memorandum No 57,Matrimonial Property, 43.*
[166] *Ibid.*
[167] *Ibid.*, 44.
[168] *Ibid., 41.*
[169] *Ibid., 41/2.*
[170] *Ibid.*, 42.

sexes and capable of influencing positively the laws regulating succession to property upon death. What, however, is entailed in the phenomenon of succession to property upon death?

2.4 Succession to property upon death

The phenomenon of succession to property upon death is "concerned with the transmission of property and rights and obligations associated with that property from the deceased to the living and depends upon death", which must be established before the property can be distributed among the surviving beneficiaries.[171]

How succession to property upon death is regulated in any society is important, because it affects the realization or sustenance of substantive equality between men and women.

The phenomenon of succession to property upon death is variable and every nation has its own peculiar laws to regulate it. What is however, common to many jurisdictions is that when transmitting property from the dead to the living, this phenomenon favours the bloodline. Furthermore, in many societies, the phenomenon of succession to property upon death existed before the official laws of succession to regulate it were introduced. As noted, the phenomenon of succession to property varies but relying on one Scottish institutional writer, James Dalrymple, 1st Viscount of Stair, it can be appreciated that there are many universal traits. Recognizing that, in spite of the differences in the various societies, certain traits regarding the phenomenon of succession to property have been universal, gives credence to proposals to reform Uganda's laws of succession in accordance with the now generally universal standards set by the CEDAW.

As early as 1693, Stair,[172] a still live source of law in Scotland, when analyzing the phenomenon of succession to property upon death, observed that:

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[171]See Sir Thomas Smith and Robert Black (eds), *The laws of Scotland: Stair Memorial Encyclopedia*, Volume 25, (Edinburgh, 1989), paragraph 643,p 200.

[172] Stair is chosen because his records about the phenomenon of succession to property refer to jurisdictions such as America, Germany, Poland and France. Stair wrote about law regarding it from a

"Where there is neither law nor custom concerning succession; as when people from diverse countries do gather into new plantations in America, and live not severally, as parts of their mother–countries but, jointly, such have goods which by death become not *nullius* to be appropriated by the first occupant. If therefore they remain the property of some persons, which needs must be by some law, it can be by no other than natural equity or the law of rationale nature".[173]

Stair was reporting that despite differences in the various communities, when a person passes away his property is not taken over by any stranger but must be passed on to persons related to the deceased. Stair was also reporting that "God, who allowed property to be acquired, would not leave man destitute of a natural rule to regulate such property after the owner's death, though there were no human laws or customs about it".[174] What Stair reported above was a universal attribute manifested in all societies.

Furthermore, in the various societies, whereas the owners of property had and do still have authority to give it away by will, this power was and still is limited. Stair noted that "the will of the property owner is not always the rule of succession because there is a natural obligation upon the property owner to provide for his relations not only during his life but also after his death".[175] The obligation to provide, however, was restricted to particular beneficiaries such as one's immediate children. Stair has written that:

> "The obligation to provide for his relatives that is cast upon the deceased is however, not indefinite; it has a natural order or standing in the nearest degree of consanguinity, with the nearest degree excluding the furthest".[176]

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cosmopolitan, rather than a local point of view. Stair's views are, therefore, representative of what different societies thought about succession to property as early as the 17th century.

[173] See David M Walker (ed), *Stair: The Institutions of the Laws of Scotland, (*Edinburgh and Glasgow, 1981), 654.

[174] *Ibid.*

[175] *Ibid.*

[176] *Ibid.*, 655.

From the above it can be deduced that in the various societies the principal concern of the phenomenon of succession to property is to transmit property within the blood family, of which unfortunately, surviving spouses are not members. It was in the past understandable that blood ties took priority over alliances that arose by virtue of marriages. This was at the time acceptable because property was largely a family fortune, i.e., ancestral land, and it would be irregular to have a stranger inherit such family property,[177] because in many societies the property owners used to receive land from their parents by gift or inheritance and it was only equitable that the assets the deceased received from parents went back to the family of progenitors, from whom the assets came.

Although there was a tendency to maintain property within the bloodline, even then male lineal descendants were favoured over females. The trend of favouring males over females still thrives in some societies. For example, under the laws of succession inspired by Islam, "girls inherit half of what their brothers inherit".[178] Primogeniture as a worldwide feature was used as a basis to choose one male descendant, i.e., the eldest son as the heir with varying rationalisations depending on the society in question. For example, in many West European societies, when land was still the most important source of personal wealth primogeniture had a purpose that Stair in the 17th century explains as follows:

> "The expediency of primogeniture is partly public and partly private: the public expediency is that the estates of great families remaining entire and undivided, they, with their vassals and followers, may be able to defend their country, especially against sudden invasion; for in Scotland, France, Poland and many other places, the great families are the bulwarks of their country; having means to maintain themselves and their followers, for sometime, without standing armies, constant pay, and subsidies. The private expediency

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[177]See Alastair Owens, "Property, gender and the life course: inheritance and family welfare provisions in early nineteenth century England" in *Social History,* Volume 26, No 3 October 2001 who notes that widows of male property owners in England from the 17th to 19th century, then considered a consumer and industrial revolution era, when much wealth was generated were "denied direct access to family property and could only get benefits through others i.e., estate administrators".

[178] See Arlette Gautier, "Legal regulation of marital relations: an historical and comparative approach," 4 who writes that the rationalization for this is that "males have more responsibilities than the females".

is for the preservation of the memory and dignity of families, which, by frequent division of inheritance, would become despicable or forgotten".[179]

Given that in various societies, especially in Western Europe, it was historically usual for males, as opposed to females, to participate in warfare, it was only fair that they be favoured over females with regard to inheritance and in that way be motivated to continue to defend their countries.[180] Primogeniture has since been abolished in all Western European societies and succession to property is regulated in a manner that does not discriminate against women.

In Uganda, primogeniture was the rule under the various tribal customary laws regulating rights of succession to property, because "men owned the property, and societies being patriarchal, the norm was to preserve property among the males".[181] Under the various customary laws of Uganda, women, particularly widows, were provided for but they did not inherit property in the individualistic sense that one presently inherits property under the state-made laws of succession. The property involved was in any event usually land, attached to the husband's family, and a few small personal items.[182] When the husband died, the eldest son was chosen as the heir, he had however, a mandatory obligation to support the widow(s) and dependent children. Therefore, along with the inheritance of the possessions of the deceased went the inheritance of the deceased's obligations as well. Evidently at customary law, widows do have rights to property after the death of a spouse,[183] but they have to depend on customary heirs, which by contemporary standards as established by the CEDAW is far from satisfactory. As shall be discussed later, this customary law has also since been abused by the selfish male heirs who inherit property of deceased persons but abandon the responsibility of caring for the beneficiaries of the deceased, including the widows.

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[179]See David M Walker (ed), Stair: *The Institutions of the Laws of Scotland,* 663-4.
[180] See David M Walker, A Legal History of Scotland (Edinburgh, 1988) 76.For example, during the feudal era in Scotland when the landed Robert de Brus died his "main English estates passed to his elder son and his Scottish lands to his younger son Robert, a not uncommon practice of inheritance".
[181] See Percy Tuhaise, "Women and inheritance: common patterns of powerlessness and subordination" in Percy Tuhaise et al, *Women and Law of Succession in Uganda; Women, Inheritance Laws and Practices, 299-335 at 302.*
[182] *Ibid.*, 303.
[183]See Alice Armstrong et al, *Uncovering Reality: Excavating Women's Rights in African Family Law,* 45 who write, however, that "what are usually projected as oppressive attributes are misinterpretations of customary law".

From the foregoing it can also be deduced that in various societies property was upon the death of the owner, transmitted to the deceased's bloodline because, in addition to what has been discussed thus far, much of the property then was kept as *estates in specie* not converted into any other form. The land market then was not as developed as it presently is. This situation has changed and continues to change in various societies in a way that favours surviving spouses over the bloodline. There are many explanations for this transition in the laws regulating rights of succession to property. Firstly, family fortunes, such as ancestral lands, are in many countries diminishing; there is hence no more justification for primogeniture.[184] Secondly, unlike in the past, many assets are acquired during marriage rather than the spouse's personal wealth. Thirdly, many couples now have modest incomes and homes, which they may wish to pass on exclusively to the surviving spouse.[185] Moreover, with the rise in life expectancy, by the time the parents die, the children are generally adults with sufficient resources of their own whereas the surviving spouse will be an elderly woman or man on meagre income.[186]

Last but not least, the exclusion of the surviving spouse from being treated like children as a proper heir no longer matches with the contemporary standards on rights within the family as prescribed by the CEDAW, particularly in terms of equality and non-discrimination. This has meant that countries that ratified the CEDAW are under pressure to reform the laws regulating rights of succession to property so as to comply with what the CEDAW prescribes.

Other than achieving compliance with the CEDAW, the laws regulating rights of succession to property upon death are important: they can also be used by the authorities, be it government, family or religious leaders, to protect vulnerable members of the family from disinheritance so as not to burden the public with destitute widows/widowers or children of the deceased. This protective function of the law of succession is manifested as follows: it imposes restrictions on property owners not to dictate recklessly what should prevail after their demise. This is why over the

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[184] See Sylvie Ferre-Andree et al, 'Work in hand for the reform of French family law', *165*.
[185] *Ibid.*
[186] See Sylvie Ferre-Andree et al, 'Work in hand for the reform of French family law', *165* who report that "many European legal systems give surviving spouses significant rights such as reserving shares for survivors in the estate".

centuries and in many cultures unbridled testamentary freedom is the exception. For example, English law recognizes testamentary freedom but the Inheritance (Family and Dependants) Act 1975 allows courts to amend wills and make provisions for certain beneficiaries that the testator may not have provided for.[187] Furthermore, in its protective function the law of succession ensures that bequests that benefit no one are void,so that testators are restrained from depleting estates after their demise by excluding persons who would succeed to them.[188]

The laws of succession are important for the realization of women's rights because when there is no will, the authorities can use the law to impose a will where certain assumptions are made and are followed when sharing the deceased's properties. In some countries, the governments make wills for the citizens in the sense that a definite provision is made by law for certain classes of relatives and dependants who cannot be affected by testamentary dispositions made or attempted to be made by the testator.[189]

To achieve substantive equality between the spouses as envisaged under the CEDAW, however, the contemporary laws of succession must award a surviving spouse a substantial share in the estate, preferably more than the entitlement given to children, because generally a surviving spouse contributes, if not to the acquisition, at least to enhancing the value of the property of his or her deceased partner and, therefore, deserves a share commensurate with his/her contribution. Even if a country were not a signatory to the CEDAW, there is justification for enhancing rights of succession to property of surviving spouses because marriage is a contract between two people, and therefore, when property is acquired during its duration and one of the contracting parties dies, lineal descendants such as children who are not a party to this marital contract should not take more benefits than the surviving contracting party.

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[187] See section 2 Inheritance (Provisions For Family and Dependants) Act 1975 at chapter 63 at http://westlaw.co.uk. Accessed 12 November 2005.
[188] See DR Macdonald, *Succession*, 3rd edition, (Edinburgh, 2001), 109.
[189] *Ibid.*, 38.

2.4.1 The need to harmonize Uganda's state-made and non-state-made laws of succession

Traditionally, in numerous societies social life is dependent on the capacity of people to make rules to guide them in their daily activities. These rules usually, but not always, represent a common character of shared values and practices.[190] In many countries, actual expression is given to such rules through the state with its legislative and judicial organs and generally accepted means of according recognition to prevalent practices.[191] However, there are also situations in which rules of an obligatory or strongly persuasive nature are created without the formal procedure of parliament, courts and other constituted bodies that characterize the contemporary state.[192] Whereas one of the main attributes of the contemporary state is its power to make laws, however extensive its power, it is nevertheless possible to have behaviour types that follow norms that are extralegal. It is also possible in a country to have some citizens who respond to obligatory demands that stem from non-governmental sources. It is consequently deducible that there are interactions determined and disputes resolved by standards and procedures that emanate not from government but directly from the life of the people.[193]

Governmental authorities may decide to ignore such manifestations or accommodate them by recognition in one form or another. The Ugandan government recognizes the above-described non-state-made law as a source of law. Accordingly, as already noted, the contemporary laws regulating rights of succession to property in Uganda take two forms, state-made when enacted by the national parliament or its predecessor and non-state-made laws of succession which are rules based on custom/tradition and religious values of a particular tribe or community such as the Muslims. There are, with varying effects on the rights of women, striking differences between state-made and non-state-made laws of succession in Uganda. These differences justify the two sets of laws to be harmonized. For example, in virtually all customary laws of

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[190] See Leon Sheleff, *The Future of Tradition, Customary Law, Common Law and Legal Pluralism,* (London, 1999), 1

[191] *Ibid.,* 3/4.

[192] *Ibid.*

[193] Ibid., 1- 7 who points out that "any understanding of a legal system of a society must take account of norms and structure that exist at the margins of governmental authorities, but possess for some of the citizens, obligatory force".

succession wills are unknown and these laws of succession are, therefore, all intestate because individuals are not entitled to establish by will how and to whom their estates devolve. The customary laws are also patrilineal "because heirs are determined by their relationship to the deceased through the male line".[194]

State-made laws of succession, have on the other hand, provisions for distributing property basing on testamentary documents such as wills. Furthermore, as a general rule, the customary laws of succession in Uganda recognize property rights of women in a very restricted manner. A woman is usually a worker in the home but traditionally not expected to lay claims to the wealth in the home because when women got married, "they only went into marriage traditionally with articles that helped them with domestic chores like cooking, food storage and harvesting".[195] During the subsistence of the marriage, women hardly owned immovable property, because traditionally land and all on the land belonged to the men. It meant that as long as she was a spouse a woman traditionally had only a life interest in the immovable property.[196] 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.[197] State-made law on the other hand recognizes a woman's right to own and manage property with authority to dispose of it as she wishes. There are evidently many contradictions between state-made and customary and religious laws regulating marriage and rights of succession to property in Uganda. These contradictions must be addressed so as to uniformly enhance women's rights and by so doing achieve compliance with the CEDAW standards on equality and non-discrimination.

With regard to procedures, under Uganda's state-made law of succession, the transmission of property occurs in two stages, namely, a passing by operation of the law to one or more representatives of the deceased person for purposes of administration, and then, transfer by the representative to the person entitled to the

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[194]See Percy Tuhaise, "Women and inheritance: common patterns of powerlessness and subordination" in Percy Tuhaise et al, *Women and Law of Succession in Uganda; Women, Inheritance Laws and Practices, 299-335 at 313.*

[195] See Jennifer Okumu Wengi, *Women's law and Grass root Justice in Uganda,* (Kampala, 1997), 42

[196] *Ibid.*

[197] Ibid., 42.

beneficial enjoyment of the property. Under the non-state-made laws of succession, the procedures differ because property may pass to an heir who steps into the shoes of the deceased maintaining the property without distributing it but with a duty to cater for the beneficiaries.

Summing up, given that there are many gaps between state-made and non-state-made laws of succession and yet the CEDAW has now set new standards on women's rights, there is in Uganda need to harmonize the two laws, make them gender sensitive and realize substantive equality as required by the CEDAW. Harmonization of the state-made and non-state-made laws of succession in Uganda is necessary because after ratifying the CEDAW, the promotion of women's human rights is no longer a culturally relative subject left to Uganda's discretion: it is rather an international legal imperative.

With the above in mind, it is now necessary to discuss the historical evolution of Uganda's laws regulating rights of succession to property and their effect on women vis-a-vis what the CEDAW prescribes.

Chapter Three

3.0 The introduction and effect of English law on women's rights of succession to property in Uganda

At present, Uganda is a united country with 56 ethnic communities each with its particular culture and norms.[198] Before the colonial era, these communities were independent of each other and occupied different parts of the land that was later to become Uganda. It was not until 1894 that Uganda became a British protectorate and these disparate communities were brought together under a centralized authority.[199]

Prior to the advent of British colonialism in Uganda, Arab and white missionaries had spread religious practices that exerted remarkable influence on the people's way of life.[200] For example, Ugandan communities that converted to Islam regulated marriage and the rights of succession to property in accordance with their newly embraced religion. In such a disparate society, "English law was received on 11th August 1902, by virtue of the Order in Council promulgated by the British Parliament".[201] With effect from that reception date, "the substance of the common law, doctrines of equity and statutes of general application in force in England at the specified date became applicable in Uganda".[202]

The applicability of the received law was subject to certain qualifications as spelled out in the Order in Council. For example, upon reception the common law, doctrines of equity and statutes of general application were to apply in so far as the local circumstances in Uganda rendered it necessary. This reception clause was not accidental but designed to provide "a wide scope of discretion and initiative that could

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[198] See Schedule to the 1995 Constitution at http://www.parliament.go.ug/Constitute.htm. Accessed 30 January 2006.
[199] Jennipher Okumu Wengi, "Women and the law of inheritance" in Percy et al, *Women and law in East Africa: The law of succession in Uganda,* 1.
[200] *Ibid.*
[201] See Christopher Mubiru Musoke, "The received law of torts in East Africa" in Thomas W Belcher (ed), *Law in a Social Context,* (The Netherlands, 1978), 131-186 at 136.
[202] *Ibid.*, 136 who notes that "the reception of English law and doctrines of equity was bound to cause difficulties in their practical implementation".

be of great value if well utilized by a creative mind".[203] Evidently, although not always the case in practice, when applying English law the courts were to be guided by customary law, provided that "it was not repugnant to justice, morality or good conscience or inconsistent with the general law in force in the territory".[204] The general law in force was interpreted to mean "any Order in Council or any regulation or rule made under any Order in Council or ordinance".[205]

With the reception of English law, fundamental changes were to follow sooner or later. For example, statutory marriages[206] that restricted the parties to monogamy were introduced, yet many Ugandans had been practising polygyny from time immemorial. Furthermore, "the parties to a statutory marriage were not only legally bound to practise monogamy as opposed to polygyny but entering into a further customary law union attracted criminal sanctions" hitherto unknown to them.[207] Moreover, "such a union was also declared to be invalid".[208] English law relevant to domestic relations was introduced to the country and applied with the presumption that it was the most suitable to govern the interspousal relationships of Ugandans, "even though the latter had a mode of life, culture and social organization different from that of the English".[209] With its restrictions, English law could not be popular and conflicts between the received English law and customary norms and practices of Ugandans were inevitable and have persisted ever since.

Besides reinforcing the phenomenon of legal pluralism, the other related effect of introducing English law to people belonging to culturally different backgrounds was the subjugation of customary law and values. For example, in the case of *Rex v Amkeyo,* it was held that "unlike a civil marriage, a woman married under native custom was a compellable witness against her husband because the elements of marriage under native custom differed materially from a civilized form of

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[203] See Christopher Mubiru Musoke, "The received law of torts in East Africa," 136.
[204] *Ibid.*
[205] *Ibid.*
[206] Presently, section 49 of the Marriage Act chapter 251 prohibits contracting a customary law after marrying under the Marriage Act.
[207] H F Morris, "Indirect rule and the law of marriage" in H F Morris and James Read, *Indirect Rule and the Search for Justice,* (Oxford, 1972), 213-250 at 220.
[208] *Ibid.*
[209] See Christopher Mubiru Musoke, "The received law of torts in East Africa," 154.

marriage".[210] The court noted that "in the first place, native custom, allows polygyny and the woman is not a free contracting agent, but is regarded in the nature of a chattel because bride price is paid to her father".

British colonial rule introduced repugnancy clauses (above) to compensate for its limited knowledge of customary law, but the truth is that British rule interfered little with the contents and application of customary law. Moreover, the repugnancy clauses were relevant on appeal when a dispute involving customary law went to the law courts applying English law but this did not happen very often.[211] There was little government initiative to study, record, develop and reform customary law, which presently remains unwritten and uncertain as it regulates women's rights of succession to property.

Unfortunately, lawyers in Uganda are not given sufficient appreciation of the country's 56 customary laws during their training. This state of affairs limits their ability to put forward progressive reforms of customary law compliant with the CEDAW. As long as customary law is not written, researched upon and generally purged of all patriarchal values by the state so as to comply with the CEDAW, it is bound to take a long time to evolve to the standards the CEDAW prescribes on its own. Customary law remains patriarchal and yet the CEDAW promotes equality between men and women and prohibits all forms of discrimination against women. This is one of the reasons why customary law in Uganda, even in the 21st century, continues to accord a subordinate status to women's human rights, especially with regard to equality and non-discrimination. The past and present Governments' failure to develop the various customary laws has resulted in Ugandans preserving them in their patriarchal state. It is probable that both the ignorance of customary law on the part of the lawyers and the persistence of people in using their disparate customary laws have contributed to the retrogressive status of women's rights of succession to property. The various aspects of customary law that contravene the CEDAW shall be discussed later. Given, however, that Uganda has 56 different customary laws, it is

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[210] See *Rex v Amkeyo* (1917) EACA 14 in H F Morris, "Indirect rule and the law of marriage" 213-250 at 221/2.
[211] See Jennipher Okumu Wengi, "Women and the law of inheritance," 1-39 at 3.

not possible to discuss all of them in detail and accordingly only the known principles shall be discussed.

From the foregoing, both the state-made law, which is generally English law of the 19th century that was imposed on Uganda, and the disparate customary laws are not compliant with the CEDAW; hence the need to reform all of them. Whether or not customary law is less progressive than English law or Islamic family law because it is not written, does not distract from the need to reform all laws presently in force in Uganda.

It should be appreciated that English colonial rule was premised on indirect rule that enabled the creation of a state that relied on separate but subordinate state structures for the natives. Inevitably during the colonial era, through the system of indirect rule, "a dual court system was established in Uganda, whereby the High Court had jurisdiction over all persons and matters but the native courts exclusively administered customary laws". The latter were inferior in the sense that "the High Court had to supervise them and almost determine their functions and limits of their activities".[212] The inferior status of customary law courts "undermined customary law in general" and invariably women's rights under it.[213] If the development of customary law, which is applied by the majority of Ugandans, had been facilitated by the state, it is possible that women's rights would be better protected under it. Retrogressive practices like polygyny prevalent in customary law would have been purged over time.

As noted, the introduction of English law reinforced legal pluralism. However, given the challenges it posed to the administration of justice, there were attempts to eliminate it, not only in Uganda but also throughout East Africa. Accordingly, in 1953 a Judicial Advisors conference was held in Uganda. The conference proposed that "a fully integrated court system with a single body of law and a judicial system equally applicable to all persons should be established in the three East African territories". [214] After Uganda's independence from Britain in 1962, the policy to integrate the judicial

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[212] See Christopher Mubiru Musoke, "The Received Law of Torts in East Africa," 152.
[213] *Ibid.*
[214] *Ibid.*

system was pursued and as a result "the dual legal system was abolished".[215] This was achieved in 1964 but the effect of the abolition of customary law courts was the further stagnation of customary law because there was no further effort to develop it. It should be appreciated that even before the abolition of the dual legal system, customary law courts were not courts of record, so their decisions were regarded as inferior compared to the superior courts applying English law.[216] The abolition of a dual legal system did not mean, however, that the English common law had become popular and widely embraced. On the contrary, in spite of a history of subordination and low ranking, customary law survived, as did legal pluralism. Presently Uganda's 1995 Constitution recognizes customary law as one of the applicable laws but requires it to be modified so as to comply with the Constitution.

Article 273 of the Constitution provides that:

> "(1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be affected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with this Constitution.
> (2) For the purposes of this article, the expression "existing law" means the written and unwritten law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after that date".

Furthermore, Article 274 of the Constitution provides that "the first President elected under this Constitution may, within twelve months after assuming office as President, by statutory instrument, make such provision as may appear necessary for repealing, modifying, adding to or adapting any law for bringing it into conformity with this Constitution or otherwise for giving effect to this Constitution". The relevant statutory instruments to achieve this objective are yet to be issued.

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[215] *Ibid.*, 153.
[216] *Ibid.*

With its populist politics, when the National Resistance Movement government came to power in 1986, a new dispute resolution forum called the Local Council court was established.[217] These courts are different from the courts Uganda inherited from the English, i.e., the Magistrate and High courts, in that they use local languages and apply informal procedures in both the gathering of evidence and arbitration over wrangles. Local Council courts entertain specified disputes but apply customary law. In effect, a dual system of courts was resurrected. The emergence of the Local Council courts alongside the High and Magistrate courts is further testimony that English law was not adapted and fully accepted by many Ugandans.

From the above, following the introduction of English law, Uganda's legal system was transformed to include the received laws, that is, the English common law and doctrines of equity, statutory laws and the state-made court hierarchy. This hierarchy comprises the Magistrate courts, High courts, the Court of Appeal and the Supreme Court. The explanation for not fully accepting English law is that the introduced law essentially excluded the multitudes and restricted its discourse to specific parties based on an antagonistic manner appearing before a magistrate or judge, a norm not widely acceptable to Ugandans.[218] Alongside the state-made laws and institutions, there continues to exist customary and religious laws, institutions and practices that form another system of law.[219] This is the phenomenon of Uganda's legal pluralism.

Presently, legal pluralism is perpetuated by people's way of life continuing to defy progressive changes such as a strict adherence to equality and non-discrimination of women as prescribed by the CEDAW. For example, few Ugandans would invoke the state-made divorce legislation when their marriages break down, opting to separate outside the state-made court processes, thereby denying women a relatively fair share of the matrimonial property. There are many reasons for this state of affairs; "state-made divorce proceedings under the divorce laws are cumbersome, protracted and very expensive as to make them inaccessible to average Ugandans".[220] Secondly,

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[217] Samuel Tindifa, "Uganda: finding traditional governance paradigms" in Glenn Hollands and Gwen Ansell (eds), *Winds of Small Change, civil society interactions with the African state* (Graz, 1998) 198-209 at 199

[218] H F Morris, "Indirect rule and the law of marriage", 213-250 at 234, 241-2.

[219] See Jennifer Okumu Wengi, *Women's Law and Grassroot Justice in Uganda,* (Kampala, 1997), 1-2.

[220] H F Morris, "Indirect rule and the law of marriage", 213-250 at 242. See Jennipher Okumu Wengi,"Women and the law of inheritance", 1-39 at 3-4.

although many Ugandans are religious and profess one Christian faith or another, their religious sects, "especially the Christian churches, while encouraging their followers to marry under legislation that the government enacts, discourage their converts from availing themselves of the divorce laws", probably because neither the Roman Catholic nor Anglican churches look upon divorce of their faithful with favour.[221] Ugandans who profess the Islamic faith are also strict adherents to their faith and hardly avail themselves of state-made laws.

The disparate situation described above is that under which women's rights to property in marriage, upon divorce and upon the death of a spouse are regulated in Uganda.

3.1 Uganda's present constitutional standards on rights to property in marriage, upon divorce and upon the death of a spouse.

As regards entitlement to equal rights on marriage, during 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 eighteen 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".[222]

Furthermore, Article 33(6) prohibits "laws, customs or traditions, which undermine the dignity, welfare or interests of women".

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, colour, ethnic origin, tribe, birth, creed or religion, or social or economic

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[221] H F Morris, "Indirect rule and the law of marriage", 213-250 at 242.
[222] Article 31(1) and (2) 1995 Constitution.

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, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion or disability".[223]

Evidently, the Constitution is compliant with the country's obligations under Articles 2(a)-(f), 5(a) and 16 (1)(h) of the CEDAW set out in Chapter One. Articles 2(1) and (2) of the Constitution provide that it is the supreme law in Uganda. Accordingly, all laws and practices such as patriarchy inconsistent with the Constitution are void to the extent of their inconsistency and must be changed to comply with it. Although the Constitution with regard to equality and non-discrimination is progressive, enabling laws to implement its various provisions are yet to be enacted. There is still a need to remove the inconsistencies and contradictions in the various legislation regulating rights to property in marriage, upon divorce and upon the death of a spouse that presently apply in Uganda so as to comply with the Constitution and the CEDAW.

3.2 Unsatisfactory aspects of Uganda's present laws and institutions regulating rights to property in marriage, upon divorce and upon the death of a spouse.

3.2.1 Unsatisfactory aspects of Uganda's state-made laws of marriage and divorce

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".[224] Consequently, valuable matrimonial properties including land on which matrimonial houses are situated are usually registered in the names of the wage-earning spouse.

Concerning contracting a valid marriage, there are several ways this can be done in Uganda, but each with its own legislation.[225] There is the Marriage Act to regulate

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[223] See Article 21(3) 1995 Constitution.
[224] See section 3 Succession Act 1906 in "Appendix 2".
[225] Copies of these legislation are attached as "Appendix 1".

secular marriages, the Marriage and Divorce of Mohammedans Act for Muslim marriages, customary marriages are registered under the Customary Marriages Act and the Marriages of Africans Act 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 CEDAW and the relevant constitutional provisions 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 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".

Overall in the course of marriage, the separate property regime prevails in all recognized marriages,[226] though under the Divorce Act courts have discretionary powers to make orders for alimony and vary property settlements. It should be recognized, however, that not all divorce cases are entertained in the state-made 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.

3.2.2 Unsatisfactory aspects of 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 leaves much to be desired. The problem is the aspiration by the legislature to accommodate all views, interests, tribes, religions and vote winning issues when enacting laws. This indeterminacy is perpetuating Uganda's inability to make the various laws of

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[226] Neither the Marriage Act nor the Divorce Act sets out guidelines regulating property sharing at divorce or judicial separation. Sections 15,16 and 18 of the Divorce Act only regulate the property a wife acquires after 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. See "Appendix 1".

marriage and succession compliant with the CEDAW. This is another problem faced by Ugandan women.

In 2003, a Domestic Relations Bill (DRB) was introduced in Parliament for debate. Contrary to what is desired to comply with Article 16 (1)(h) of the CEDAW, the DRB does not propose substantive equality between the spouses in the Islamic, customary or state-made laws regulating rights to property during marriage and upon divorce. Instead of outlawing polygyny, the DRB proposes seeking permission from district officials before a man takes another woman.[227] How such a requirement can be implemented in practice to ensure that men do seek approval before taking on other wives is questionable and yet many partners mean multiple claims leading to property fragmentation with more conflicts over the scarce resources.

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".[228] Muslims rejected the DRB and advocated a separate Bill on *Kadhis* courts because, as they allege, it is not in conformity with *Sharia*.[229] The DRB has since been withdrawn from parliament to cater for the interests of all Ugandans and, although the final form it will take is difficult to predict, debates about it make it appear inconsistent with the CEDAW.[230]

Given Uganda's indeterminate Parliament, it is important to explore ways of setting individuals free from extended families as a step towards achieving substantive equality between men and women in their rights to property within marriage, upon divorce and upon the death of a spouse. This requires, however, addressing issues of social security. The absence of state social security on which to rely when the worst

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[227] Section 31 of the version of the Bill with the candidate.
[228] *Ibid.*, Memorandum to the Bill.
[229] See the Weekly Message Newspaper, Volume 3, No 88 9-15, December 2003,with headlines: "DRB in House Next Year Now Muslims want Bill on *Kadhis* Courts". See also Evelyn Kiapi Matsamura, "Muslim demand changes in bill on women's rights" at Human Rights House Network site http://www.humanrightshouse.org/dllvis5.asp?id=3130. Accessed 23 January 2006.
[230] See Von Struensee, "The domestic relations bill in Uganda: addressing polygamy, bride price, cohabitation, marital rape and female genital mutilation" at http://www.eldis.org/static/DOC17736.htm who notes among others that " the DRB does not address all legal inadequacies". Accessed 30 September 2005.

comes leaves many women at the mercy of the extended families and vulnerable to family pressures. Uganda maintains "four social security systems: the National Social Security Fund that caters for employees in the private sector, the Civil Service Pension Scheme covering government employees, the Urban and Local Authority Scheme for local authorities, and the Teaching Service Scheme for teachers. However, Uganda's social security covers only 2% of the population".[231] The effect of this situation is that when their husbands pass away leaving behind meagre resources, the widows have no option but to seek support from extended families, even if this means compromising the rights that state-made laws of succession confer on them.

Although land is the most valuable property in Uganda, the laws regulating its ownership do not promote substantive 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".[232] The law provides that matters to do with land titling can be pursued by the individual or the household.[233] 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.[234]

In 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[235] before mortgages or planned transfers of land upon which the family lives and derives sustenance are effected. This is a progressive

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[231] See Ramadhani K.Dau, "Trends in Social Security in East Africa: Tanzania, Kenya and Uganda" in *International Social Security Review*, Volume 56,No 3-4, July –December 2003, 25-37 at 30.He notes that "most beneficiaries of social security are men".
[232] See section 5 Land Act 1998.
[233] *Ibid.*
[234] See Marjolein Benschop, *Rights and Reality Are Women's Equal Rights to land, Housing and Property Implemented in East Africa?*, (Nairobi, April 2002), 76.
[235] See section 40 Land Act 1998.

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".[236] 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. 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.

3.2.3 Unsatisfactory aspects of Uganda's state-made laws of intestate succession

Uganda's state-made laws regulating rights of intestate succession to property are wanting in many respects. Firstly, with the exception of the Constitution, other subordinate laws[237] regulating rights of intestate succession to property are archaic in as much as they were enacted before the Constitution of 10th October 1995 and the CEDAW that came into force on 3rd September 1981. For example, the Succession Act that regulates both testate and intestate succession to property "commenced on 15th February 1906".[238] 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 CEDAW and the Constitution discussed in 3.1 above.

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[236]See *Perspectives of the Legal Fraternity on the Adequacy of the 1998 Land Act in Protecting Land Rights of Women and Tenants*-A Research Commissioned by Uganda Land Alliance, series No 2, 2003, 9.
[237] Subordinate laws mean all laws in Uganda other than the 1995 Constitution. The relevant subordinate laws are attached as "Appendix 2".
[238] See Succession Act in "Appendix 2".

While Uganda's subordinate state-made laws of intestate succession are modelled on the English, thc latter have since amended their laws but the former has yet to make fundamental reforms. Granted there were some amendments effected in 1972, but not much has been done to liberate the law from the English values of the colonial era so as to enhance substantive equality between the sexes. Unlike the law before it, following the 1972 amendment to the Succession Act, "illegitimate and adopted children were recognized and entitled to share equally with legitimate children of a deceased person".[239] Overall, the effect of the 1972 amendments was not to increase the entitlements of surviving spouses at intestate succession, but to ensure illegitimate children were not disinherited. As shall be discussed later, some aspects of the 1972 amendments contravene the equality standards on women's rights prescribed by the CEDAW.

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 legislation. 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; [240] The Administrator General's Act;[241] The Administration of Estates (Small Estates) (Special Provisions) Act;[242] Resistance Committee Judicial Powers Statute 1988; and the Public Trustee Act,[243] which is only relevant to succession in as much as it empowers the Administrator General 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

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[239] See P.K. T.Nanyenya, "A simple guide to the law of succession in Uganda" in F.M Ssekandi(ed) *Introduction to Law Series* (Kampala, 1972) 1-108 at 7.
[240] Succession Act, chapter 162.
[241] Administrator General 's Act, chapter 157.
[242] The Administration of Estates (Small Estates) (Special Provisions) Act, chapter 156.
[243] Public Trustee Act, chapter 161.

concerns given that some provisions of the law contradict the country's commitments on equality and non-discrimination under the CEDAW. 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 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 contrary to Uganda's commitments under the CEDAW, which enjoins state parties to protect the rights of both married women and those in cohabitation.[244]

In situations where the deceased dies intestate, the law sets out the relevant percentages entitled persons get from the estate. Section 27(1) of the Succession Act, in a situation where "an intestate is survived by a customary heir, a wife, lineal descendants and dependant relatives, 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".[245] 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,

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[244] See CEDAW Committee General Recommendation No 21(13th Session) on Equality in Marriage and Family Relations Paragraph 18 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 7 November 2005.

[245] 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.

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 without appointing executors, or persons named as executors in the will have predeceased the testator, or renounced probate of the will".

Uganda's state-made law of intestate succession does not promote substantive equality between men and women in accordance with the CEDAW 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, unlike polygyny, is not prevalent.

In patrilineal 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.[246] Although there are remedies to address this situation, as shall be discussed later, 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 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.[247] 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, males are favoured to females".[248]

It should be recognized, however, that in some situations, especially monogamous relationships where there are no children surviving the deceased, the law favours 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

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[246] See Percy Night Tuhaise, "Women and inheritance: common patterns of powerlessness and subordination" in Tuhaise Percy et al, *The Law of Succession in Uganda: Women, Inheritance laws and Practices*, 299-335 at 313/4.
[247] *Ibid.*
[248] *Ibid.*

married couple without children, in which case the widow would get a bigger share of the estate as above.[249]

In addition to the above entitlements, a widow's occupation of the residential house until she dies, remarries or voluntarily goes away appears secure under the Second Schedule to the Succession Act. Section 26(1) of the Succession Act, however, paves the way to the Second Schedule and provides that:

> "The residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act".

Furthermore, section 29 of the Succession Act provides that "no wife or child of an intestate occupying a residential holding under section 26 and the Second Schedule to this Act shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the wife or child may be entitled under section 27". Section 27 has been discussed above.

Rule 1(1) and (2) of the Second Schedule to the Succession Act regulating residential holdings provide that:

> "(1) In the case of a residential holding occupied by the intestate prior to his or her death as his or her principal residence, any wife or husband, as the case may be, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it.

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[249] By 2005 Uganda's population, which doubles every twenty years, was 27 million people. See http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html. Accessed 7 August 2005.

(2) In the case of a residential holding owned by the intestate as a principal residential holding but not occupied by him or her because he or she was living in premises owned by another person, any wife or husband, as the case may be, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident with the intestate prior to his or her death, shall be entitled to occupy it".

Furthermore, rule 2 of the Second Schedule provides that "any wife, husband or child who normally cultivated, farmed or tilled any land adjoining a residential holding owned by an intestate prior to his or her death shall have the right to cultivate, farm and till the land as long as he or she continues to be resident". Clearly, the surviving spouse's rights in the home and adjoining land are legally secured.

There are concerns with regard to the widow's right to occupy the residential or matrimonial house because the occupation is conditional, as the law provides incidents under which she loses the right to occupy it. Rule 8 of the Second Schedule to the Succession Act, prescribes the various events under which occupancy of a residential holding terminates. It provides:

> "The occupancy of a residential holding hereunder shall terminate automatically on the happening of any of the following events-
>
> (a) upon the remarriage of the occupant where the occupant is a wife;
>
> (b) upon the death of the occupant or all the occupants;...
>
> (d) upon the occupant or occupants ceasing to occupy the residential holding for a continuous period of six months."

The discriminatory aspect with the above rules is that they do not have the same effect on widows and widowers. Rule 8(a) above is discriminatory against women.

Rule 4 of the Second Schedule to the Succession Act requires "certificates of occupancy to be issued to persons who take up occupation of the residential holding".

Rule 10 of the Second Schedule then provides that:

> "It shall be an offence punishable with imprisonment not exceeding six months or a fine not exceeding one thousand shillings or both for any person to evict or attempt to evict from a residential holding prior to the issue of a certificate under rule 4 of this schedule, any wife or child of an intestate who normally resided there at the date of death of the intestate or to do any act calculated to persuade or force any wife or child to quit such holding prior to the issue of the certificate".

What is unsatisfactory with rule 10 above is that it does not punish evictions after issuance of certificates of occupancy and the penalty of one thousand shillings, the equivalent of 30 pence, is not a sufficient deterrent.

Although the Succession Act appears to accord widows security of occupancy in the matrimonial house, it is deceptive. What are conferred are user rights only; ownership in the said house ultimately vests in the legal heir.[250] A progressive law of succession ought to confer upon surviving spouses full ownership of their matrimonial homes. Presently, after the wife dies or the husband dies or the wife remarries and the male children have attained the age of 18 years and the females have married or attained 21 years, the matrimonial house goes to the legal heir who usually is the eldest son.

Legal heir is defined under section 2(n) of the Succession Act as follows:

> "The living relative nearest in degree to an intestate under the provisions set out in Part III to this Act together with and as varied by the following provisions-
>
> (i) between kindred of the same degree a lineal descendant shall be preferred to a lineal ancestor and a lineal ancestor shall bc preferred to a collateral relative and a paternal ancestor shall be preferred to maternal ancestor;

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[250]See section 26 (1) Succession Act, chapter 162.

(ii) where there is equality under subparagraph (i) of this paragraph, a male shall be preferred to a female.

(iii) Where there is equality under subparagraph (ii) of this paragraph, the elder shall be preferred to the younger;

(iv) If no legal heir is existing and reasonably ascertainable under subparagraphs (i), (ii), and (iii) of this paragraph, the husband or the senior wife of the intestate, as the case may be, shall be the legal heir".

The law with regard to the definition of a legal heir discriminates against women when it prefers a male to a female. This discrimination is prejudicial to women's rights of succession to property in that there are cases when males as legal heirs take property, i.e. the matrimonial home, by virtue of being male (as shown above). Furthermore, section 2(n)(iv) above is silent on what entitlements the junior wives claim when the residential house goes to the senior wife. It was logical for the CEDAW Committee in General Recommendation No 21 "to call upon state parties to discourage polygyny and eventually do away with it".[251] Uganda ought to comply with the CEDAW so as to address the uncertainties that junior wives encounter over residential houses.

There are other aspects of the state-made laws regulating rights of succession to property that are detrimental to widows. For example, section 272 of the Succession Act provides that "when there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration". This means that in the absence of any direction to the contrary by any of the joint administrators, one of the estate administrators can commit the rest and the entire estate. In families where men sire children outside wedlock, it is common for the widow to administer an estate with other people who cater for her non-biological children's interests. It does not follow, however, that such people must always agree with the widow or work in her interest.

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[251] See CEDAW General Recommendations No 21(13th Session) On Equality in Marriage and Family Relations Paragraph 14 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 7 November 2005.

The adverse effect is that even where the widow is opposed to a particular transaction the other estate administrators can exploit this weakness in the law to sell and transfer whatever they deem fit to the prejudice of the widow. In other words, executors do at times act illegally and the less involved in estate administration they are, the better for the widows.

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, 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 many unsatisfactory aspects that need to be addressed. Uganda's inability to comply with Article 16 (1)(h) of the CEDAW is regrettable because in 1995 Uganda enacted a new Constitution and with it many human rights provisions were copied verbatim from international human rights instruments and made part of the law of the land,[252] thereby inspiring changes for the better that ought to have been effected by now.

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[252] See Articles 21(2), 31 and 33 of the 1995 Constitution, which prescribe "non-discrimination and equality before the law".

3.2.4 Unsatisfactory aspects of Uganda's state-made laws of testate 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".

Section 38(2) of the Succession Act provides that "the provision for the maintenance to be made by an order under subsection (1) above, shall subject to subsection (3), be, where the deceased's estate produces an income, by way of periodical payments and the order shall provide for their termination not later than in the case of a wife or husband, her or his remarriage." Furthermore, section 38(2)(b) provides that "where the deceased's estate does not produce any income or sufficient income, the court may authorise the applicant to receive such share as the applicant would be entitled to in the distribution of the estate of an intestate under section 27". Section 27 of the Succession Act has already been discussed.

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-

(i) a wife, a husband, a son or daughter under eighteen years of age or a son or daughter of or above eighteen years of age who is wholly or substantially dependent on the deceased;

(ii) 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 necessaries of life suitable to a person of his or her station".

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.

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 six months after a representative to the estate has been appointed". There are however many difficulties, such as language barriers, 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 "the 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 term "will" carries "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".[253] 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".[254] The above requirements of the law appear demanding to ordinary people not used to executing wills, let alone writing. The state-made law of testate succession ought to accept as valid wills that have been executed by the testator but are only witnessed by one person. 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.

In summing up, it should be recognized that even if testamentary dispositions were to promote widows' rights of succession to property, few husbands make wills bequeathing property to their wives. A study conducted by the International Fund for Agricultural Development (IFAD) in 2000 reported that "only 10% of Ugandan men made wills bequeathing property to their wives".[255]

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[253] See Jennipher Okumu Wengi, "Women and the law of inheritance" in Tuhaise Percy et al, *The Law of Succession in Uganda: Women, Inheritance laws and Practices*, 1-39 at 22.
[254] See section 50 Succession Act in "Appendix 2".
[255] See IFAD website at http://www.ifad.org/gender/learning/challenges/widows/55.htm. Accessed 7 June 2004.

3.2.5 Unsatisfactory aspects of Uganda's customary laws of succession

As noted, when a person dies, his or her estate must be administered under the state-made law of succession. Section 4 of the Administrator General's Act, as discussed above, requires "all deaths to be reported to the Administrator General". In practice, partly owing to ignorance of state-made laws and the inaccessibility of the Administrator General's office as shall be discussed hereafter, many deaths are not reported and the respective estates are administered informally under patriarchal customary and Islamic family laws. What is common to all of Uganda's disparate customary laws is that "males are given preference over females with regard to rights of succession to property" contrary to the CEDAW.[256]

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.[257] 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.[258] 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. The clan and family (above) constitute what has appropriately been described as "the semi-autonomous social fields: unwritten rule generating and enforcing entities".[259] 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

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[256] See Percy Night Tuhaise, "Women and inheritance: common patterns of powerlessness and subordination," 299-335 at 321.

[257] *Ibid.*, 320 who notes that "the clan elders and other customary structures have powers to alter even a legally valid will, if it falls short of cultural beliefs and expectations".

[258] *Ibid.*, 320. She notes that "the clan leaders in conjunction with the family members can change a will in order to exclude a woman appointed heir by the husband".

[259] See 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 20 May 2005.

property lest the relatives of the deceased cease to interact and support her and the children.[260] 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 Article 16 (1)(h) of the CEDAW. [261]

At customary law, the majority of women have access but not rights in family property and as such cannot assert ownership rights.[262] 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.[263] 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".[264] Clan membership "was customarily the effective criterion on which usufructuary rights and control over land was based".[265] Accordingly, land was allotted to men rather than women. However, even the men had no right to sell the land to a non-clan member. Unfortunately, this is no longer the case as men now use the land as security for loans.[266] Restrictions on women's ownership of land are yet to change. Women are, therefore, prejudiced by the prevailing state of affairs.

The shortcomings of the customary law notwithstanding, state-made laws regulating rights of succession to property are in some cases less pragmatic and hence less protective of some women. For example, under Uganda's state-made laws of succession there is no provision permitting people in cohabitation to inherit from each other, yet at customary law such people access some property. Notwithstanding, the

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[260] See Percy Night Tuhaise, "Women and inheritance: common patterns of powerlessness and subordination," 299-335 at 302/3.
[261] See Jennipher Okumu Wengi, "Women and the law of inheritance," 1-39 at 8.
[262] *Ibid.*
[263] See Percy Night Tuhaise, "Women and inheritance: common patterns of powerlessness and subordination," 299-335 at 302/3.
[264] See Florence Butegwa, "Using the African Charter On Human and Peoples Rights to secure women's access to land in Africa," 500.
[265] *Ibid.*
[266] *Ibid.*

challenge for Uganda to make her various customary laws of succession fully compliant with Article 16 (1)(h) of the CEDAW is still enormous.

3.2.6 Unsatisfactory aspects of Islamic family law as practised in Uganda

Generally, the various 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 and other state-made laws and institutions prescribe 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 the CEDAW and Uganda's new constitutional standards on rights of women, implying that Islam was embraced long before the latter were known.

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.[267]

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 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.

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[267]See Abdullah A An-Naim, *Islamic Family Law In A Changing World: A Global Resource Book*, (London, 2002), 40 who notes that "by 2000, Muslims constituted ten percent of Uganda's population".

Contrary to the CEDAW, 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 a mistress with no right or legal claim on the man concerned. Islam "forbids extramarital relationships".[268] 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".[269] All the arguments in favour of polygyny do not have any consideration of women's emotional needs and the complications it poses to the achievement of substantive 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 CEDAW commitments on the rights of women.

Whereas polygyny is permitted in Islam, it was never meant as an unrestricted licence for any man to marry as he wishes, contrary to what many Ugandan Muslims practise. 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".[270]

These injunctions are followed more in theory than in practice in Uganda with the result that when men marry more wives the property available to the women upon the husband's death is very meagre.

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[268]See Jamila Hussain, *Islamic Law and Society,* (Sydney, 1999), 74.
[269] *Ibid.*
[270]*Ibid.*, 72.

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 *Quran,* to the beneficiaries who are the widows / widowers, father, mother and children of the deceased. According to the *Quran :*

"*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".[271]

If the deceased left brothers 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".[272] A wife receives "a one-quarter share of her husband's estate if there are no children; if there are children she is 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".[273]

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 Articles 2(a)-(f) of CEDAW standards on equality and non-discrimination of the sexes. The situation is compounded further if the deceased husband was polygnous and was survived by several children. Polygyny is widely

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[271] See Jamila Hussain, *Islamic Law and Society,* (Sydney, 1999), 104.
[272] *Ibid.*
[273] *Ibid.*

practised 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.[274] 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.[275] 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.[276] 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".[277] It is also "subject to the consent of the heirs, since it should not deprive the heirs of their legitimate rights".[278] 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 favour widows.

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[274] See Mai Yamani, *Feminism and Islam: Legal and Literacy Perspectives*, (Berkshire, 1996), 79.
[275] *Ibid.*
[276] See Jamila Hussain, *Islamic Law and Society,* 113.
[277] *Ibid.*
[278] *Ibid.*, 114.

Article 129 (i) (d) of Uganda's Constitution provides that "Parliament may enact a law to provide for the establishment of *Kadhis* courts to deal with Islamic matters of marriage, divorce, inheritance of property and guardianship".[279] Although Parliament has not yet enacted the said law, among Muslims it is Islamic law that is enforced in property distribution of their estates in practice. The Uganda Muslim Supreme Council appoints a *Sheikh* for every district in the country who handles property distribution in accordance with the *Quran*. The Uganda government must be faulted for the delay to enact the relevant law that presumably should have made *Khadhis* courts compliant with the constitutional standards on women's rights. The problem is that the government is reluctant to make Islamic family law compliant with the Constitution and inevitably the CEDAW and yet, in Uganda, many women profess the Islamic faith and Islamic law governs their marriages, divorce and rights of succession to property.

It should be recognized, moreover, that the CEDAW in Article 16(1)(c) and (h) provides that:

> "States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ...
>
> (c) The same rights and responsibilities during marriage and at its dissolution;...
>
> (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property."

The above tenets are violated whenever Uganda endorses devolution of property in accordance with Islamic law that treats men and women differently. In General Recommendation No. 21 (13th session, 1994), regarding equality in marriage and family relations, the CEDAW Committee gave clarification on the implementation of Article 16(1)(c) above as follows:

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[279] See Article 129 (i) (d) of Uganda's Constitution.

"An examination of States parties' reports discloses that many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage". [280]

Furthermore, the CEDAW Committee has noted that:

> "There are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished".[281]

Summing up, practices inspired by Islam continue to permit Ugandan men a sexual licence completely forbidden to women: the right to marry up to four wives. Furthermore, there are no equal rights of succession to property. Uganda, as a state party to the CEDAW, has no excuse for not addressing the discrimination against women committed under Islamic family laws. Interfering with state-made, customary and Islamic family laws is the inevitable consequence of Uganda's ratification of the CEDAW without any reservations.

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[280] See General Recommendations of the CEDAW Committee No 21(13th Session) on Equality in Marriage and Family Relations paragraph 17 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed on 12 March 2005

[281] See General Recommendations of the CEDAW Committee No 21(13th Session) on Equality in Marriage and Family Relations paragraph 35 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed on 12 March 2005

3.2.7 Unsatisfactory aspects of the state-made institutions regulating rights of succession to property

Article 247(a) of the Constitution provides that "Parliament shall establish an efficient, fair and expeditious machinery for the administration and management of estates of deceased persons". Furthermore, in terms of article 247(b), "Parliament must ensure that the services of the organization or department established for the purpose of estate administration are decentralized and accessible to all persons who may reasonably require these services". It is unfortunate that the anomalies the above constitutional provisions were meant to address have not been catered for given that institutions to regulate rights of succession to property in the above prescribed manner are yet to be established.

The present institutions regulating rights to property in marriage, upon divorce and upon of death of a spouse predate the Constitution and are in some respects inconsistent with it. Nevertheless, to ensure an orderly divorce and succession to property in accordance with the state-made laws, the said institutions enforce the relevant laws, though their performance leaves much to be desired. This is because of the flaws in the relevant procedures followed before accessing them. These state-made institutions include the Grade 1,2 and 3 Magistrate courts, the Chief Magistrate courts, the High court, Court of Appeal and finally the Supreme Court. There are many barriers that impede access to these courts. For example, rather than promoting one local language to official status, the Constitution provides in Article 6(1) that "the official language of Uganda is English". With English being the language of the courts, many women, both in urban and rural areas where local languages are widely spoken, find the law courts inaccessible. English and the local languages that are widely spoken in Uganda have nothing in common, making it difficult for the interpreters to translate with accuracy all court proceedings to litigants. Moreover, given that Uganda has more illiterate women than men, women are more likely than men to find the state courts and related institutions unwelcoming. [282]

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[282] According to an International Fund for Agricultural Development (IFAD) study under the Gender Strengthening Programme for Eastern and Southern Africa, done in 2000, "illiteracy in Uganda is 55.1% among women, compared with 36.5% among men". Usually, in rural areas the gap is larger and literacy rates are lower. There could be unreported improvements but the trend remains. http://www.ifad.org/pub/gender/genpfe.pdf Accessed 13 July 2005.

State administrative institutions regulating rights of succession to property are also not easily accessible and their procedures are generally cumbersome.[283] Prominent in this category is the Office of the Administrator General. This is a government department established in 1933 and charged with the responsibility of ensuring that estates of deceased persons are administered in accordance with state-made laws of succession.[284] To enable it execute its mandate, the office derives its authority from a statute: the Administrator General's Act.

To enable the institution protect widows and entitled beneficiaries from losing property to unscrupulous estate administrators, the Administrator General's Act provides for a Statutory Certificate of No Objection.[285] This is a certificate granted in intestate succession matters to persons who have the consent of the family to enable them proceed to the courts of law and petition for Letters of Administration so as to administer the respective estates. However, in order to pursue this Letter of No Objection, a file, which is basically a form and a file cover, must be bought at the Administrator General's office and duly filled in. If properly filled in, the file, indicating among other things the particulars of the deceased's properties, creditors and debtors, etc, is submitted for the approval of the legal officers in the Administrator General's office, where the file is opened and registered by the office. Thereafter, depending on the nature of the property and other particulars as indicated on the said forms, a legal officer in the Administrator General's office must convene a family meeting to establish consensus as to who should administer and distribute the deceased's estate properties among entitled beneficiaries. In Uganda, no rights over any property arise until an estate administrator has been appointed by court to administer the estate. The said meeting is therefore important for the purpose of finding an administrator for the estate. It may also, however, be convened to arbitrate in property disputes within the family. Important as it is, there is unfortunately no time limit within which the said meeting must be convened. In practice, given the high workload at the Administrator General's office, family meetings are not convened as expeditiously as they should be, in some cases only months after reporting to the office.

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[283] Vero Matovu, "Inheritance among the Iteso" in Tuhaise Percy et al, *The Law of Succession in Uganda: Women, Inheritance laws and Practices*, 70-112 at 105/6.
[284] See Administrator General's Act in "Appendix 2".
[285] *Ibid.*, section 5.

If the deceased passes away testate, witnesses to his will must also attend the family meeting to confirm that the deceased executed the will in their presence. It is after complying with these preliminaries that the Administrator General issues a Letter of No Objection to whomever the family has chosen to administer the intestates' estate. This is not the end of the process, however, given that, as noted, Letters of no objection are statutory requirements that precede applying for Letters of Administration from the law courts. It follows that the grantee of the Letter of No Objection must then lodge an application, depending on the value of the estate, with the relevant state court having competent jurisdiction for Letters of Administration. It is the court that finally grants her or him authority to administer the estate by virtue of a Letter of Administration.

What is also unfortunate is that the process of seeking court authority is both expensive and time consuming. It commences with the engagement of a lawyer to file the relevant court papers, which are not filed until court fees are paid, for which money must be made available. When the relevant papers are properly filed, the court issues a notice in the local newspapers calling upon anyone who has any objection to the granting of authority to the applicant to administer the deceased's estate to lodge any such objection in court. The notice lapses after fourteen days. What follows then is seeking an appointment before a judicial officer, usually the Registrar of the court, to have the applicant for Letters of Administration formally identified.

After the identification process, the court may issue the Letters of Administration to the applicant. However, the law does not impose a time limit after identification within which the Letters of Administration must be issued to the applicant. In some cases, several months may pass before the Letters are issued, probably owing to the busy schedules of the Judges of the High Court, if this is where the application is made. Evidently the procedural aspects of applying for a grant of Letters of Administration or authority to administer an estate are so cumbersome as to discourage the use of state institutions regulating rights of succession to property.

The Administrator General's Act enhances the protection of estate beneficiaries by creating under section 11(1) thereof, a criminal offence of intermeddling with property of a deceased person, punishable on conviction with a fine and or

imprisonment. Intermeddling refers to "any act committed by an unauthorised person while dealing with the property of a deceased person". Section 11(2) of the Administrator General's Act provides that "any person who commits an offence under this section is liable on conviction to imprisonment for a period not exceeding three months or to a fine not exceeding two hundred shillings or to both, but without prejudice to any civil liabilities which he or she may have incurred". Although this law should protect estate beneficiaries, especially widows, from greedy and as such often interfering relatives who steal property, the provision has not been protective because, *inter alia*, the sanctions of a fine of two hundred shillings (the equivalent of about 30 pence) or three months imprisonment or both on conviction are not a sufficient deterrent. This is yet another problem for Ugandan widows, and is a plausible explanation as to why their rights to property are not respected by their in-laws, leaving widows desperate. Penalties for offences related to the law of succession, such as for intermeddling with the property of a deceased person, ought to be made sufficiently harsh so as to act as a deterrent.

It should be appreciated that the Administrator General's office is not primarily concerned with the rights of women to equitably inherit, when implementing the law of succession. Most of the office's concern is on the correct application of the law of succession; a law that is flawed because it prescribes protracted costly procedures and weak penalties when breached. Moreover, while it is possible that the office has done much to champion widows' rights, even when the office moves in to assist widows, it too has to rely on other government agencies, such as the police, to give effect to its directives. Some of these institutions are slow in responding. Police officers are known to lack the resources to apprehend offenders immediately. Worse still, some police officers may consider family wrangles over property as private affairs outside the ambit of criminal law and with a patriarchal socialization it is possible for many to hold their own biases against women. The effect of this unsatisfactory situation is that widows remain vulnerable to property dispossession.

The Administrator General, as noted, may undertake the administration of an estate where "the will specifically appoints the Administrator General as sole executor, or where the will omits to appoint an executor, or where an executor dies before the testator, or where the executor renounces probate, or where letters of administration

are not obtained within two months from the death of the testator".[286] It is also not uncommon for courts to place under Administrator General's charge contentious estates where several children from different mothers survive the intestate and none of the women is a lawful widow. The Administrator General's office, therefore, plays a key role in the administration of estates in Uganda. Unfortunately, this office is only located in Kampala, the capital city, implying that beneficiaries from other parts of the country must incur transport and other expenses if they are to utilize it. However, the Administrator General can appoint agents, presently Chief Administrative Officers who are senior civil servants in the various districts. The problem, however, is that these agents, most of whom are non-lawyers, have a limited knowledge of the laws of succession, given that they receive no specialized training and their role is more to do with forwarding estate wrangles to the Administrator General than resolving disputes. The effect of this unsatisfactory situation is that the services of the Administrator General's office are not as accessible as they ought to be and inevitably most widows rights of succession to property are not determined in accordance with the state-made laws of succession.

There is, moreover, no mechanism such as public seminars in place to educate the public about the services of the Administrator General and the laws of succession. With the protracted processes, it is understandable why customary and religious laws continue to guide estate matters in Uganda more than the state-made laws and institutions. Moreover, corruption in public institutions, including the office of the Administrator General, cannot be ignored. These are all disincentives to utilizing the state-made institutions regulating rights of succession to property. Available records reveal that in 1966 there were only 234 reports of death registered, but by 2002 there were 3,941 reports of death received.[287] What these records also reveal is that in a country where many people are succumbing to death due to civil wars and AIDS/HIV among others, the bulk of the population is not reporting the death of property owners, contrary to what the state-made laws prescribe. The effect of this situation is that it is difficult for the government to ensure that all estates are administered in a manner that complies with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

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[286] See section 4 (3)(d) Administrator General's Act, chapter 157.
[287] According to records compiled at the Administrator General Office 1965-2002.

As noted, other than the Administrator General's Act, the Succession Act sets out provisions and procedures to follow if one wants to obtain Letters of Administration and /or Probate. This power to regulate the administration of estates under the Succession Act vests in the High court and Magistrate courts in accordance with the provisions of the said law. As expected under the Succession Act, the jurisdiction of the High court, unlike Magistrate courts, is unlimited. It follows that where a Magistrate court without jurisdiction makes a grant of Letters of Administration or Probate, such a grant is null and void. The problem with regard to limiting jurisdiction is that while it is static, inflation continues to erode jurisdiction from the lower courts, especially Magistrate courts, implying that most applications to administer estates are legally the preserve of the not easily accessible High court. Unfortunately, a backlog of cases in the High court is not an uncommon phenomenon. Clearly, even if assuming that it were possible for women to have immediate access to the state courts, the long costly process, the technicalities in the substantive and procedural laws are setbacks in the protection of women's rights of succession to property in Uganda.[288]

3.2. 8 Local Council courts and the regulation of rights of succession to property

The Resistance Committees (Judicial Powers) statute 1 of 1988 confers civil jurisdiction on Local Councils 1, i.e. village and Local Council 2, the parish and Local Council 3, the sub-county Resistance Committees, to hear and try cases of a civil nature.[289] Their role is both judicial and administrative.[290] After the promulgation of the Constitution, Resistance Committees were renamed Local Councils (LC).

The civil disputes L C courts deal with are defined under section 4 and the schedule of the Resistance Committees (Judicial Powers) Statute 1/1988. In the second schedule to this statute, these courts can entertain civil disputes on matters governed by customary laws and of relevance to succession are disputes concerning the identity of the customary heir, disputes concerning marital status of women, and disputes concerning paternity of children. Local Councils are, therefore, useful in ascertaining

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[288] See Jennipher Okumu Wengi, "Women and the law of inheritance," 1-39 at *4*.
[289] See section 4 (1) Resistance Committee Judicial Powers Statute 1 of 1988.
[290] Local Council refers to the smallest unit of people constituted by villagers in a locality. Out of these villagers, elections are held to choose nine people who constitute a Local Council 1 executive that carries out administrate work in the village.

wives of a deceased person, and confirming whether norms of marriage in a given society as required by customary law were fulfilled. Some Local Councils are also known to preserve estates of deceased persons from plunder by denying intermeddlers access to the property. Others work closely with the Administrator General's office by writing letters requesting that a particular widow be assisted to realize her rights of succession to property.

In April 2006, Parliament passed the Local Council (LC) courts Bill 2005 intended to strengthen LC courts, "when entertaining petty cases of a civil nature such as land, family disputes and other community related conflicts".[291] Notwithstanding, the proposed law does not fundamentally transform the jurisdiction of LC courts with regard to regulating women's rights of succession to property. Like the case before, LC courts shall continue to be constituted by a quorum of at least three and a maximum of five members, one of whom must be a woman. Unlike the situation before, the proposed law prescribes that plaintiffs shall petition LC courts after paying a fee to be determined by the relevant Minister in subsequent guidelines. Furthermore, "guilty parties shall be liable to pay a fine not exceeding Shs20, 000 (the equivalent of £7)".[292] People unable to pay the fines have an option to pay in kind or to do community work. The Magistrate courts are to retain their powers to supervise and review decisions of the LC courts. Although the proposed law is yet to come into force, it is evident that penalties for breach of the same are not a sufficient deterrent.[293]

While the LC courts play a role in arbitrating issues relating to women's rights, their role is generally founded on customary law that may vary even within the same tribe. The fact that Local Councils exercise judicial powers based on customary laws reinforces legal pluralism, creating more uncertainties for women. It is also true that men dominate the Local Councils.[294] Consequently, while LC courts dispense justice

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[291] See New vision Newspaper of 20 April 2006 at http://www.newvision.co.ug/detail.php?mainNewsCategoryId=8&newsCategoryId=13&newsId=494236.

[292] *Ibid.*

[293] *Ibid.*

[294] There is a legal requirement that "of the nine positions of the Local Council Executive at least three must be filled by women".

without regard to technicalities like the Magistrate and High courts, many are not protective of women.[295]

Summing up, Local Councils have been empowered to regulate rights of succession to property, in addition to the powers conferred on the Magistrate, High court and the Office of the Administrator General. Despite the existence of all these institutions, women's rights of succession to property are not satisfactory. The explanation for this state of affairs is that all the laws and institutions regulating rights of succession to property, as discussed thus far, are not compliant with the CEDAW.

3.3 Summary of the unsatisfactory aspects of Uganda's laws and institutions regulating rights to property in marriage, upon divorce and upon the death of a spouse vis-a-vis compliance with the CEDAW

Uganda's inability to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW is because of archaic state-made laws of marriage and succession, weak institutions to enforce the said laws, costly protracted procedures prior to obtaining remedies from the said institutions and the application of patriarchal customary and Islamic family laws.

Contrary to the CEDAW, Uganda's state-made 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 tribes 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 in the manner CEDAW prescribes. As a general rule, division of matrimonial property under

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[295] See Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda* at http://www.hrw.org/reports/2003/uganda0803/6.htm. This 2003 study discusses the shortcomings of Uganda's legal framework pointing out that "women do not perceive Local Council courts as viable sources of support when facing domestic disputes including rights to marital property because male parties influence the outcome of the proceedings". Accessed 7 November 2005.

customary law for the benefit of estranged wives was, and still is, not recognized nor is maintenance payable to a wife after divorce.[296]

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. This situation means that upon divorce, courts in Uganda cannot allocate domestic property equally between the parties. Moreover, the work housewives engage in, such as child raising and looking after homes, is neither monetized nor evaluated. The CEDAW Committee has, however, observed that "non-financial contributions by the wife often enable the husband to earn an income and increase matrimonial assets, and that financial and non-financial contributions should be accorded the same weight".[297] 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.

Presently, state-made laws of succession where there are children surviving the deceased accord surviving spouses 15% of the estate, which must be shared if there is more than one widow. Where there are children surviving the deceased, Islam awards widows an eighth of the estate. 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* and courts do not have powers to reverse such transactions, even if done with the purpose of defeating the interests of the surviving spouse. The courts' powers under the Succession Act are restricted to distributing the net estate of the deceased among all dependant relatives.

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[296] See Jennifer Okumu Wengi, *Women's law and Grass root Justice in Uganda*, 42.

[297] See General Recommendations of the CEDAW Committee No 21(13th Session) on Equality in Marriage and Family Relations paragraph 32 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 20 January 2005.

Islamic and state-made laws of marriage and succession in Uganda do not confer property rights upon unmarried women in cohabitation. The CEDAW Committee has, however, noted in General Recommendation No 21 that "in many countries, property accumulated during a *de facto* relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner". The CEDAW Committee recommended that "property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked".[298]

As noted, customary and Islamic family laws permit polygyny and not polyandry thereby endorsing inequalities between the sexes. The CEDAW Committee in General Recommendation No 21 has, however, noted that:

> "States parties' reports also disclose that polygamy is practised in a number of countries. Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited. The Committee notes with concern that some States parties, whose constitutions guarantee equal rights, permit polygamous marriage in accordance with personal or customary law. This violates the constitutional rights of women, and breaches the provisions of article 5 (a) of the Convention". [299]

Article 2 of the CEDAW prescribes:

> "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:
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> (a) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; ...

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[298] *Ibid.*, paragraph 33.

[299] See CEDAW General Recommendations No 21(13th Session) On Equality in Marriage and Family Relations paragraph 14 at. http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed on 12 March 2005.

> (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women".

The relevance of Article 2(f) above is that Uganda is obliged to ensure that public as well as private authorities and institutions do not discriminate against women. The preference of male to female legal heirs under the state-made law of succession,[300] evictions of widows but not widowers from residential homes when they remarry[301] are all discriminatory. In summary, many aspects of the state-made, customary and Islamic family laws are discriminatory and on the basis of Article 2 above, the Ugandan government is liable for all violations of women's rights.

Government institutions regulating rights of succession to property, such as the office of the Administrator General, are yet to be decentralized throughout the country. With the exception of the LC courts, the procedures that the other relevant institutions prescribe to be followed before granting a remedy are costly, stringent and generally not well known or suited to promoting women's rights.[302] Moreover, although, depending on the peculiar facts of the case, courts may be protective of surviving spouses, this protection has limitations given that it is only available in cases when disputes are brought to court; yet a number of disputes are settled outside state-made institutions where arbitrators may hold retrogressive views on women's rights to property. Article 2 (c) of the CEDAW, however, requires Uganda "to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination". Compliance with Article 2(c) requires all institutions regulating rights of succession to property to be accessible and effective in protecting women's interests.

Furthermore, in General Recommendation No 5, the CEDAW Committee noted that:

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[300] See section 2 (n)(iii) of the Succession Act, chapter 162.
[301] Rule 8(a) of the Second Schedule to the Succession Act, chapter 162.
[302] See Human Rights Watch, *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*. This study also discusses women's access to justice and courts generally pointing out that "many women find difficulties in accessing the state-made courts owing to ignorance of the law, limited command of the English language used in courts and poverty".

> "In many state party reports, the introductory remarks and the replies by state parties reveal that while significant progress has been achieved in regard to repealing or modifying discriminatory laws, there is still a need for action to be taken to implement fully the convention by introducing measures to promote *de facto* equality between men and women".[303]

In summary, despite Uganda's imperative obligations under Articles 2(a)-(f) and 16(1)(h) of the CEDAW, 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.

3.4 Focus of the investigation into the English, Scots and South African jurisdictions

The investigation into the English, Scots and South African jurisdictions focuses on the following: the historical development of women's rights to property under the respective family laws; the present regulation of women's rights to property in marriage, upon divorce and upon the death of a spouse; and the South African experience with regard to making state-made, customary and Islamic laws of marriage and succession regulating rights to property compliant with her 1996 Constitution that provides for equality of the sexes.

As noted, the purpose of the investigation is to seek ideas to enable Uganda to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW. With that purpose in mind, this cannot be a systematic study of all relevant laws and institutions of England, Scotland and South Africa given that it is only a fortuitous search for reform ideas.

Hopefully, studying the English, Scots and South African laws of marriage and succession shall provide answers to intractable questions such as: (1) whether compliance with the CEDAW can be achieved when basic properties such as the matrimonial houses are not jointly owned by the spouses and as a result the parties have unilateral powers of disposal by will or *inter vivos;* (2) whether the separate

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[303] See General Recommendations No 5 of the CEDAW Committee at the seventh session http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom5. Accessed 17 June 2004.

matrimonial property regime unencumbered until the occurrence of marital disputes is consistent with the CEDAW standards on women's rights; and (3) what protection, if any, can be made available to unmarried women in cohabitation? The other pertinent question is what rules regulating testate and intestate succession to property are consistent with the CEDAW? In summary, the examination of the English, Scots and South African laws of marriage and succession regulating rights to property is an invaluable source of ideas for a matrimonial property regime, relevant institutions and laws of succession that Uganda should adopt to comply with her CEDAW commitments.

Ideally, Uganda should adopt a matrimonial property regime disposed to inexpensive and accessible means of resolving disputes and one which reduces: (1) the costs to the spouses, so that more of the spouses' property is available to them after separating their affairs, and (2) emotional costs by limiting the likelihood that litigation will be necessary to resolve disputes. Furthermore, the matrimonial property regime should not only comply with the CEDAW, but also normatively improve upon the laws of succession.

With the above in mind, it is now necessary to examine the English laws and institutions regulating women's rights to property in marriage, upon divorce and death of a spouse.

Chapter Four

4.0 Introductory comment on the English laws of marriage, divorce and succession

Uganda's state-made laws regulating rights to property in marriage, upon divorce and upon the death of a spouse are modelled on English law that was exported to the country during the era of British imperialism.[304] Unlike Uganda, England has since amended her laws to enhance women's rights to property. Given the historical link between the two jurisdictions, it is logical to selectively review the relevant English legislation and institutions that presently regulate women's rights to property in marriage, upon divorce and upon the death of a spouse. The purpose of the present review is to gather ideas that would enable Uganda to comply with Article 2(a)-(f) and 16(1)(h) of the CEDAW; inevitably, it is not as thorough a review of all relevant laws and institutions as has been done in the chapter on Uganda.

4.1 Historical development of women's rights to property in marriage, upon divorce and upon the death of a spouse in England.

In England there was no marital partnership of equals as is presently understood until the middle of the twentieth century.[305] The idea of male superiority was deeply rooted not only in the context of the laws of marriage but also in laws regulating rights of succession to property. In England, the married woman was under a disability because her legal personality was merged with that of her husband and she was said to be "under his coverture, acting only under the cover or wing of her husband".[306] Marriage acted as a legal transmission of the wife's person, moveable and immovable property to the husband. The exceptions were trifling items classified as paraphernalia that remained her separate estate: her clothes, furniture in which to keep them, and her trinkets. The other exception was any pocket money given to the wife for the purchase of her clothes and ornaments either before marriage or periodically throughout

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[304]English law of succession, like Ugandan state-made law of succession is common law and discretionary as compared to Scots law, which is based on fixed rights.
[305] See Stephen Creteny, *Family Law in the Twentieth Century: A History,* (Oxford, 2003), 91.
[306] *Ibid.*, 91. He notes there "was a strict adherence to the doctrine of unity of husband and wife".

marriage.[307] It can be submitted that it was only when the wife suffered personal injury that courts would interfere with the husband's power in regulating his household.[308]

Whereas the law treated married women as minors for poor women, marriage could provide a much-needed alleviation of poverty because "the husband was liable for the wife's ante-nuptial moveable debts".[309] At common law these debts were assumed by the husband no matter how little the property that passed to him by virtue of the marriage.[310] Rich women, however, protected their interests in property through the device of marriage contracts. Prudent parents in the wealthy and middle classes would insist on a proper settlement being made on a daughter's marriage to ensure that "her property was held for her separate use; in this way, their family property could be protected against appropriation by her husband and his creditors".[311] The outcome was that whereas the daughters of the rich could enjoy the protection of equity through marriage contracts, the daughters of the poor suffered and benefited depending on their husbands' circumstances due to the injustices of the common law.[312]

By the mid 19th century a few women were earning an income of their own, either "through trade or by writing, and there were cases of husbands impounding their wives' earnings" to meet their own debts.[313] In such a situation feminine agitation for reform was inevitable, and (eventually) a series of laws were enacted to address the problem. The Matrimonial Causes Act of 1857 remedied some defects in the then applicable law. For example, as long as "a judicial separation was in force, a wife was deemed to be a *femme sole* with respect to any property she acquired".[314] In terms of section 25 of the Matrimonial Causes Act of 1857, the wife "had the sole power to dispose of a legal interest *inter vivos* or by will".[315] Furthermore, under section 21

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[307] *Ibid.*
[308] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, (London, 1998), 184.
[309] See Stephen Creteny, *Family Law in the Twentieth Century: A History,* 91who notes that "any disposition made by an engaged woman without her fiancé's consent was voidable by him on attaining his marital right".
[310] *Ibid.*
[311] *Ibid.*
[312] *Ibid.*, 92.
[313] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 110.
[314] *Ibid.*
[315] *Ibid.*

thereof "if a wife were deserted she could obtain a protection order to prevent her husband and creditors from seizing any property and earnings, which she became entitled to after the desertion, and vest them in her as if she were a *femme sole*".[316] While the above reforms were progressive, however, the most radical law reform was through the Married Women's Property Act 1882 (MWPA 1882).

Sections 2 and 5 of the MWPA 1882 provided that "any woman marrying after 1882 should be entitled to retain as her separate property all property owned by her at the time of the marriage".[317] Furthermore, it was provided that "even if a woman had married prior to 1882, any property she acquired after 1882 should be held by her in the same way".[318] It was enacted in section 1 thereof that "a married woman would be capable of acquiring, holding and disposing of any real or personal property as her separate property, by will or otherwise, in the same manner as if she were a *femme sole,* without the intervention of any trustee".[319] This was a progressive reform in the laws to benefit women, but even though the law acknowledged the doctrine of separate property, a setback was that women in general did not hold much property. Property owned by women in nineteenth century England was usually inherited from their fathers.[320] To protect the status of their daughters, most fathers included them in the distribution of the *patrimony*; however, the type of property inherited by sons and daughters differed. Daughters usually inherited personal property and sons more often inherited real property such as freehold land.[321] It is not surprising, therefore, that many women did not benefit in any real sense from these reforms.

The above shortcomings notwithstanding, it was the MWPA 1882 that replaced the total incapacity of a married woman to hold property at common law, with a rigid doctrine of separate property.[322] Section 17 empowered a court to "summarily and

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[316] *Ibid.*
[317] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law,* 9th edition, 110
[318] *Ibid.*
[319] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law,* 9th edition, 110.
[320] See Hiam Brinjikji, *Property Rights of Women in Nineteenth Century England* at http://www.umd.umich.edu/cas1/hum/eng/classes/434/geweb/PROPERTY.htm. Accessed 17 July 2004.
[321] *Ibid.*
[322] See paragraph 286, *Halisbury's Laws of England*, 4th edition, Volume 29(3), (London, 2001), 181.

within its discretion decide any question between husband and wife as to the title to, or possession of property; and this could be applied to any species of property".[323]

Following the enactment of the MWPA 1882, by section 7(7) of the Matrimonial Causes (Property and Maintenance) Act 1958, it was confirmed that "any power conferred by the MWPA 1882 to make orders with respect to any property includes a power to order a sale of the property".[324] Courts were also empowered to order a transfer to the entitled spouse any property, which represented the proceeds of disposal, when one spouse unlawfully sold the property of another.[325]

The MWPA 1882, therefore, addressed many women's concerns because it gave English courts vast discretion. By invoking it, courts could even divide interests in a house purchased by the husband with contributions, however little, from the wife.[326] Although the MWPA 1882 was protective of women, it could not address all situations that emerged with time such as the claims of third parties against matrimonial homes. This *lacuna* in the law was only cured by the Matrimonial Homes Act 1967(MHA 1967) that provided security against third parties, thereby complementing "the common law right of a well-behaved wife to having a roof over her head".[327] It should be appreciated that in common law, a wife has a right to look to her husband for maintenance and, if he deserts her, to remain in the home, unless her conduct is such as to deprive her of that right to maintenance. This meant that even if the husband had legal title and all equitable interest in the matrimonial home, the wife's rights were henceforth contained in both the Matrimonial Homes Act and the common law.

The MHA 1967 provided that where one spouse is entitled to occupy a dwelling house, and the other is not, the latter may not be evicted by the former without a court order; if the latter is not in occupation, then with permission of the court, she/he may enter and occupy the house.[328] The spouses' rights of occupation were, however, to be registered as charges on the land to ensure that thereafter there would be no sale or

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[323] *Ibid.*
[324] *Ibid.*, paragraph 287,182.
[325] *Ibid.*, paragraph 286, 181.
[326] *Ibid.*
[327] See Stephen Creteny, *Family Law in the Twentieth Century: A History,* 129.
[328] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law,* 9th edition, 185.

mortgage of the dwelling house by the spouse in whom the legal estate was vested unless the registration was discharged or the other spouse consented.[329] Section 1(2) MHA 1967 empowered either spouse to apply to the court for "an order declaring, enforcing, restricting or terminating those rights or regulating the exercise, by either spouse, of the right to occupy the dwelling house".[330] In terms of section 1(3) of the MHA 1967, when entertaining the application, the court was "to consider all circumstances of the case including conduct of the parties towards each other, the needs of the spouses, their financial resources, the needs of any children, and all circumstances of the case".[331] By section 2(2) the rights conferred by the MHA 1967 would cease upon death or divorce, unless before divorce the court made an order that allowed the rights to continue.[332]

The MHA 1967 has since been overtaken by the 1983 Matrimonial Homes Act, which substantially amended it by improving the rights of occupation in the home and is included in Part IV of the Family Law Act 1996(FLA 1996).[333]

Related to the foregoing developments was the Matrimonial Proceedings and Property Act 1970 (MPPA 1970) that addressed the question of improvements made by one spouse upon the property of another. [334] Section 37 provided that the improver has a right to "a share in the beneficial interest in the property, real or personal, to which she or he has contributed an improvement in money or money's worth".[335] It was a requirement, however, that the improvements must be substantial and there must be no agreement between the spouses to a different effect.[336] The MPPA 1970 made specific reference to the contributions made by the parties to the welfare of the family, including "contributions made by looking after the home or caring for the family".[337] With the adoption of this law, courts moved away from an exclusive concern with

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[329] See Stephen Creteny, *Family Law in the Twentieth Century: A History,* 129. Registration was notice to third parties of the equitable rights of the other spouse.
[330] See S.M Creteny, *Principles of Family Law* (London, 1974) 170.
[331] *Ibid.*, 172.
[332] *Ibid.*,170.
[333] *Ibid.*, 66. The 1983 Matrimonial Homes Act was repealed.
[334] See Stephen Creteny, *Family Law in the Twentieth Century: A History,* 134/5.
[335] See section 37 Matrimonial Proceedings and Property Act 1970 at http://www.westlaw.co.uk. Accessed 30 November 2005.
[336] *Ibid.*
[337] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law,* 9th edition, 136.

maintenance towards equitable distribution of property on the breakdown of the marriage.

The latest and most relevant amendments to interspousal property relations in England are contained in the Family Law Act 1996 and the Matrimonial Causes Act 1973 (MCA1973) as amended by pertinent legislation.[338]

Evidently, English family law regulating rights to property has evolved slowly but systematically. This situation is promoted by the present divorce court's definition of property as "property owned by a party during marriage as well as acquired after the end of the marriage, but before the ancillary relief application is determined".[339] English divorce courts also consider for distribution property likely to be acquired in future such as pension.

The lesson for Uganda is that, at the very least, unrelenting law reform initiatives are crucial to advancing women's rights to property in marriage and upon divorce.

4.2 The strengths and weaknesses of the English separate property marital regime subject to redistribution by court

Under a separate property marital regime each spouse owns the property acquired before marriage and in the course of it.[340] Consequently, neither spouse needs the other's consent to sell, pledge or rent his or her assets. English law, as evidenced from the foregoing development of women's rights to property in marriage and upon divorce, is based on a separate property marital regime. This marital regime is now subject, however, to redistribution by the relevant courts. Reform ideas that Uganda can gather from this English approach to advancing rights of women can be derived from laws enacted to regulate or ameliorate this separate property marital regime. For example, the "rights of occupation of a spouse who has no proprietary, contractual or

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[338] See FLA 1996 and MCA 1973 as amended at http://www.westlaw.co.uk Accessed 30 November 2005.
[339] See Mary Hayes and Catherine Williams, *Family Law, Principles, Policy and Practice,* 2nd edition, (London, 1999), 618.
[340] See B Hale et al, *The Family and Society* (London, 2002), 145.

statutory interest in the matrimonial home of another are secure under the FLA 1996".[341]

Sections 30(1) and (2) of the FLA 1996 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".[342]

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".[343]

The FLA 1996 has given the non-entitled spouses security of tenure and the privilege of being considered eligible to pay the mortgage, rent or other outgoing so as to keep up occupation and prevent the mortgagee or landlord from seeking possession.[344] The matrimonial home rights, however, must be registered to bind third parties and will usually come to an end on the other spouse's death or on the dissolution or annulment of the marriage unless the court has ordered they should continue after termination of the marriage.[345]

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[341] See paragraph 286, *Halisbury's Laws of England*, 4th edition, Volume 29(3), (London, 2001),182.
[342] See section 30 (1) and (2) FLA 1996.
[343] *Ibid.* 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".
[344] See section 30(3) FLA 1996.
[345] See section 33(5)(a),(b) and 33(6) FLA. See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 68.They write that "the occupying spouse can protect the right of occupation against

Under sections 30-40 of the FLA 1996, the court may make orders to regulate the occupation of the home by spouses, former spouses or cohabitants.[346] The orders include the exclusion of one party from the home and the vicinity of the home and the prohibition, termination or restriction of the exercise of the respondent's rights as appropriate.[347] In determining whether to make an occupational order, the court will take into account the housing needs and resources of each of the parties and any relevant child, the financial resources of each of the parties, the likely effect of any decision by the court on the health, safety and well being of any relevant child and the conduct of the parties towards each other.[348]

As can be seen from the above, the separate property marital regime in England has been ameliorated by the FLA 1996 to protect the less economically powerful partner.

Another lesson Uganda can learn from England concerns the purposeful regulation of marriage contracts. Barlow notes that "couples are more likely to prefer a marriage contract detailing the regime for the acquisition and division of property when one or both have previously been married and have children from another relationship".[349] In England, the law regulates ante-nuptial and post-nuptial marriage contracts purposefully by interfering with them as and when need arises.[350] This position of the law is logical because pre-nuptial agreements tend to be superseded by later events. For example, an agreement sensible in the first two years of marriage might become increasingly irrelevant after the birth of children, illness or redundancy affecting any marriage at any time. Ante-nuptial agreements are also problematic in that they provide a remedy for those "who have access to legal advice or, even more critically, for those who choose to take advantage of it prior to a relationship breakdown or

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third parties such as mortgagees by registering a charge under the Land Registration Act, 1925 or the Land Charges Act, 1972".

[346] See section 31-40 FLA 1996.

[347] Section 35 FLA regulates occupation rights of a former spouse; Section 36 FLA regulates cohabitants; and section 37 FLA deals with situation where neither spouse is entitled to occupy the home.

[348] For example see sections 33(6) and 35(6) FLSA 1996.

[349] See Anne Barlow et al, "Community of property – a study for England and Wales" in *Family Law*, January 2004,Volume 34, 47-52 at 50.

[350] See paragraph 32, *Halsbury's Laws of England*, 4th edition, Volume 29 (3), 38. Ante-nuptial agreements are vehicles by which property can be transferred from one spouse to another and have evidential weight when the terms of the agreement are relevant to an issue before the court in proceedings for divorce.

death".[351] Among women, only a minority generally take advantage of ante-nuptial agreements.[352] In sum, therefore, the fact that ante-nuptial and post-nuptial marriage contracts are not final and binding in England is a positive attribute to advancing women's rights to property that could be emulated. Although ante-nuptial and post-nuptial agreements may not be common in Uganda, the important concept to take from England is that courts should be able to interfere with them regardless of what the parties think.

In England, an agreement between husband and wife to live apart, with or without cause, is in general valid and enforceable provided that it is made in contemplation of, and is followed by, an immediate separation.[353] What must be recognized is that the law makes it illegal for a woman to sign away her rights of recourse to the courts to regulate her maintenance.[354] If there is a maintenance agreement subsisting and the parties are resident in England, either party may apply to the court for alteration thereof. This power is provided for in section 35 of the MCA 1973, as amended, which sets the grounds for alteration as: "(1) a change in the circumstances in which any financial arrangements contained in the maintenance agreement were made or, as the case may be, omitted from it, including a change foreseen by the parties when making the agreement; or (2) lack of proper financial arrangement with respect to any child of the family".[355] Whether or not the agreement should be altered is up to the court, but it must find, before so doing, that there has been a change in the circumstances in light of which the financial arrangements were made, whether or not foreseen at the time the agreement was made.[356]

As regards judicial powers, a divorce court in England has wide discretionary powers to distribute and allocate property, irrespective of strict property rights.[357] The MCA 1973 as amended gives courts wide discretion to make financial provisions when

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[351] See Anne Barlow and Rebecca Probert, "Regulating marriage and cohabitation: changing family values and policies in Europe and North America – an introductory critique" in *Law & Policy*, Volume 26 (1), January 2004, (Oxford, 2004), 6.
[352] *Ibid.*
[353] See section 34 (2) MCA 1973 at http://www.westlaw.co.uk, which defines maintenance and separation agreements. Accessed 23 January 2006.
[354] See section 34(1)(a) FLA 1996.
[355] See section 35(2)(a) and (b) FLA 1996.
[356] See section 35 (1) and (2) MCA 1973.
[357] See section 24 MCA 1973 that sets out the various court orders in connection with divorce proceedings. These include property transfers and orders to vary benefits.

granting the decree of divorce, nullity of marriage or judicial separation.[358] The jurisdiction of the court is, moreover, not confined to property in England but extends to property abroad as well. Section 23(1)(a) of the MCA 1973 as amended, provides that "upon grant of a decree of divorce, nullity or judicial separation, the court may order either spouse to make periodical payments as specified in size and duration by the order, to the other, or an order that either spouse shall secure such payments to the other". [359]

What the above provision entails is that where it is thought that "the respondent is likely to default on payment, has considerable capital assets, or is abroad, the court may make a secured periodical payment order".[360] Furthermore, the court may require that "some capital asset be charged as security for the payments; if the payer defaults any income from the asset can bc used to satisfy the order".[361] An order for the periodical payment of money ceases automatically upon the payee's remarriage.[362] Furthermore, in terms of section 23(1)(c) MCA 1973 as amended the court is empowered to order either party in a divorce, judicial separation or nullity proceedings to "pay to the other a lump sum, if necessary in the form of secured instalments".[363]

From the foregoing discussion it is evident that under sections 22,23 and 24 of the MCA 1973 as amended, upon granting a decree of divorce, nullity or judicial separation, the court may order a transfer of property from one party to the other or to a child or children, whether the property is in possession or in reversion; vary, extinguish or alter the terms of bcnefit of any ante-nuptial settlement; or make a new settlement, the terms of which the court would specify. If after the grant of the decree dissolving or annulling a marriage either party to that marriage remarries, that party is not entitled to apply, by reference to the grant of that decree, for a property adjustment order in his or her favour against the other party to that marriage.[364] The

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[358] See sections 24 and 31 MCA 1973. Section 31 relates to courts power to discharge and enforce orders.
[359] See section 23 (1)(a) MCA 1973.
[360] See Carlyon Hamilton and Allison Perry, *Family Law in Europe,* 121.
[361] *Ibid.*
[362] *Ibid.*,120.
[363] Section 23 (1)(c)MCA1973.
[364] *Ibid.*, section 28 (3). This includes the amendment by the Matrimonial and Family Proceedings Act 1984,section 5 (3).

remedy of transferring specific property may be given as an alternative or in addition to a lump sum order. There is also no limitation imposed as to the nature of the property in respect of which the jurisdiction to make a property adjustment order may be exercised, provided that the property can be identified as susceptible to specification in the order. It is, therefore, possible for a periodic tenancy and property acquired after the end of the marriage, depending on the peculiar circumstances of the case, to be the subject of a property adjustment order.[365] Under English family law an order for periodical payments (maintenance) made to an applicant spouse, pending the outcome of the divorce suit is obtainable. It can take effect on presentation of the petition and terminates on decree absolute or earlier if the court thinks fit.[366]

With regard to sharing pension on divorce, a court has the power to issue an earmarking order under section 24B to 25E MCA 1973 as amended. This gives the court power to allocate a pension annuity when it comes into payment, i.e., when the beneficiary becomes entitled to receive the pension, the spouse receives the earmarked portion of the pension.

As regards the exercise of its power to make periodical orders, lump sum orders, property adjustment orders, orders for the sale of property or pension sharing orders, the court must have particular regard to, among others, the following matters:

> "(a) The income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
> (b) The financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
> (c) The standard of living enjoyed by the family before the breakdown of the marriage;
> (d) The age of each party to the marriage and the duration of the marriage;

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[365] See section 24 and 28 MCA 1973 that provide for property adjustment orders. Section 24A provides for orders for the sale of such property as the court may deem proper.
[366] See section 24 MCA 1973.

(e) Any physical or mental disability of either of the parties to the marriage;

(f) The contribution which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by looking after the home or caring for the family;

(g) The conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it".[367]

Section 37 of the MCA sets out courts power when dealing with transactions intended to defeat financial relief.[368] Accordingly "there are freezing injunctions to prevent disposal of assets, available in proceedings for financial relief, when a party is about to make a disposition of assets, or transfer the assets out of the jurisdiction or otherwise defeat the exercise of the court's power or the spouse's claims".[369] In terms of section 37(2)(b) thereof if court is "satisfied that the other party has made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, may make an order setting aside the disposition".[370] Clearly the court "can make such orders as it thinks proper to restrain a spouse from dealing with the assets, in order to protect any claims and preserve or retain property, which may become the subject matter of court proceedings".[371] The injunctions can "cover assets yet to come into the party's possession and is limited to the maximum amount of the likely claim".[372]

Under the Civil Procedure Rules 1998 Part 25, "the High Court can grant a search order which allows a person to enter premises to search and seize evidence, such as bank statements and tax forms, needed in court proceedings where there is a suspicion of non-disclosure".[373] Although these applications are "usually *ex parte,* a hearing *inter partes* must take place soon afterwards".[374]

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[367] See section 25 MCA 1973 setting out matters to which court must have regard as it exercises its power under sections 23, 24, 24A and 24B.
[368] See section 37 MCA.
[369] See Carlyon Hamilton and Allison Perry, *Family Law in Europe,(London,2002)* 125.
[370] See section 37 MCA.
[371] See Carlyon Hamilton and Allison Perry, *Family Law in Europe,* 125.
[372] *Ibid.,126.*
[373] *Ibid.*
[374] *Ibid.*

A court has the power to prevent "a respondent from leaving the country in a claim for ancillary relief if the applicant would otherwise be deterred from pursuing his or her claim".[375] The High court can order a writ that can be used against a party who has "defaulted on maintenance and is resident abroad but temporary present in England".[376] This vast power of the divorce court is worth emulation if Uganda, which like England also subscribes to a separate property regime at marriage, is to advance women's rights to property to the same extent.

The above-discussed aspects of English family law constitute its strong points in regulating its separate property marital regime. Although English family law is gender-neutral, its provisions reinforce in one way or another women's rights to property during marriage and upon divorce. Uganda's compliance with Article 16(1)(h) of the CEDAW will be improved greatly if the country, emulating the English system, enacts laws that ameliorate its separate marital regime to the same extent as England has done.

4.2.1 Unsatisfactory aspects of the laws regulating the English separate property marital regime subject to redistribution by court

Although English family law appears protective of spouse's rights to property upon divorce, it is not without problems; presently the law does not explicitly state what the aim of the court is when exercising its power. Before it was amended, section 25(1) of the MCA 1973 required courts to make financial provisions and property adjustment orders so as "to place the parties in the financial position in which they would have been if the marriage had not finally broken down".[377] Presently, in exercising its discretion when making financial provisions orders, orders for the sale of property or pension sharing orders as required by sections 23,24,24A and 24B of the MCA, the "court must have regard to all the circumstances of the case, priority being given, however, to the welfare of any child of the family who has not attained the age of eighteen".[378] Under section 52(1) of the MCA a "child of the family in relation to the

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[375] Ibid., 127.
[376] *Ibid.*
[377] See paragraph 722, *Halsbury's Laws of England,* Volume 29(3), 4th edition, 417 for a restatement of section 25 (1) MCA 1973 before amendment.
[378] See section 25 (1) MCA 1973.

parties to a marriage means: (1) a child of both of those parties; and (2) any other child, who has not been placed with those parties for foster care, and who has been treated by both of those parties as a child of their family". The point is that English courts accord first priority to minor children and not husbands or wives.

Besides what has been discussed above, section 25A (1) MCA 1973 contains the "clean beak" provisions.[379] Accordingly "a duty is placed on court to consider in all cases of divorce and nullity whether and, if so, how and when it would be just and reasonable to terminate the financial obligation of each party towards the other". It should be appreciated, however, that instead of realizing substantive equality as the CEDAW prescribes, the main objective of the divorce court in exercising its power under the said section 25, is to achieve a fair outcome. There are examples to support this view. The principle of the judgement in *White v White* is that it is permissible to depart from equality as long as there are reasons for doing so.[380] In many marital judgements, the judge's objective is not substantive equality but fairness. English courts in the absence of a legislation providing for equal division of matrimonial assets discriminate between the respective roles of husband and wife. In the case of *Cowan v Cowan* a wife was awarded 38% and the husband 62% of the property.[381] The husband and wife had commenced married life with minimal resources but the development of a successful business venture by the husband with initial contribution by the wife led to the creation of numerous assets. Judge Thorpe noted that "fairness permits and in some cases requires recognition of the product of genius with which only one of the spouses may be endowed". The judge clarified that "whereas, no doubt, the husband's capacity to devote himself to the expansion of the companies depended in part upon the stability and security of the home and family life, which the wife created and sustained, his creativity was not dependent on a stable and secure home". This approach of the court contravenes Articles 2(a)-(f) and 16(1)(h) of the CEDAW which require state parties to ensure not fairness, but substantive equality between men and women in marriage and family relations.

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[379] *Ibid.*, section 25A.

[380] See *White* v *White* (2001) 1 AC 596 at http://www.westlaw.co.uk. Court noted that "in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles". Accessed 30 November 2005.

[381] See *Cowan* v *Cowan* (2001) 2FLR 192 at 206 at http://www.westlaw.co.uk. Accessed 30 November 2005.

Given section 25(a),(b),(d) and(f) of the MCA 1973, a young and healthy wife without family responsibilities, may not expect as large an award as an older wife who has spent a long time in marriage, and whom owing to advanced age, it may be unreasonable to expect to find paid employment. Strict adherence to the letter and spirit of Articles 2(a)-(f) and 16(1)(h) of the CEDAW on substantive equality and non-discrimination does not endorse such distinctions whatever the rationalization. Marriage in England does not guarantee a half share in any property, given that English courts consider the exact nature of the relationship between the parties. It is unsatisfactory that married women do not have definite or fixed rights in family assets but are left dependent on the whims of the husband or on the discretion of a judge. The Law Commission of England, finding it too difficult to implement, rejected the "community of property regime, which would have accorded to married people definite or fixed rights to property".[382] The CEDAW Committee General Recommendation No 21 has, however, called on "State Parties to acknowledge the right of women to own an equal share of the property with the husband during the marriage and at its dissolution".[383]

It should be appreciated that divorce in England involves three distinct aspects: the procedure which terminates a marriage and ends with a decree absolute; dealing with the interests of the children; and settling monetary matters of the divorcing parties.[384] Whereas the parties may agree over the issues of divorce and children, dealing with monetary claims of the parties tend to defy swift settlements. For example, any court order dealing with the monetary claims of the parties can only be confirmed after a decree *nisi*.[385] Furthermore "there is no time limit thereafter during which the court must make an order settling the financial issues, although a spouse's right to apply to the court to decide the question of ancillary relief is lost on remarriage".[386] What this means is that it is more difficult and can take longer for court to settle the monetary

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[382] There are new efforts to advocate a community property marital regime in England. See Anne Barlow et al, 'Community of property-a study for England and Wales' in *Family Law* January 2004,Volume 34, 47-52.

[383] See CEDAW General Recommendation No 21(13th Session, 1994) paragraph 30 at http://www.un.org/womenwatch/daw/recomm.htm#recom21. Accessed 10 November 2005.

[384] See "Divorce proceedings in England – how they work" at http://www.dterry.demon.co.uk/div_ar01.html. Accessed 8 July 2004.

[385] *Ibid.*

[386] *Ibid.*

claims of the parties than to grant a divorce order.[387] The fact that the divorce and the resolution of financial issues are not nccessarily decided at the same time is unsatisfactory.[388]

Whereas matrimonial property law in England is technically a separate property system, "in practice case law and statutory law especially section 25 MCA 1973, have developed results that closely resemble a deferred community".[389] The advantage is that a spouse is able to manage and control his or her own assets during a marriage; the disadvantage is that the community element at the termination of a marriage may prove to be no more than a mere theoretical possibility. If one spouse has control of the majority of assets because she or he is the only wage earner, there is a possibility they will be gradually dissipated and not much will remain when and if the time for division comes.[390] The challenge in England, therefore, is to do away with the unjust enrichment of the wage earner at the expense of the primary child carers and homemakers who are usually women. Common law property rules have been faulted for treating married women as minors; sadly, modern laws do not appear to be any different.[391]

There are other problems with English law: having obtained a judgement for a lump sum, actual enforcement is difficult. The successful party must invoke "civil procedures, which are usually ill suited for a family law matter especially after the court has already heard a full disclosure of the recalcitrant party's finances".[392] The desirable "general enforcement application recommended some years ago" is yet to be implemented.[393] Given this situation, some women continue to encounter hurdles

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[387] *Ibid.*
[388] *Ibid.*
[389] The decision in *White v White* imposed "a deferred community regime on divorce but of uncertain scope". Courts enforce this regime "where assets exceed needs, which has done nothing to improve the position of non-owner spouses during the relationship with regard to obtaining a share in the family home". See Anne Barlow, "Rights in the family home time for a conceptual revolution?" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* (London, 2004)), 52-78 at 73.
[390] See B. Hale et al, *The Family and Society* (London, 2002) 149.
[391] See Hilary Hiram and Jane Mair, "A leonine partnership: marriage, undue influence and the family home" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* 99-116 at 115.
[392] See Peter Watson-Lee, 'Financial provision on divorce: clarity and fairness' in *Family Law,* Volume 34, March 2004, 182-186 at 186.
[393] *Ibid.*

when enforcing court awards. For example, in *Lambert v Lambert,*[394] the judge took the view that the husband's contribution was more important than the wife's and divided the assets in the ratio 63:37 in favour of the husband. On the wife's appeal, it was held that "the nature of contribution of a breadwinner and a homemaker were intrinsically different and incommensurable and each should be recognised as no less valuable than the other", and a more generous award was made in favour of the wife. The press, however, reported difficulties in her realising the same.[395] It may therefore be prudent, however costly, in a divorce action to implement a plan to freeze the parties' assets, especially those that can be shifted overseas.

English family law, contrary to the CEDAW Committee's recommendation in General Recommendation No 21 that married and unmarried women be treated equally, does not cater for women in extra marital cohabitation.[396] Accordingly, unmarried cohabitants are denied status when seeking orders for financial provisions on the breakdown of a relationship.[397] This is retrogressive because many unmarried people are vulnerable to being denied property by their partners, and any attempt to implement Article 16(1)(h) of the CEDAW is incomplete as long as some women are excluded because they are not married. Presently, "cohabiting couples are most secure by entering into cohabitation contracts to prevent later disputes regarding rights in property".[398] Notwithstanding, in terms of Part IV of the FLA 1996, "applications are permitted for occupation orders, for non-molestation orders and orders for transfer of a tenancy to be filed in courts by cohabitants."[399] Section 62 thereof defines cohabitants "as a man and a woman who, although not married to each other, are living together as husband and wife".[400] The conferred rights are, however, limited to

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[394] See *Lambert* v *Lambert* 2003 *Fam* 103 at http://www.westlaw.co.uk. Accessed 30 November 2005.

[395] See *Lambert v Lambert* (2003) 1 FLR 139, at http://www.international-divorce.com/englanddivorcelaw/ It is reported that "Shan Lambert who was ordered to pay his wife half of a twenty million pound fortune in a divorce settlement disappeared". The wife was told "she would never get a penny of the extra money". Accessed 24 March 2004.

[396] See CEDAW General Recommendation No 21 (13th Session 1994) at http://www.un.org/womenwatch/daw/recomm.htm#recom21 . Accessed 30 November 2005.

[397] See Stephen Creteny, "Family" in Peter Birks (ed), *English Private Law,* Volume 1, (Oxford, 2000), 66.

[398] See Carlyon Hamilton and Allison Perry, *Family Law in Europe,* 157. They note that "husbands and wives are unable to bind themselves with a contractual premarital agreement, whereas cohabitants can." Therefore, divorcing couples face "financial outcomes that represent a judicial lottery based on the exercise of statutory discretion".

[399] See sections 36,38 and schedule 7 of the FLA 1996; See The Rt Hon Lord Justice Thorpe, 'Property rights on family breakdown' in December (2002) *Family Law,* Volume 32 at 892.

[400] *Ibid.*, section 62 FLA.

situations of final separation. The wider question of division of assets acquired "by joint contribution not nccessarily financial, and the resolution of financial dependence is still not addressed".[401] England ought to create legal safeguards for people in cohabitation relationships similar to what Scotland has done under the Family Law (Scotland) Act 2006, discussed in Chapter Five.

English property law determines the rights of spouses during the marriage, if there is a dispute with a third party, and the rights of cohabiting unmarried couples both during and at the end of their relationships.[402] Family law determines the allocation or ownership of a home upon marital breakdown, regardless of property rights, and allows the exclusion of a partner from the family home.[403]

Rights in the family home may be acquired under the law of trusts or awarded by a court upon marital breakdown. The award of an interest in the family home under the law of trusts is based on contributions that the parties have made, while under the MCA 1973, the court has a broad discretion to reallocate the property of the parties.[404] The dichotomy between family and property law, however, is not necessarily to the advantage of women because "property law does little to distinguish between rules relating to business property and the owner-occupied family homes".[405] Rights of third parties continue to override personal rights to the detriment of women. An order under the MCA 1973 allowing/ permitting an estranged ex-wife to utilize certain properties, especially the family home, is meaningless when followed by an order of bankruptcy. It is unsatisfactory that "ownership of beneficial interest does not guarantee the capacity to oppose successfully the sale of family homes by creditors or upon bankruptcy".[406]

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[401] See The Rt Hon Lord Justice Thorpe, 'Property rights on family breakdown' in December (2002) *Family Law,* Volume 32 at 892.
[402] See Anne Barlow, "Rights in the family home time for a conceptual revolution?" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* 53-78 at 58.
[403] *Ibid.,* 53.
[404] See Rebecca Probert, *Family law and property law: competing spheres in the regulation of the family home?* Paper presented at the WG Workshops Institute of Advanced Legal Studies, 1-3 July 2002, University of London, 7.
[405]See Anne Barlow, "Rights in the family home time for a conceptual revolution?" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* 53-78 at 60.
[406] See Rebecca Probert, *Family law and property law: competing spheres in the regulation of the family home?* Paper presented at the WG Workshops Institute of Advanced Legal Studies, 1-3 July 2002, University of London, 7.

Barlow notes that "the doctrines of constructive trusts and proprietary estoppel, however, have been used to modify property law as it applies to families".[407] Constructive trusts include informal agreements and deceptive utterances, which give rise to the appearance of an informal agreement to share ownership of the home.[408] When the trust is established to exist, the court resolving a dispute between the couple will "quantify the respective interests of the parties by examining their common intention".[409] Where the intended shares in the property are unclear from the express discussions, courts "will refer to all payments made and acts done by the claimant in order to decide the appropriate proportions".[410] The other remedy available to non-legal owners with a beneficial interest in the home is the doctrine of proprietary estoppel. Barlow observes that this remedy like the constructive trust is unsatisfactory and "requires conduct by a legal owner inducing a partner to believe that they have an equitable interest in their home, which causes them to act to their detriment".[411] A court upon proof of such conduct intercedes to prevent it from adversely affecting the non-owner.

The difficulties wives encounter by relying on beneficial interests have, however, been exposed. For example, in *Lloyds Bank v Rosset* the husband executed, unknown to the wife, a charge in favour of Lloyds Bank and then defaulted on the loan.[412] The Bank sought to sell the property but the wife alleged by way of defence she had a beneficial interest in the property. There was no express agreement between the husband and wife that she would have a beneficial interest in the property. Court ruled that "conduct such as payment towards the purchase price by the party who was not the legal owner was required before such an inference would be drawn". The work that Rosset (wife) had done on the property was insufficient to create the inference of beneficial owner or the creation of a constructive trust. Court noted that the common intention approach requires two elements. First, "the claimant has to establish the express or implied existence of a common intention to share the property that may be

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[407] See Anne Barlow, "Rights in the family home time for a conceptual revolution?" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* 53-78 at 60.
[408] See Anne Barlow, "Rights in the family home-time for a conceptual revolution?" in Alastair Hudson (ed), *New Perspectives on Property Law, Human Rights and The Home,* 53-78 at 61.
[409] *Ibid.*
[410] *Ibid.*
[411] *Ibid.*, 64.
[412] See *Lloyds Bank v Rosset* 1991 1AC 107 at http://westlaw.co.uk. Accessed 30 November 2005.

based on the inferences drawn from the parties' conduct". In order "to justify an inference of an implied intention to share, conduct must consist of direct contributions either initially to the purchase price or secondarily to the mortgage repayment". Secondly, "the claimant must show that he or she has acted on that common intention to his or her detriment".[413] The need for direct contribution to the purchase price is a limitation to the common intention approach and an obstacle to female claimants. It undervalues all indirect contributions both financial and non-financial.[414] By insisting on direct contributions to purchase prices, courts are ignoring the reality of the continued existence of the sexual division of labour in relationships and the impact on women's economic resources.

To sum up, the rights of women over the family home are not satisfactory. Granted that, in cases of separation or divorce, courts have extensive powers to deal with married couples' respective shares in the matrimonial homes, it is nevertheless important to ascertain a married spouse's share where third parties, especially secured lenders, are involved.

4.3 The strengths and weaknesses of English laws and institutions regulating intestate succession to property

Presently, English law has rules of intestate succession,[415] which benefit the surviving spouse more than the children of the marriage. Uganda ought to adopt similar legal provisions because in the majority of cases, surviving spouses contribute to the acquisition of estate properties with the deceased. It is reasonable that the law should recognize their contribution in the entitlement it affords them. Furthermore, if it is accepted that marriage is a contract between two people, it is only logical that when one party passes away the children or dependents that were never a party to the same should not share more than the contracting parties. It should be appreciated, however, that the English law of succession evolved gradually.

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[413] *Ibid.*

[414] See Anne Barlow, "Rights in the family home time for a conceptual revolution?" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* 53-78 at 60.

[415] Intestate includes a person who leaves a will but dies intestate as to some beneficial interest in his real or personal estate: Administration of Estates Act 1925 section 55(1)(vi) at http://westlaw.co.uk. Accessed 28 January 2006.

Before 1926 the rules of intestate succession applicable to real property differed from those applicable to personal property.[416] Under the rules of inheritance applicable to real property, males were preferred to females of the same degree and among males of the same degree the eldest son was preferred.[417] The rules applicable to personal property provided for a division between the children if there was no widow, but if there was a widow, "she obtained one third and the children two thirds of the personal property".[418] If there were no children, the widow "took one half with the other half passing to the father or mother of the intestate or, in default, to his brothers or sisters".[419] On the death of a married woman, her husband took all her personal property if he survived her, to the exclusion of any children.[420]

The Administration of Estates Act 1925 (AEA 1925) provided a new system of intestate succession applicable to both real and personal property.[421] This Act "overhauled the law relating to intestate succession in two respects: first, the law relating to realty and personality was put on the same footing; and second, the distribution of estates was completely changed".[422] In effect the surviving widow was given "interest greater than she had before 1926 and the surviving widower was given the same rights as the surviving widow".[423]

The AEA 1925 part IV had the effect of greatly restricting the class of next of kin who could qualify and share under intestacy.[424] This was amended as regards deaths intestate after 1952 by the Intestates' Estates Act 1952, further "reducing the class of relatives who could qualify to claim a share where there was a surviving spouse and no issue".[425] This was further "amended: (1) as regards deaths intestate after 1966, by the Family Provisions Act 1966; (2) as regards illegitimate children of persons dying

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[416] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 875.
[417] See paragraph 645-6, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 347.
[418] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 875.
[419] *Ibid.*
[420] *Ibid.*
[421] See Administration of Estates Act 23, 1925 at http://www.westlaw.co.uk. Accessed 28 January 2006.
[422] *Ibid.*
[423] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 875.
[424] See section 45 AEA 1925 that reads that "with regard to the real estate and personal inheritance of every person dying after the commencement of this Act there shall be abolished all existing modes, rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of a personal inheritance, whether operating by the general law or by any custom among others".
[425] See paragraph 583, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 312.

intestate after 1969 by the Family Law Reform Act 1969; which has since been replaced, as regards illegitimate relations of a person dying on or after 4th July 1988, by the more comprehensive provisions of the Family Law Reform Act 1987; and (3) as regards deaths intestate after 1995, by the Law Reform (Succession) Act 1995, which introduced a 28 day survivorship condition for the spouse of an intestate".[426] The relevant provisions of the above legislation are discussed hereafter.

The Intestates Estates Act 1952 increased the amount of the lump sum to which the surviving spouse of a person dying intestate after 1952 was entitled; this was further increased, as regards spouses dying intestate, after 1966 by the Family Law Reform Act 1966.[427] Ever since "the Lord Chancellor has had the power to vary the fixed net sum and has exercised that power as regards spouses dying intestate on or after 1st July 1972 by the Family Provisions (Intestate Succession) Order 1977, SI 1977/415; as regards spouses dying intestate on or after 1st March 1981, by the Family Provision (Intestate Succession) order 1981 SI 1981/255; and as regards spouses dying on or after 1st December 1993 by the Family Provisions (Intestate Succession) order 1993, SI 1993/2906".[428]

Presently succession to the real and personal estate on intestacy is regulated under section 46 of the AEA 1925 as amended. Accordingly under section 46(1) if "an intestate dies on or after 1st January 1996 and leaves a husband or wife who survives the intestate by the period of 28 days and leaves no issue, parent, brother or sister of the whole blood or issue of a brother or sister of the whole blood, the whole residuary estate is held in trust for the spouse absolutely".[429] Under the Act a residuary estate consists of the real and personal estate of the deceased.

Where an intestate "leaves no issue but leaves a parent, brother or sister of the whole blood or issue of a brother or sister of the whole blood, the surviving spouse takes, regardless of value, the personal chattels, a fixed net sum[430] referred to as the statutory

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[426] *Ibid.,* 311.
[427] See paragraph 583, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 311/2.
[428] *Ibid.,* 312.
[429] See section 46 (1) AEA 1925. See paragraph 591, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 318.
[430] The fixed net sum as provided for death on or after 1 December 1993 is £200,000. See paragraph 591, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 318.

legacy, subject, in the case of an intestate dying on or after 1st January 1996, to surviving the intestate by 28 days, free of inheritance tax and costs, and with interest primarily payable out of income at 6 percent per annum[431] until paid or appropriated, and, subject to providing for that sum and the interest on it, the residuary estate is held as to one-half in trust for the surviving spouse absolutely".[432]

The term personal chattels means:

> "Carriages, horses, stable furniture and effects (not used for business purposes), motor cars and accessories (not used for business purposes), garden effects, domestic animals, plate, plated articles, linen, china, glass, books, pictures, prints, furniture, jewellery, articles of household or personal use or ornament, musical and scientific instruments and apparatus, wines, liquors and consumable stores but not any chattels used at the death of the intestate for business purposes, nor money or security for money".[433]

Where the intestate leaves issue, "the surviving spouse takes the personal chattels, a fixed net sum, free of inheritance tax and costs, and with interest primarily payable out of income at 6 per cent per annum until paid or appropriated, and a life interest in half the remainder".[434] The said fixed net sum is "the amount provided for by or under the Family Provisions Act 1966 and the AEA 1925 section 46(1) amended by the Family Provisions Act 1966s 1(1), (3) and (4)".[435] The sum may be increased "by order of the Lord Chancellor; for death on or after 1st December 1993 it is £125,000 according to the Family Provision (Intestate Succession) Order 1993, SI 1993/2906".[436]

It should be appreciated that in describing the intestate's issues above, "in the case of death after 4th April 1988 pursuant to the Family Law Reform Act, 1987, reference to any relationship between two persons is, unless a contrary intention appears, to be constructed without regard to whether or not the father and mother of either of them,

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[431] This rate varies as the Lord Chancellor may specify by order.
[432] See paragraph 591, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 318.
[433] *Ibid.*, See section 55(1) x AEA 1925. Section 55 thereof is the definition section.
[434] See paragraph 592, *Halsbury's Laws of England*, 4th edition, Volume 17(2),320.
[435] *Ibid.*
[436] *Ibid.*

or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time".[437]

Where the residuary estate of the intestate "comprises an interest[438] in a dwelling house[439] in which the surviving spouse was resident[440] at the time of the intestate's death, the surviving spouse may, except if he or she is sole personal representative, by written notice within twelve months of the date of the first general grant of representation, require the personal representative to appropriate the intestate's interest in the dwelling house towards satisfaction of any absolute interest[441] of the surviving spouse in the intestate's real or personal estate".[442] The appropriation is "made at the value of the house at the time of appropriation and not at the date of death".[443] It may, however, be necessary to sell the house and pay debts and the estate administrator would give good title to the purchaser. It is usually the norm and not the exception, that, when the deceased has left no issue and substantial debts, the surviving spouse will take the house as part of the statutory legacy.[444] In England, the spouse's entitlement to the personal chattels and to the statutory legacy often exhausts the estate. This is particularly likely if the intestate and the spouse were beneficial joint tenants in the matrimonial home or in the other property of value, "because such

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[437] *Ibid.*, paragraph 588, 316.

[438] The intestate's interest in the dwelling house "must not, if the right is to be exercised, have been a tenancy which would determine or could by notice given after the date of death be determined within two years of that date". This stipulation has no effect no matter when the death took place if: "(1) the surviving spouse would in consequence of such an appropriation become entitled under the Leasehold Reform Act, 1967 to acquire the freehold or an extended leasehold either immediately on the appropriation or before the tenancy determines; or (2) the intestate had given notice under that Act and the benefit of the notice is appropriated with the tenancy". See paragraph 593, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 321.

[439] "Where part of a building was, at the date of the death of the intestate, occupied as a separate dwelling, that dwelling is treated as a dwelling house". See Intestates Act 1952, schedule 2 paragraph 1(5). See AEA 1925. Furthermore, unless the circumstance otherwise necessitate, "references to a dwelling house include references to any garden or portion of ground attached to and usually occupied with, or otherwise required for the amenity or convenience of, the dwelling house". See Paragraph 593, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 321.

[440] 'Was resident' means 'had his home'; that is, "it is not necessary that the surviving spouse should be physically present there at the moment of the intestate's death". See Paragraph 593, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 321.

[441] It should be appreciated that "reference to an absolute interest in the real and personal estate of the intestate includes a reference to the capital value of a life interest, which the surviving spouse has elected to have redeemed." See Intestates' Estates Act 1952 Schedule 2 paragraph 1(4) of the Intestate Act 1952 chapter 64.

[442] See Paragraph 593, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 321.

[443] *Ibid.*

[444] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 877.

property vests in the surviving spouse as surviving joint tenant before the spouse's entitlement to the statutory legacy is calculated".[445]

While the above is the law in England, in comparison with Uganda's state-made law of intestate succession, the surviving spouse only has a right to stay in the residential house subject to the rights of other beneficiaries, such as the children. It is, moreover, the norm and not the exception that children and other dependent relatives survive most Ugandans. The lesson is that Uganda's state-made law of intestate succession has to be amended to confer more rights to surviving spouses, especially with regard to the residential homes. Overall in Uganda, unlike England, the claims of the deceased's children supersede the claims of the surviving spouse.

In England, where the deceased was the widow or widower, the issue will take all benefits of the estate;[446] failing issue, the spouse's parents will take equally between them or all to one if only one survives;[447] failing parents the order is: first siblings,[448] then grandparents, then uncles and aunts, all of whom failing the estate passes as *bona vacantia* to the crown.[449] The crown, however, may make provisions for dependants whether kindred or not and for other persons for whom the deceased may have made provision.[450]

Where there has been judicial separation, neither spouse can claim in the intestate succession of the other. The MCA 1973 section 18(2) provides that:

> "If while a decree of judicial separation is in force and the separation is continuing either of the parties to the marriage dies intestate as respects his or her real or personal property, the property as respects which he or she died intestate shall devolve as if the other party to the marriage had then been dead".

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[445] See Roger Kerridge, "Succession" in Peter Birks (ed), *English Private Law,* Volume 1,517.
[446] See section 46(1)(ii) AEA 1925 at http://www.westlaw.co.uk . Accessed 30 November 2005.
[447] Section 46(1)(iii) and (iv) AEA 1925.
[448] *Ibid.*, section 46(1)(v)AEA.
[449] *Ibid.*,section 46(1)(1)(vi)AEA.
[450] *Ibid.*

The above notwithstanding, a spouse may still apply for a reasonable provision under the Inheritance (Provisions for Family and Dependents) Act (IPFDA1975), but this would be in respect of maintenance only.[451]

Where there is partial intestacy, a surviving spouse with effect from 1st January 1996 does not have to bring into account, when computing the statutory legacy, the value of any benefit received under the will.[452]

The English law regulating rights of intestate succession has some commendable safeguards against wastage of estate properties before a grant of letters of administration is made. Under section 9(1) of the AEA1925 as amended, the intestate's estate vests temporarily in the public trustee until the grant of administration to the personal representative to administer the estate. On their appointment, the personal representatives hold the estate.[453] It should be appreciated, however, that section 9(3) of the AEA 1925 provides that "the vesting of real or personal estate in the public trustee does not confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of the property."

The order of priority to a grant of letters of administration in a total intestacy is specified by the Non Contentious Probate Rules (NCPR) 1987.[454] Rule 22(1) thereof commences with reference to "the surviving husband or wife, followed by the children of the deceased and the issue of any deceased child who died before the deceased, then the father and mother of the deceased, then the brothers and sisters of the whole blood and the issue of any deceased brother or sister of the whole blood who died before the deceased". In the default of any person having a beneficial interest in the estate, "the Treasury Solicitor is entitled to a grant if he claims *bona vacancia* on behalf of the crown".[455] Where all persons entitled to a grant have been cleared, "a grant may be made to a creditor of the deceased or to any person who may have a beneficial interest in the event of an accretion to the estate".[456]

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[451] See section 1(2) IPFDA 1975 chapter 63 at http://westlaw.co.uk. Accessed 12 November 2005.
[452] See paragraph 615, *Halsbury's Laws of England*, 4th edition, Volume 17(2),333.
[453] See section 9 of the AEA 1925 as amended.
[454] See NCPR 1987 Statutory Instrument 1987 No 2024 (L.10) at http://www.opsi.gov.uk/si/si1987/Uksi_19872024_en_2.htm#mdiv22 . Accessed 30 November 2005.
[455] Rule 22 (2) NCPR 1987.
[456] Rule 22(3) NCPR 1987.

In comparison with Uganda's state-made laws of intestate succession, priority to administer an estate is not accorded to the surviving spouse but to the beneficiary with the greatest share in the estate, who may not necessarily be the surviving spouse. It is not uncommon for the surviving spouse not to be the mother of all the deceased's children and, therefore, not take priority in administering the deceased's estate.

In England, the procedures followed in estate administration applications are protective of surviving spouses. A number of documents must be lodged with the registrar in an application for a grant. An application must be supported by an oath by the applicant.[457] The oath is a sworn affidavit concerning the deceased's death and domicile, whether he died testate or intestate, the entitlement of the applicant to a grant and the value of the estate.[458] Moreover the applicant swears to administer the estate dutifully (the duties are specified in the oath form). Rule 8(4) of the NCPR 1987 provides that "in an application for a grant of administration, the oath must state in what manner all persons having a prior right have been cleared off and whether any minority or life interest arises under the will or intestacy".[459]

Although English law of intestate succession is progressive, there are nevertheless some unsatisfactory aspects. For example, whereas cohabitation is a reality in England, the law of succession still draws sharp distinctions between the succession rights of the partners in a cohabiting relationship. Cohabitants have no legal rights to succeed on a partner's intestacy. However, cohabitants can apply for financial provision out of the intestate's estate under the IPFDA 1975, provided that the intestate died after 1st January 1996. This is the import of section 2 of the Law Reform (Succession) Act 1995.[460] This Act in section 2 joined to the list of applicants "a person who has lived as husband or wife with the deceased in the same household for the whole of the period of two years ending immediately before the date of his death". The objective of this reform is to give "greater recognition to the position of cohabitants who previously had to show dependence upon the deceased if they were to succeed in a claim".[461] However, even then "a cohabitant may only receive

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[457] Rule 8(1) NCPR 1987.
[458] Rule 8 NCPR 1987.
[459] Rule 8(4) NCPR 1987.
[460] See Andrew Borkowski, *Textbook on Succession,* (London, 1997), 11.
[461] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law, 9th edition*, 887.

provision based on his or her need for maintenance, as there is no entitlement to seek a capital share of the deceased's estate as there is for a surviving spouse".[462]

4.4 The strengths and weakness of English laws and institutions regulating testate succession to property

Under section 2(4)(b) IPFDA 1975, the court may "vary the disposition of the deceased's estate effected by will or the law relating to intestacy or both, in such a manner as the court may think fair and reasonable having regard to the provisions of the order and all the circumstances of the case".[463] The IPFDA 1975 allows reasonable maintenance to be given to a former or separated spouse.

Under section 1 of the IPFDA 1975, the court is empowered to make orders for a wide variety of relief out of the deceased's property in favour of, among others, the following persons:

> "(1) the wife or husband of the deceased;
> (2) a former spouse or former civil partner of the deceased who has not remarried;
> (3) a person other than the husband or wife or former husband or former wife of the deceased who, if the deceased died on or after 1st January 1996, was living in the same household as the deceased as the husband or wife of the deceased during the whole of the period of two years ending immediately before the date when the deceased died;
> (4) a child of the deceased;
> (5) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage; and
> (6) any person, not falling within any other class of applicant, who immediately before the death of the deceased was being maintained, either wholly or partly by the deceased".

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[462] *Ibid.*
[463] See section 2(4)(b) IPFDA 1975.

It should be appreciated that under the IPFDA 1975 any reference to "a wife or husband is to be treated as including a reference to a person who in good faith entered into a void marriage with the deceased unless either: (1) the marriage of the deceased and that person was dissolved or annulled during the lifetime of the deceased and the dissolution or annulment is recognised by the law of England and Wales, or (2) that person has during the lifetime of the deceased entered into a later marriage".[464]

The IPFDA 1975 provides that, in the case of the spouse applicant, reasonable provision is not limited to maintenance requirements as is the case with a former spouse but may include a lump sum and property transfer.[465] According to section 2(4)(a) of the IPFDA1975 the court may order "any person who holds property-forming part of the net estate of the deceased to comply with the payment or transfer orders". The IPFDA 1975 is discretionary both in the quantity of the award and the right. Reliance on discretionary awards has, however, its own problems: it leads to uncertainty as to the likelihood of an application succeeding under it.

Where an order is made under the IPFDA 1975, then, "for all purposes, including the purpose of the enactments relating to inheritance tax, the will or the law relating to intestacy, or both, as the case may be, have effect and are deemed to have had effect as from the deceased's death subject to the provisions of the order".[466]

The application for maintenance or property transfer, as the case may be, must be made within six months of the taking out representation in respect of the estate.[467] The court must be satisfied, however, that the arrangement of the deceased's estate effected by the deceased and by the rules of intestate succession does not make reasonable provision for the applicant.[468] When the court decides that no reasonable provision was made, it may issue any of the following orders: "an order for periodical payment out of the net estate of the deceased, for the transfer of property, for the acquisition out of property in the estate of specified property and transfer or

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[464] *Ibid.*, section 25(4)(a) and (b).
[465] *Ibid.*, section 1(2)(a).
[466] *Ibid.*, section 19(1).
[467] However, court may give permission to extend the time. See section 4 IPFDA at http://westlaw.co.uk.
[468] See section 2(1) IPFDA 1975.

settlement thereof, or for an order varying any ante nuptial or post-nuptial settlements".[469]

Before deciding whether reasonable provision has been made and, if not, what provisions should be made, what court may consider is generally prescribed as follows: the fiscal requirements and resources of the applicant and those of any other applicant and beneficiaries of the estate; "any obligation and responsibilities owed by the deceased to the applicant or to any beneficiary; the size and nature of the net estate; any physical or mental disability and any other matter including conduct of the applicant or any other person which in the circumstances of the case court may consider relevant."[470]

With regard to spouse or former spouses, the court considers among others "the age of the applicant, duration of the marriage and contribution made by the applicant to the welfare of the family of the deceased including any contribution made by looking after the home or caring for the family".[471] Furthermore, where the applicant is a spouse and not a judiciary-separated spouse, the court also has regard to "the provision which the applicant might have reasonably expected, had the marriage been terminated by divorce rather than death".[472] The court may alter an award under section 2 of the IPFDA 1975 for periodic payments at a future date. A lump sum award may be satisfied by payments in instalments.[473]

The IPFDA 1975 has antiavoidance provisions.[474] Under these, applicants for provisions can petition court to issue an order against a donee to provide such sums of money or property as specified, "if the court is satisfied that less than six years before death of the deceased, with intention of defeating an application for provision under the Act, the deceased made a disposition and that full consideration was not given by the beneficiary of the disposition or any other person".[475] This exercise of power by the court must be "to facilitate the making of financial provision for the applicant

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[469] *Ibid.*, section 2(1)(a)-(f).
[470] *Ibid.*, section 3 (1)(a)-(g).
[471] *Ibid.*, section 3(2).
[472] *Ibid.*, section 3(2).
[473] *Ibid.*, section 7.
[474] *Ibid.*, section 10.
[475] *Ibid.*

under the Act".[476] The order may be made whether or not the donee at the date of the order holds any interest in the said property, and shall not exceed the amount of the disposition or value of the property at the deceased's death or at the earlier disposal by the donee less any transfer tax paid by the donee.[477] When dealing with this application, court must have regard to "all the circumstances in which the disposition was made, any valuable consideration given thereof, the relationship, if any, of the donee to the deceased, the conduct and financial resources of the donee and other circumstances of the case".[478]

The term disposition does not "include any provision in a will, any nomination such as set out in section 8(1) thereof or any donation *mortis causa*, or any appointment of property made otherwise than by will, in the exercise of a special power of appointment but subject to these exceptions, includes any payment of a premium under a policy of assurance and any gift of any property whether made by an instrument or not".[479] If in the course of the application another objectionable disposition is revealed, the court may exercise the same power in respect thereof as in respect of the original application. When court is convinced that there has been a breach in the above terms of the law, it "may make an order against the donee of the money or property that has been transferred; if not, it may make an order directing the personal representative not to pay or transfer".[480]

When exercising its power the court must have regard to the value of the property at the date of the hearing.[481] Furthermore, in making the orders, under section 11 and 10 above court may make such consequential directions as it thinks fit, to give effect to the order or for "securing a fair adjustment of the rights of the persons affected thereby".[482] In comparison, Ugandan law does not give the courts such powers as to reverse transactions intended to defeat entitlements, as the IPFDA 1975 gives to English courts.

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[476] *Ibid.*
[477] *Ibid.*, section10(4).
[478] See section 10 (6).
[479] *Ibid.*, section 10 (7).
[480] *Ibid.*, section10(2)(c) .
[481] *Ibid.*, section 11 (3).
[482] *Ibid.*, section 12 (3).

Under the IPFDA 1975 the rules regulating joint tenancy can also be modified. For example, "where a deceased person was, immediately before his death, beneficially entitled to a joint tenancy of any property, then, if, before the end of the period of six months from the date on which representation with respect to his estate was first taken out, an application is made for an order under the IPFDA 1975, the court for the purpose of facilitating the making of financial provision for the applicant under the Act may order that the deceased's severable share of that property, at its value immediately before his death, is, to such extent as appears to the court to be just in all circumstances of the case, to be treated for the purpose of the Act as part of his net estate".[483]

In terms of section 19 IPFDA 1975 a copy of every order made must be filled at the principal registry of the Family Division and "a memorandum of the order must be endorsed on or permanently annexed to the probate or Letters of Administration under which the estate is being administered".[484]

With regard to dispute resolution fora, both the High Court and county courts have unlimited jurisdiction in relation to applications under the IPFDA1975.[485] Furthermore, proceedings may be heard and disposed of by a master or district judge.[486] Given that more than one forum has jurisdiction to entertain applications under the IPFDA 1975 the inference is that applicants are not constrained by the inaccessibility of courts when making applications under the Act.

The Law Reform (Succession) Act 1995 inserted section 18A to the Wills Act to the effect that if a testator's marriage was dissolved or annulled, any will previously made by him should take effect as if any appointment of the former spouse as executor and trustee were omitted and any bequest to the former spouse should lapse unless a contrary intention appeared in the will.[487] Under the Wills Act 1837 "every will made by a man or woman is revoked by his or her marriage except where a marriage is

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[483] See section 9 IPFDA 1975.
[484] *Ibid.*, section 19(3) IPFDA.
[485] See County Courts Act, 1984 section 25 (amended by the High court and County courts jurisdiction Order 1991, SI 1991/724, art 2 (8), Schedule). See paragraph 699, *Halsbury's Laws of England*, 4th edition, Volume 17(2), 384.
[486] *Ibid.*
[487] See Nigel Lowe and Gillian Douglas, *Bromley's Family Law*, 9th edition, 871.

void".[488] This is the effect of section 18 Administration of Justice Act, 1982.[489] There are exceptions, though: "a will is not revoked by marriage in so far as it is made in exercise of a power of appointment, if the property thereby appointed would not pass in default of appointment to the testator's personal representatives".[490] The other exception is "where a testator makes his/her will on the eve of his/her wedding and it appears from a will that at the time, it was intended the will should not be revoked because he/she was to be married to that particular person".[491] In comparison as shown in Uganda marriage revokes a will.

4.5 Further ideas from England relevant to women's rights to property

Hamilton and Perry report that generally "public funding is available from a community legal services fund depending on an applicant's means, but only those with a small income and capital qualify".[492] Beneficiaries of public funding may be obliged however to pay back to the state some of the money received by way of public funding if property is recovered or preserved in the proceedings.[493] Public funding is "available for applications for injunctions, ancillary financial relief on divorce and for many other matters raising substantial questions of law relating to rights to property".[494] The lesson for Uganda is that it needs to consider establishing public funding for litigants with small incomes.

As shown by the English jurisdiction, any government desirous of promoting reforms in family laws protective of women's rights to property, has to focus not only on family law but also extend its attention to wider issues such as pension laws, welfare benefits, housing laws, laws of succession, tort laws and so forth. There must be concurrent reform of the various laws affecting women's rights to property.

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[488] *Ibid.*, 869.
[489] *Ibid.*
[490] *Ibid.*
[491] *Ibid.*
[492] See Carlyon Hamilton and Allison Perry, *Family Law in Europe*, 99.
[493] *Ibid.*
[494] *Ibid.*

With the above lessons in mind, it is now necessary to seek others from Scots laws regulating rights to property in marriage, upon divorce and upon the death of a spouse.

Chapter Five

5.0 Introductory comment on the Scots laws of marriage, divorce and succession

The rationale of examining the Scots laws of marriage, divorce and succession is to gather ideas about attaining substantive equality between men and women in an intimate relationship so as to enable Uganda to comply with Article 2(a)-(f) and 16 (1)(h) of the CEDAW.[495] The pertinent laws and institutions regulating rights of succession to property in Scotland are examined only to the extent that they are relevant to the said purpose. Scotland has for long grappled with challenges of realizing equality between men and women in a relationship and inevitably has many ideas to offer to Uganda. For example, the Family Law (Scotland) Act 1985 (hereafter called FLSA 1985), prescribes that "with the exception of gifts and inherited property, spouses have equal shares in household goods obtained in prospect of or during the marriage".[496] Furthermore, the Scots law of succession provides "for fixed rights to property that cannot be defeated by will; this protects the surviving spouse and children against disinheritance".[497]

It is necessary to trace the development of married women's rights to property so as to appreciate the various aspects of Scots laws regulating rights to property at marriage, upon divorce and death of a spouse. The Scots laws of marriage and succession regulating rights to property, however, are not without inadequacies. Accordingly, the present study has incorporated the reforms advanced by the Scottish Law Commission Report on Succession 1990, and the Family Law (Scotland) Act 2006 (FLSA 2006).[498]

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[495] Scotland, unlike England, has a legal system closer to civil law. Its features include fixed rights to property under the law of succession. Scotland provides an alternative to how rights of succession to property can be protected other than relying on court's discretion.

[496] See section 25 FLSA 1985 at http://www.westlaw.co.uk .

[497] See Michael C Meston, *Succession (Scotland) Act*, 5th edition, 64.

[498] See FLSA 2006 asp2 at http://www.opsi.gov.uk/legislation/scotland/acts2006/20060002.htm. Accessed 30 February 2006.

5.1 Historical development of women's rights to property in marriage, upon divorce and upon the death of a spouse in Scotland

The history of women's rights to property during marriage and upon divorce in Scotland, at least with regard to equality and non-discrimination, leaves much to be desired. Up to the second half of the 19th century, the legal existence of the wife was included in and consolidated with that of her husband.[499] Writing about the effect of marriage on the person and property of the spouses in Scotland, Fraser notes that:

> "The marriage operates in regard to the wife, so as to sink her person in the eye of the law. The husband and wife are one; and the unity of persons is so complete that the legal existence of the wife is said to be suspended during marriage, or at least incorporated with, and consolidated in, that of the husband".[500]

Unavoidably, upon marriage a wife lost the property of her whole moveable estate, which became immediately and entirely the property of her husband. [501]

Marriage created a communion of all moveable property possessed by the parties.[502] This communion communicated the civil interests of each person in their moveables to the other.[503] Fraser remarks that "the administration of the common fund was not, as in ordinary partnerships, given to both the *socii;* the husband alone had it."[504] The husband enjoyed the twin rights of *jus mariti* and the right of administration.[505] Bell explains that "the *jus mariti* was a right of property the purpose of which was to transfer the property from the female spouse to the male during the marriage."[506] The right of administration applied to the wife's estate, both heritable and moveable. The effect of this situation was that it was necessary for the wife to obtain her husband's

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[499] See Eric M Clive, *The Law of Husband and Wife in Scotland* (Edinburgh, 1982) 295.
[500] See Patrick Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, 2nd edition, (Edinburgh, 1876), 507.
[501] See George Joseph Bell, *Principles of the Law of Scotland*, paragraph 1547, (Edinburgh, 1899), 602.
[502] See Eric M Clive, *The Law of Husband and Wife in Scotland* (Edinburgh, 1982) 295.
[503] *Ibid.*
[504] See Fraser, *Treatise on Husband and Wife According to the Law of Scotland,* 649.
[505] See Eric M Clive, *The Law of Husband and Wife in Scotland* (Edinburgh, 1982) 295.
[506] See Bell, *Principles of the Law of Scotland,* paragraph 1547, 602.

consent before suing debtors, drawing rents of her heritage and granting discharges.[507] Fraser clarifies that "the general rule was that what was considered moveable property by the law pertained to the husband *jure mariti*, and everything heritable remained, notwithstanding the marriage, the property of the wife... the rationale of the rule was that, the union lasting no longer than the joint lives of the spouses, items that had a perpetual duration, such as heritable property, could not be put into the stock of a relationship temporary in its nature".[508] He further explains that:

> "The character of the property, as heritable or moveable, was determined at the date of marriage or at the date of its acquisition if it came to the wife during marriage. For example, if the property in question at the time of marriage was a sum of money, it was held to be moveable, notwithstanding that it represented the sale of a house, and it would remain the property of the husband even though after marriage he changed its character by investing it in the purchase of land."[509]

If at the date of marriage the wife had heritable property it would not become the husband's property by any subsequent change,"except in cases where the wife consented to the alteration from heritable to moveable for purposes of allowing it to fall under the *jus mariti*".[510]

Although the wife's heritage was outside the *jus mariti* of the husband, all acts of administration regarding it required the husband's consent. Fraser writes that:

> "Where the wife during marriage succeeded to property or acquired it by gift, the question whether it belonged to the husband in virtue of the *jus mariti* was determined according to its condition at the time of the succession, opening, or acquisition of the property; and no change operated upon it by the executor or trustee or other person in whose hands it was, could affect the husband's rights thereafter".[511]

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[507] See Eric M Clive, *The Law of Husband and Wife in Scotland* (Edinburgh, 1982) 295.
[508] See Fraser, *Treatise on Husband and Wife According to the Law of Scotland,* 688.
[509] *Ibid.,* 689.
[510] *Ibid.,* 689 and 703.
[511] *Ibid.,* 689.

Bell clarifies that "there were, however, two exceptions to the husband's *jus mariti*: the one of paraphernalia, the other of peculium".[512] Paraphernalia referred to the wife's dresses and ornaments. He explains that "these articles were regarded as peculiarly the property of the wife... paraphernalia, however, excluded articles of household furniture presented to the wife by her relatives on her marriage and although paraphernalia was property of the wife, it was not at her disposal *inter vivos* but she could bequeath it by will."[513] He writes that "peculium was a fund appropriated to the wife by custom or by special gift".[514] He notes further that by custom certain presents, called the lady's gown, were made to a wife on the sale of land made with her consent. This and analogous gifts were held to be peculium.[515] Furthermore, "a sum of money or provision could be secured to a wife as peculium either by herself before marriage, or by the husband by ante-nuptial contract or while solvent renouncing his *jus mariti,* or by purchasing a policy of insurance the sum of which was payable to her heirs after her death."[516]

It was possible to exclude the husband's *jus mariti* by ante-nuptial and post-nuptial contracts.[517] The effect of an exclusion of the *jus mariti* was that the wife's moveable estate became her own property, but unless there was also exclusion of the husband's right of administration, the victory for married women was a superficial one, for the wife could not be said to enjoy the essentials of ownership. Fraser notes that "when the *jus mariti* was excluded the right of administration began to operate".[518]

The legal powerlessness of married women changed for the better gradually. There was a series of legislative reforms that enhanced their rights to property. For example, the Conjugal Rights (Scotland) Amendment Act 1861 in section 1 entitled a wife who had been deserted by her husband to apply for an order to "protect property which she had acquired or might acquire by her own industry after desertion, and property which

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[512] See Bell, *Principles of the Law of Scotland,* paragraph 1554/5, 605.
[513] *Ibid.*, paragraph 1555-1559, 605.
[514] *Ibid.*
[515] *Ibid.*, 606.
[516] *Ibid.*
[517] See Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, 784.
[518] *Ibid.*, 797.

she had succeeded to or might succeed to or acquire rights to after desertion, against her husband, his creditors, or any person claiming in or through his right."[519]

Fraser notes that "after the order of protection was granted, the *jus mariti* and the husband's right of administration were excluded".[520] He explains that henceforth "the wife was free to dispose of such property as if she were unmarried. Upon her demise it went to her heirs. If she again cohabited with the husband such property was her separate estate, excluded from the *jus mariti* and right of administration". [521]

Subsequently, following the enactment of the Married Women's Property (Scotland) Act 1877 the "husband's *jus mariti* and right of administration were excluded as from 1st January 1878 from the wages and earnings of any married woman, acquired or gained by her in any employment, occupation or trade in which she was engaged".[522] Bell adds that the above law "limited the husband's liability for the wife in any marriage taking place after the Act, for the ante-nuptial debts to the value of any property which he would have received from, through or in right of his wife's property at, before or subscquent to the marriage".[523]

The total abolition of the husband's *jus mariti* was achieved, however, by the Married Women's Property (Scotland) Act, 1881. It provided in section 1 that:

> "When a marriage is contracted after the passing of the Act and the husband at the time of the marriage has his domicile in Scotland, the whole moveable or personal estate of the wife, whether acquired before or during the marriage, is by operation of law, vested in the wife as her separate estate, and is not subject to the *jus mariti*. Any income of such estate is payable to the wife on her individual receipt, or to her order, and to this extent the husband's right of administration is excluded; but the wife is not entitled to assign the prospective income thereof, or unless with the husband's consent to dispose of such estate".[524]

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[519] See Fraser, *Treatise on Husband and Wife According to the Law of Scotland*, 824.
[520] *Ibid* .
[521] *Ibid.*, 826.
[522] See Bell, *Principles of the Law of Scotland*, paragraph 1560, 607.
[523] *Ibid.*, paragraph 1571A, 612.
[524] *Ibid.*, paragraph 1560D, 607.

From the foregoing, after 1881 the wife's heritable and moveable properties were her own. The husband's right of administration and *jus mariti* over the rents and produce of her heritable property had been excluded. Nevertheless, the husband's right of administration was not wholly eliminated until the passing of the Married Women's Property (Scotland) Act 1920 (MWPSA 1920).[525] Section 1 provided that "after the passing of the Act the heritable or moveable property of a married woman shall not be subject to the rights of administration of her husband".[526] Section 3(1) of the MWPSA 1920 provided that a married woman "was capable of entering into contracts and incur obligations as if she were not married".[527] Following the MWPSA 1920, marriage ceased to have any effect on property. Each spouse remained the proprietor of his or her own goods with no fetters *inter vivos* upon his or her right to dispose of it.[528]

The coming into force of the Married Women's Property Acts, intended to equalize the legal rights of husband and wife in relation to their property did not, even then, radically improve married women's rights to property as such because women were generally poorer than men.[529] Hiram and Mair observe that "the effect was that the person who paid for the property, generally the husband, was considered as the owner of it and consequently acquired sole rights to the matrimonial home and its contents".[530] Thus, the husband's position was strengthened but the wife was upon dissolution of the marriage worse off than before the passing of the Acts.

The first lesson from Scotland, therefore, relates to the inadequacies of the separate property regime as regards the rights of married women. Having secured the separate property regime through the MWPSA 1920, it was, less than five decades after, realized that strict rules of separation of property were not a remedy to the injustices women suffered when married. In view of that realization, probably the Married Women's Property Act 1964 was enacted. Under section 1 a wife secured an equal

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[525] See Eric M Clive, *The Law of Husband and Wife in Scotland,* (Edinburgh, 1997), 212.
[526] *Ibid.*
[527] *Ibid.*
[528] *Ibid.*
[529] See Hiram Hilary and Jane Mair, "A leonine partnership; undue influence and the family home" in Alastair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* 105.
[530] *Ibid.*

share with her husband in "any money or property derived from any allowance made by her husband to meet the expenses of running the home".[531] This meant that savings made by the wife there from were no longer to be regarded as the husband's property and in law returnable to him. This aspect of the law has since been replaced by section 26 FLSA 1985 that confers "a right of equal shares, unless there is an agreement to the contrary, in any money or property acquired out of allowances made by either party to a marriage to the other for joint household expenses".[532]

The Law Reform (Husband and Wife)(Scotland) Act 1984, that put into effect the Scottish Law Commission proposals on reforming the law of husband and wife, got rid of the husband's supervisory powers over his minor wife.[533] This was the last manifestation of the husband's right of administration.

Married women's rights to property upon divorce were regulated some time ago under the Divorce (Scotland) Act 1976. Prior to the enactment of the FLSA 1985, upon divorce the guilty spouse lost his/her legal entitlement in the estate of the other that should have accrued to him or her upon the death of his or her partner, or upon a divorce in which she or he was the innocent party.[534] The innocent spouse was placed in a position to claim his or her legal rights as if the guilty spouse was dead; to that extent divorce operated like death.[535] Furthermore, prior to the enactment of the FLSA 1985, financial provision on divorce was granted on a discretionary basis, under section 5(2) of the Divorce (Scotland) Act 1976.[536] It did not specify, however, how the discretion was to be exercised and it led to inconsistent judgements. Prior to 1985, matrimonial misconduct "could reduce a spouse's settlement, although the law was based on irretrievable breakdown of marriage".[537] In sum, after a difficult development process, married women's rights to property are now secure under the FLSA 1985.

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[531] See Clive, *The Law of Husband and Wife in Scotland,(1997),* 246.
[532] *Ibid.*
[533] *Ibid.,* 223.
[534] See Clive, *The Law of Husband and Wife in Scotland,,(1997),* 437/8.
[535] *Ibid.*
[536] *Ibid.* , 439.
[537] See Joe Thomson, *Family Law in Scotland*, 2nd edition, (Edinburgh, 1991), 120.

5.2 The strengths and weaknesses of the Scots separate property marital regime subject to laws based on principles and modified by court discretion

Since the coming into force of the FLSA 1985, Scotland has adopted a separate property marital regime subject to laws based on principles and modified by court discretion.[538] According to section 24 FLSA 1985 marriage, unless otherwise prescribed by law, has on its own no effect on the respective parties' rights to property.[539]

Uganda can gather ideas to advance women's rights to property by examining the FLSA 1985 and other laws that regulate this marital property regime. The preamble to the FLSA 1985 sums it up as "an Act to make fresh provision regarding, among others, aliment, financial provisions on divorce or nullity of marriage, and property rights and legal capacities of married persons in Scotland, and for connected purposes."[540] Section 27 is the interpretation clause that defines needs to mean present and foreseeable needs.[541] Section 1 creates an obligation of aliment; each party to the marriage owes the other financial support during the marriage, in proceedings for divorce, and separation or declarations of marriage or nullity of marriage.[542]

The separate property marital regime in Scotland is regulated on the basis of plainly stated principles modified by a framework of discretion and this has been the case since the FLSA 1985 came into force. The said principles promote an equal division of matrimonial property; with the discretion entering through tests as to whether what emerges from the application of these principles is fair and reasonable.[543]

The separate property marital regime is further modified by the presumption of equal shares in household goods under section 25 FLSA 1985. Prior to this law the fact of joint use of property did not raise a presumption of joint ownership between married

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[538] See Joe Thomson, *Family Law in Scotland,* 4th Edition,(Edinburgh,2002)67/8.
[539] See section 24 FLSA 1985 at http://www.westlaw.co.uk. Accessed 30 November 2005.
[540] See preamble FLSA 1985.
[541] *Ibid.*, section 27(1).
[542] *Ibid.*, section 2.
[543] See Joe Thomson, *Family Law in Scotland*, 4th edition, 140-141.

people.[544] This state of affairs favoured the wage earners who could work and buy property but not the homemakers. Section 25(1) FLSA 1985 prescribes that:

> "(1) if any question arises (during or after a marriage) as to the respective rights of ownership of the parties to a marriage, in any household goods obtained in prospect of or during the marriage other than by gift or succession from a third party, it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question".

Section 25(2) provides that the "presumption of equal shares will not be rebutted merely by the fact that while the parties were married and living together, the goods in question were purchased from a third party by either party alone or by both in unequal shares". Ideally, for commonly used immoveable property and household goods joint ownership is desirable if there is to be *de facto* equality between the parties that the CEDAW Committee requires of State parties.[545]

Section 25(3) FLSA 1985 defines household goods to mean:

> "Any goods including decorative or ornamental goods kept or used at any time during the marriage in any matrimonial home for the joint domestic purposes of the parties to the marriage, other than: (a) money or securities; (b) any motorcar, caravan or other road vehicle; and (c) any domestic animal".[546]

Section 25 of the FLSA 1985(above), relates closely to the Matrimonial Homes (Family Protection)(Scotland) Act 1981(MHFPSA 1981).[547] Thus, in terms of section 3(2) MHFPSA 1981, a spouse who has a right to occupy the matrimonial home "may apply for an order granting him or her the possession or use, in the matrimonial home,

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[544] See Clive, *The Law of Husband and Wife in Scotland (1997)* 9.

[545] See CEDAW Committee General Recommendation No 25, Thirtieth session in 2004. The Committee clarified the meaning of *de facto* equality and the interpretation of CEDAW Articles 1 to 5 thus: "...a purely legal or pragmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality". See http://www.un.org/womenwatch/daw/cedaw/recommendations. Accessed 20 May 2005.

[546] See FLSA 1985, section 25 (3)(a), (b), and (c).

[547] See MHFPSA 1981 chapter 59 at http://www.westlaw.co.uk .Accessed 30 November 2005.

of any of its furniture and plenishings owned by the other". Furniture and plenishings mean "any article situated in the matrimonial home owned or hired by either spouse and reasonably necessary to enable the home to be used as a family residence."[548]

The presumption of equal shares in money and property derived from housekeeping allowance is created under section 26 FLSA 1985, where under, allowances made by a husband to his wife and by the wife to her husband, "where the allowances are for their joint household expenses, or, for similar purposes, are in the absence of any agreement to the contrary, treated as belonging to each party in equal shares."[549]

Sections 8 to 26 of the FLSA 1985 set out the orders, principles, shares in household goods and housekeeping allowance, value of matrimonial property, and factors to take into account in any award of financial provisions upon divorce. They provide guidelines to enable courts to exercise this power. For example, section 8 (1)(a)-(c) of the FLSA 1985 provides that:

> "In an action for divorce, either party to the marriage may apply to the court for one or more of the following orders: an order for the payment of a capital sum to him by the other party to the marriage; an order for the transfer of property to him by the other party to the marriage; an order for the making of a periodical allowance to him by the other party to the marriage; an order under section 12A(2) or (3) of this Act; a pension sharing order; and an incidental order within the meaning of section 14(2) of this Act".

In accordance with the above, in terms of section 8(1)(a) and (aa) FLSA 1985 courts have power "to order the payment of a capital sum or transfer of property from one spouse to another".[550] This is a commendable provision of Scots law because "a capital settlement based on equal sharing of matrimonial property compensates the

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[548] *Ibid.*, section 22.
[549] See FLSA 1985, section 26.
[550] See section 8 FLSA 1985, at http://www.westlaw.co.uk . Accessed 30 November 2005.

long-term economic disadvantage which married women, especially homemakers, tend to suffer in terms of loss of career prospects, earning and associated benefits".[551]

Furthermore, under the FLSA 1985 section 8(1)(ba), the court can order a capital sum payment in respect of lump sums due under pension schemes. There are, however, limitations with section 8(1)(ba) of the FLSA 1985; courts can earmark a proportion or a fixed lump sum amount of the pension for the benefit of the non-member spouse, payable to him or her by the trustee or managers of the pension scheme at the date when the pension matures; "this does not benefit, however, all women in practice because it is only valuable where it forms part of a court order".[552] However, not all divorce cases involve such orders, "as the parties tend to come up with their own private agreements that do not form part of a court-based settlement".[553]

Section 8(1)(b) of the FLSA 1985 (above), allows "the court to make orders for periodical allowances, and under (c) incidental orders within the meaning of section 14(2)". In executing such orders "regard must be had, however, to the reasonable resources of the parties at the time of the settlement".[554]

Section 8(2) of the FLSA 1985 provides that:

> "Subject to sections 12 to 15 of FLSA 1985, where an application for any of the orders has been made under subsection (1) above the court shall make such orders, if any as is:
>
> (a) justified by the principles set out in section 9 of the Act; and
>
> (b) reasonable having regard to the resources of the parties."

Section 12 (above) relates to orders for payment of a capital sum or transfer of property. Under section 12(1) an order under section 8(2) of the FLSA 1985 for payment of a capital sum or transfer of property may be made:

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[551] See Griffith Anne, "Re-ordering kin: the redistribution of resources on family breakdown" in *Hume Papers on Public Policy* 1999, Volume 9 at http://www.davidhumeinstitute.com. Accessed 12 November 2004.
[552] *Ibid.*
[553] *Ibid.*
[554] Section 8(2)(b) FLSA 1985.

" (a) on granting a decree of divorce; or

(b) within such period as the court on granting a decree of divorce may specify.

(2) The court on making an order referred to in subsection (1) above, may stipulate that it shall come into effect at a specified future date".[555]

Section 14 referred to in section 8(1)(c) FLSA 1985 relates to incidental orders. Section 14(2) defines "an incidental order" to mean one or more of the following orders:

" (a) an order for the sale of property;

(b) an order for the valuation of property;

(c) an order determining any dispute between the parties to the marriage as to their respective property rights, by means of a declarator thereof or otherwise;

(d) an order regulating the occupation of the matrimonial home or the use of furniture and plenishings therein or excluding either party to the marriage from such occupation;

(e) an order regulating liability, as between the parties for outgoings in respect of the matrimonial home or furniture or plenishings therein;

(f) an order that security shall be given for any financial provision;

(g) an order that payment shall be made or property transferred to any *curator bonis* or trustee or other person for the benefit of the party to the marriage by whom or on whose behalf an application has been made under section 8(1) of this Act for an incidental order".

From the above, the FLSA 1985 addresses the various situations that may require certain peculiar incidental orders. In this way, women's rights to property are protected. Uganda's realization of *de facto* equality that the CEDAW Committee recommends may require the country to enact legislation that give courts as much

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[555] See FLSA 1985, section 12 (1)(a)&(b), and 12 (2).

power to redistribute the resources of the couples upon divorce as the FLSA 1985 has done in Scotland.

Section 13 FLSA 1985 regulates orders for periodical allowance. However, the court does not make orders for a periodical allowance under section 8(2), unless the order is justified by the principles set out in paragraphs (c), (d) and (e) of section 9(1) FLSA 1985. What are these principles?

The principles that courts observe in resource distribution when a marriage breaks down are set out in section 9(1) FLSA 1985. They are:

> " (a) the net value of the matrimonial property should be shared fairly between the parties to the marriage;
>
> (b) fair account should be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interest of the other party or of the family.
>
> (c) any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;
>
> (d) a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support on divorce.
>
> (e) a party who at the time of the divorce seems likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period".

Section 9 (2) provides that in subsection (1)(b) (above) and section 11(2) of the FLSA 1985, economic advantage means "advantage gained before or during the marriage and includes gains in capital, income and in earning capacity, and economic disadvantages are construed accordingly". However, taking fair account of economic advantages and disadvantages under section 9(1) (b) (above) does not render making

awards easy because the courts have to consider the economic advantages or disadvantages sustained by either party. In some situations it is probable that the advantages or disadvantages suffered or gained by spouses balance themselves out. [556]

Under section 9(1)(c) FLSA 1985 the economic cost of caring for dependent children is shared equally at divorce. The court's jurisdiction has been taken over by the Child Support Act 1991, which gives power to officers of the Child Support Agency (CSA) to make maintenance assessments.[557] The rationale underlying it is to ensure that absent parents meet their financial responsibilities towards their children rather than impose a burden on the taxpayer. Whereas this may be the primary goal of the CSA, it inadvertently sets free the income of the mother for other purposes than catering for dependent children.

There has been under section 9(2) FLSA 1985 a widening of the definition of contributions of the couples to include "direct and non-direct financial contributions". Resources have also been defined under section 27(1) to include "present and foreseeable resources". The rationale for all this is to address the hardships created by the gendered way in which women's roles within families are constructed. Women, be they married or cohabiting, tend to be more constrained than their male partners in acquiring resources. This is due to the domestic role they take on looking after dependent children. These activities affect their access to employment and career activities. The limited access to income adversely affects, moreover, their access to work related benefits such as redundancy pay, pension and contribution based social security benefits. In comparison, Ugandan law makes no provision, upon divorce, for non-financial contributions.

In realizing section 9(1)(d) FLSA 1985 (above), the factors to be taken into account are set out in section 11(4) FLSA 1985. According to section 11(4) FLSA 1985:

> "For purposes of section 9(1)(d) of the FLSA 1985, the court has regard to;

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[556] See Joe Thomson, *Family Law in Scotland*, 4th edition, 157.
[557] *Ibid.*, 210-211. There are proposals to scrap the Child Support Agency by September 2006 or soon thereafter and replace it with a more efficient organisation to force absentee parents pay child maintenance more expeditiously.

(a) the age, health and earning capacity of the party claiming the financial provision;

(b) the duration and extent of the dependence of the party prior to the divorce;

(c) any intention of that party to undertake a course of education or training

(d) needs and resources of the parties;

(e) all the other circumstances of the case".[558]

Case law has clarified the meaning of section 9(1)(d) (above). For example, in *Sheret v Sheret* the couple lived together only for a year.[559] During the marriage the pursuer was dependent on the defender. The defender argued that the pursuer (wife) had not been dependent on his financial support to a substantial degree. The court accepted that the pursuer was financially dependent during the marriage but it was for a short duration. The pursuer was accordingly entitled only to a payment of £40 per week for 13 weeks to enable her to adjust.

Section 10(1) FLSA 1985 provides that "in applying the principles set out in section 9(1)(a), the net value of the matrimonial property shall be taken to be shared fairly between the parties of the marriage when it is shared equally or in such other proportions as are justified by special circumstances". Net value is then defined under section10 (2) FLSA 1985 as follows:

"The net value of the matrimonial property shall be the value of the property at the relevant date after deduction of any debts incurred by the parties or either of them –

(a) before the marriage so far as they relate to the matrimonial property; and

(b) during the marriage, which are outstanding at that date".

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[558] See FLSA 1985, section 11 (4)(a), (b), (c), (d)&(e).
[559] See *Marianne Sheret* v *Micheal Sheret* 1990 SCLR 799.

The rights of the spouses to matrimonial property and the basis of sharing it fairly are covered under section 9(1)(a) above. Matrimonial property is defined under section 10 FLSA 1985 as per section 10(4) and (5):

> "Subject to subsection 5 below, in this section and in section 11 of this Act, matrimonial property, means all the property belonging to the parties or either of them at the relevant date which was acquired by them or him (otherwise than by way of gift or succession from a third party)-
>
> (a) before the marriage for use by them as a family home or as furniture and plenishings for such home, or
>
> (b) during the marriage but before the relevant date
>
> (5) The portion of any rights or interests of either party-
>
> (a) under a life policy or similar arrangement; and
>
> (b) in any benefits under a pension arrangement which either party has or may have (including such benefits payable in respect of the death of either party), which is referable to the period to which subsection (4)(b) above refers, shall be taken to form part of the matrimonial property".[560]

Under section 10(3) FLSA 1985, the relevant date is when the parties cease to cohabit or when summons in an action for divorce is served, whichever is earlier.[561] The effect of the above law is that all property acquired during the relevant period by either or both spouses, subject to the exception, is included regardless of whether one or both parties had legal title to it in the course of the marriage. In terms of section 10(3A) of the FLSA, when making orders to transfer property under section 8(1)(aa) as discussed above, relevant date means the appropriate valuation date. Appropriate valuation date has been defined as: "where the parties to the marriage or, as the case may be, the partners agree on a date, that date; where there is no such agreement, the date of the making of the order under section 8(1)(aa)".[562] The idea here is that women, who may have acquired nothing during marriage owing to the peculiar constraints they face, are entitled to a share equal to half the property regardless of

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[560] See FLSA 1985, section 10(4)(a)&(b) and 5(a)&(b).
[561] *Ibid.*, section 10(3)(a)&(b).
[562] See section 10(3A)FLSA 1985.

who has acquired it. The other lesson is that, unlike in English law, women are not dependent on judges exercising discretion to determine their entitlement, basing their discretion on "assessments made about their conduct as wives and about their contributions, financial or otherwise, to the marriage".[563] These ideas are in agreement with what the CEDAW Committee has recommended on realizing *de facto* equality between men and women in General Recommendation No 25, specifically that state parties should endeavour "to redistribute resources and power between men and women".[564]

As noted above, section 10(5) FLSA 1985 provides that "the portion of any rights or interest of either party under a life policy or occupational pension scheme, or similar arrangement referable to the period to which subsection 4(b) thereof refers, shall be taken to form part of the matrimonial property".[565] Given the above, the proportion of the policy or pension that accrues during marriage is shared between the spouses. The lesson here is that the inclusion of pension rights as matrimonial property is an acknowledgement that women have a right to share equally in the pension earned by their husband in the course of the marriage, a right that cannot be extinguished by divorce.

The separate marital property rule reflected in subsection (1)(a) of section 24 FLSA 1985 (above), is also subject to many exceptions affecting the occupancy rights granted to spouses under the MHFPSA 1981. There are instructive lessons from this law, for example, under section 1(1) MHFPSA 1981, where one spouse, the entitled spouse, is the owner or the tenant of the matrimonial home, and the other spouse, the non-entitled spouse, is not the owner or tenant. The non-entitled spouse has the following rights: (a) if in occupation, to continue to occupy the matrimonial home; and (b) if not in occupation, to enter into and occupy the matrimonial home.[566]

The matrimonial home is defined as "any house, caravan, houseboat or other structure which has been provided or has been made available by one or both spouses as, or has

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[563] See Anne, "Re-ordering kin: the redistribution of resources on family breakdown" in *Hume Papers on Public Policy* 1999.
[564] See CEDAW General Recommendation No 25 of the 13th Session, 2004.
[565] See FLSA 1985, section 10(5).
[566] See MHFPSA 1981, section 1(1).

become, a family home".[567] It is enough that a house has been acquired with the intention that it should be used as a family home. The couple does not need to have lived there.[568] Furthermore, "for purposes of securing the statutory rights of occupation, a non-entitled spouse has the right, without the consent of the entitled spouse, *inter alia*, to pay rent or mortgage instalments instead of the entitled spouse, and to carry out essential repairs".[569]

Under section 4 MHFPSA 1981, the court has power to exclude either spouse from the matrimonial home. The order may be sought either by the entitled or non-entitled spouse. Under section 4 (2) MHFPSA 1981, it is mandatory for courts to "make an exclusion order if it appears to court that the making of an order is necessary for the protection of the applicant, or any child of the family from any conduct or reasonably apprehended conduct of a non-applicant spouse injurious to the physical or mental health of the applicant or child". Section 4(1) provides that "an application for an exclusion order can be made, whether or not that spouse, the applicant, is in occupation at the time of the application".[570]

A non-entitled spouse's statutory rights of occupation are not affected by the entitled spouse's dealing with the property, as this is catered for under section 6(1) MHFPSA 1981. This protection in terms of section 6(2)(a) and (b) thereof does not apply, however, "where the entitled spouse occupies the home by permission of a third party or shares the occupation of the home with a third party".

Dealings include "the grant of heritable security over the home".[571] Therefore, while the entitled spouse may sell the matrimonial home, the purchaser will take the property subject to the non-entitled spouse's statutory rights of occupation. This is so unless she or he has renounced in writing her/his statutory right.[572]

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[567] See MHFPSA 1981, section 22.

[568] See Thomson, *Family Law in Scotland,* 4th edition, 89.
[569] See MHFPSA 1981, section 2.
[570] See MHFPSA 1981, section 4.
[571] See MHFPSA, section 6(2).
[572] *Ibid.,* section 6(3)(a)(ii).

Sections 3(3) and 19 MHFPSA 1981 regulate the situation where both spouses own the matrimonial home in common and one wants to sell. Section 19 MHFPSA 1981 gives courts the discretion to refuse to grant a decree to a party to sell his/her share of the matrimonial home that is owned in common. According to section 19(1)(a) and (b) MHFPSA 1981, the court has discretion, after having regard to the circumstances of the case, to refuse the granting of the said decree or only to grant the decree subject to, among others, the conditions set out in section 3(3)(a)-(d) of the Act. Under section 3(3) MHFPSA 1981 the court is obliged to regulate spouse's rights of occupancy and make:

> "Orders as appear just and reasonable having regard to all circumstances of the case including
>
> (a) the conduct of the spouses in relation to each other or otherwise;
>
> (b) the respective needs and financial resources of the spouses;
>
> (c) the needs of any child of the family;
>
> (d) the extent if any to which-
>
> (i) the matrimonial home; and (ii) in relation only to an order under subsection (2) above, any item of furniture and plenishings referred to in that subsection, is used in connection with a trade, business or profession of either spouse; and
>
> (e) whether the entitled spouse offers or has offered to make available to the non-entitled spouse any suitable alternative accommodation".[573]

As regards tenancies, under section 13(1) MHFPSA 1981, the court may on the application of a non entitled spouse make an order transferring the tenancy of a matrimonial home to the applicant spouse and provide for the payment by the non-entitled spouse to the entitled spouse of such compensation as seems just and reasonable. In implementing section 13(1) of the MHFPSA, the court considers the factors in section 3(3) of the MHFPSA 1981 set out above. Thomson clarifies that "an order granting an application under section 13(1) MHFPSA 1981 can be made on granting a decree of divorce or nullity of marriage declaration".[574]

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[573]Section 3(3) MHFPSA 1981.

[574] See Thomson, *Family Law in Scotland,* 4th edition, 101.

Section 13(9) MHFPSA 1981 provides that "where both spouses are joint or common tenants of a matrimonial home, the court may, on the application of one of the spouses, make an order vesting the tenancy in that spouse providing payment by the applicant to the other spouse of such compensation as seems just and reasonable"
Another method of promoting women's property rights in Scotland, worth emulation in Uganda, is the issuance of matrimonial interdicts. By section 14(2) MHFPSA 1981, matrimonial interdict includes interdicts which "prohibit a spouse from entering or remaining in a matrimonial home or in a specified area in the vicinity of the matrimonial home". Thomson explains that:

> "Where an entitled spouse seeks a section 14(2)(b) interdict, to exclude a non-entitled spouse from the home, the interdict is used to protect the applicant's proprietary rights. Where both spouses are entitled, neither can obtain an interdict under section 14(2) (b) of the MHFPSA 1981 excluding the other from the matrimonial home, in which case he or she has a one-half *pro indiviso* share. Accordingly, in situations of this nature, recourse must be had to exclusion orders under section 4 MHFPSA 1981."[575]

Section 4 MHFPSA 1981 provides that "where there is an entitled and non-entitled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse may apply to the court for an order suspending the occupancy rights of the other spouse in the matrimonial home". A court will issue an exclusion order if it is necessary to protect the applicant or any child of the family from conduct injurious to their health.[576]

Women's rights to property are also protected under the Mortgage Rights (Scotland) Act 2001. It provides in section 1(1) and (2) that "the non-entitled spouse of the debtor if the property is a matrimonial home and the sole or main residence of the non-entitled spouse when the debtor's land is residential property, may seek a court order suspending the enforcement of the creditor's rights".[577] Thomson notes that the purpose of the above law is "to ensure that where a house is being acquired on a

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[575] *Ibid.*, 104.
[576] Section 4(2) MHFPSA 1981 at http://www.westlaw.co.uk. Accessed 30 November 2005.
[577] Mortgage Rights (Scotland) Act 2001 asp 11 at http://www.westlaw.co.uk. Accessed 30 November 2005.

mortgage, the debtor and his family are given protection from eviction in the event of the debtor's default in the payment of instalments".[578]

To sum up, the message from Scotland is that although marriage per se affects neither the rights of the spouses to their property nor their legal capacity, in terms of the FLSA 1985 spouses are compensated for the economic sacrifices they make. One of the objectives of the FLSA 1985 is, as discussed, the protection of women who devote time and effort to housekeeping and rearing children during marriage and by so doing give up well paid jobs as well as damage their future career prospects. The FLSA 1985 is a commendable blow to the rigours women encounter under a separate property regime. Overall, there has been a progressive change in the married women's rights to property as a result of the FLSA 1985 and the protection afforded under the MHFPSA 1981.

5.2.1 Unsatisfactory aspects of the laws regulating the Scots separate property marital regime subject to redistribution by court

Widening the definition of the couple's resources, as has been done under section 27(1) FLSA 1985 (above), is laudable but problematic as well; bank accounts and real estates are easy to evaluate, pension rights are less so. Clarke notes that "the future earnings of a husband who divorces while in the early stages of a professional career are difficult to predict with accuracy".[579] Taking pension sharing as an example, he observes that although pension rights "can in most cases be valued as matrimonial property, the pension will not have reached maturity and it may be many years before any funds are due to be paid out". Courts are, therefore, faced with the difficulty of equitably sharing the value of an asset, which does not exist in liquid form.[580] Inevitably wives may find that they are being awarded less than 50% of the value of pension rights and even as little as one third.[581] These are the concerns Uganda needs to be wary of, as it seeks reform ideas.

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[578] See Thomson, *Family Law in Scotland*, 4th edition, 108.
[579] See Clark Simon, "Property rights and the economics of divorce" in *Hume Papers on Public Policy 1999*, Volume 9, Issue 2, who discusses the challenges of sharing pension.
[580] *Ibid.*
[581] See Anne, "Re-ordering kin: the redistribution of resources on family breakdown" in *Hume Papers on Public Policy 1999.*

Thomson observes that "although section 9(1)(b) FLSA 1985 (above) was intended to recognize the economic contribution of non-earning wives and mothers, in practice it has not worked".[582] He explains that this is because of two reasons:

> "it is hard to quantify unpaid services such as housekeeping and child care and these may be set against the wife's alimentation by her husband during the marriage; and only capital sum payments and/or transfer of property orders are available under this principle, and many husbands have no capital assets".[583]

Implicitly unless she has the good fortune to have married a wealthy man, a woman is unlikely to profit from divorce and, especially if she has children, she is likely to lose by a marriage that ends in divorce. Free childcare as well as access to adequately paid employment is still needed to alleviate married women from the harsh consequences of divorce.

Although equal sharing is the norm under the FLSA 1985, there are circumstances that call for variations of equal sharing. The special circumstances in question have been set out in section 10(6) FLSA 1985 and include: "the terms of any agreement between the parties on the ownership or division of any matrimonial property; the source of the funds or assets used to acquire any of the matrimonial property where those assets were not derived from the income or efforts of the parties during the marriage; and any destruction, dissipation or alienation of property by either party".[584] On the basis of section 10(6) FLSA 1985 reaching consensus has been encouraged. Griffith notes that "couples may reach their own agreements on matters of aliment, childcare and distribution of their property".[585] These agreements, called minutes of Agreements and Joint Minutes of Agreements, account for a number of divorces in any year.[586] However, "such agreements, generally provide for the transfer of a share representing half of the matrimonial property to the parent with care of children, usually the mother; but, they rarely provide for her to receive periodical allowances or a capital payments to reflect her share of the pension rights that form part of

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[582] See Thomson, *Family Law in Scotland*, 4th edition, 159.
[583] *Ibid.*
[584] See FLSA 1985, section 10(6)(a), (b), (c), (d)&(e).
[585] See Anne, "Re-ordering kin: the redistribution of resources on family breakdown" in *Hume Papers on Public Policy 1999.* Her findings are to this effect.
[586] Ibid.

matrimonial property".[587] Some women, therefore, find themselves in possession of capital assets but low on income coming into the household even when the former husband is paying child support.[588]

The rationale of the above agreements is that the parties are empowered, but in practice women rarely have the same economic and social bargaining power as men. In the case of *Cornelius McAfee v Margaret McAfee* in an action for divorce, the defender sought an order to vary an agreement between the parties.[589] It was pleaded that there had been external pressure operating prior to the signing of the agreement. The defender claimed that she had been unable to secure finance from their bank or building societies in order to continue supporting herself and the children (owing to the pursuer's actions). It was in such circumstances that she signed an agreement discharging her right to claim a capital sum from the pursuer. Court allowed proof of the defender's averments.

5.3 The strengths and weaknesses of Scots law and institutions regulating intestate succession

The admirable idea in Scots law of intestate succession, worth adoption by Uganda, is that of fixed rights of surviving spouses and children to property of the deceased. These are the protected legal rights referred to in the Succession (Scotland) Act 1964 (hereinafter called SSA 1964)[590] available in both testate and intestate succession. The setback, however, is that legal rights are exigible only out of moveables.[591] Moreover, it is possible to defeat claims for legal shares by *inter vivos* gifts. Unlike the English,[592] the Scots law of succession only regulates succession to property left by the deceased at death and does not interfere with what one does with his property during his life. Although the Scottish Law Commission considered measures to counteract lifetime transactions, designed to avoid or reduce the impact of legal shares, it unfortunately concluded that "it was not desirable to introduce antiavoidance

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[587] *Ibid.*
[588] *Ibid.*
[589] See *Cornelius McAfee* v *Margaret McAfee* 1990 SCLR 805 at http://www.westlaw.co.uk. Accessed 30 November 2005.
[590] See SSA 1964 at http://www.westlaw.co.uk. Accessed 30 November 2005.
[591] See Report on Succession, (Scottish Law Commission, Scot Law Com 124), (Edinburgh, 1990), 3.
[592] See The Inheritance (Provision for Family and Dependants Act) 1975 discussed in Chapter Four.

measures".[593] It was also feared that "this would unnecessarily complicate the law and the administration of justice".[594] The point is that the above inadequacies need to be addressed before Uganda can safely emulate the Scots law of succession regulating moveable property. The CEDAW Committee in General Recommendation No 21 at paragraph 35, has clarified that "the inheritance rights for widows must reflect the principle of equal ownership of property acquired during the marriage".[595] In other words, there is need to look at property rights, interests and assets transferred otherwise than by succession and how these impact on what is available for sharing at the demise of the property owner.

Succession to agricultural land is covered under section 29(1) and (2), part VI of the SSA 1964. With regard to heritable property, particularly agricultural property, there are no claims for legal rights; this is based on the desire to maintain heritages as a single unit for economic viability.[596] Scotland, however, has made fundamental changes with regard to agricultural land and land related issues. Separate statutes regulate agricultural land and tenancies. There are at least three other main statutes to consider in detail if one is to discuss land rights in Scotland: the Abolition of Feudal Tenure etc (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003, and the Land Reform (Scotland) Act 2003. The novelty in land reform has been the introduction of communities' rights to buy land, though this has not been without controversy. Given the multiplicity of laws and media debates around land related issues, there will be no more discussion of the same in the present study.

In Scotland, the order of estate distribution commences with the payment of debts, then prior rights and then legal rights and finally deals with the free estate.[597] Macdonald notes that "because some rights are exigible from heritage and others from moveables, the deceased's heritage and moveables must be quantified separately until after the realization of legal rights".[598] The order is as follows:

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[593] See Report on Succession, (Scottish Law Commission), 37.
[594] *Ibid.*
[595] See CEDAW Committee General Recommendation No 21 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 9 October 2005.
[596] See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 22/3.
[597] *Ibid.*, 30.
[598] See D.R Macdonald, *Succession, 3rd edition,* (Edinburgh, 2001), 34/5.

"(a) Payment of debts;

(b) Prior rights; right to dwelling house as per section 8(1);

(c) Prior rights; furniture and plenishings as per section 8(3);

(d) Prior right; right to cash as per section 9;

(e) Legal rights; and

Free estate as per section 2 of the Succession (Scotland) Act that regulates succession to intestate estates".[599]

The SSA 1964 refers to prior rights of a surviving spouse whether the deceased passes away with or without issue. These prior rights to a house, furniture and plenishings and to a sum of money are set out in sections 8 and 9 of the SSA 1964.[600]

The SSA 1964 favours a surviving spouse with regard to prior rights over the house. Under section 8(1), " the law provides the surviving spouse with two separate rights: firstly, a right to the intestate's interest in the dwelling house, and secondly, a right to her or his furniture and plenishings. The above rights can be claimed independently of each other".[601] The first prior right of a surviving spouse is to the dwelling house of the intestate and in all cases the extent of the right is limited to a statutorily prescribed value of £300,000. However, before the right is claimed certain tests of eligibility must be met. Hiram notes that "firstly, there must be a dwelling house as defined in the SSA 1964.[602] Secondly, the intestate must have had a relevant interest in it: he must have been the owner or tenant. Thus, if the tenancy was worded to end with his death there is no interest for the spouse to inherit. Thirdly, the surviving spouse must have been ordinarily resident in the house at the date of the intestate's death."[603]

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[599] *Ibid.* , 35.

[600] The Prior Rights of Surviving Spouses (Scotland) Order 2005, No 252 updated the amounts of prior rights with effect from 1st June 2005. See http://www.opsi.gov.uk/legislation/scotland/ssi2005/20050252.htm Accessed 30 January 2006.

[601] See Hiram, *The Scots Law of Succession,* 112-113.

[602] SSA 1964, section 8(6)(a) defines a dwelling house to include "a part of a building occupied at the date of death of the intestate as a separate dwelling". It includes "any garden or portion of ground attached to, and usually occupied with, the dwelling house or otherwise required for the amenity or convenience of the dwelling house".

[603] See Hiram, *The Scots Law of Succession*, 115.

Meston clarifies that:

> "Section 8 of the SSA 1964 is the most important to surviving spouses, especially widows; the prior right, which it creates, was an improvement in the position of the surviving spouse and the purpose is to ensure that a surviving spouse can live undisturbed in the house which he or she has been occupying, and can retain the furniture and plenishings of that house".[604]

The right to a tenant's interests, as illustrated hereunder, is severely restricted.[605] The relevant provision of section 8(6)(d) SSA 1964 prescribes that:

> "8(6)(d) relevant interest, in relation to a dwelling house, means the interest therein of an owner, or the interest therein of a tenant, subject in either case to any heritable debt secured over the interest; and for the purpose of this definition "tenant" means a tenant under a tenancy or lease (whether of the dwelling house alone or of the dwelling house together with other subjects) which is not a tenancy to which the Rent Acts 1971-74 apply".

The other prior rights prescribed by the SSA 1964 are to furniture and plenishings under section 8(3) and to a monetary sum in section 9, all of which are also claimed out of the deceased's intestate estate. In terms of section 8(3), "the furniture and plenishings must belong to the deceased and not be a subject of hire purchase".[606] They should also be in the dwelling house "in which the surviving spouse was ordinarily resident at the time of the deceased's death".[607] Although the furniture and plenishings must belong to the deceased, the dwelling house in which they are does not have to.[608]

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[604] See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 155-6 who notes that "the intestate estate from which the prior right to the house is claimed is the whole intestate estate after paying debts and expenses". The house is taken subject to any encumbrances on it.
[605] See Hiram, *The Scots Law of Succession,* 116 who writes that "succession to secure and assured tenancies under the Housing (Scotland) Acts 1987 and 1988 respectively, are excluded because these Acts regulate succession to the tenancies to which they apply".
[606] See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 43.
[607] *Ibid.,* 45.
[608] *Ibid.*, 45.

Section 8(3) and (4) SSA 1964 provide as follows:

> "(3) Where a person dies intestate leaving a spouse, and the intestate estate includes the furniture and plenishings of a dwelling house to which this section applies (whether or not the dwelling house is comprised in the intestate estate), the surviving spouse shall be entitled to receive out of the intestate estate-
>
> (a) where the value of the furniture and plenishings does not exceed £24,000 or such larger amount as may from time to time be fixed by order of the Secretary of State, the whole thereof;
>
> (b) in any other case, such part of the furniture and plenishings, to a value not exceeding £24,000 or such larger amount as may from time to time be fixed by order of the Secretary of State, as may be chosen by the surviving spouse:
>
> Provided that, if the intestate estate comprises the furniture and plenishings of two or more such dwelling houses, this subsection shall have effect only in relation to the furniture and plenishings of such one of them as the surviving spouse may elect for the purpose of this subsection within six months of the date of death of the intestate.
>
> (4) This section applies, in the case of any intestate, to any dwelling house in which the surviving spouse of the intestate was ordinarily resident at the date of death of the intestate".

The effect of sections 8(3) and (4) SSA 1964 is to preserve the moveable estate of the other houses for legal rights and dead's part or intestate estate as defined in section 1 (2) SSA 1964.[609]

Section 1 (2) SSA 1964 provides that:

> "(2) Nothing in this Part of this Act shall affect legal rights or the prior rights of a surviving spouse; and accordingly any reference in this Part of this Act to an intestate estate shall be construed as reference to so much of the

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[609] See Hiram, *The Scots Law of Succession*, 132.

net intestate estate as remains after the satisfaction of those rights, or the proportion thereof properly attributable to the intestate estate".

Furniture and plenishings include "garden effects, domestic animals, linen, glass, books, articles of household use, plated articles, china and prints". The list is not exhaustive; it excludes "animals used at the date of death for business purposes, money, security, heirlooms (which are any articles associated with the intestate family) of such a nature and extent that it ought to pass to some member of the family, other than the surviving spouse".[610]

As stressed, prior rights i.e. right to house, furniture and plenishings and money are only available to a surviving spouse but not to children and come strictly out of the intestate's estate. There is, as noted, a monetary limit upon the right to the dwelling house, which varies by the order of the Secretary of State. According to section 8(1)(b) SSA 1964, presently if the dwelling house exceeds £300,000, the surviving spouse is entitled to that sum instead. This means that not in all cases is a surviving spouse entitled to the transfer of the house itself.[611] The surviving spouse may also be compelled to accept a sum equivalent to the value of the dwelling house and not take the house in cases as set out under section 8(2) SSA 1964. Meston notes that:

"These exceptions arise when in terms of section 8(2)(a) SSA 1964, the dwelling house forms only part of the objects comprised in one tenancy or lease under which the intestate was the tenant. The justification for this restriction could be that the deceased's dwelling house was part of the property over which the landlord may not be in position to grant a separate lease for the surviving spouse".[612]

Furthermore, in terms of section 8(2)(b), a surviving spouse may be denied the house if "the dwelling house forms the whole or part of the subject of an interest comprised in the intestate estate and was used by the intestate for carrying on trade, profession or

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[610] Section 8(6) SSA 1964.
[611] See Hiram, *The Scots Law of Succession*, 121.
[612] See Michael C Meston, *Succession (Scotland) Act*, 5th edition, 42.

occupation, and the value of the estate as a whole would be substantially diminished if the dwelling house were disposed of otherwise than with the assets of the trade."[613]

As noted, under section 8(1) SSA 1964, when the estate comprises two or more interests in qualifying houses, the surviving spouse has six months from the date of death of the intestate in which to elect which house he or she wishes to take, although this presupposes that the surviving spouse was actually ordinarily resident in both houses at the time of the deceased's death.[614] From the foregoing it follows that for spouses who are separated judicially as well as those who have otherwise separated, the surviving spouse's prior rights to the house under section 8(1) SSA 1964 may be defeated by reason of lack of ordinary residence.

Section 9 (1) SSA 1964 provides that:

> "(1) Where a person dies intestate and is survived by a husband or wife, the surviving spouse shall be entitled to receive out of the intestate estate-
>
> (a) if the intestate is survived by issue, the sum of £42,000 or such larger amount as may from time to time be fixed by order of the Secretary of State, or
>
> (b) if the intestate is not survived by issue, the sum of £75,000 or such larger amount as may from time to time be fixed by order of the Secretary of State, together with, in either case, interest at the rate of 7 percent per anum or at such a rate as may from time to time be fixed by order of the Secretary of State on such sum from the date of the intestate's death until payment:
>
> Provided that where the surviving spouse is entitled to receive a legacy out of the estate of the intestate (other than a legacy of any dwelling house to which the last foregoing section applies or of any furniture and plenishings of any such dwelling house), he or she shall, unless he or she renounces the legacy, be entitled under this subsection to receive only such sum, if any, as remains after deducting from the sum fixed by virtue of paragraph

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[613] See SSA 1964, section 8(2)(b).
[614] See DR Macdonald, *Succession,* 3rd edition, (Edinburgh, 2001), 35.

(a) of this subsection or the sum fixed by virtue of paragraph (b) of this subsection, as the case may be, the amount or value of the legacy".

According to the above, the surviving spouse is entitled to a prior right of cash in terms of section 9(1). This money is available after satisfaction of debts and section 8 prior rights. The surviving spouse must also receive interest on the cash from the date of death until actual payment. In terms of section 9(2) SSA 1964, where the estate is worth less than the relevant sum, "the surviving spouse is entitled to the whole of the estate" and, as stressed, where the surviving spouse has a right to the whole of the intestate estate, he or she has the right to be appointed executor.[615] All the prior rights are independent of each other, implying that what the spouse gets depends on what mix of assets was in the estate.

Although the children reduce the surviving spouse's cash entitlement where they exist, they themselves have no rights of this kind at all. In terms of section 9(2) SSA 1964 "where the estate is unable to satisfy the spouse's cash claims, she takes all and therefore no estate remains on which the children's rights could operate".[616] Legal rights are postponed in favour of prior rights. It follows that children's entitlement by way of *legitim* is only a right to so much of the net moveable estate as remains after the widow's prior rights have been settled. It also means that "a man wishing to favour his wife against his children is better dying off intestate".[617] It also follows that generally under this law, a stepmother not related to the children, and surviving as a spouse, benefits more from the estate than the children of the intestate.

Hiram notes that "a person who takes legal rights cannot persist on delivery of any particular item of moveable property since the right is a personal right against the executor to a share in the value of the whole moveable estate and not an actual right to the property itself ".[618] In other words, "the claimant's right is to cash and not to particular assets from the estate".[619] The executor "can hand over assets, but failing agreement among all concerned, he can sell and transfer the proceeds; but if the assets

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[615] See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 48.
[616] *Ibid.,* 49.
[617] *Ibid.*
[618] See Hiram, *The Scots Law of Succession*, 81.
[619] *Ibid.*

fetch more than their death value, the right must be revalued and a capital gains tax may be due".[620]

The law on intestate succession recognizes the claims of someone who had cohabited with the deceased as husband and wife before his death, without being legally married to him. Upon the surviving cohabitant applying for provision, the court considers all the circumstances of the case including "the size and nature of the deceased's net estate, any benefits received or to be received by the applicant as a result of the deceased's death and the nature and extent of any other claims on the deceased's net estate".[621]

Under section 9(1) SSA 1964, when a surviving spouse has been bequeathed a legacy, the amount of that legacy is to be deducted from the sum which the spouse would have received otherwise under section 9(1)(a) or (b) SSA 1964 that relate to cash entitlement.[622] Under section 9(4) SSA 1964, a surviving spouse has a right to become the executor where she or he has taken the whole of the intestate's estate under section 9(2). Section 9(2) and (1) SSA 1964, as noted, relate to entitlement to financial provision on intestacy. Otherwise in terms of section 14 SSA 1964, all property heritable and moveable vests in the executor by virtue of confirmation for administration and disposal.

Whereas there is, as illustrated above, a prior right to a house, it is still possible to defeat it where the title is held in the deceased's name, for example in the husband's name alone, and he has bequeathed the house to other people by will. It is also possible for such a husband to give away the house as a gift *inter vivos* and probably also the furniture and plenishings therein, effectively defeating the surviving spouse's prior rights.[623] It is also possible for one to convert one's estate into heritable and pass away testate having bequeathed it elsewhere. Hiram explains that "the main purpose

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[620] See DR Macdonald, *Succession,* 3rd edition, 38.

[621] See FLSA 2006, section 29 at http://.www.westlaw.co.uk that allow courts to "make provision on intestacy for surviving cohabitants". Under section 29(2), court "may order payment to the surviving cohabitant out of the deceased's net estate of a capital sum, and or a property transfer (whether heritable or moveable)" and so forth. The problem is that the law is discretionary. Better is a law that gives cohabitants automatic entitlements like married couples.

[622] See Michael C Meston, *Succession (Scotland) Act,* 5th edition 47.

[623] See Hiram, *The Scots Law of Succession,* 58.

of the Matrimonial Homes Family Protection Scotland Acts (above discussed) is to give occupancy rights to non-entitled spouses who do not own a share in the matrimonial home; but occupancy rights terminate on the death of the entitled spouse."[624] These are weaknesses as far as rights of spouses to matrimonial homes in Scotland are concerned. In practice the surviving spouse is not as secure as in England because in Scotland there is a tendency for dwelling houses, where the couple reside, to be owned in common. In England, under joint ownership, none has a separate interest but they share the item *pro indiviso* meaning that none can sell the property *inter vivos* nor dispose of it by testamentary disposition; when one dies the share accrues to the surviving spouse. This is better security for wives than when the property is owned in common, under which each holds a *pro indiviso* share with which he has free ability to deal, including the right to sell one's portion of the property and dispose of it by will.

Hiram explains that "a special destination is a clause inserted into a document of title that specifies by whom the property is to be taken on the death of the owner. It ensures that the property does not fall into the deceased's estate".[625] In Scotland, heritable property between the spouses is in the majority of cases the matrimonial home but even this can be a subject of special destinations as are moveables.[626] Where a husband dies intestate, leaving behind heritage containing a special destination to a third party that has not been revoked, his wife, executors or representatives would not treat such heritage as part of his intestate estate.[627] A surviving spouse can, therefore, be a victim of a reckless husband who arranges his financial affairs in such a way as to leave her inadequately provided for, by giving away his property *inter vivos* with the result that property at death does not reflect his wealth during marriage. For example, the husband could live with his wife in a house over which he has made a special destination to another person. Presently section 18(2) SSA 1964 provides that:

> "On the death of a person entitled to any heritable property subject to a special destination in favour of some other person, being a destination which the

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[624] *Ibid.*
[625] *Ibid.*, 171 who notes that " special destinations are special because they relate only to a specific item of the property that forms the subject of the destination".
[626] See Macdonald, *Succession*, 3rd edition, 46.
[627] See SSA 1964, section 36(2)(a).

deceased could not competently have, or in fact has not, evacuated by testamentary disposition or otherwise, the property shall, if the executor of the deceased is confirmed thereto, vest in the executor for the purpose of enabling it to be conveyed to the person next entitled thereto under the destination (if such conveyance is necessary) and for that purpose only".

The executor is, therefore, empowered to confirm the subject matter to which the destination relates in order to transfer it to the party entitled to it in terms of the destination if granting of the title is necessary.[628] The necessity for section 18(2) above cannot be divorced from section 36(2)(a) SSA 1964 which provides that:

" (2) Any reference in this Act to the estate of a deceased person shall, unless the context otherwise requires, be construed as a reference to the whole estate, whether heritable or moveable, or partly heritable and partly moveable, belonging to the deceased at the time of his death or over which the deceased had a power of appointment and, where the deceased immediately before his death held the interest of a tenant under a tenancy or lease which was not expressed to expire on his death, includes that interest:

Provided that:

(a) where any heritable property belonging to a deceased person at the date of his death is subject to a special destination in favour of any person, the property shall not be treated for the purpose of this Act as part of the estate of the deceased unless the destination is one which could competently be, and has in fact been, evacuated by the deceased by testamentary disposition or otherwise; and in that case the property shall be treated for the purpose of this Act as if it were part of the deceased's estate on which he tested."

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[628]See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 123.

Section 31(1)(a) SSA 1964 prescribes that:

> "Where two persons have died in circumstances indicating that they died simultaneously or rendering it uncertain which of them survived the other, then, for all purposes affecting title or succession to property or claims to legal rights or the prior rights of a surviving spouse, where the persons were husband and wife, it shall be presumed that neither survived the other".

Meston explains that "this treatment for spouses who have died in a common calamity is intended to avoid a situation in which the estate of the elder spouse would pass to the younger by virtue of the presumption and then to the younger spouse's relatives to the exclusion of the elder spouse's relatives."[629] Otherwise, the general rule in section 31(1)(b) SSA 1964 is that "the younger is presumed to have survived the elder for all purposes of succession".

The above constitutes the legal framework under which property rights of surviving spouses are protected under the law of intestate succession in Scotland. What makes Scots law a useful source of ideas for Uganda is the statutorily imposed scheme of property devolution on intestacy, which appears to be more generous to widows/widowers than what they would otherwise get under a will through which their spouse is free to dispose as she/he wishes her/his heritable property and one third or one half, as the case may be, of her/his moveable estate.[630] The spouse though retains, as stressed above, the right to die testate or intestate.

Hiram notes that an estate may become artificially or partially artificially intestate on two conditions. Firstly, if the deceased has made a will but it is, on whatever grounds, "wholly or partially invalid, the estate will fall to be distributed according to the relevant provisions of the SSA 1964."[631] Secondly, artificial intestacy may also result "where a beneficiary renounces a legacy in order to claim legal rights; the legacy will fall into intestacy unless there is a residuary legatee."[632] One other ground for artificial intestacy is that "there has been a rational calculation on the part of the

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[629] See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 24.
[630] *Ibid.*, 53
[631] See Hiram, *The Scots Law of Succession,* 145.
[632] *Ibid.*

surviving spouse who is the main or only beneficiary under a will. The said spouse renounces her or his benefits under the will in order to obtain greater benefits from intestacy by excluding claims for *legitim* by the children of the deceased."[633]

5.4 The strengths and weakness of Scots law and institutions regulating testate succession

Scots law confers certain entitlements on intestacy as well as restricting the freedom of a testator to dispose of his or her estate as he or she wishes. Under the law, the surviving spouse has "a legal right (*jus relictae* for a wife or *jus relicti* for a husband) to a third of the deceased's moveable estate, if there are surviving issue of the deceased; or one half if there are no issue surviving."[634] The children of the deceased have "a legal right (*legitim*) to a third of the deceased's moveable estate, if there is a surviving spouse or one half if there is no surviving spouse."[635] If a child has predeceased the deceased leaving issue, the issue are entitled to the share of *legitim* the child would have taken had he survived.[636] The phenomenon of legal rights "operates as a control to testamentary freedom".[637]

Gloag and Henderson have clarified that:

> "Legal rights are not strictly rights of succession but rather are claims in the nature of debts due from the deceased's estate. The claimants cannot, however, compete with creditors of the deceased; their claims attach to the free moveable estate remaining after these debts have been met, and in a case of intestacy, after satisfaction of the prior rights of a surviving spouse. The spouse, parent or grandparent, as the case may be, remains free to deal with his property in his lifetime and may

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[633] *Ibid.* She notes that "for the intestacy to be complete the beneficiary must be a universal legatee so that, there being no other beneficiary the only possible out come of renunciation can be complete artificial intestacy".
[634] See Macdonald, *Succession*, 3rd edition,38.
[635] *Ibid.*, See also SSA 1964, section 2.
[636] See Michael C Meston, *Succession (Scotland) Act*, 5th edition, 57.
[637] *Ibid.*, 64.

> defeat or diminish the claims on his moveable estate by converting it in whole or in part to heritage".[638]

In testate succession legal rights may arise only when the terms of the will are rejected by the widow and the children, or where the testator has made no provision for them or her.[639] Meston clarifies that the "power to bypass the testator's will is usually exercised when the legal rights are more beneficial than the provisions made in the will."[640] Where some children reject their provision in the will and the widow does the same, a partial or total intestacy in terms of section 36 SSA 1964 is created; when this happens, the widow gains, given that by virtue of her entitlement to prior rights, she may, depending on the size, claim the whole intestate estate under prior rights.

Macdonald notes that "the system of legal rights has many advantages: legal rights are automatic and require no court application to determine one's share in the estate, making the administration of estates easier, unlike in England where discretionary payments require application to the courts."[641] Legal rights are certain and do not take account of the merits and demerits of a particular claimant. It follows that past matrimonial disputes and the spouses' conduct towards each other are not considered, which is in agreement with the principles followed under the FLSA 1985 when sharing property at divorce.

As regards writing wills, Scots law has adopted, since the Requirement of Writing (Scotland) Act 1995, a liberal position towards testamentary documents.[642] They need to be subscribed by the grantor; however, in terms of section 2(4) thereof, other legislation may prescribe different provisions regarding formalities. Meston notes that "under section 2 of the said law validity is achieved merely by the granter subscribing the will without further formality."[643] Section 7 of the Requirement of Writing (Scotland) Act 1995 provides that "a document is subscribed by a grantor if it is

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[638] See Gloag and Henderson, The Law of Scotland, 10th edition,(Edinburgh,1995), par 42.2, p744.
[639] See Michael C Meston, *Succession (Scotland) Act,* 5th edition, 64.
[640] *Ibid.*
[641] See Macdonald, *Succession*, 3rd edition, 38.
[642] See Requirements of Writing (Scotland) Act 1995 c 7 at http://.www.westlaw.co.uk . Accessed 30 November 2005.
[643] Michael C Meston, *Succession (Scotland) Act,* 5th edition, 87.

signed by him at the last page excluding annexations". Meston clarifies that "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 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".[644] Under section 3 (7)(a) and (b) of the Requirement of Writing (Scotland) Act 1995 the witness should "either see the testator subscribing the will or the granter should acknowledge his subscription to the witness".[645] In comparison, according to Ugandan law a will is invalid without two witnesses. The point is that Scots legal regulations for the execution of wills appear less demanding than the relevant laws of Uganda.

To sum up, at Scots law even if there is a will, and the husband leaves nothing to his wife and/or children, if the deceased has no children the widow has a legal right to half her husband's free moveable estate but not to heritable property.[646] If the deceased has children, legitimate or illegitimate, she has a legal right to one-third of his free moveable estate, and the children jointly have a similar right to one-third of the free moveable estate. If there are only surviving children, they have a right jointly to half the free moveable estate.[647] The husband can, by will, leave the remaining free moveable estate and all heritable property to whomever he wishes. Furthermore, he can deprive his widow and/or children further by having converted all his free moveable estate into heritable property, by selling assets in order to buy another house, or by legitimately transferring all his free moveable estate to a third party in his lifetime, and leaving his heritable property to whomever he wishes. A will cannot be set aside by an aggrieved spouse with the aim of taking prior rights in lieu of the provisions thereof; only out of the intestate estate, "such as undisposed of by testamentary disposition" according to section 36(1) SSA 1964, are prior rights exigible.[648]

As regards reforming the Scots law of succession, the Scottish Law Commission has proposed the abolition of prior rights, replacing legal rights with a new system of

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[644] *Ibid.*, 88.
[645] See Requirements of Writing (Scotland) Act 1995, section 3 (7).
[646] Michael C Meston, *Succession (Scotland) Act*, 5th edition, 65.
[647] See Macdonald, *Succession*, 3rd edition, 38.
[648] *Ibid.*, 35.

legal shares and largely abolishing the distinction between moveable and heritable property.[649]

5.5 Further ideas from Scotland relevant to women's rights to property.

There are lessons for Uganda to learn from the recent Scots family law reforms whereby proprietary rights of women in cohabitation have been improved. The FLSA 2006 creates for cohabitants "a rebuttable presumption of equal shares in household goods".[650] Section 26(2) FLSA 2006 provides that "it shall be presumed that each cohabitant has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation". Section 26 (4) defines household goods as "any goods (including decorative or ornamental goods) kept or used at any time during the cohabitation in any residence in which the cohabitants are (or were) cohabiting for their joint domestic purposes, excluding money, securities, any motor car, caravan or other road vehicle, or any domestic animal". The presumption of equal shares in money and property derived from housekeeping or similar allowance in section 26 FLSA 1985 applies to cohabitants.[651]

The relevancy of the above provisions is that unmarried cohabitants, as much as married couples, set up home with a range of possessions for the use of themselves and any children as part of the same household. It is, therefore, progressive to enact laws that confer some rights to the unmarried; it complies with the protection that the CEDAW requires State parties to accord to all women, married or in cohabitation.[652] In comparison, Ugandan state-made family law does not protect rights of women in cohabitation.

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[649] See Draft Succession (Scotland) Bill clause 1(2)(a) in the 1990 Report on Succession (Scottish Law Commission).

[650] Under FLSA 2006, section 25 the status of cohabitant is not automatic: "court must determine if one was a cohabitant by having regard to: the length of the period the two people have been living together; the nature of their relationship during that period; and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period".

[651] See FLSA 2006, section 27.

[652] See CEDAW Committee General Recommendation No 21 at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 9 October 2005.

Where a cohabitation has terminated otherwise than by death, "a former cohabitant may apply, within one year after the end of the cohabitation, to a court for financial provision".[653] This provision has probably been modelled on the principle in section 9(1)(b) FLSA 1985 that "fair account be taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of any child of the family". This provision will cater for the situation where a partner, who has given up working either to care for the children of the relationship or other dependant relatives or to maintain the household in the interests of the other partner's career, may suffer financially when the relationship comes to an end.

Where a cohabitation is terminated by death, the surviving cohabitant has no automatic rights of intestate succession, the basis on which an estate is divided up when the deceased did not leave a valid will or fixed rights to a legal share of the deceased's estate; but she or he may apply to a court for provision out of the deceased's estate.[654] Section 29(4) FLSA 2006 provides that "an order or interim order under subsection (2) shall not have the effect of awarding to the survivor an amount which would exceed the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased".

The FLSA 2006 extends matrimonial interdicts beyond the matrimonial home to include an applicant's place of work, home or school.[655] The aim of this measure is to improve the protection offered to members of families.

The other import of the FLSA 2006 is that it has reformed the FLSA 1985; it gives courts jurisdiction, hitherto lacking, to take account of any changes in the value of the jointly owned assets between the relevant date and the date of the proof or settlement.[656] This means all property acquired during the marriage up to the relevant date when the parties separate is valued. When the law gives courts mandate to

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[653] See FLSA 2006, section 28.

[654] *Ibid.*, section 29.
[655] *Ibid.*, section 10.
[656] S 16 FLSA 2006 at http://.www.westlaw.co.uk Accessed 10 May 2006.

ascertain and distribute between the parties, changes in the value of jointly owned property, the reforms favour homemaker spouses.

As regards reform of the institutions that implement the law in Scotland, the current court system has been criticised as inappropriately adversarial, costly and old-fashioned for dealing with family law situations.[657] There have been recommendations for the introduction of "family courts that would be less formal and less confrontational".[658] The lesson for Uganda is that it needs to consider establishing family courts and also adopt non-adversarial procedures.

With the above lessons in mind, it is now necessary to seek reform ideas from South Africa.

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[657] There is concern over the cost of taking cases to court with suspicion that there are financial motives for some professionals in dragging cases. See Journal of Scotland on line at http://www.journalonline.co.uk/news/1002727.aspx of 2 February 2006.Campaigners for reform believe that "allowing people other than lawyers the right to represent clients in court will bring down the costs of legal fees".

[658] See Scottish Executive Publication, *Improving Family Law in Scotland: Analysis of Written Consultation Response, at* http://www.scotland.gov.uk/Publications/2004/10/20057/44653. Accessed 20 November 2005.

Chapter Six

6.0 Introductory comment on the South African laws of marriage, divorce and succession

Concerning propositions to improve women's rights to property under Uganda's laws of marriage and succession, the South African jurisdiction offers invaluable lessons.[659] Since the demise of apartheid, South Africa is transforming in accordance with her Constitution of 1996 (Constitution), and reforms in the laws of marriage and succession to emancipate all her people constitute a crucial aspect of this process. The reasons for reforms in the said laws are twofold: (i) to ensure that the statutory, religious and customary laws of marriages and related matters are compliant with the Bill of Rights in the Constitution; (ii) to ensure that religious and customary laws hitherto denied state recognition under the apartheid era are recognized as equals with state-made laws.[660]

The strengths and weaknesses of the South African law reform endeavours shall be examined fully below after discussing the historical development of women's rights to property in marriage, upon divorce and death of a spouse.

As South Africa is a multiethnic society, the present Chapter cannot cover all the communities, but will be biased towards black women who constitute the majority and are reported to have suffercd most under both the patriarchal customary laws and the era of apartheid.[661]

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[659] The purpose of seeking ideas from South Africa is to reform women's rights to property in marriage, upon divorce and death of a spouse, and enable Uganda achieve compliance with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

[660] See NJJ Olivier et al, " Indigenous Law" in W. A. Joubert et al (ed), *The Law of South Africa*, First Reissue, Volume 32, (Durban, 2004), paragraphs 26 and 35, pp30, 31and 44. The contributors note that "Roman–Dutch and customary laws are now treated as equal partners and recognition of customary law may be claimed basing on the right to culture provided for under sections 30 and 31 of the Constitution". Section 211(3) of the Constitution provides that "all courts must apply customary law where appropriate, subject to the Constitution and legislation that deal in particular with customary law".

[661] See Sisoke Msimang, "Affirmative action in the new South Africa: the politics of representation, law and equity" at http://www.isiswomen.org/wia100/hum0016.html who writes that "black women were the most disadvantaged during the apartheid era". Accessed 20 November 2005.

South Africa is a hybrid legal system, a mix of English common law and civilian Roman-Dutch legal principles.[662] It has been selected for study because it avails an alternative method of protecting women's rights to property in marriage, upon divorce and death of a spouse. As shall be discussed hereafter South Africa has also strived more than Uganda in making customary and Islamic family laws compliant with her Constitution.[663]

6.1 Historical development of women's rights to property in marriage, upon divorce and upon the death of a spouse in South Africa

In South Africa, the subordination of black women's rights to property under both the state-made and non-state-made laws of succession is not ahistorical. Colonialism and the policy of apartheid had a role to play in subordinating black people. It is not surprising that although most people in South Africa are not of a European ancestry, "the country's formal legal system is dominated by a European heritage".[664] It is also not strange that although the state-made laws, compared with customary and religious laws, are more protective of women's rights to property, black people were excluded from their normative influences. For example, the provisions of the Marriage Act, 1961(Act No 25 of 1961) were only extended to the whole of South Africa in 1997.[665] This Marriage Act, Extension Act No 50 of 1997, came into operation on 27th April 1997.[666] Clearly the unsatisfactory situation of black women's rights to property in marriage, upon divorce and upon the death of a spouse is not accidental. A brief analysis of what constitutes the South African mixed legal system suffices to explain why this is the case.

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[662] See Reinhard Zimmermann and Daniel Visser, *Southern Cross, Civil law and Common Law in South Africa,* (Oxford, 1996), 4.

[663] Customary law of succession has been investigated with a view "to making it compliant with the Constitution". See Project 90 Report on the Status of Customary Law of Succession at http://www.pmg.org.za/docs/2003/appendices/03114salrc.htm. Accessed 11March 2004.

[664] See Amanda Barrat and Pamela Snyman, *Researching South African Law* at http://www.llrx.com/features/southafrica.htm. Accessed 8 April 2004. See also H.R. Hahlo and Ellison Kahn, *The South African Legal System and Its Background,* (Cape Town, 1968), 579.

[665] See section 1 (1) and (2) of the Marriage Act, Extension Act 1997, Act No 50,1997 at http://home-affairs.pwv.gov.za. Accessed 13 March 2004.

[666] See section 2 Marriage Act, Extension Act 1997.

Fagan writes that:

> "Prior to European encroachment upon Southern Africa, including the area later to be known as the Cape of Good Hope, there were indigenous groups of gatherer-hunters known as the *Khoikhoi* herding sheep and cattle... not being cultivators, the *Khoikhoi* society was based not on possession of land, but on small kin groups whose members were related to each other through the male line".[667]

The above state of affairs is invaluable in accounting for the phenomenon of patriarchy in black South Africa, where all communities are patrilineal.

As a guide to what constitutes South African law, it is important to remember that Dutch settlers began to settle in the present Western Cape in the middle of the seventeenth century. In 1806, these Dutch settlers were defeated by the British, who seized the Cape of Good Hope for Britain.[668] The present South African law manifests this colonial history. Fagan points out that the "common law" of South Africa is based on the "Roman-Dutch" law of the original Dutch settlers.[669] Barrat and Snyman clarify that "this is civil law, Roman law as interpreted by the Dutch writers of the 17th and 18th centuries".[670] Consequently, from the early days, "the principal sources of South African law were the treatises of authors such as Grotius, Johannes Voet and Johannes van der Linden".[671] Gibson notes that "all these treatises, whether on the law in general, or on special branches of it, or on procedure, became authoritative in the course of time in The Netherlands... the acceptance of Grotius's work as being a correct statement of the law inaugurated a custom among the Dutch people of

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[667] See Eduard Fagan, "Roman Dutch law in its South African historical context" in Zimmermann and Visser, *Southern Cross, Civil law and Common Law in South Africa,* 33-64 at 34. He cites among other sources for this information, T.R.H.Davenport, *South Africa: A Modern History* (4th Edition, 1991) 6.

[668] See J. T.R Gibson, *Wille's Principles of South African Law*, 6th edition, (Johannesburg, 1970), 31.

[669] See Eduard Fagan, "Roman Dutch law in its South African historical context" in Zimmermann and Visser, *Southern Cross, Civil law and Common Law in South Africa,* 33-64 at 40. He clarifies that the "nomadic nature of the Khoikhoi as well as their illiteracy rendered their legal process inaccessible. Moreover, there was a general Dutch view of the Khoikhoi as inferior". These factors contributed to the general exclusion of Khoikhoi law.

[670] See Barrat and Snyman, *Researching South African Law.* See also Eduard Fagan, "Roman Dutch law in its South African historical context" in Zimmermann and Visser, *Southern Cross, Civil law and Common Law in South Africa,* 33-64 at 41.

[671] These are names of eminent lawyers who accomplished their tasks resulting in a system of jurisprudence. See Gibson, *Wille's Principles of South African Law*, 27-29. He notes that "from the 14th –18th centuries, a succession of Dutch jurists set out the principles of the law prevailing in the Netherlands".

regarding works of other jurists as reliable".[672] This tradition has continued to exist in South Africa.[673] He writes that "when the British took possession of the Cape in 1806, the existing system of law was preserved, so that the common law as described above remained in force".[674] The influence of English law, however, modified the substantive provisions of the Roman-Dutch law.[675]

Laws regulating marriage, divorce and succession to property were primarily Roman-Dutch. Hahlo and Kahn clarify that "there were areas where the influence of English law was minimal, such as the law of persons and family relations, succession, property and portions of the law of obligations... and areas where it was deeply penetrative, such as bills of exchange, company law and evidence". [676]

Gibson explains that at common law marriage had two effects: the variable and invariable.[677] He adds "the invariable consequences result without exception from every marriage, and cannot be changed by the parties before or during the marriage... the husband becomes the guardian of his wife's person".[678] The variable effects, however, "depend upon whether the parties are married under the common law, that is without an ante-nuptial contract, or whether they are married with an ante-nuptial contract." [679] He clarifies that "where the parties are married without an ante-nuptial contract the consequences are: (1) a community of property between the parties, (2) community of profit and loss between them and (3) the husband acquires the marital power".[680] He further explains that the marital power of the husband confers on him, among others, "the power of administration and alienation of her property; the effect of this is that he alone has full legal capacity, and this he exercises on behalf of the community and of the wife".[681] Marriage, in that context, transformed wives from adults into minors and put them under the control of their husbands. Only the end of

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[672] See Gibson, *Wille's Principles of South African Law*, 29.
[673] *Ibid.*
[674] *Ibid*, 31.
[675] See Christoff Heyns ed, *Human Rights Law in Africa*, (London, 1997), 246-7.
[676] See Hahlo and Kahn, *The South African Legal System and Its Background*, 578.
[677] See Gibson, *Wille's Principles of South African Law*, 96.
[678] *Ibid.*, 96-7.
[679] *Ibid.*, 100.
[680] *Ibid.*
[681] *Ibid.*,103.

the marriage by divorce or death enabled the wife to acquire full legal capacity.[682] Common law, therefore, bestowed on the husband infinite legal capacity to the extent of being able to pledge family property without seeking approval from his wife.[683] Notwithstanding, the husband's vast authority was being continuously circumscribed by the common law and statutes.[684] Unfortunately, black people could not benefit from the development of the Roman-Dutch family law because in many respects they were not subject to it. Common law abhorred polygamy and did not recognise their customary law marriages as valid. Gibson sums it up: "our courts refuse to recognize, as a marriage, a union or relationship which allows polygamy, even if it be recognized by the law of some other country... or by native custom".[685] Hahlo and Kahn clarify that "while in accordance with the territoriality principle all are governed by what may be called European law, in a few respects tribalized Bantu can claim to be judged by Bantu law and custom as their personal law... Main instances are the Bantu customary union, succession, guardianship and land tenure in the reserves."[686] The adverse effects of applying customary law to regulate the matrimonial property rights of black women shall be discussed later.

Within the commercial law context, however, contemporary Roman-Dutch law often did not meet the expectations of nineteenth-century society, and as a result the settlers relied on legislative improvements based on English Acts and interpreted through English precedents.[687] Furthermore, South Africa's superior court lawyers and judges were often trained in England and thus were inclined to depend on English treatises. Fagan surmises that in the second half of the 19th century "since Britain was reaching its imperial zenith, it is not surprising that the local courts looked to English law to complement Roman-Dutch law in areas where the latter was found wanting".[688]

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[682] *Ibid.*, 129.

[683] *Ibid.*, 103

[684] For example, by the1950's under the Matrimonial Affairs Act of 1953, the husband had to seek consent of the wife before alienating "her separate property, or community property, which she had acquired for the community". See Gibson, *Wille's Principles of South African Law*, 104.

[685] See Gibson, *Wille's Principles of South African Law*, 87and 91 With the adoption of apartheid the Prohibition of Mixed Marriages Act 55 of 1949 was introduced in an attempt to prevent marriages between Europeans and non-Europeans.

[686] See Hahlo and Kahn, *The South African Legal System and Its Background*, 579.

[687] See Barrat and Snyman, *Researching South African Law*. See also Hahlo and Kahn, *The South African Legal System and Its Background*, 578, who add that "English legal rules were persuasive material where Roman-Dutch books were silent, vague or contradictory".

[688] Fagan, "Roman-Dutch law in its South African historical context", in Zimmermann and Visser, *Southern Cross, Civil law and Common Law in South Africa*, 32-64 at 57.

The transformation of the laws of the Cape Colony was emulated by the British Colony in Natal, and subsequently, to a great extent, by the Transvaal and Orange Free State, both of which were Republics founded by Dutch Boers in the second half of the nineteenth century.[689] When Britain gained full command of South Africa in 1910 it created the Union of South Africa with four regions, namely the Orange Free State, Natal, the Cape and the Transvaal.[690] After this merger, the laws of these regions were made more standardised both by legislative improvements and by the new Appellate Division of the Supreme Court, the topmost court in the country under the 1909 South Africa Act.[691] Hahlo and Khan add that "this 1909 Act united the four provinces converting the Supreme Courts of the Cape, Transvaal and Natal, and the High Court of the Orange Free State into provincial divisions of the new Supreme Court of South Africa".[692]

At present, the resulting legal system is a hybrid system, a mix of English common law and civilian Roman-Dutch legal principles. In the words of Zimmermann,[693] "South Africa is leading among the mixed legal systems still based on common law (in the sense of uncodified) law". Barrat and Snyman clarify: "while many legal doctrines and the arrangement of the law in general can be traced to a civilian heritage, court procedure owes much to the common law tradition, with adversarial trial, detailed case reports, which include dissenting judgments, and adherence to precedent".[694] Such is the explanation why the formal legal system in South Africa is dominated by a European heritage.

As noted, for black people, during the period of English governance a system of native administration was established. According to this policy, indigenous people could rule themselves according to indigenous law in certain matters such as rules of

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[689] See Barrat and Snyman, *Researching South African Law.* See also Hahlo and Kahn, *The South African Legal System and Its Background,* 575-6.
[690] See Gibson, *Wille's Principles of South African Law,* 31 who notes that "prior to the union of the colonies in 1910, there were separate legislative bodies in each of them; in the Cape from early times, followed in later years by the Orange Free State, the Transvaal and Natal... laws were made by each of these bodies to suit local conditions".
[691] See Barrat and Snyman, *Researching South African Law.* See also Gibson, *Wille's Principles of South African Law,* 31.
[692] See Hahlo and Kahn, *The South African Legal System and Its Background,* 238.
[693] See Zimmermann and Visser, *Southern Cross, Civil law and Common Law in South Africa,* 3.
[694] See Barrat and Snyman, *Researching South African Law.* See also Hahlo and Kahn, *The South African Legal System and Its Background,* 585.

marriage and succession.[695] This accounts for the eminence of customary norms in the areas of marriage and succession among the blacks of South Africa. In South Africa, patriarchal customary or indigenous laws, though presently a subject of reform by the South African Law Reform Commission (SALRC), continue to have adverse consequences for women's rights to property.

The recognition of customary law in South Africa is not ahistorical. South Africa posed the same problems the British faced in the rest of their colonial Africa. This was the co-existence of the imported legal system, i.e., common law and one or more systems of customary law.[696] Olivier et al narrate that "there were several reasons why the British Empire was in favour of partial recognition of particular systems of customary law: economic considerations, fear of discontent, treaties with traditional chieftains and the belief that English law was too advanced to be applied to the indigenous peoples".[697] When British colonialism ended, "legal dualism persisted, i.e., the coexistence of state-made laws and the customary law system with a dual court system".[698] Today, the consequence of legal dualism is the persistent subordination of women's rights to property in the non-state-made laws of succession.

The recognition of customary law in South Africa and many other British colonies in Africa was subject to a repugnancy clause, formulated in the empowering legislation as "promoting natural justice or equity and morality".[699] The repugnancy clause was adopted as "an equitable measure to regulate those aspects of customary substantive and procedural law, which were according to western perceptions, contrary to civilized general rules of conduct and legal norms".[700] In practice, these repugnancy clauses were and still are usually invoked when a matter goes before the formal courts, yet in the majority of cases black women's rights to property are determined informally by families or religious clerics and few cases reach the formal courts on appeal. The implication of this is that customary law has not been fundamentally

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[695] See NJJ Olivier et al, "Indigenous Law" in W. A. Joubert et al (eds), *The Law of South Africa*, Vol 32, par 262, p 268.
[696] *Ibid*, paragraph 9, p 12.
[697] *Ibid.*
[698] *Ibid.*, 13.
[699] *Ibid.*, paragraph 9, p 13.
[700] In *re Southern Rhodesia (1919) AC 211*, the Privy Council said: "...some tribes are so low in the scale of social organization that their usage and conceptions of rights and duties are not to be reconciled with the institutions and ideas of civilized society..." See Anthony Allot, *Essays in African Law*, (London, 1960), 13.

changed or developed by the imposition of repugnancy clauses. As a result, customary law of succession is likely to be the most problematic to the post-apartheid reform endeavour aimed at enhancing the rights of black women.[701]

In South Africa, British rule also introduced laws detrimental to black women's rights of succession to property. For example, section 23(7)(a) of the Black Administration Act 1927 denied black people the benefit of gender sensitive state-made laws and institutions by providing that "the Master or any executor appointed by the Master will not have power in connection with the administration and distribution of the estate of any black person who died intestate".[702] In fact the Black Administration Act was introduced with a view to establishing "a national system for the recognition and application of customary law and the creation of a separate court structure".[703] The 1927 court structure consisted of "the courts of chiefs and headmen, the commissioner's court with civil and criminal jurisdiction, the Native Appeal court for civil appeals, the Native Divorce Court for dealing exclusively with western marriages contracted by blacks as well as the appellate division of the Supreme court, as a court of appeal against decisions of the Native Appeal Court".[704] Courts of chiefs and headmen heard matters of customary law, with a right of appeal to courts staffed by magistrates.[705] The legacy of these policies survives to date. Presently, Schedule 6 item 16(1) of the 1996 Constitution provides:

> "Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it, and anyone holding office as a judicial officer continues to hold office in terms of the legislation applicable to that office subject to-

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[701] In South Africa, there is a multiplicity of customary laws varying from one another. There are problems of eliminating tribal variations to evolve a common customary law. In recognition of this plurality, the Recognition of Customary Marriages Act 120/1998(RCMA) in section 1 defines customary law "as the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those communities" See N JJ Olivier et al, "Indigenous Law" in W. A. Joubert et al , *The Law of South Africa,* Vol 32, paragraphs 26 and 35, pp 30, 31 and 44.

[702] See MJ De Waal, et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa,* Vol 31, (Durban, 2001), paragraphs 395, p 262.

[703] See NJJ Olivier et al, "Indigenous Law" in W. A. Joubert et al, *The Law of South Africa,* Vol 32, paragraph 262 and 264, p 269.

[704] *Ibid.*

[705] *Ibid.*, paragraph 266, p 271. NJJ Olivier et al, write that "the application of customary law was subject to repugnancy clause of public policy and natural justice."

(a) any amendment or repeal of that legislation; and

(b) consistency with the new Constitution"

Currently, South Africa retains a pluralistic legal system with customary law remaining a legal system for those who wish to be subject to it. The rules of customary law may not conflict, however, with the Constitution.[706] That the rules of customary law do not contradict the Constitution in practice as far as rights to property are concerned is one of the hurdles that South Africa is addressing to emancipate her black women in the laws of succession.

As noted, alongside customary and religious laws is also the state-made law of succession. Courts and the Master of the High court, a judicial office manned by persons with law qualifications, enforce the state-made law of succession in South Africa.[707]

The history of estate administration under the state-made laws of succession is linked to the colonial legacy. The orphan's chamber "created in 1674 in South Africa was later replaced in 1833 in the Cape Colony by what were called Master's offices".[708] The current Administration of Estates Act 66 of 1965(Estates Act 66/1965), to be discussed later, replaces a series of legislation that introduced the Master's office in South Africa. It deals with the administration of deceased's properties, delimits the jurisdiction of the Master of the High court and prescribes that the Master's office in its area of jurisdiction must have full supervision of the management of all property and estates of deceased persons.[709]

In the light of the above, it can be seen that South African law consists of the earlier common law decisions of the superior courts, rules set down by the Roman-Dutch authorities and statutory law, i.e. Acts of the national and provincial legislatures, and governmental regulations. Statutory law is now being modified to accommodate

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[706] In the case of *Bhe and others* v *The Magistrate Khayelitsha and Another* 2005(1) SA 580(C.C), the Constitutional Court held that "the entire statutory scheme governing deceased estates of black persons is unconstitutional and discriminates on the basis of race, birth and gender."

[707] See section 2(2) Administration of Estates Act 66 of 1965 (Estates Act 66/1965) at: http://www.acts.co.za/ad_estate/. Accessed 12 November 2005.

[708] See MJ De Waal et al, " Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al, *The Law of South Africa*, Vol 31, paragraph 393, p261.

[709] *Ibid.*

customary and religious laws. South African state-made law "is not codified and must be sought in court decisions and individual statutes".[710] Such is the legal and institutional framework under which black women's rights to property in marriage, upon divorce and death are situated.

6.2 The strengths and weaknesses of the South African reform of the laws regulating rights to property in marriage, upon divorce and upon the death of a spouse.

The starting point, as far as an objective evaluation of the reforms of women's rights to property under the laws of marriage, divorce and succession is concerned, is the Constitution.[711] The Constitution prescribes equal treatment and prohibits unfair discrimination.[712] In terms of section 7, the state is obliged to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights. Section 9(1) provides that "everyone is equal before the law and has the right to equal protection and benefit of the law". Sections 9(3) and 9(4) provide that "neither the state nor any person may discriminate directly or indirectly against anyone on a listed ground such as race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth".

The Constitution guarantees the right to freedom of religion, belief and opinion in terms of sections 15(1) and 31. Furthermore, it allows for the implementation of legislation for the recognition of religious personal law under section 15(3) thereof. Sections 30 and 31 clarify that "in the event of a conflict between gender equality and

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[710] See *Barrat and Snyman, Researching South African Law.* See also Hahlo and Kahn, *The South African Legal System and Its Background,* 592 who explain that "in countries with codified systems of law statutes take the form of amendments to the code and have to be fitted into the general legislative scheme... in countries with non -codified systems, statutes create islands in the sea of the common law and have to be interpreted accordingly."

[711] See the 1996 Constitution at http://www.acts.co.za/constitution. Accessed 14 March 2004.

[712] See sections 9(3), 9(4) and 9(5) of the Constitution. In *Harksen v Lane NO & others* 1998(1) SA300 (C.C) court set the test for unfair discrimination. It requires "a two-stage analysis: Firstly, does the differentiation amount to discrimination? If it is on a specified ground then discrimination will have been established. If not on a specified ground then, is there a potential to impair the fundamental human dignity of persons as human beings? Secondly, if the differentiation amounts to discrimination is it unfair? If it is based on specified ground, unfairness is presumed. If on an unspecified ground, unfairness will have to be established by the complainant. If there is unfair discrimination then a determination will have to be made as to whether the provision can be justified under the limitation clauses". See, Mathew Chaskalson et al, *Constitutional Law of South Africa,* (Cape Town, 1999), 14-6.

religion and culture related rights, equality will outweigh culture and religion". Section 30 actually recognizes the right to participate in the cultural life of one's choice, but qualifies that exercising of the right "may not be inconsistent with any provision of the Bill of Rights". Section 31, dealing with the rights of cultural or religious groups to enjoy their culture and to practise their religion, contains a similar qualification.[713] That the Constitution elevates the Bill of Rights over religious and cultural rights is a positive development for women's emancipation. The above constitutional provisions are supportive of the SALRC as it rewrites the hitherto patriarchal customary and Muslim personal law into the statute books of a post-apartheid South Africa.[714]

In accordance with the Constitution, the SALRC has embarked on integrating Islamic and customary law into state made laws.[715] For example, the customary law of succession reform proposals are aimed at "amending the Intestate Succession Act 81/1987 by extending it to black people whose estates were hitherto exclusively devolved under customary law".[716] The SALRC has proposed to improve women and children's rights of inheritance by "eliminating the customary law concept of male primogeniture".[717] This is to be realized by modifying the Intestate Succession Act of 1987,to include polygynous households while awarding rights to the matrimonial homes to surviving spouses.[718] Accordingly, the SALRC has proposed that under the customary law of succession, where the deceased had more than one customary wife, all the surviving wives shall share equally in his estate.[719]

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[713] See section 31(2) Constitution.

[714] For example, a draft Muslim Marriages Bill has been proposed pursuant to the Islamic and Related Matters Project of 2003.

[715]The Judicial Matters Amendment Act 2002 amended the South African Law Commission Act 19 of 1973 to change the Commission name to the SALRC. See http://www.law.wits.ac.za/salc/salc.html. Accessed 23 July 2005.

[716]See SALRC Discussion Paper 93 Project 90 at http://www.law.wits.ac.za/salc/discussn/discussn.html. Accessed 7 May 2005.

[717]See SALRC Project 90 Report on the Status of Customary Law of Succession at http://www.pmg.org.za/docs/2003/appendices/031114salrc.htm. Accessed 14 March 2004.

[718] The rationale of the Customary Law of Succession Bill is "to extend the general law of testate and intestate succession embodied in the Wills Act of 1953 and Intestate Succession Act 81 of 1987 to all persons in South Africa, to repeal s 23 of the Black Administration Act of 1927,hitherto only applicable to blacks and to enact new provisions consistent with the Constitution". See NJJ Olivier et al, " Indigenous Law" in W. A. Joubert et al (eds), *The Law of South Africa,* Volume 32, paragraph 244, pp247-8.

[719]See SALRC Discussion Paper 93 Project 90 on customary law cited at http://www.vanuatu.usp.ac.fj/library/Online/Usp%20Only/Customary%20Law/South.htm. Accessed on 16 February 2006.

Another important and closely related example of the reform is the Recognition of Customary Marriages Act 120 of 1998(RCMA), which now denies courts of chiefs and headmen jurisdiction over nullity, divorce or separation in customary marriages.[720] Olivier et al clarify that "only a family court or the High court have jurisdiction to dissolve a customary marriage".[721] A traditional leader may, however, "mediate in a dispute or matter relating to a customary marriage."[722] This arrangement is useful in ensuring that all South African women are treated equally and fairly by the more gender sensitive family and High courts.

A customary marriage, according to the RCMA, is a marriage "negotiated, celebrated or concluded according to any of the systems of indigenous African customary law existing in South Africa".[723] This provision does not include marriages concluded in accordance with Hindu, Muslim or other religious rites.[724] Under this law, "a wife in a customary marriage has, on the basis of equality with her husband and subject to the matrimonial property system governing the marriage, full status and capacity to acquire assets, to dispose of them, to enter into contracts and to litigate, in addition to any rights and powers that she might have at customary law."[725] The defects with the RCMA shall be discussed later.

In terms of the above mentioned law, a customary marriage entered into after the commencement of the RCMA, on 15 November 2000,[726] in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses unless such consequences are

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[720] See text of the RCMA, which came into force in 2000 at http://www.acts.co.za/custom_marriages/index.htm. Accessed 14 March 2004.

[721] See NJJ Olivier et al, " Indigenous Law" in W. A. Joubert et al (eds), *The Law of South Africa,* Volume 32, paragraph 266, p271. They note that "pilot family courts have been operating since 1998 and handle all cases arising out of customary and civil marriages". Denying chiefs and headmen jurisdiction over nullity, divorce or separation in customary marriages may protect women against patriarchal tendencies.

[722] *Ibid.*

[723] See section 1 of the RCMA.

[724] *Ibid.*

[725] See section 6 RCMA.

[726] The RCMA endorses "legal dualism in respect of proprietary consequences of a customary marriage". The proprietary consequences of a customary marriage entered into before the commencement of the RCMA continue to be governed by customary law. However, spouses in such a marriage may apply jointly to the court to change the matrimonial property system that applies to their marriage. See NJJ Olivier et al, " Indigenous Law" in W. A. Joubert et al (eds), *The Law of South Africa*, Volume 32,paragraph 152, pp156-7.

specifically excluded in an ante-nuptial contract regulating the matrimonial property system of their marriage.[727]

The full community of property marital regime, which prior to the demise of apartheid applied only to the white community of South Africa, is instructive with regard to protecting women's rights to property.[728] Although South Africa has the full community of property marital regime as its default it permits, as noted above, the parties to opt out by using ante-nuptial contracts. The parties can opt for marriage out of the community property regime with the accrual system or without it. The effect of opting for the accrual system is that only the value of the assets acquired during the marriage is shared equally.[729] The accrual system is, however, a difficult option, as the parties must calculate the differences in the net starting value and the net final value of the estate of each spouse but exclude inheritance and gifts.

As noted, Cronje et al have clarified that "when parties marry in community of property, all ante-nuptial assets and all assets acquired post-nuptially are legally united in one estate, that is, divided equally between the spouses and their estates upon dissolution of the marriage."[730] Furthermore because all pre-marital assets are pooled together in the joint estate, it follows that all debts are also shared equally.[731]

Community of property dissolves upon the death of either party to the marriage or the termination of the marriage. In accordance with the Estates Act 66/1965 the joint estate is managed by the executor who both pays all the claims against the estate, and recovers all claims due to the estate. He then gives half the net joint estate to the surviving spouse, while the heirs of the dead spouse take the other half.[732]

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[727]See section 7(1) and (2) RCMA.
[728] South African state-made family law even before the demise of apartheid was more gender sensitive than Ugandan law. See Chapter Two (2.3).
[729] See Chapter Two (2.3).
[730] See D SP Cronje et al, "Marriage" in W. A. Joubert et al (eds), *The Law Of South Africa,* Volume 16, First Reissue, (Durban, 1998), paragraph 64, p82.
[731]*Ibid.*, paragraph 77, p102.
[732] *Ibid.*, paragraph 235, p234.

The executor may liquidate the joint estate in order to pay out the heirs of the predeceased spouse in cash.[733] This may leave the surviving spouse without any means of income. The surviving spouse is allowed, however, "to buy out some of the assets or even the whole estate in order to pay out the heirs".[734] The other disadvantage of marriages in community of property is that "control of the joint estate is taken out of the hands of the surviving spouse and vested in the executor, and this applies even to the surviving spouse's own half share of the joint estate".[735]

Furthermore, whereas a marriage in community of property ensures that the surviving spouse gets property, it is not explicit that she/he takes the matrimonial home and its contents. The property that a surviving spouse takes depends on what remains after the executor has paid off all the creditors and it is possible for a surviving spouse to have no shelter as a result of this arrangement.[736]

The community of property regime has safeguards when one partner is reckless with funds, in which case the other spouse may apply for a separation of the property order from court even if for a limited duration.[737]

The RCMA, by prescribing a community of property marital regime, elevates the status of black women by improving their position in a customary marriage. It also provides for certainty by identifying the rights and duties of spouses in contracting a marital union in accordance with customary laws as modified by statutory law.

The novelty, therefore, is the decision by the SALRC to overhaul customary law using state-made laws and impose a community of property regime in a legal system where such a marital property regime is unknown. This is an idea Uganda should adopt if it is keen on eliminating customary law patriarchy and comply with Article 2(a)-(f) and 16(1)(h) of the CEDAW.

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[733] The heirs of the predeceased spouse are paid after all creditors' claims are met. To meet all the creditor's claims, "the executor is obliged to liquidate the assets of the joint estate including immovable property". See D SP Cronje et al, " Marriage", paragraph 235, p234.
[734] See D SP Cronje et al, " Marriage", paragraph 235, p234.
[735] *Ibid.*, pp234-5.
[736] *Ibid., p234.*
[737] *Ibid.*, paragraphs 70 and 71, pp92-96.

Under the RCMA, "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".[738] The contract regulates the future matrimonial property system of his marriage. Section 7(7)(a) and (b) of the RCMA provide: "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". [739]

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 men can no longer contract a polygynous relationship as freely as they used to do in the past.

When granting a decree for the dissolution of a customary marriage, the court has wide powers with regard to distribution of the assets and benefits of the marriage. Section 8(4)(b) of the RCMA provides that "where the husband is a spouse in more than one customary marriage, the court must take into account all relevant factors including any contract or order made for any change in the matrimonial property system and must make any equitable order that it deems just."[740]

For a customary marriage to be recognized as a valid marriage, a customary marriage entered into before 15th November 2000 must only be valid at customary law.[741] However, if entered into from 15th November 2000 onwards it "must comply with the

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[738] See Section 7 (6) RCMA.
[739] See section 7 (7) RCMA.
[740] *Ibid.*, section 8 (4)(b).
[741] Ibid., section 2 (1). Customary law means "the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples". A customary marriage means " a marriage concluded in accordance with customary law". See section 1 (ii) and (iii) RCMA.

following requirements: the marriage must be negotiated; entered into or celebrated in accordance with customary law; the prospective spouses must be above the age of 18 years;[742] both prospective spouses must consent to the marriage and the parents of a prospective spouse who is a minor must consent to the marriage".[743] Without any pretensions to recommending reforms in South African laws of marriage or succession, the better practice is a law that makes it illegal for minors to marry.[744] In terms of section 3(3)(a) of the RCMA, if he or she (a minor) has no parents, then his or her legal guardian must consent.[745] If the parents or legal guardian cannot consent, a Commissioner of Child Welfare can be approached for consent and where consent is refused by either of the parents, the legal guardian or the Commissioner of Child Welfare, then only a Judge of the High Court may consider granting consent.[746]

Although the RCMA institutes a default community marital property regime at customary law, it has not addressed all issues of succession to property. For example, a valid customary law marriage requires that full bride price is paid. Where a woman is in a marriage that she thinks is a customary marriage and the man dies, his family can claim that there had never been a valid customary marriage, as a bride price had not been paid. This is an issue that the RCMA does not address. For that and other reasons legislation to regulate customary law of succession has been proposed.

Presently owing to the patriarchal culture at customary law inheritance devolves through the male line.[747] Furthermore, "customary law of succession is based upon primogeniture, according to which the eldest son or his eldest male descendant is the person who succeeds the deceased".[748] Olivier et al explain that "in a polygynous

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[742] See section 3(1) RCMA.
[743] See section 3(3) (a) RCMA.
[744] South Africa ratified the CEDAW without any reservation on 15 December 1995.See http://www.un.org/womenwatch/daw/cedaw/states.htm. Article 16 (2) of the CEDAW prohibits the betrothal and marriage of children. Article 1 of the UN Convention On The Rights of the Child (CRC) defines a child as "a human being below the age of 18years". South Africa ratified the CRC in 1995.See http://www.unhchr.ch/pdf/report.pdf for the CRC ratification register. Accessed 12 November 2005.
[745] See section 3 (3) RCMA.
[746] *Ibid.*
[747] Inheritance at customary law refers to "the transfer of property rights only, whereas succession means the transfer of rights, duties, powers and privileges normally associated with the deceased's status". See NJJ Olivier et al, "Indigenous Law" in W. A. Joubert et al (eds): *The Law of South Africa, Volume 32,* paragraph 223, p213. The contributors also note: "customary law is not merely concerned with inheritance of the deceased's property but also with succession to the deceased's status". This may include the status of being a family head and looking after the various members of the extended family the deceased looked after.
[748] The exclusion of women from heirship and being able to inherit property was "in keeping with a system dominated by a deeply embedded patriarchy, which reserved for women a position of subservience and

household, primogeniture is qualified by the fact that the senior heir is the eldest son of the first wife, even if he is not the first maiden born son of the family head".[749] As regards monogamous families, Olivier et al explain that " the successor of the family head is the eldest son, or if he predeceases the family head, the eldest son's senior male descendant".[750] Customary law varies from tribe to tribe. For example, among the *Tsonga* tribe, "the eldest son succeeds to the status of the family head, while the last-born son, and in some cases the daughter of the deceased inherit the house property".[751] As noted unlike state-made laws, customary law creates a "distinction between general succcssion to the status of the deceased and special succession, which is succession to the position of the head of the various houses of the deceased".[752]

It is true that customary law is patriarchal but it does not leave widows destitute, though in practice they frequently suffer neglect and lack support.[753]Although males take the property, they have the obligation to cater for the widows and other dependants of the deceased. Ideally not all aspects of customary law are discriminatory and some fulfil important social functions, such as the duty of an heir to maintain vulnerable family members. At customary law:

> "When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family.

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subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands or the head of the extended family". See *Bhe and others* v *The Magistrate Khayelitsha and Another* 2005(1) SA 580(C.C).

[749] See NJJ Olivier et al, " Indigenous Law" in W. A. Joubert et al (eds), *The Law of South Africa, Volume 32,* paragraph 223, p213/4.

[750] *Ibid.,* paragraph 224,p215.

[751] See NJJ Olivier et al, "Indigenous law" in W. A. Joubert et al (eds), *The Law of South Africa, Volume 32,* paragraph 223, p214.

[752] *Ibid.*

[753] In *Bhe and others* v *The Magistrate Khayelitsha and Another* 2005(1) SA 580(C.C), the deceased's father intended to sell the immovable property of the deceased to defray his funeral expenses. Fearing that Mrs Bhe and her daughters would be rendered homeless, the applicants approached the High court and obtained interdicts to prevent: (a) the selling of immovable property for purposes of offsetting funeral expenses; and (b) further harassment of Mrs Bhe by the father of the deceased.

He is obliged to support and maintain them, if necessary from his own resources, and not to expel them from his home".[754]

Although that is the ideal position of customary law, it is in practice difficult to ensure that all heirs adhere to the rules. Consequently, the SALRC is in favour of beneficiaries enjoying individual rights to property. In the modern world, real rights guarantee more effectively a person's material security, namely, a right a holder can enforce.

Importing statutory law into customary law to minimize the adverse effects of patriarchal values on women is progressive. This is not to deny though that there are inadvertent consequences that have to arise out of law reform and implementation, leading to new problems within the communities. For example, extending the Intestate Succession Act 81/1987 to customary law ignores the contribution of the extended family to the deceased's estate.[755] While the current SALRC recommendations comply with the constitutional requirement for gender equality, by extending the state made law rule of preferring the wife and children for inheritance purposes, it does so blindly by failing to take account of the fact that most state-made laws enacted before 1994 were designed for a nuclear family, while customary law of succession is suited to regulate a traditional polygamous family with many reliant relatives.[756] The said state-made law, therefore, adjusts badly into a customary law family structure and leaves siblings, parents of the deceased etc out in the cold.[757] State-made law of succession protects certain family members only, i.e., wife and children; customary law of succession includes all family members with interest, such as the siblings and parents of the deceased.[758]

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[754] See *Mthembu* v *Letsela* (1997) 2 SA 936 in the absence of a male descendant, the deceased 's property passed to his father pursuant to primogeniture. When the widow sued alleging discrimination, the High court held that "the rule of male primogeniture is compatible with the equality clause of the Constitution in that it does not discriminate unfairly against women". Judge Le Roux J holding that " if one accepts the duty to provide sustenance, maintenance and shelter as a necessary corollary of the system of customary law, I find it difficult to equate this form of differentiation between men and women with the concept of unfair discrimination". This decision been overturned by the Constitutional Court in *Bhe and others v The Magistrate, Khayelitsha and Another* 2005(1) SA 580(C.C).

[755] See SALRC Project 90 Report on the Status of Customary Law of Succession at http://www.pmg.org.za/docs/2003/appendices/031114salrc.htm. Accessed 30 November 2005.

[756] *Ibid.*

[757] *Ibid.*

[758] See Likhapa Mbatha, "Reflections on the rights created by the Recognition of Customary Marriages Act" in *Agenda Special Focus 2005* at http://www.agenda.org.za/index.php?option=com_content&task=view&id=264&Itemid=153. Accessed 30

When all is said and done, however, the support for customary law of succession in any patriarchal society is strong and rationalizations such as the above to preserve it are predictable. This is not unique to South Africa. In many cases, "traditionalists base objections or resistance to change in customary law on vested interests. In a traditional set up, there is no room for democracy or transparency".[759] All objections to the importation of state-made law into customary law or purging patriarchy are a manifestation of the male persons' desire to perpetuate the subordination of women.

It should be pointed out that an active and gender sensitive arm of the judiciary, in the name of the Constitutional Court of South Africa, supports many of the women's rights protection endeavours to purge patriarchy and the legacy of apartheid. The judgements of the Constitutional Court are progressive, which is laudable given that in South Africa, as already noted, many people were excluded from the ambit of state-made laws under the policy of apartheid. It was not uncommon for courts to decline to recognize, for example, a widow of a Muslim marriage as a surviving spouse.[760]

The judicial activism of the Constitutional Court ought to be emulated by the law courts in Uganda. In the case of *Bhe and others v The Magistrate, Khayelitsha and Another,*[761] the said court, condemning what is practised under South African customary law, confirmed that "customary law rules relating to intestate succession are unconstitutional and discriminatory". The case concerned two girls who successfully challenged the rule that, in the absence of a will stipulating that girls inherit their deceased father's estate, they could not inherit the property on the grounds that they are female. Following their successful application and the above decision, all intestate estates are supposed to be distributed under the provisions of the Intestate Succession Act 81/1987.

May 2005. She notes that "customary forms of property are classified into personal and family property. Personal property refers to property amassed by the nuclear family while family property refers to property placed under the administration of the heir through customary inheritance". By imposing a community property regime, "customary heirs and their wives have been unfairly enriched because property placed under the heirs as family property to benefit others, now forms part of his property and the RCMA is silent on this aspect."

[759]See SALRC Project 90 Report on the Status of Customary Law of Succession.

[760]This was because, as judge Ngcobo of the Constitutional Court noted, "a Muslim marriage was repugnant to the policy and legal institutions both of Holland and England, and was reprobated by the majority of the civilized peoples on grounds of morality and religion" See Daniels *v Campbell No and Others,* CCT40/03 at http://www.concourt.gov.za. Accessed 14 March 2004.

[761] *Bhe and others* v *The Magistrate Khayelitsha and Another* 2005(1) SA 580(C.C).

There are many challenges against women's rights to property that South Africa is successfully addressing. For example, as far as land issues are concerned, "traditional African forms of tenure were generally not consistent with individual ownership of land."[762] This is, however, presently eroded by individualism on thc part of males who seek titles to the exclusion of women. There are thus peculiar challenges relating to land ownership that affect women more than men in South Africa. It should be appreciated that "the tenure situation, which existed at the advent of democratic governance in South Africa, was one of insecurity".[763] Rutsch and Jenkin report that during the apartheid era there was "control of large land areas by independent and self-governing states, a myriad of different national, territorial, provincial and local government laws and administrative systems coupled with poor record keeping and corruption".[764] The chaos caused by this state of affairs was part of the heritage following the demise of apartheid. One of the consequences of this confusion was that people, such as the rural women, actually using and occupying the land, were often pushed aside and dispossessed when development and land transactions took place.[765] This is the phenomenon the South African government has partly addressed through the enactment of the Communal Lands Act No 11 of 2004(CLA 2004).

The purpose of the CLA 2004 is to give secure land tenure rights to communities and persons who occupy and use land that the previous governments had reserved for occupation by the African people. As noted, most of this land is registered in the name of the state or held in trust by the Minister of Land Affairs or the *Ingonyama* trust for the *Kwazulu–Natal* communities.[766]

Women's rights to land have been promoted. The CLA 2004 provides in section 4(1) and (2) that "old order rights (i.e. rights to communal land registered or not, that were in existence before the enactment of this new law), held by a married person, are despite any law, practice, usage or registration to the contrary, deemed to be held by

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[762] See DL Carey Miller and Anne Pope, *Land Title in South Africa,* (Cape Town, 2000), 16.
[763] *Ibid.*, 461.
[764]See Peter Rutsch and Fred Jenkin, *The New Land Laws of South Africa* (Durban, 1992) 27 in D L Carey Miller and Anne Pope, *Land Title in South Africa,* 462.
[765] See Cherryl Walker, *Land reform and gender in post-apartheid South Africa* at http://www.unrisd.org /80256B3C005BCCF9((http publications) AF426AF7DD941F180256B67005B7059? Open document Accessed 15 December 2005.
[766] See section 2 of the CLA 2004 at http://www.info.gov.za/gazette/acts2004/a11-04.pdf. Accessed 15 November 2005.

all spouses irrespective of the matrimonial property regime". Such rights "must be held jointly by all spouses in undivided shares and be registered in the names of all spouses concerned." [767]

The CLA 2004 further provides in section 4(3) that "regardless of marital status, customary law, practice or usage or any other law, a woman has an equal right in land or to land or interest in land as a man".

There are lessons for Uganda to gather from the CLA 2004. While women's rights may be curtailed by direct discrimination in state-made laws, in many cases non-state-made laws may also indirectly discriminate. The lesson is that discrimination, that is both direct and indirect in the various laws, has to be addressed concurrently as the CLA 2004 has attempted to do (above).

Holistic law reform also requires that institutions such as courts implementing the law be equally radically reformed to render them accessible. It should be appreciated that in jurisdictions where the substantive and procedural laws of succession are simple, women are more likely to invoke state-made laws and institutions, thereby advancing their emancipation. The reverse may also be true. Complicated structures and procedural requirements of state-made courts may mean that many people are denied access to them, however good the substantive law may be. The high cost of litigating in state-made courts and rigorous court proceedings conducted in official but alien languages do not make courts endearing to some people. The South African government must be commended for introducing family courts to deal with matters relating to family disputes; these courts are more accessible than the High courts. The emancipation of women through the law remains incomplete if the courts remain linguistically, geographically or financially inaccessible to most women.

Equality courts were also created by the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 (PEPUDA 2000), also called the 'Equality Act', to hear cases about equality and non-discrimination[768] but not employment discrimination dealt with by the Labour Courts. They have powers to "conciliate and

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[767] *Ibid.*, section 4(2) CLA 2004.
[768] See the PEPUDA 2000 at http://www.gov.za/gazette/acts/2000/a4-00.pdf. Accessed 14 April 2004.

mediate, grant interdicts, order payment of damages or order a person to make an apology".[769] Furthermore, any person or an association, acting on his or her own behalf or on behalf of others can take a case to the Equality Court.[770] These courts are discussed later under the PEPUDA.

6.2.1 Unsatisfactory aspects of the South African law reform process

The processes and methods of law reform in South Africa are, however, not without problems: There is a desire by the SALRC to consider, as much as possible, everyone's views in the law reform process. This is done through public requests for memoranda, attendance of workshops and consultations organized throughout the country.[771] Such public participation approach, though useful as it endows the law reform exercise with legitimacy, has a detrimental effect on the speed with which the process of law reform can take place. In other words the process is not expeditious, as one would wish it; it is also costly. For all the consultations by March 2006 there was, with the exception of the RCMA, which came into force in 2000, hardly anything else to show in terms of enacted laws. The Customary Law of Succession Project of 2000, the Islamic and Related Matters Project of 2003(presently the Draft Muslim Marriages Bill), the Domestic Partnerships Project of 2003 among other projects are yet to be translated into law.[772] The lesson from this is that, firstly, public participation in law-reform endeavours cannot advance radical reforms needed to reverse the unsatisfactory situation of women's rights to property; secondly, public participation in law-reform endeavours leads to competing and divergent demands that are not easily reconcilable. For example, the customary law of succession has for a long time been "criticised for gender and age discrimination".[773] As early as 1996, "the SALRC published an issue paper on succession in customary law".[774] In 1998 a Bill was submitted to the National Assembly that was to amend customary law of

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[769] *Ibid.*, section 21.
[770] *Ibid.*, section 20.
[771] See the SALRC site on how it carries out its duties at http://www.law.wits.ac.za/salc/salc.html Accessed 10 March 2006.
[772] See The South African Policy and Law online at http://www.polity.org.za/pol/acts for South African Acts of Parliament from 1993-2005.Accessed 10 March 2006.
[773] See NJJ Olivier et al, "Indigenous Law" in W. A. Joubert et al (ed), *The Law of South Africa,* Volume *32* paragraph 35, p44.
[774] *Ibid.*

succession.[775] However, "when the traditional leaders protested against the proposed changes, the Bill was withdrawn, a discussion paper on the same followed in 2000," but to date no law has been enacted.[776]

With the Draft Muslim Marriages Bill (arising from the Islamic Marriages and Related Matters Report 2003) as another example, the SALRC proposed after consultation that polygyny be retained.[777] This recommendation was adopted although the Constitution provides for absolute equality before the law and between the sexes.

Concerning the retention of polygyny, there are peculiar problems that the SALRC ignores. The prevailing situation causes hardships to women, complicates inheritance and is inimical to gender equality. The retention of polygyny makes gender equality enshrined in the Constitution a right on paper only. It is impossible to attain absolute equality as envisaged by the Constitution without eliminating polygyny. For example, while surviving spouses male or female married in a community of property regime do inherit equally under monogamous marriages, in a polygynous marriage the men stand to benefit more than the women as they inherit from their different wives' estates while the women must share the estate from one man. It should be noted that while the Bill allows polygyny, it is silent on polyandry.

The few changes discernible from the Draft Muslim Marriages Bill concern, therefore, the proposal that "all matters on Islamic marriages such as confirmation of divorce (*talak*), confirmation that circumstances warrant a Muslim man to marry another woman, are to be heard by a secular judge and two assessors who are experts on Islamic law.[778] It should be appreciated that even then the preference is for a Muslim judge to preside over the proceedings, assisted by two Muslim assessors; if there is no Muslim judge, "a practising Muslim advocate or any attorney with at least

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[775] *Ibid.*

[776] *Ibid.*, Although the SALRC is issuing reports on reforms, they have not resulted into Parliament enacting laws. In *Moseneke v The Master* at http://www.worldlii.org/int/cases/ICHRL/2000/93.html. The Constitutional Court put Parliament on notice and gave it "two years to review the whole field of succession and administration of deceased persons' estates in a harmonious and effective manner, with full respect for the rights anchored in the Constitution". To date this has not been done. See http://www.polity.org.za/pol/acts for South African Acts of Parliament from 1993-2006.

[777] See Project 59 Islamic Marriages and Related Matters Report of July 2003 at http://www.law.wits.ac.za/salrc/report/pr59report.pdf. Accessed on 10 May 2004.

[778] See Wesahl Agherdien Domingo,"Marriage and divorce: opportunities and challenges facing South African Muslim women with the recognition of Muslim personal law" in *Agenda Special Focus 2005*.

10 years experience will act as the presiding officer."[779] Clearly, this will not substantially advance equality and Muslim women's rights to property because the proposals on assessors, though gender neutral, are in practice perpetuating patriarchy. Most if not all experts on Islamic law are conservative men, ill suited to advance the emancipation of women in the manner envisaged under Article 2(a)-(f) and 16(1)(h) of the CEDAW. Involving assessors to interpret the *Quran* for a secular judge to determine women's rights to property cannot guarantee equality. Gender-neutral verses from the *Quran* are time and again manipulated through biased interpretation by patriarchal figures that favour themselves and other men. Muslim assessors are least likely to go against the separate property regime at marriage that the Quran provides. They are also unlikely to deny other Muslim men the opportunity to take other wives even if they do not strictly meet the *Quranic* requirements. This is, therefore, not a radical change to emancipate women.

Furthermore, in the Draft Muslim Marriages Bill, the SALRC has proposed "an opt-out clause, where the parties could choose not to be governed by the proposed law."[780] This is like offering a Muslim man a choice to ask the prospective wife whether she wants more rights in her marriage. An opt-out clause is least likely to advance the rights of women. It is possible that many a Muslim woman, given her socialization, will not insist on more rights than those granted by the *Quran* at the time of marriage.[781] A situation of this nature does not augur well for women's emancipation. What this state of affairs means is that women within marriages not subject to the Bill will continue to suffer the abuse of an unregulated Muslim personal law, the very situation that the Bill seeks to remedy. The fact that the parties have to elect jointly to opt out may, on the face of it, appear to provide equality in the decision making process, but the reality of the lives of some women is that they negotiate from a weaker bargaining position.

The SALRC has also proposed, in the Islamic Marriages and Related Matters Report 2003 (above), that Islamic law of succession should apply in case of Muslim persons

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[779] *Ibid.*
[780] *Ibid.*
[781] *Ibid.*

dying intestate. This does not liberate women. Islamic law is discriminatory of women at inheritance and entitles women to half the inheritance of what men get.

In the Draft Muslim Marriages Bill the SALRC is silent on what happens when the marriage ends and there is no contract stipulating who gets what. Presumably, because Muslim marriages are not governed by community of property regime, the separate property regime would prevail when a marriage comes to an end. Unfortunately, it is more of a norm than an exception that many Muslim women are discouraged to work during marriage and, therefore, upon divorce many are likely to be poor and with no work prospects.

Moreover, even if assuming such women were working, the forms of labour traditionally associated with femininity like childcare, providing for the bodily and emotional needs of other people, routine tasks of cooking and cleaning have traditionally not been regarded as work when done for family members nor been remunerated. Even where such work is undertaken in the public sector, it is neither highly rewarded, nor regarded as important. In sum, the nature of women's work exposes them to marginalization and, therefore, a separate property regime may not be ideal for them. The above notwithstanding, the Bill provides for equal status and capacity of spouses, and states that a wife and husband in a Muslim marriage are "equal in human dignity and both have, on the basis of equality, full status, capacity and financial independence, including the capacity to own and acquire assets and to dispose of them, to enter into contracts and to litigate".[782]

It should also be appreciated that in the Islamic Marriages and Related Matters Report of July 2003,[783] the SALRC has emphasized that "it is not Islamic law that is being reformed, but South African law being adjusted to recognize Islamic marriages". Clearly some reform proposals are not radical enough to promote the rights of women because they fall short of Article 2(a)-(f) and 16(1)(h) of the CEDAW.

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[782] See Wesahl Agherdien Domingo,"Marriage and divorce: opportunities and challenges facing South African Muslim women with the recognition of Muslim personal law" in *Agenda Special Focus 2005.*

[783]See Project 59 Islamic Marriages and Related Matters Report of July 2003 at http://www.law.wits.ac.za/salrc/report/pr59report.pdf . Accessed 10 May 2004.

It could be that the reform initiatives in South Africa are difficult to implement because of legal pluralism. Reforming customary law has proved difficult, partly "because of two versions of customary law: the written ossified customary law applied by the courts, and the living customary law prevailing in the communities".[784] Reforming the written customary law, which is "a mixture of tradition, colonial and apartheid legislation such as the Native Administration Act 1927, Bantu Authorities Act 1951 and subsequent laws and regulations that oppressed blacks", may have little effect on the unwritten versions of customary law.[785]

There are many problems emanating from legal pluralism in South Africa. The varied nature of the cultural, ethnic and linguistic composition of the various communities means that both the written and living customary law differ from community to community. This makes it difficult to determine which of the various tribes' customary laws should be integrated into state laws. The same is true of religious laws; for example, Muslims comprise less than 5% of the population of South Africa, implying that they would not need as a minority a separate law. Even in the framework of a separate law, "there are many Islamic schools of law creating complications as to which specific school's law to adopt as binding on others".[786] For example, the Draft Muslim Marriages Bill may not be binding, even if it becomes law, on sects within the Muslim community that believe Islamic religion is too sacred to be reformed by secular people.[787] To conservative Muslims it is impermissible to let a non-Muslim judge preside over Muslim matrimonial issues while other Muslims accept it.[788] The consensus that the SALRC sought through public consultations has not materialized both under the proposed customary law of succession and among Muslims. These are the challenges Uganda ought to consider as it proposes reforms in

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[784] See *Bhe and others* v *The Magistrate Khayelitsha and Another* 2005 (1) SA 580(C.C) where court held that "the official rules of customary law were sometimes contrasted with what was referred to as 'living customary law', in which the rules were adapted to fit in with changed circumstances. The problem with these adaptations was that they were *ad hoc* and not uniform". Court noted that "Magistrates responsible for the administration of intestate estates continue to adhere to the rules of official customary law, with the consequent anomalies as a result of changes that have occurred in society".

[785] *Ibid.*

[786] See Wesahl Agherdien Domingo,"Marriage and divorce: opportunities and challenges facing South African Muslim women with the recognition of Muslim personal law" in *Agenda Special Focus 2005.*

[787]See Project 59 Islamic Marriages and Related Matters Report of July 2003 at http://www.law.wits.ac.za/salc/report/pr59report.pdf. Accessed 12 March 2004.

[788] Some Muslims describe the Draft Muslim Marriages Bill as contrary to the *Quran*. See the Alinaam website, http://www.alinaam.org.za/misc/mplc05.htm. Accessed 30 November 2005.

both customary and religious laws regulating women's rights of succession to property.

The different types of marriages available in law, customary marriage, civil marriage and marriage under Islamic law all result in considerable gender inequality. This situation is contrary to what Article 16(1)(h) of the CEDAW provides about equality of the sexes under the laws of marriage. Patriarchy, poverty, ignorance of rights and socialization all adversely bear on women's choices of rights to property at marriage. Conflicts and competitions between state-made laws and non-state-made laws regulating women's rights to property at marriage, upon divorce and upon the death of a spouse can generate uncertainty.

The reform process in South Africa involves further problems; it is piecemeal. The SALRC is currently dealing with four interrelated legal regimes of marriages as the topic of separate studies. The regimes in question are Muslim, Hindu, customary and civil marriages. A piecemeal approach carries the risk of reforms not being thorough. Moreover, some reforms are contradictory. Recognizing marriages celebrated under customary and Islamic rites where girls below 18 years can only marry with parental consent contradicts the Marriage Act 1961 that defines minors for purposes of civil marriages as persons below 21 years who cannot marry without parental consent. These different standards ought to be harmonized, otherwise a girl of 19 could contract a customary but not a civil marriage in the same country.[789]

There are other problems with the South African law in general. Ascertaining what law is applicable to what situation in protecting women's rights to property in South Africa is cumbersome. The relevant state-made laws are found in various statutes. In the area of succession they are the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965, limiting the powers of a testator to prohibit the alienation of immovable property; Estates Act 66/1965, regulating formalities of estate administration such as reporting the death and taking out letters of executorship over an estate; the Intestate Succession Act 81/1987, regulating intestate estates; the Maintenance of Surviving Spouses Act 27/1990, providing for surviving spouses to

[789] The law should prescribe ages of marriage that do not affect girl's academic programmes to enable them complete school.

claim reasonable maintenance from estates of deceased spouses and the Wills Act of 1953 to regulate execution of wills and any testamentary writing.[790] The law of Succession Amendment Act 43 of 1992 was "passed to validate wills that do not fully comply with the strict requirements of the Wills Act."[791] The point is that many laws regulating the same matter do not create certainty. The lesson from South Africa is that where there are various laws regulating rights of succession to property, they need to be harmonized to make the protection of women's rights more reliable.

6.3 The strengths and weaknesses of the state-made laws regulating intestate succession

Under the Intestate Succession Act 81 of 1987 inheritance of the deceased's property is restricted to her or his nearest relatives.[792] The Act applies to "the intestate estates of persons who die intestate, either wholly or in part after the commencement of the Act on 18 March 1988".[793] Relevant to widows, section 1(1)(a) thereof provides that "if a deceased is survived by a spouse but not by a descendant, the spouse inherits the entire estate."[794] If a spouse as well as a descendant survive the deceased, the surviving spouse succeeds to "a child's share of the estate or so much of the estate as does not exceed in value the amount fixed from time to time by the Minister of Justice, by notice in the Government Gazette,[795] whichever is greater, and the descendant inherits the residue, if any, of the estate."[796] However, what is a child's share a spouse is entitled to?

In section 1(4)(f) of the Intestate Succession Act, a child's share is defined as follows:

> "A child's portion, in relation to the intestate estate of the deceased, shall be calculated by dividing the monetary value of the estate by a number equal to

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[790] See MJ De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa*, Volume 31.
[791] *Ibid.*, paragraph 237,p154.
[792] *Ibid.*, paragraph 216,p132.
[793] *Ibid.*, paragraph 216,p132.
[794] *Ibid.*
[795] *Ibid.* Under section 1(3) Intestate Succession Act 81/1987, "a notice by the minister does not apply in respect of the intestate estate of a person who died before the date of the notice".
[796] See MJ De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa, Volume 31*, paragraph 216, p132.

the number of children of the deceased who have either survived him, or died before him but are survived by their descendants, plus one".

The above provision contains two important aspects. De Waal et al explain that:

"Firstly, whatever the matrimonial regime of the parties, the surviving spouse is always entitled to a child's share or the prescribed minimum amount of the intestate estate. However, where the parties were married in community of property, or under the accrual system, the surviving spouse's share of the joint estate does not form part of the intestate estate. Secondly, the minimum amount to which the surviving spouse is entitled is not laid down by statute but fixed from time to time by notice by the Minister of Justice".[797]

Evidently although a child's share may not be good enough for a woman who has contributed to the accumulation of estate properties, this position is better than what obtains under customary and religious laws of succession.[798] Moreover, the Intestate Succession Act also provides in section 1(6) that "if a descendant of a deceased, excluding a minor or a mentally ill descendant, entitled together with the surviving spouse of the deceased to benefit from an intestate estate, renounces his right to receive such a benefit, such a benefit will vest in the surviving spouse".[799]

South African state-made law demarcates specific roles for surviving spouses in the process guarding against the phenomenon of property dispossession of widows. For reporting death, as an example, under the Estates Act 66/1965, formalities to fulfil on the death of a person in South Africa are set. The formalities are "lodging a death notice in a prescribed form, in respect of any person who dies within South Africa leaving property or a document, which is or purports to be a will".[800] In terms of section 7(1)(a) thereof "this must be done within 14 days after the death". Section

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[797] *Ibid.*

[798] At customary law females enjoy user rights, but males generally inherit the property. Islamic law of succession gives females half what the males inherit. See *Bhe and others* v *The Magistrate Khayelitsha and Another* 2005 (1) SA 580(C.C) where court held that "customary law of succession excludes women from inheriting property."

[799] See M J De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa, Volume 31,* paragraph 220,135.

[800] See section 7(1) Estates Act 66/1965, text at http://www.acts.co.za/ad_estate/. Accessed 12 November 2005.

7(1)(a) also requires that "the death notice be lodged by the surviving spouse of the deceased and if there is no spouse, his nearest relative or connection residing in the district in which the death occurred." Under section 7(4) of the Estates Act 66/1965, "if the person signing any death notice was not present at the death, or did not identify the deceased after death, such person shall furnish the Master with proof of the death."

Where a person dies outside South Africa, "any person who has possession or control of the property of the deceased or document, which is or purports to be a will of the deceased, must lodge the death notice with the master within 14 days."[801] Section 8 (1) thereof reads that "any person who has any document being or purporting to be a will in his possession at the time of or at any time after the death of any person who executed such document, shall, as soon as the death comes to his knowledge, transmit or deliver such document to the Master". Section 8(3) thereof requires "the Master to register every will lodged with him in the register of estates."[802] If this law is followed to the letter, it is credible that, given the prescriptive nature of the law and the short time within which death notices are lodged, chances of estate properties being wasted away will be considerably reduced.

In terms of section 9(1) Estates Act 66/1965, "the surviving spouse of a person who dies in South Africa or any person ordinarily resident must make an inventory and deliver it to the master within 14 days after the death, or within such further time as the master may allow." In terms of section 9(1)(a) thereof this is done in the presence of persons who have interest in the estate such as the heir. The inventory lists all properties of the deceased: moveable, immoveable and claims in favour of the estate. Section 35 Estates Act 66/1965 regulates the liquidation and distribution account and requires the "executor to submit to the master such an account in the prescribed form." An estate becomes distributable under section 35(12) thereof when the account has been laid for inspection and has been advertised and no objection has been lodged.

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[801] See section 7(2) Estates Act 66/1965.
[802] *Ibid.*, section 8 (3).

In terms of section 12(1) the Master "may appoint an interim curator to take any estate into his custody until letters of executorship have been granted or signed and sealed, or a person has been directed to liquidate and distribute the estate."

Section 13(1) "forbids any person to distribute or liquidate the estate of a deceased person without letters of executorship, or in pursuance of the direction by the master or under an endorsement made under section 15 regulating the appointment of assumed executors."

Section 25(1) is to the effect that "upon the death of a person who is neither ordinarily resident in South Africa nor the owner of any property other than moveables, the Master may dispense with the procedures of requiring security from applicants and issue letters of executorship or direct the manner in which to liquidate the estate".[803] In all other cases letters of executorship are mandatory before an estate is administered.

In terms of section 18(3) "if the value of any estate does not exceed the amount determined by the Minister by notice in the Gazette, the Master may dispense with the appointment of an executor and give directions as to the manner in which any such estate shall be liquidated and distributed".[804] The relevancy of these provisions in the law is that where an estate is small in value, the master has the discretion to direct it to be administered summarily without the need to apply for letters of executorship. This is presumably a time and money saving relief to women wishing to administer their indigent late spouse's estates. It should also be appreciated that the administration of estate procedures prevailing in South Africa are expedient.

The duties which fall upon the executor may generally be summarized as follows: providing the Master with an inventory of the estimated value of all estate property (Section 27(1) Estates Act 66/1965); upon receipt of letters of executorship publicize a notice for the estate debtors and creditors (Section 29(1) Estates Act 66/1965); in terms of section 28 Estates Act 66/1965 create a bank account in the republic for the

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[803] See section 25(1) Estates Act 66/1965.
[804] *Ibid.*, See section 18(3).

estate as soon as he gets funds of the estate in excess of 1000 *Rands;*[805] determine the financial status of the estate (Section 34); recover all estate properties (Section 38,47 Estates Act 66/1965); make good all estate liabilities (Section 35 Estates Act 66/1965); draw up the estate accounts (Section 35 Estates Act 66/1965); file them with the Master's office (Section 35 Estates Act 66/1965); make the estate account available for inspection after approval by the Master (Section 35 Estates Act 66/1965); distribute the net estate among the beneficiaries (Section 35 Estates Act 66/1965)and finally request the Master's discharge.[806] These prescriptive procedures guard against estate property wastage.

Furthermore, section 26(1) A of the Estates Act 66/1965 provides that "an executor may before the account has lain open for inspection, in terms of section 35 above, with the consent of the Master release such amount of money and such property out of the estate as in the executor's opinion are sufficient to provide for the subsistence of the deceased's family or household".[807]

There are more emancipation achievements pending formal enactment into law. For example, the Amendment of Customary Law of Succession Bill 109 of 1998 proposes to "repeal section 23 of the Black Administration Act".[808] It further proposes that estates of black persons should be administered in accordance with the Estates Act 66 of 1965, the Wills Act of 1953 and the Intestate Succession Act 81 of 1987.[809] Compared with customary law the above statutory laws are less patriarchal. This progressive bill, when enacted into law, will greatly advance black women's rights of succession to property.

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[805] 1000 Rands is the equivalent of £91as on 27 March 2006.
[806] See M J De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa, Volume 31 par 412, p268.*
[807]See section 26(1)A of the Estates Act 66/1965.
[808] See NJJ Olivier et al, " Indigenous law" in W. A. Joubert et al (ed), *The Law of South Africa,* Volume *32* paragraph 244, p247/8.
[809] *Ibid.*

6.4 The strengths and weaknesses of the state-made laws regulating testate succession

The freedom of a testator to dispose of the whole or any part his estate as he pleases is not absolute and is subject to limitations: the court will not give effect to bequests that are illegal or against public policy or are too ambiguous to be enforced.[810] Furthermore, the Immovable Property (Removal or Modification of Restrictions Act 94 of 1965) also "limits the powers of a testator to prohibit the alienation of immovable property".[811]

De Waal et al clarify that as regards priority of claims to the testator's estate, "the maintenance and education of the testator's minor children" are a charge on his estate, with priority for claims of creditors, but preceding claims of legatees and heirs.[812] The last claim on a testator's estate is "the maintenance of the surviving spouse".[813] De Waal et al also note that for marriages that end by death after the Maintenance of Surviving Spouses Act 27/1990 came into force, "the survivor will have a claim against the estate of the deceased spouse for the provision of reasonable maintenance needs until his death or remarriage."[814] This situation is only permitted as long as the survivor is not able to provide from her/his own resources.[815]

To determine the maintenance requirements of the surviving spouse, section 3 of the said law stipulates the factors to be considered:

> "The property in the estate of the deceased spouse available for distribution to heirs and legatees; the existing and expected means, earning capacities, financial needs and obligations of the survivor and the standard of living of the

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[810] For example, those calculated to break up a marriage. See MJ De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W. A. Joubert et al (eds), *The Law of South Africa*, Volume *31*, paragraph 290,p189.
[811] See M J De Waal et al, "Wills and succession, administration of deceased estates and trusts", paragraph 278, p183.
[812] *Ibid.*
[813] *Ibid.*
[814] *Ibid.*
[815] *Ibid.*

survivor during the subsistence of the marriage and her or his age at the death of the deceased spouse".[816]

Under section 2 of the said law the "survivor's claim for maintenance has the same order of preference in respect of other claims against the estate of the deceased spouse as a claim for maintenance by a dependent child of the deceased spouse".[817] Accordingly, under section 2(3)(b) thereof whenever "a claim by the survivor and that by the dependent child compete they must be must be reduced proportionately."[818]

The Wills Act 7 of 1953 regulates the execution of wills and any other testamentary writing. Every person of the age of 16 years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act.[819] The Wills Act is, however, a complicated piece of legal act and rather technical. Concerning the validity of wills as an example, a valid will according to section 2 (1)(a)(i) Wills Act 1953 as amended must be:

"Signed at the end thereof by the testator or by another person in his presence and under his direction; the signature must be made by the testator or by the other person who signs in his presence and by his direction, or must be acknowledged by the testator and such other person in the presence of two or more competent witnesses, present at the same time; the witnesses must attest and sign the will in the presence of the testator, each other and when applicable, the person who signed the will in the testators presence and by his direction".[820]

The Law of Succession Amendment Act 43 of 1992 was passed to ameliorate the above prescriptive rules and other rigours.[821] Section 3(g) thereof reads among others that "if a court is satisfied that a document drafted or executed by a person who has died since the execution thereof was intended to be his will, the court must order the master to accept that document as a will, although it does not comply with all the

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[816] *Ibid.*
[817] *Ibid.*, paragraph 424, p278.
[818] *Ibid.*, paragraph 424, p278.
[819] *Ibid.*, paragraph 234, p151.
[820] *Ibid.*, paragraph 234, p151.
[821] *Ibid.*, paragraph 237,154.

formalities for the execution of a will".[822] This is a law Uganda should adopt as it avoids the problems experienced by many people not familiar with the formal laws as well as the numerous hardships arising from the strict formalistic approach of the law courts.

Section 14(1) of the Estates Act is to the effect that when a person has been nominated as an executor in a will registered in the office of the master, he/she must apply in writing for a grant of letters of executorship.[823] De Waal et al clarify that forms for this purpose are obtainable from the Master's Office.[824] They also point out that by regulation the Minister of Justice has since defined the persons "who may liquidate or distribute the estate of the deceased person, whether as executor or agents under instructions and these include the surviving spouse of the deceased, an attorney, a board of executors, and a trust company among others".[825]

6.5 Further South African ideas relevant to women's rights to property

One of the aims of the ongoing SALRC "Administration of Estates Review" discussion paper is "the introduction of a unitary system for the administration of estates of all South Africans".[826] Measures to improve the administration process and reduce the work of the supervising authority and executors, as far as it can be justified, are also considered. It has been rccommended that "all estates should be administered subject to the supervision of a state official called the Master and that beneficiaries should have a choice to report an estate to the Master or a service point with jurisdiction".[827] Estates of all persons who die leaving a will or property must be reported. Comments have also been invited on the question "whether a role should be retained for traditional leaders or authorities and customary law".[828] The above South African ideas are worth adopting given that they are likely in one way or another to improve women's rights to property.

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[822] Ibid., paragraph 237, p154.
[823]See section 14 (1) Estates Act 66 / 1965.
[824] See M De Waal et al, "Wills and succession, administration of deceased estates and trusts," paragraph 402,p266.
[825]*Ibid.,* paragraph 402,p265.
[826] See The Administration of Estates Review Discussion Paper 110,project 34 introduced in October 2005 at http://www.doj.gov.za/salrc/dpapers/dp_110.pdf. Accessed 30 January 2006.
[827] *Ibid.*
[828] *Ibid.*

It appears that in South Africa, for closing the gap between paper law and practice, that is, between municipal laws of succession fully compliant with the Constitution and the not so perfect laws presently in force, both state-made and non-state-made, the country has opted to give priority to international laws. South African municipal laws regulating rights of succession to property are by implication now open to scrutiny in the light of international law in domestic courts. In this regard section 39(1)(b) of the Constitution provides that "international law must be considered when a court interprets the Bill of Rights". It implies that the CEDAW may be taken into consideration when there is a matter before a court concerning discrimination against women. The outcome is that provisions such as Article 16(1)(h) of the CEDAW have a definite normative effect on the interpretation and application of any law relating to gender equality in South Africa.

Furthermore, the Constitution provides that "when interpreting any legislation, every court must prefer to apply any reasonable interpretation of legislation in a manner consistent with international law", that is, exclude any alternative interpretation that is inconsistent with international law.[829] Moreover, South Africa has also enacted a law to implement the CEDAW: the Promotion of Equality and Prevention of Unfair Discrimination Act 2000(PEPUDA 2000).[830] The objectives of the PEPUDA 2000 include "furthering the obligations imposed in terms of CEDAW and giving effect to the letter and spirit of the Constitution."[831] The preamble to the PEPUDA 2000 reads that "the consolidation of democracy in South Africa requires the eradication of social and economic inequalities, especially those that are systemic in nature generated by colonialism, apartheid and patriarchy."

Chapter two of the PEPUDA 2000 contains a general prohibition on unfair discrimination by the state and any person. Section 8 deals with the prohibition of unfair discrimination on the ground of gender. Specific forms of unfair discrimination include the following: "preventing women from inheriting family property; any practice including traditional, customary or religious practices that impair the dignity

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[829]See section 233 Constitution.
[830]See 6.2. The PEPUDA 2000 gives effect to the letter and spirit of the Constitution and overrides any discriminatory legislation.
[831] See Chapter one PEPUDA at http://www.polity.org.za/pol/acts . Accessed 30 November 2005.

of women or undermine equality between men and women; and any policy or conduct that unfairly limits access of women to land rights, finances and other resources".[832]

Chapter four of the PEPUDA 2000 contains provisions regarding the establishment of equality courts and matters concerned therewith. Accordingly, "every Magistrate's court and every High Court is an equality court for the area of its jurisdiction".[833] The equality court must determine, upon receipt of a complaint, "whether unfair discrimination, hate speech or harassment, as the case may be, has taken place as alleged".[834] In comparison with Ugandan law there is no national legislation that facilitates the practical implementation of the CEDAW. Because economic, social and cultural rights are concerned with calls on governments to take positive actions to ensure that such rights are implemented, the easy way out for most governments is to say that there are no resources. What South Africa is doing to implement the CEDAW is therefore laudable.

Chapter five of the PEPUDA 2000 deals with the promotion of equality and places a "duty on the state and all persons to promote equality."[835] In terms of section 24(1) of the Act "the state has a duty and responsibility to promote and achieve equality."[836]

What the state must do to achieve equality is set out in section 25 of the PEPUDA 2000. It includes, among others, providing assistance, advice and training on issues of equality. Section 32 provides for the establishment of an Equality Review Committee consisting of seven members from various commissions. The powers, functions and term of office of the Equality Review Committee are set out in terms of section 33. Although the PEPUDA 2000 does not define sex and gender, it can be assumed that sexual discrimination is primarily based on biological differences between men and women. The PEPUDA 2000 provides a powerful vehicle for socially and economically disadvantaged women to assert their claims.

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[832]PEPUDA 2000, section 8(c) and (e).
[833] *Ibid.*, section 16 (1)(a).
[834] *Ibid.*, section 21.
[835] *Ibid.*, Section 24.
[836] See PEPUDA Chapter Five.

Equality is the foundation of democratic societies aspiring to social justice and human rights. In South Africa black women are subject to inequalities in law and fact. This situation is exacerbated by the existence of discrimination in families, in communities and at workplaces. Discrimination is promoted by the survival of stereotypes and of traditional cultural and religious practices and beliefs detrimental to women. South Africa is addressing, however, this unfortunate situation aggressively. Section 181(d) of the Constitution establishes the Commission for Gender Equality. This Commission is now in existence and its functions include investigating inequalities, reviewing existing and upcoming legislation from a gender perspective among others.[837] In terms of section 187 of the Constitution, the Commission for Gender Equality "must promote respect for gender equality and the protection, development and attainment of gender equality."[838] In comparison with Ugandan law, the Equal Opportunities Commission, the nearest equivalent of the South African Commission for Gender Equality though, provided for in the 1995 Constitution, is yet to be established.

The South African government, fighting to eradicate poverty and provide work opportunities for the unskilled, mooted the micro-enterprise concept. Sewing co-ops, chicken farming, candle making, gardening and arts and crafts are a few of the micro-enterprise projects initiated collectively by women's community groups.[839] Common features of most of these activities reflect an extension of women's homemaking skills and are "generally undertaken in combination with other domestic or income generating activities."[840] In practice, a holistic emancipation of women requires more than mere amendments of the laws of succession as in South Africa.

Women in South Africa continue to be the main beneficiaries of social security grants which include child support grants for mothers unable to support their children; old age pensions; women qualify at the age of 60, and men at the age of 65 years; care dependency grants are given to caregivers dealing with severely disabled children up to the age of 18 years; disability grants for those who are unable to secure

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[837] See functions and powers of the Commission for Gender Equality at http://www.cgc.org.za. Accessed 12 April 2004.
[838] See section 187 (1) Constitution.
[839] See: Women in South Africa, "Challenges for collective action in the new millennium" at community workers Co-operative site http://www.cwc.ie/news/art03/womensa.html. Accessed 12 November 2005.
[840] *Ibid.*

employment, and foster care grants to caregivers of children who have been placed with them by the courts.[841]

To sum up, the proposed reforms in South Africa are not based on the assumption that law reforms, on their own, will necessarily result in a change of adverse social practices and thus advance the rights of women. In other words, to effect the reforms proposed in the laws of marriage and succession, the South African government[842] has also invested in social services, provided microfinance credit for women, and has involved men in gender issues. This is not to say that the emancipation of women, especially black women, in South Africa is over. What has been achieved since the demise of apartheid, as far as the emancipation of women is concerned, is nevertheless encouraging. These are the lessons Uganda could consider in her desire to fully comply with Article 2(a)-(f) and 16(1)(h) of the CEDAW.

With the above in mind, it is now necessary to review the relevant ideas gathered from England, Scotland and South Africa with the purpose of proposing reforms to Uganda's laws of marriage and succession.

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[841]See The South African Government Information Website at http://www.info.gov.za/aboutsa/socialdev.htm on the subject of social development where projects for women's economic empowerment are discussed. They include "eating-houses, overnight facilities, car washes, beauty salons, vegetable gardens, garment-making, poultry and egg production, bread baking, leather works, offal cleaning, child minding and paper-and-fabric printing". Accessed 20 November 2005.
[842]*Ibid.*

Chapter Seven

7.0 Proposals to enable Uganda comply with the CEDAW

The need for Uganda to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW prescribing substantive equality between men and women in marriage and family relations prompts a number of proposals for law reform.[843] On the basis of the preceding chapters, there are three models of marital property sharing from which Uganda can choose: (1) the English separate property marital regime, with judicial discretion in matters of property distribution upon divorce and death of a spouse; (2) the Scots separate property marital regime, subject to laws based on principles and modified by court discretion upon divorce but based on fixed rights with regard to succession to property; and (3) the default immediate or full community marital property regime of South Africa, under which a surviving spouse's share of the joint estate does not form part of the deceased's estate.

The above cited model jurisdictions have adopted a variety of solutions to the question of women's rights to property in marriage, upon divorce and upon death, reflecting their diverse economic and cultural assumptions. For example, the relevant English judicial decisions are confined to the merits of the particular case with no articulation of common principles to be applied in all cases. There is no judicial consensus about how questions of law relating to matrimonial property must be resolved.[844] On the other hand, in Scotland, the Family Law (Scotland) Act 1985 sets out various principles to guide the court in making orders for financial provision with detailed clauses modifying the principles. In contrast to England and Scotland, in South Africa the distribution of matrimonial property depends on whether the parties are applying state-made, customary or Islamic family law, which differ from each other. As a result of the above state of affairs, it is impossible to come up with one set of common principles. Moreover, the present study has not been a systematic

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[843] See Chapter One (1.0).

[844] See B. Hale et al, *The Family and Society* (London, 2002), 321.This is probably because the "MCA 1973 does not mention equal sharing of the parties resources even marriage related assets".

comparative analysis of all laws regulating rights to property in marriage, upon divorce and upon the death of a spouse, and has not examined the same issues in the three jurisdictions. Instead ideas have been randomly chosen from the model jurisdictions and adapted to suit Uganda's law reform needs.

As shown in Chapter Three, the situation that presently prevails in Uganda is that the state-made laws of marriage do not give wives a right to own equal shares of matrimonial property with their husbands during marriage, thereby contributing to their destitution as widows; unmarried cohabiting women[845] have no rights to the property of their partners; and a widow who remarries, as opposed to a widower,[846] loses her right of occupancy in the matrimonial home. All these are contrary to Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

Furthermore, 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 judicial officers to come to quite different conclusions based on similar facts. It is, therefore, desirable that Uganda adopts a matrimonial property regime that advances certainty in the laws regulating the sharing of the parties' resources upon divorce and death of a spouse. Certainty would enable the parties to have an apprehension of what to anticipate on divorce or death and, as well as reducing animosity, it would enable the parties to reach settlements quickly. It would also enable judicial officers render their decisions more expeditiously and reduce the backlog of cases.

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[845] The CEDAW Committee has observed in General Recommendation No 21, on equality in marriage and family relations at paragraph 33, that "in many countries, property accumulated during a *de facto* relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner..." See http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21.Accessed 20 November 2005.

[846] See Rule 8 of the Second Schedule to the Succession Act in Chapter Three (3.1.1).

Uganda's customary and Islamic laws of marriage and succession do not advance women's rights to property in marriage, upon divorce and upon the death of a spouse. As shown in Chapter Three, there is a very limited duty to maintain divorced wives under Islamic family law. Similarly, under the Islamic law of succession, where children survive the deceased, widows are entitled to a mere eighth of the estate and there are generally no equal rights of succession to property. At customary law, more property is given to males, especially to the customary heir, than to females.[847] As shown in Chapter Two, such a state of affairs is no longer defensible because, unlike in the past, many assets are now acquired during marriage with the contribution of both parties rather than by the husband's personal endeavour.

Chapter Three has pointed out that under the state-made laws of marriage and succession, and partly as a result of the separate matrimonial property regime, Ugandan law continues to grapple with the insurmountable difficulty, upon marital break-up, of adequately rewarding the non-financial contributions of homemaker spouses, even with the mitigating factor of judicial discretion. The norm is that, generally at divorce, financial contributions of the husband tend to be accorded more weight than the non-financial contributions of homemakers. This is contrary to what Articles 2(a)-(f) and 16(1)(h) of the CEDAW prescribe on equality in marriage and family relations.[848]

The problem with a separate matrimonial property regime in both state-made and non-state-made laws of marriage and succession,[849] and the reason why sustaining it makes Uganda's full compliance with Articles 2(a)-(f) and 16(1)(h) of the CEDAW difficult, is that in many cases virtually all the valuable property belongs to the

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[847] See Chapter One (1.0). The CEDAW Committee urged Uganda to "address the prevalence of retrogressive non-state-made laws as evidenced by customs and traditional practices that prevent women from inheriting property".

[848] The CEDAW Committee has noted in General Recommendation No 21, on equality in marriage and family relations at paragraph 32, that "in some countries, on division of marital property, greater emphasis is placed on financial contributions to property acquired during a marriage, and other contributions, such as raising children, caring for elderly relatives and discharging household duties are diminished. Often, such contributions of a non-financial nature by the wife enable the husband to earn an income and increase the assets. The Committee recommended that financial and non-financial contributions should be accorded the same weight." See http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 20 November 2005.

[849] Section 3 of Uganda's Succession Act 1906 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".

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.

The 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 meagre, 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.

That the situation of women's rights to property upon marriage, upon divorce and upon the death of a spouse deserves reform has been reinforced by the 2003 Human Rights Watch study on domestic violence and Women's vulnerability to HIV/AIDS in Uganda, referred to in Chapter Three. The report highlights the situation of homemaker spouses under Uganda's separate matrimonial property regime with evidence that many husbands are "unilaterally mortgaging, pledging or giving gifts to third parties matrimonial property, without regard to the interests of the spouse".[850]

In the light of the preceding chapters, English law may offer the appropriate model of both a matrimonial property and succession regime that would enable Uganda to fully comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW. Although under English law marriage by itself has no automatic effect upon proprietary rights, it creates a right to occupy the matrimonial home.[851] Section 30(1) and (2) of the Family Law Act 1996 confers on a non-owning spouse "the right not to be evicted by the owning spouse from the home or dwelling house and, if not in occupation, a right to enter the

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[850] See: *Just Die Quietly: Domestic Violence and Women's Vulnerability to HIV in Uganda*, http://www.hrw.org/reports/2003/uganda0803. Accessed 30 November 2005.
[851] See Carolyn Hamilton and Alison Perry, *Family Law in Europe, (London, 2002), 105.*

same".[852] This is a progressive state of affairs that, if adopted, would benefit Uganda's non-owning spouses.

In the technical sense, English law creates a separate matrimonial property regime; however in practice, both case law and statute, especially section 25 of the Matrimonial Causes Act 1973(as amended), have been interpreted in such a way that it closely resembles a deferred community.[853] Notwithstanding, the main advantage of the said English matrimonial property regime is that a spouse is generally able to manage and control his or her own assets during a marriage; the disadvantage is that the semblance of a community element at the termination of a marriage may prove to be no more than a mere theoretical possibility. As noted already, if the husband or wife "owns" the bulk of the matrimonial property, with the exception of the home, as the main or sole income earner, it is conceivable that most property will be eventually dissipated to the prejudice of the other spouse before it can be shared upon divorce or death.[854] Moreover, considering recent family litigation in England, it is uncommon for wives and husbands to share matrimonial property on a 50:50 percent basis on divorce. This state of affairs is contrary to what Articles 2(a)-(f) and 16(1)(h) of the CEDAW prescribe on equality of rights in marriage and family relations and to that extent, English law may not be the most appropriate model for Uganda to adopt.[855]

The other aspect of English law that may not be appropriate is that, on divorce, the principal focus when deciding financial provisions is not spouses but minor children.[856] When deciding matters under section 25(1) of the Matrimonial Causes Act 1973 (as amended), the first consideration is given to the welfare of any minor

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[852] See sections 30 FLA1996 at http://www.westlaw.co.uk . Accessed 30 November 2005.
[853] See John Eekelaar, "Asset distribution on divorce-time and property" in Nov 2003 *Fam Law* 828. He writes that "the decision in *White* v *White* (2001) 1AC 596 and *Lambert* v *Lambert* (2003) 1 FLR 139 introduced into English law a regime of community (albeit only a deferred community limited to acquisitions)... this is questionable given that English matrimonial law is based on separation of property and so it is not literally the case that each spouse already has a property interest in the pool of assets that is simply awaiting quantification". This would be evident if one of the spouses were to die before court made the order.
[854]See B. Hale et al, *The Family and Society,* 149.
[855] See Chapter Four for a discussion of the cases of *White* v *White* (2001) 1AC 596, *Cowan* v *Cowan* (2001) 2 FLR 192 at 206 and *Lambert* v *Lambert* (2003) 1 FLR 139. In all the said cases, wives were given less than 50% of the property at divorce.
[856] See Chapter Four (4.2.1).

child and thereafter are considered other matters that the judge has regard to.[857] Accordingly, English courts exercise discretion taking into account the requirements and responsibilities of the parties. These are spelt out, among others, as the "parties' means, standard of living prior to the marriage, the age of the parties, duration of the marriage, any physical or mental disability of either party, the past, present or future contributions made or to be made to the welfare of the family, and conduct and value of any benefit lost upon dissolution of the marriage".[858] However, as noted, "the Matrimonial Causes Act 1973 does not state what weight" should be given to each of the listed matters.[859] The weight or importance to be attached to any of the relevant factors depends on the facts of the particular case. This approach of the common law neither promotes equality between spouses nor complies with the CEDAW. English law, "in the matter of financial provisions upon divorce, is still in a state of uncertainty".[860] The effect is that English law, in the absence of a legislation prescribing equal division of property upon divorce, falls short of what Uganda should adopt to comply fully with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

Under English family law, there are no financial settlement provisions for cohabiting couples upon separation or death. Cohabitants can only invoke property law when suing their partners for a share of their property.[861] English courts have the power to effect a property transfer by declaring that the person who owns the property in issue, especially the family home, holds that property on constructive trust for both himself and the other partner, whether married or not.[862] The principle of constructive trusts is a useful tool in protecting the proprietary rights of cohabitants as demonstrated in the case of *Grant v Edwards.*[863] Grant, who had separated from her husband, started living with Edwards and the couple had children. A family house was purchased and

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[857] See section 25(1) MCA 1973.
[858] Section 25 MCA 1973.
[859] See B. Hale et al, *The Family and Society,* 316.
[860] Recently, the Law Society of England and Wales made proposals on sharing assets on divorce that "should be read in conjunction with section 25 MCA 1973 for purposes of creating clarity on the principles upon which financial division on divorce should be resolved". See Peter Watson Lee, "Financial provision on divorce: clarity and fairness" in 2004 *Fam Law* 348.
[861] See Anne Barlow, "Rights in the family home time for a conceptual revolution?" in Alistair Hudson (ed), *New Perspectives on Property Law, Human Rights and the Home,* (London, 2004)), 52-78 at 67.
[862] *Ibid.*, 69; See *Gissing* v *Gissing* (1970) 2 All ER 780, where court discussing the application of constructive trusts noted that: "there has to be a common intention between the owner and non-owner that the latter should have a beneficial share in the property, and the non-owner must have acted to his or her disadvantage in reliance on that common intention".
[863] See *Grant v Edwards and Another* (1986) 2 All ER 426.

the title was taken in the name of Edwards alone, on the understanding that to have it registered in both names would be prejudicial against Grant in her matrimonial proceeding with her then husband. Grant contributed to child raising and the household expenses, thus enabling Edwards to meet the mortgage obligations. Upon Grant claiming a share in the house, the Court of Appeal held that "Edwards held the house in trust for Grant and that Grant was entitled to a half share in it". While the English can rely on constructive trusts to protect the proprietary rights of unmarried women, it would be better to give certain rights to both parties over the matrimonial home and closely related important properties that override the rights of a mortgagee, except where there has been free and informed consent of both to the transaction.

Whatever the shortcomings with English law, Uganda can borrow many ideas from this approach to regulating rights to property in marriage and upon divorce or death of a spouse. Worth emulating is the custom in England, supported by case law where the matrimonial home is held under beneficial joint tenancy, and upon the death of one joint tenant the benefit passes on by survivorship to the survivor directly.[864]

Rules of the English law of succession that ought to be considered in reforming the law of succession in Uganda are those that confer power on the court under the Inheritance (Provision for Family and Dependants) Act 1975.[865] This confers a power to order the transfer of the property of the deceased to a surviving spouse, either where no reasonable provision has been made by the deceased's will or, where the deceased is intestate, it would be equitable to alter those rules.[866] Reasonable provision, in the case of a surviving spouse, is not limited to maintenance requirements (as is the case with a former spouse) but may include a lump sum and property transfer. Under section 2(4), the court may order any person who holds a property forming part of the net estate of the deceased to comply with the payment or transfer orders.

Furthermore, in recognizing a spouse's contribution to the acquisition of the matrimonial property during the spouse's life, the English Administration of Estates

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[864] English beneficial joint tenancy at death has the same effect as survivorship destinations under Scots law.
[865] See IPFDA 1975 at http://www.westlaw.co.uk . Accessed 30 November 2005.
[866] See sections 1(2), 2, 9 and 10 IPFDA 1975.

Act 1925 as amended "benefits the surviving spouse more than the children of the marriage".[867]

It could be, however, that compared with England, the Scots jurisdiction offers more appropriate matrimonial property and succession regimes that Uganda should adopt in her efforts to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW. The separate matrimonial property regime in Scots law is regulated on the basis of plainly stated principles modified by a framework of discretion, and this has been the case since the enactment of the Family Law (Scotland) Act 1985.[868] The Act provides a starting point of equal division of family property subject to discretion to achieve fairness.[869] Section 10(1) of the Family Law (Scotland) Act 1985 provides that "the net value of the matrimonial property shall be taken to be shared fairly between the parties to the marriage when it is shared equally or in such other proportions as are justified by special circumstances". The separate matrimonial property regime in Scotland is further modified by the presumption of equal shares in household goods under section 25 of the Family Law (Scotland) Act 1985. In this respect, Scots law addresses a big problem associated with the separate matrimonial property regime: often the household property belongs to the wage earner and during the marriage it may not be easy for the homemaker wife to buy her own.

Fixed rights are available to surviving spouses and children in relation to the property of the deceased. These are the protected legal rights referred to in the Succession (Scotland) Act 1964 available in both testate and intestate succession. The drawback, however, is that legal rights are exigible only out of moveables.[870] Moreover, as shown in Chapter Five, it is possible to defeat claims for legal shares by *inter vivos* gifts. Unlike English law,[871] the Scots law of succession regulates only succession to property left by the deceased at death and does not interfere with what one does with

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[867] See John Dewar and Stephen Parker, *Law and the Family* (Butterworths, London, 1992) 206.This is the rationale of the system. See section 46 of the Administration of Estates Act 1925 as amended providing for the entitlements of a surviving spouse when the intestate leaves issue. Uganda ought to borrow ideas from this law and improve her surviving spouses' rights of succession to property.
[868] See Joe Thomson, *Family Law in Scotland,* 4th Edition, 141.
[869] See Elizabeth Cooke et al, "Community of property- a regime for England and Wales: interim report in September 2005 IFL 133-137 at 136.
[870] See Report on Succession (Scottish Law Commission, 1990), 3.
[871] See Chapter Four (4.4).

his/her property during his/her life. In Scotland, unlike in England, the court has no discretionary power to amend wills or the rules of intestate succession in order to make greater financial provision for surviving spouses that may not have been adequately catered for.

It could be that the South African default immediate or full community of property, profit and loss matrimonial property regime and the pertinent laws of succession would be the most appropriate for Uganda in fully complying with the provisions of Article 2(a)-(f) and 16(1)(h) of the CEDAW. Under the South African matrimonial property regime, property of both parties to the marriage is shared equally, thereby providing compensation for a wife if she is unable to acquire her own property due to commitments of child rearing and other forms of unpaid housework. The strength of the full community regime is that it protects the interests of the homemakers; thus the benefit of adopting it in Uganda would be that homemakers, who tend to leave marriages more or less destitute, would instead leave owning at the very least a half share of the matrimonial property. Furthermore, in the course of the marriage, husband and wife have equal rights to the matrimonial property. As noted, the community regime commences on marriage and subsists through it, until ended by death or by a judicial act, such as divorce or nullity.[872] The other advantage with the full community of property regime, at least as enforced in South Africa, is that there are safeguards when one partner is reckless with funds. In such a case, the other spouse may apply for a separation of property order from the court even for a limited duration. When the community comes to an end upon divorce, family assets are divided equally and, if need be, lump sum awards are granted.[873]

South African state-made law regulating rights of succession to property is also instructive. The Intestate Succession Act 81 of 1987 has confined succession to property to close relatives. In terms of section 1(1)(a), "if a deceased person is survived by a spouse but not by a descendant, the spouse inherits the entire estate".[874] Where a spouse and descendant survive the deceased, "the spouse inherits a child's share of the estate or so much of the estate as does not exceed the amount fixed from

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[872] See Chapter Two (2.3).
[873] See Chapter Two (2.3).
[874] See M.J.De Waal et al, "Wills and succession, administration of deceased estates and trusts" in W.A. Joubert et al (eds), *The Law of South Africa,* Volume 31, paragraph 216, 132.

time to time by the Minister of Justice by notice in the Government Gazette, whichever is greater; while the descendant inherits any residue of the estate".[875]

De Waal et al clarify that "whatever the matrimonial regime of the parties, the surviving spouse is always entitled to a child's share or the prescribed minimum amount of the intestate estate... where the parties were married under the default community of property, or under the accrual system, the surviving spouse's share of the joint estate does not form part of the intestate estate".[876] Accordingly, and unlike in Uganda, surviving spouses in South Africa under the state-made law of intestate succession will always inherit more property than the descendants. The South African Law Reform Commission has also proposed that under the customary law of succession, instead of the senior wife taking more property, where the deceased had more than one customary wife, "all surviving wives should share equally in his estate".[877] As regards the law regulating testate succession, a testator may bequeath specific property belonging to himself alone but when a spouse makes a will and bequeaths property belonging to the community, "he is presumed to have intended to dispose of his own share alone".[878]

In the light of the above points, is it possible for Uganda to come up with a default matrimonial community of property regime and a law of succession that is not based on the South African model and yet still achieve full compliance with Articles 2(a)-(f) and 16(1)(h) of the CEDAW? It is unlikely that a deferred community regime is suitable in Uganda if it is considered desirable to achieve substantive equality between men and women in marriage and in family relationships as Articles 2(a)-(f) and 16(1)(h) of the CEDAW prescribe. As discussed in Chapter Two, "in a deferred community there is no community property during the marriage and the parties own their property separately".[879] However, "on dissolution of the marriage, certain property is defined as community property and divided according to the principles of

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[875] *Ibid.*
[876] *Ibid.*
[877] See SALRC Discussion Paper 93 Project 90 on customary law cited at http://www.vanuatu.usp.ac.fj/library/Online/Usp%20Only/Customary%20Law/South.htm. Accessed on 16 February 2006.
[878] See M.J.De Waal et al, "Wills and succession, administration of deceased estates and trusts", paragraph 309, 203.
[879] See Elizabeth Cooke et al, "Community of property-a regime for England and Wales: interim report in September 2005 IFL 133-137 at 133.

community of property marital regime".[880] A deferred community property regime, therefore, does not enable women to own an equal share of the property with the husband during marriage as the aforesaid provisions of the CEDAW prescribe.

Furthermore, a deferred community of property regime, even if it were to achieve the objective of realizing substantive equality between the spouses, presupposes that the parties act in good faith when dealing with their property; if they do not, one party will have nothing to gain from the other if the marriage comes to an end. Trustworthiness, when executing transactions over properties that affect parties to the marriage, is better prescribed by law than wished to exist. The uncertainty of assuming that the parties are always going to act in the best interest of the other makes the deferred community of property regime unsuitable to Uganda with its obligation to fully comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

If a full community of property marital regime can be introduced into non-state-made laws regulating customary marriages in South Africa,[881] it is possible for a default immediate or full community of property regime to operate in both Uganda's state-made and non-state-made laws as well. A full community property regime would comply with Uganda's laws given that in terms of the Constitution of Uganda as the supreme law, "every person has a right to own property either individually or in association with others".[882] Even if it were to contravene any of Uganda's laws, which it does not, the CEDAW Committee in General Recommendation No 25 has clarified that "pursuit of substantive equality calls for redistribution of resources and power between men and women."[883] Adopting an immediate full community of property marital regime is one way Uganda can redistribute resources and power between men and women. However, there are problems associated with the South African model of full community of property regime: the community of liability makes the whole of the community property open to one spouse's creditors, which may not be acceptable to Ugandans not used to such a state of affairs. Given the above difficulty with the South

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[880] *Ibid.*

[881] See section 7 (2) Recognition of Customary Marriages Act No 120 of 1998 providing for a community of property marital regime in customary law marriages.

[882] See Article 26(1) Constitution of Uganda.

[883] See CEDAW General Recommendation No 25 of the Thirtieth Session 2004, paragraph 8 at http://www.un.org/womenwatch/daw/cedaw/recommendations. Accessed 20 May 2005.

African full community regime, it becomes necessary for Uganda to modify it in order to fit her circumstances.

Preferably, Uganda should adopt a matrimonial property regime that is not difficult to enforce in order to advance substantive equality between men and women as prescribed under Articles 2(a)-(f) and 16(1)(h) of the CEDAW. Such a regime would influence Uganda's laws of succession for the better, since merely amending the laws of succession, when the matrimonial property regime does not restrict what the parties do with their property, falls short of complying with the relevant provisions of the CEDAW. Although the full community of property regime as provided in South Africa is compliant with the CEDAW, it may be unsuitable for Uganda, as some people may not accept sharing equally all the property they own. This applies especially to inherited property over which members of the extended family may have genuine claims.

Zweigert and Kotz have advanced the view that successful law reform requires social acceptance. They observe that "it may well prove impossible to adopt, without modification, a solution tried and tested abroad because of differences in court procedures, the powers of the various authorities, the working of the economy, or the general social context into which it would have to fit."[884] Orucu also warns that "a transplanted legal system not compatible with the culture in the receiving country, without the appropriate transposition and tuning, will create only virtual reality."[885]

If the above views are accepted, recommendation for reform in Uganda must be put in context. In Uganda, there are two types of family property: firstly, there is the nuclear family property generated by the husband and wife, and secondly, there is property inherited by the wife or husband but to which other members of the family, such as siblings, have claims in customary law. For example, title to clan burial land may be in the name of one individual but siblings of the titleholder have a right to bury their dead on such land. Blindly adopting a full community of property marital regime may

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[884] See Zweigert and Kotz, *Introduction To Comparative Law,* 15.

[885] See Esin Orucu, *The Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*, 97. She writes that transposition as used in music means that in law "each legal institution or rule introduced, is used in the system of the recipient, the transposition occurring to suit the particular socio-legal culture and needs of the recipient".

have the effect of turning clan burial lands into matrimonial property that is liable to being shared equally between the titleholder and his wife, a situation unfair to the siblings of the titleholder. A matrimonial property regime that ignores these realities would be unpopular with many Ugandans and would be unacceptable to many. In the circumstances, adopting a modified community of property marital regime is more likely to be more acceptable than the South African model of a full community of property regime.

7.1 A description of Uganda's proposed modified community of property marital regime and its effect on succession to property

The present part of the study sets out substantial proposals for the reform of matrimonial property and the law of succession in Uganda.[886] In light of the preceding discussion, the relevant ideas gathered from England, Scotland and South Africa have been modified to suit Uganda's circumstances. Given that none of the three model jurisdictions fully complies with the relevant provisions of the CEDAW, the gaps in ideas have been replaced by intuition. The proposals apply equally to both cohabitants and married people; wherever used, spouse includes a cohabitant.

7.1.1 Proposals to reform Uganda's matrimonial property regime

Where a property is owned jointly, each individual owner always owns an equal share. When a property owned jointly is sold, each joint owner/tenant has an equal interest in the sale and is required to individually sign the sale agreement.[887] Should a joint owner/tenant die, the interest passes automatically to the survivor without going to court. By contrast, ownership in common may mean that property is owned in unequal shares.[888] Each of the owners may deal with his or her own interest separately, for example, by bequeathing his or her share of the property to anyone they choose. Joint ownership more readily ensures that wife and husband may remain

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[886] The proposals affect state- made, customary and Islamic laws regulating rights to property in marriage, upon divorce and upon the death of a spouse.

[887] See Tom Guthrie, *Scottish Property Law,* 2nd edition, (West Sussex, 2005), 17 who notes that the difference between common and joint property is that "in joint property the shares of the joint proprietors cannot be sold separately or bequeathed on death; instead on death or departure of the joint proprietor his share goes to the remaining joint proprietors". Moreover, "there is no right of division and sale in joint property" that is available in common property.

[888] See Tom Guthrie, *Scottish Property Law,* 2nd edition, (West Sussex, 2005), 13.

secure in a furnished home. The rationale behind the proposal of joint ownership is to recognize that domestic work gives rise to proprietary interests in the home and household property.[889] Accordingly, it is proposed that there should be joint ownership of the matrimonial home and household property in Uganda. Separate property of the spouses should be certain property acquired before marriage, all property after divorce and certain property obtained by gift and inheritance.

For any dwelling house to qualify as a matrimonial home, it should be the principal residence of the family. It should not matter that the couple have no children or that one of the spouses does not for whatever reason reside there all the time. Where there is more than one home, the spouses should choose only one home that should be taken to be the matrimonial home. In the case of a house used as the parties' principal place of residence, though acquired by one party before, it should upon marriage become jointly owned as the matrimonial home.

The rules of joint ownership of the matrimonial home and household property operate well where the homes are owner occupied. What happens, however, when the matrimonial home is rented accommodation? Solutions are to be borrowed from England and Scotland to deal with such situations. For example, under section 1(1) Matrimonial Homes (Family Protection)(Scotland) Act 1981, "where one spouse, the entitled spouse, is the owner or the tenant of the matrimonial home, and the other spouse, the non-entitled spouse, is not the owner or tenant, the non-entitled spouse has the following rights: firstly, if in occupation, to continue to occupy the matrimonial home, and secondly, if not in occupation, to enter into and occupy the matrimonial home".[890]

Similarly, section 30(3) of the English Family Law Act 1996 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

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[889] It would not be logical to confine joint ownership to the home, because if it is accepted that a spouse contributed domestic work that enabled the other to save and buy the home, why not claim that this contribution also enabled him or her to acquire household properties of which she or he is entitled to claim a share?

[890] See section 1(1)(a) and (b) of the MHFPSA 1981 at http://www.westlaw.co.uk . Accessed 30 November 2005.

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."

A Ugandan law to the effect that non-entitled spouses should, if in occupation, continue to occupy the home and if not in occupation, enter and occupy the same, should be adopted. A law in the above words is inevitable once it is accepted that the spouses or partners own the matrimonial homes jointly. The effect is that although the non-entitled spouse may not be the recognized tenant, she or he should still have rights in the matrimonial home. Accordingly, where matrimonial homes are rented, it should be an offence to evict the non-entitled spouse and upon this incidence the court should issue an order that equally distributes their household property between the parties and determine any rights between them such as counterclaims. Furthermore, on relationship breakdown, it should not be possible for one joint tenant to unilaterally bring the tenancy of a joint home to an end.[891]

The above proposals are an attempt to achieve a difficult but long-overdue solution to the situation of wives in rented accommodation. It would be the first time for such legislation to be tried in Uganda and it may face much resistance. However, if the rigours of the separate property marital regime presently in force are to be dealt a blow, there is no simple way of achieving the desired goal in the absence of this legislation.

Household property should be defined as any property used in the home for the benefit of both parties, including among others furniture, plates, and cars for non-commercial use. At the very minimum, all objects, the principal purpose of which is domestic, should be included in this category. It should not be necessary that both parties contributed to its acquisition nor that it has been intended for common use. What is important is that the property is in fact used as household property or falls in

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[891] Restriction on rights of a joint tenant to unilaterally bring tenancy of a joint home to an end shall not be unique to Uganda. In Scotland, under section 13 and 20 of the Housing (Scotland) Act 2001 asp 10, "a joint tenant of a secure tenancy may abandon the tenancy or can give notice to quit without terminating the tenancy of all joint tenants". A secure tenancy under part 2, is defined to include: "where the landlord is a local authority landlord, a registered social landlord and where the tenant is an individual and the house is the tenant's principal home".

that category. Where an object is bought by one spouse out of her separate income but is of household asset nature, it should become household property. Given this definition of household property, most contents of the matrimonial home should become household property.

There should be separate ownership of gifts, clothes, businesses, all the capital that either party owns at marriage, income and inherited property as long as none of the above falls in the category of household property or matrimonial home. Although gifts are separate property, where the intention of the donor is to the contrary, such gifts should become household property forthwith. Where the gift is money that has been used to buy a matrimonial home or improve existing properties that the parties use as household property, this should not be considered separate property. Where money earned separately as income is used to buy a house that the parties use as a matrimonial home, it should henceforth be jointly owned.

In the course of the marriage both parties should consent before the sale of the matrimonial home and household property, and either party should stop the unilateral sale of these items or sue for compensation where wrongly sold.

Following the adoption of the above rules, institutions that offer mortgages should be made aware of this law by the government making amendments to legislation especially the Land Act 1998, regulating ownership and transactions in land, to ensure that the parties to the marriage consent before sale or mortgage is effective. Given that some female spouses or unmarried partners may be ignorant of this law, and to guard generally against duress or undue influence, wives consenting to transactions involving matrimonial homes should be required to appear in person before a Registrar of Titles to confirm they are aware of their rights in the homes before any sale is effected. A certificate duly issued by court, to the effect that the parties are aware of their rights in the matrimonial home, should be acceptable in lieu of personal appearance before the Registrar of Titles. This is the only way that the possibility of undue influence should be removed. Furthermore, the Registrar of Titles should regularly update the land registers to enable the public to be aware of whatever transactions there are on the land or with regard to the matrimonial home.

Where the title to the home or household property is registered in one name, it should be lawful for the spouse whose name is not on the title to apply to court to issue an order, that is, to the Registrar of Titles or any relevant officer as the case may be, to have her or his name entered on the title register. The proposal that titles to matrimonial homes should be issued in joint names should go a long way towards ensuring that the new family legislation is not flouted.

Where the matrimonial home is in a building or buildings in which units of property, such as flats, are owned by individuals, and common parts of the property, such as the grounds and building structure, are owned jointly by the unit owners, the Condominium management should compile and regularly update a register of matrimonial homes. The court, on application by any interested party, including prospective purchasers of flats, should issue orders compelling any condominium management to compile and regularly update its register of matrimonial homes.

Although income should be separate, there should be joint responsibility for the debts of the parties affecting the matrimonial home and household property. Given this joint liability, either party in the course of the marriage should apply to the court for an order restraining a partner from wasting or pledging the matrimonial home and household property.[892] The court should vary its orders as need arises, for example, reinstate authority upon a spouse formerly maladministering household property. The same court should award compensation to a spouse whenever household property has been alienated to a third party without the necessary consent.

The court should protect innocent third parties, through interspousal compensation, when one partner exceeds his or her authority and unilaterally alienates the matrimonial home or household property. The same court should have the authority to

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[892] Uganda's compliance with the CEDAW requires the practical ability on the part of women to exercise their rights to property. The CEDAW Committee in General Recommendation 21, on equality in marriage, and family relations at paragraph 31, has warned "in many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or *de facto* relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it." See http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21. Accessed 20 November 2005. Joint ownership of the matrimonial home and household property should address these concerns.

distribute the matrimonial home or household property between the parties if the need arises.

For any separately contracted debt relating to private property, the individual party should be liable. Where the property available to the creditors of one of the parties is not enough to discharge the debt, liability should not extend to the matrimonial home and household property transactions, over which joint consent should be required to be valid. Because of this state of affairs, the laws of succession should not allow any of the spouses to unilaterally exercise rights of *inter vivos* and *causa mortis* over the matrimonial home and household property.

It is proposed that there should be equal sharing of the matrimonial home and household property on divorce, regardless of the contributions and responsibility of any of the parties in bringing the marriage to an end. To cater for young dependants, the law should provide that the spouse who is given custody of minor children should be entitled to the matrimonial home, unless there is suitable alternative accommodation available.[893] Minority should be defined to mean children of the spouses below 18 years of age.[894] Where there are no minor children, given that the matrimonial home and household property should be jointly owned, unless the parties have agreed otherwise, the court should issue an order that the same be sold and the proceeds equally shared.

The adoption of the matrimonial property regime outlined above would invalidate many provisions of Uganda's state-made law of succession. For example, as regards the rights to property of separated husbands or wives, section 30 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".[895] Adopting a modified community of property marital regime renders section 30 invalid.

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[893] This proposal modifies the rigidity of full community regimes that enforce strict property rights without catering for the welfare of minor children.
[894] This is the age of majority in Uganda.
[895] See section 30 Succession Act, chapter 162.

There should be no discrimination against unmarried men and women in cohabitation.[896] 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. As shown, the CEDAW Committee has observed in General Recommendation No 21 at paragraph 33 that "in many countries, property accumulated during a *de facto* relationship is not treated at law on the same basis as property acquired during marriage. Invariably, if the relationship ends, the woman receives a significantly lower share than her partner".[897] The Committee recommended that "property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged".[898]

To cater for people who choose cohabitation to avoid the proprietary consequences of marriage or for other reasons outside the scope of the present study, there should be an option of using cohabitation agreements to regulate the consequences of such relationships.

It should, therefore, be lawful to opt by ante-nuptial contracts out of the modified community of property marital regime; however, this should not be done after contracting the marriage or commencing cohabitation. The courts in Uganda should vary ante-nuptial contracts on the basis that whatever the circumstances, household property and the matrimonial home are jointly owned and any agreement that attempts to defeat this objective should be null and void. The effect is that marriage or cohabitation contracts should not be less generous than the default matrimonial property regime in force. This restriction is based on public policy, i.e., Uganda's treaty obligation to fully comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

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[896] The CEDAW does not discriminate between married women and cohabitants and implementing Articles 2(a)-(f) and 16(1)(h) of the CEDAW while discriminating between married and unmarried women would be wrong. Furthermore, in function there is not much 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.

[897] See the CEDAW Committee General Recommendation No 21, paragraph 33 on women's rights to property during *de facto* relationships at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21.Accessed 20 November 2005.

[898] *Ibid.*

The modified community of property marital regime is an opportunity to share the profits and loss over the matrimonial home and household property equally, with safeguards of restraining one partner who may be tempted to use them for personal benefit. Given that wives or women in cohabitation tend to have less property than their husbands or partners because of child rearing duties, these proposals are bound to benefit females more than males.

The effect of adopting and implementing a modified community of property marital regime in Uganda would be that rules regulating matrimonial homes and household property would take precedence over rules relating to contracts and property laws. Matrimonial homes and household property would no longer be a means of securing business credit and would cease to be attractive to lenders because of the rights arising from joint ownership.[899] These might possibly be perceived as an interference with contracts, but it seems unlikely that a modified community of property marital regime could be established without them.[900] It may not be possible to adopt, without any problems, a marital property regime that promotes substantive equality between the spouses in the manner required by Article 2(a)-(f) and 16(1)(h) of the CEDAW. Better than Uganda's present state of affairs is a matrimonial property regime that promotes substantive equality between the spouses, notwithstanding that there may be adverse effects on commerce and third parties.

The adoption of joint ownership of the matrimonial home and household property means joint consent to all transactions involving the same. This requirement may cause hardships to some spouses and third parties involved in the occasional urgent sale, purchase and lease of matrimonial homes and their contents. It may also require judicial consent to substitute for one of the spouse's consent in the rare event of a mental incapacity that would prevent the appreciation of the nature and relevancy of the transaction. In this case the court should have power to give judicial consent on

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[899] Creditors should henceforth consult their customers' partners, consider loan applications thoroughly and where possible insist on other suitable means of guaranteeing loans. Even in Scotland the Matrimonial Homes (Family Protection)(Scotland) Act 1981 preserves a non-owning spouse's occupation rights by preventing a third party who has repossessed the property from occupying it.

[900] See Elizabeth Cooke et al, "Community of property-a regime for England and Wales: interim report in September 2005 IFL 133-137 at 137 who note that "community of property has its origin in many jurisdictions, in a wish to protect non-earning spouses".

her or his behalf. The court's power should be exercised rationally when transactions regard the matrimonial home and one spouse is unable to give consent.

There is also need to set time limits after which suits to reverse transactions on the basis of undue influence or lack of consent before the sale of the matrimonial home and household property should be time barred. The proposal is that any litigation over unlawful sales of matrimonial homes or household property should be time barred after three years. Where there are exceptional circumstances, however, such as grave illness of the aggrieved party, by reason of which she or he was unable to prosecute the matter, the court should grant leave to file suits out of time. What court should have, however, this new and demanding jurisdiction?

7.1.2 Proposed institutions to enforce the modified community of matrimonial property regime and the laws of succession

In Uganda, shortly after January 1986, Resistance Councils were established countrywide at village, parish, sub-county and district levels. The enactment of the Resistance Committees (Judicial Powers) Statute 1987 resulted in these administrative units being vested with judicial powers. As discussed in Chapter Three, these courts are easily accessible by the people, are generally manned by the people's chosen representatives, use local languages in proceedings, are devoid of technicalities and are expeditious in handling cases. The Resistance Council courts (referred to as Local Council courts since the passing of the Local Government Act 1997) handle, however, only simple civil cases and have no criminal jurisdiction. They can arbitrate but cannot issue orders of divorce, judicial separation or nullity of marriage, or distribute property between litigants. Similarly, the Local Council courts do not determine rights of succession to property.

Regardless of their popularity, the present study proposes Local Council Courts to be retained with their present mandate but not be vested with the power to distribute property upon divorce or determine rights of succession to property, because presently people without legal training man the Local Council courts and it is, therefore, difficult to expect them to interpret the proposed law correctly. The effect of this proposal is that any new institution created to enforce the proposed marital regime

should handle disputes involving customary law of marriage and succession. It should be widely decentralized throughout the country so as to be as accessible as the Local Council courts.

To enforce the proposed matrimonial property regime and the legislation regulating rights of succession to property, it shall be necessary to set up a Family court at the level of a magistrate court specialized in resolving family problems and manned by people with legal qualifications. A Family court at the level of a magistrate court is suitable because magistrate courts are more accessible than the High court and it is, therefore, easier to seek a remedy from the same with relative ease and speed without incurring great cost. It is important that the Family court adopts procedures that are not cumbersome, to dispel the notion that divorce proceedings or interspousal litigations must take months to resolve. There should be a time limit of six weeks within which judgements of the Family courts must be written and rendered.

The Family court should entertain applications from cohabiting partners not formally married. As noted, married and unmarried women in cohabitation should be at par as regards rights to domestic property. Furthermore, where parties have opted to enter into an ante-nuptial contract to escape the modified community of property marital regime and one party is contesting the same, the family court should have jurisdiction to deal with the matter. In all matters before it, the Family court should promote the practical realization of substantive equality as stipulated under Articles 2(a)-(f) and 16(1)(h) of the CEDAW. The Family court should have on application, by any of the parties, jurisdiction to declare what property falls in the category of household property and what does not. The spouses should agree on the modalities and quantum of the housekeeping allowances, which should also constitute household property

Each party owes a duty of maintenance to the other, and where this obligation is neglected, the Family court should issue an order attaching the wages of the party in default or her/his separate property, as the case may be, to enforce this obligation. The money so attached should be paid to the Family court for onward transmission to the aggrieved party. The requirement to first deposit the said money with the Family court is to ensure compliance. In cases where both parties are agreeable, when the court orders compensation of one spouse by another for whatever reason, implementation

should be by way of orders issued against the economically stronger spouse, for transfers from his/her bank account if in employment. It could also be effected by the employer making the payment in cash or to the bank holding the payer's account and the bank should comply with any court orders presented by the payee. Where the payer is reluctant to pay, the court should issue orders for the sale of some of his separate property as the circumstances may require. The Attorney General should revise the jurisdiction of the Family courts as and when needed.

As regards procedures, borrowing ideas from the English Family Law Act 1996,[901] mediation should be promoted in all family courts rather than lawyers immediately proceeding to litigate. To provide counselling services prior to any litigation and ensure that only matters that deserve to go to court do so, the Family court should have a government-paid counsellor on its staff. The rationale for this is to avoid escalating disputes for financial gain, as some adversarial lawyers who promote conflicts between separating couples tend to do. Everything possible should be done to encourage couples to stay together, given the unity of their rights to property.

It is important that access to courts is addressed concurrently with the initiative to come up with amendments to the laws of marriage and succession. It is important that people get to know what happens in the family courts and why. Accordingly, basic information about the family courts should be made widely available in local languages that people understand. The government should endeavour to promote local languages to become official and national in the long-term so as to be used in the Family court to increase the sense of approachability. The exorbitant legal costs, including filing fees, should be reduced while the "gymnastics" and delays associated with courts should be purged. One way of achieving the above objective is by the government setting up a National Legal Aid Board. Where a case has been handled using taxpayers' money and the indigent party wins, the Legal Aid Board should recover its costs and other expenses. In this way the legal aid scheme should become self-sustaining. Only unemployed people should be eligible to access legal aid, lest the scheme be abused.

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[901] See the defunct section 8(6)(b) of the Family Law Act 1996 that prescribed meetings with marriage counsellors.

The Family courts should convene in a separate court building free from criminal or commercial litigation so as to promote the consideration of emotionally charged problems.

As regards marriage contracted under Islamic family law, both the law and institution, i.e. the *Quranic* provisions or interpretations on women's rights to property and the *Khadhis* courts, should be restructured to improve the situation of Uganda's Muslim women. Accordingly, the government should convene an assembly of all representatives of Ugandan Muslims to agree on a uniform application of Islamic law as amended by a modified community of property marital regime. This initiative is relevant to ensure acceptance of the modified Islamic family law and the willingness on the part of all Muslims to comply. By this restructuring, Islamic law should henceforth abide with the national Constitution, gender equity and equality principles and in particular Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

Restructuring Islamic law of marriage is not unique to Uganda, having already been attempted in South Africa. The South African Draft Muslim Marriages Bill has proposed "that all matters on Islamic marriages such as confirmation of divorce (*talak*), confirmation that circumstances warrant a Muslim man to marry another woman, may be heard by a secular judge conversant with South African law and two assessors who are experts on Islamic law".[902] Similarly, in Uganda a secular judge assisted by two Muslim assessors should preside over all matters regarding the determination of rights to property in marriage, upon divorce and death of a partner. The *Khadhis* court should 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 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 that *Khadhis* courts do not contravene principles of gender equality and non-discrimination.

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[902] See Chapter Six for a discussion about making Islamic family law compatible with the South African Constitution.

In hierarchy, the Family and the newly reconstituted *Khadhis* courts should be at the same level; appeals from these courts should go to the High court and thereafter to the Court of Appeal and Supreme Courts.

To recap, the proposal is not that there should be no financial independence during marriage, as this would not be suitable for the enterprise culture, but that Family and *Khadhis* courts should have sufficient power to enforce a modified community of property marital regime. There is nothing wrong with people in intimate relationships owning valuable property jointly as long as the law sets safeguards against any of the parties abusing this arrangement. As shown, what is generally owned separately by the parties before marriage and is brought to the marriage for use and benefit of all should, henceforth, become part of the household property to be equally administered by both parties. Similarly, where income earned separately is used to buy household goods, it should not be possible to claim that the goods are separate property. Where there is litigation concerning the matrimonial home or the household property and damages are awarded, they should constitute household property to be equally shared by the parties.

7.1.3 Recompense for a spouse's contribution to another's separate property

Sharing increases in property value will not be a Ugandan novelty. In Scotland under the Family Law (Scotland) Act 2006, amendments to the Family Law (Scotland) Act 1985 have been effected, giving courts jurisdiction to take account of any changes in the value of the jointly owned assets between the relevant date and the date of the proof or settlement, and to divide this between the parties.[903]

As noted, business investments including agricultural properties should be separate property. However, where one of the parties has contributed to the value of the business in the course of the marriage, upon divorce or judicial separation and on application by the non-owning spouse, the family courts should, after considering the evidence available, determine the contribution made by the non-owning spouse and

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[903] See section 16 Family Law (Scotland) Act 2006 at http://www.westlaw.co.uk. Accessed 10 May 2006.

on that basis order the owning spouse to pay the decreed amount of money to the non-owning spouse. The proposal stands even if the property is separate, such as inherited property or a farm; if, however, in the course of the marriage one's spouse helps to increase the value of such property, the court should determine the value of this contribution and cause it to be paid to the non-owning spouse as part of the divorce package.

The parties should, however, be free to go to court at any time, if they so wish, and sue each other for recompense for their contribution to enhancing the value of each other's separate property in the course of the marriage. The same principle should apply to separately earned income as long as one of spouses can prove on the balance of probabilities that she or he has made a contribution towards the same. For example, the husband could have started a business and invested all his income into the same, because the wife pays rent, buys food and meets living expenses. The effect of this proposal is that the couple's income, though earned individually, should come under court scrutiny, and contributions made by either of the spouses determined and paid to the deserving spouse. Reputable accounting or valuation firms approved by the court should carry out this exercise where the parties have failed to agree with each other on how to determine the recompense.

The right to seek recompense for improving a partner's separate property and maintenance in the course of marriage requires that family courts be given wide jurisdiction. Accordingly, the family courts in Uganda should have the power to recover documents and thereto-related authority to deal with any peculiar circumstances of cases coming to their attention. Furthermore, courts in Uganda, like their English counterparts under section 37 of the Matrimonial Causes Act 1973 when dealing with acts intended to defeat recompense, should have the power to reverse property transfer transactions which a party enters into twelve months before the break-up.

It should be emphasized that with the exception of the separate property marital regime, any regime that involves joint ownership of the matrimonial home and household properties, coupled with the obligation to recompense spouses who

contribute to their partners separate property, carries with it practical problems that in the absence of radical proposals, such as the above, defy easy solutions.

7.1.4 Proposals to reform the state-made law of intestate succession

In the CEDAW Committee General Recommendation No 21, at paragraph 35, it was noted: "there are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances, women are granted controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principle of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished."[904] As will be shown, the proposed law of succession in Uganda should address the above CEDAW Committee's concerns.

Both the English and Scots laws of succession give priority to the claims of surviving spouses over those of children. [905] The Scots law of succession confers fixed rights. A modified community property marital regime would have the same effect in Uganda, with the result that the laws of succession would apply only to the deceased's share of the property within that community. Before determining the composition of the intestate estate, the matrimonial home and household property would be excluded. Where the matrimonial home is rented accommodation, the tenancy would be joint and the surviving cohabitant or spouse would succeed to it. The deceased's separate estate would then be shared equally between the spouse and the children. In addition to the matrimonial home and the household property, the surviving spouse would take, therefore, a child's share in the net remaining property, i.e., a business if available for sharing immediately, money not in a joint bank account, other houses than the principal residential home and the deceased's separate property in general. A child's share should be calculated by valuing the identified property, less claims by

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[904] See CEDAW Committee General Recommendation No 21 at paragraph 35 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21.Accessed 30 November 2005.

[905] See Chapters Four and Five. In intestate succession, both England and Scotland accord priority to surviving spouses, then children and remoter issue, then parents and lastly siblings.

creditors, and dividing the same by the number of children plus one. Where there is no surviving spouse, the children should take all the property in equal shares regardless of sex.

Where the deceased was owner of an agricultural investment and the family feels that it is better kept in ownership of a single member of the family, the family should be at liberty to do so, seeking Family court guidance if needed. It should also be possible for the deceased to reserve such investments for the benefit of his beneficiaries under a trust as long as he excludes the matrimonial home and household property. Given that most big agricultural properties are owned by or managed as companies, it is unlikely that there would be any conflict over succession to them. The deceased's interests in such property would be determined and paid to the estate administrator to be shared out among the beneficiaries.

Adopting these proposals for reform of the law of succession would have the effect of repealing many provisions of the present law. For example, section 25 of the Succession Act that provides: "all property in an intestate estate devolves upon the personal representative of the deceased upon trust for the persons entitled to the property under this Act." Similarly, section 27(3) of the Succession Act, which "allows the distribution of an intestate estate according to the wishes of the dependants, provided the court approves of the distribution", should be repealed.

The other effect of adopting these proposals would be that the present section 27(1) of the Succession Act, under which "a customary heir receives 1%, the wife receives 15%, a dependent relative 9% and the lineal descendants 75% of the whole of the property of the deceased", shall be repealed. Furthermore, as shown in Chapter Three, section 202 of the Succession Act, providing that "the administration of the estate shall be granted to the person entitled to the greatest proportion of the estate," should be amended to read that the administration of the estate shall be vested in the surviving spouse. Unlike the law of succession presently in force, claims of surviving spouses would, accordingly, take precedence over those of the deceased's children.

The proposals for reform of the Ugandan law of intestate succession set out in this section complement the modified community of property marital regime by

abolishing the distinctions between male and female surviving spouses. Presently, Rule 8 of the Second Schedule to the Succession Act prescribes the various events under which occupancy of a residential holding terminates. It provides that "the occupancy of a residential holding shall terminate automatically on the remarriage of the occupant where the occupant is a wife". Similar restrictions are not extended to widowers. The proposed reform abolishes these discriminations by creating equality as between the spouses in the use and occupation of the jointly owned matrimonial home. Given these proposals, Rule 4 of the second Schedule to the Succession Act requiring "a certificate of occupancy to be issued upon taking up occupation of the residential holding" should be repealed.

These proposed reforms shall be a fundamental departure from Uganda's present law of intestate succession. Section 26 of the Succession Act, paving the way to the Second Schedule, explicitly provides that "the residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act." These provisions should be repealed. On intestacy, the surviving spouses should take the principal residence.

There should be exceptions to these rules with regard to certain sorts of property that could be taken by the deceased's family. In Scots law, some forms of property are excluded from falling under a surviving spouse's rights. Section 8(6)(b)of the Succession (Scotland) Act 1964 also defines furniture and plenishings to which a surviving spouse has a right as "including garden effects, domestic animals, plates, plated articles, linen, china, glass, books, pictures, articles of household use and consumable stores". It excludes "any articles used at the date of death of an intestate for business purposes, money, and securities for money or heirlooms". An heirloom is defined as "any article that has an association with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate".[906] The lesson from the Scots law of succession is

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[906] See section 8(6) (c) SSA 1964 at http://www.westlaw.co.uk Accessed 30 November 2005.

that the surviving spouse can be excluded from articles with the character of an heirloom. Including this rule within reforms of the Ugandan law of intestate succession would enable other family members, usually descendants, to retain rights to property that, traditionally, they have always had.

7.1.5 Proposals to reform the state-made law of testate succession

If one of the spouses dies testate, the surviving spouse should be entitled to take the household property and the matrimonial home. These should form an exclusionary category of property over which any individual spouse has no power of testation, as a consequence of the introduction of the community of property regime outlined at 7.1.1. Thus, these entitlements would apply regardless of what any testamentary document to the contrary may provide. The surviving spouse should have the right to apply to the court for a discretionary share of the deceased's net estate if she or he feels that the deceased testator has not made adequate provision for her or him. Accordingly, section 38(1) of the Succession Act, that relates to the power of the High court to order payment out of the estate of the deceased for the maintenance of dependents, should be amended to exclude such power over the matrimonial home and the household property. Furthermore, 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 and parents of the deceased.[907] 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 newly constituted Family Court.[908]

Where a spouse is bequeathed property under a will, she or he should have up to six months to choose between taking that property or proceeding to court to claim a larger share from the deceased's net estate. Accordingly, the deceased may bequeath his separate property or estate as he deems fit, but freedom of testation should be open to challenge in the court by his surviving spouse and dependents. In adjusting wills, the

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[907] In Uganda, because there is no state social security, children support their parents in old age, hence the need for them to claim a share from their children's estate.
[908] See 7.1.2.

courts should ensure that in all cases the spouse's entitlements to property are not less than the share that she or he would have taken had the deceased died intestate.

Courts in Uganda should also have the power to deal with any transfers of separate property in terms similar to the anti-avoidance provisions of the Inheritance (Provisions for Family and Dependants) Act 1975.[909] Under these, applicants for provisions can petition the court "to issue an order against a donee to provide such sums of money or property as specified, if the court is satisfied that less than six years before the death of the deceased, with intention of defeating an application for provision under the Act, the deceased made a disposition and full consideration was not given by the beneficiary of the disposition or any other person".[910] These powers should be restated under the reformed Ugandan law in relation to the separate property of the deceased whenever there is need to do so.

The requirement of attestation by at least two witnesses for an unprivileged will before it can be declared valid is problematic to many Ugandans, especially the illiterate.[911] Whenever this requirement has not been met, many wills have been declared invalid to the detriment of those persons who stood to gain under them. The proposal is to borrow the Scots law approach of requiring only one witness to make a will valid. Courts should also consider as valid any will where there is no doubt or controversy about the handwriting and signature of the testator, expert opinion being sought where there is doubt.

The penalties in the law of succession that relate to property rights violations should be made more stringent and deterrent.[912] A term of imprisonment for two years for any person convicted of property rights violation should be the least penalty for breaches of the new law of succession. Hopefully, with deterrent punishments in

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[909] See paragraph 686 *Halsbury's Laws of England*, 4th edition, Volume 17(2), 372.
[910] See section 10 Inheritance (Provision for Family and Dependants) Act, 1975.
[911] Section 50 Succession Act Chapter 162 on execution of unprivileged wills provides that two or more witnesses shall attest the will, each of whom must have seen the testator sign it. See Chapter Three (3.2.4). Soldiers in the battlefield may execute wills, called privileged wills, without witnesses; however other persons must have their wills witnessed, hence the term unprivileged wills.
[912] The penalties for breaching Uganda's laws of succession are not sufficiently deterrent. Penalties are as low as three months imprisonment and fines are less than the equivalent of a British pound. See Chapter Three (3.2.7).

place, relatives of deceased persons and others shall avoid stealing deceased people's property.

7.1.6 Proposals to reform customary and Islamic laws of succession

Customary and Islamic laws regulating rights of succession to property should comply with the standards prescribed by the state-made laws of succession.

The lesson from South Africa is that Uganda can restructure customary and religious laws of succession to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW. This compliance can be achieved by incorporating the provisions of the CEDAW into customary and religious laws. What this requires is to adopt as part of customary laws of marriage and succession new principles that incorporate the default modified community property marital regime. The same should be done for the Islamic law of succession. The practice of favouring males in matters of succession to property at customary and Islamic family law should stop. However, how, should this be achieved?

It is proposed that 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.[913]

In cases where all the surviving wives were cohabiting with the deceased in one matrimonial home, each of them should have equal rights in it. The wives may agree, however, on an alternative arrangement as long as the right of any wife to a share in the matrimonial home is not compromised. In cases where the parties cannot agree about the distribution of the estate, the Family court or *Khadhis* court, as the case may be, should arbitrate over the matter.

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[913] To avoid competition over resources, before a man marries another wife, the family or *Khadhis* court should ensure he has acquired another furnished home for her.

Polygyny under both customary and Islamic family law means that most estates must have more than one administrator.[914] As shown in Chapter Three, section 272 of the Succession Act provides that "when there are several executors or administrators, the powers of all, may in the absence of any direction to the contrary be exercised by any of them who has proved the will or taken out administration." This provision of the law should be amended to read that under no circumstance should the power of all executors who have undertaken administration be exercised by only one of them. The rationale of this amendment is to avoid situations where executors or administrators marginalize others and act without the consent of all of them because the law is permissive.

Finally, as shown in Chapter Three, all deaths in Uganda must be reported to the Administrator General. [915] Restructuring customary and Islamic laws of succession requires the Administrator General's department to be decentralized to ensure that all estates are administered in accordance with the reformed law.

7.2 Supplementary reforms

(a) Unifying the legal system

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 the cultural, ethnic and linguistic composition of the 56 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 study has proposed that customary and Islamic family law should be restructured to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW, a better approach is a uniform legal system. In South Africa, to the question of whether to create a unified legal system that applies to all ethnic/religious groups, or whether to continue with a plural legal system, answers are being sought in empirical studies and public consultations,

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[914] In practice the different wives and children of the deceased all compete to become estate administrators, and as a compromise more than one person is chosen.
[915] See Chapter Three (3.2.5).

while at the same time working towards uniformity.[916] The recommendation 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 multiethnic and multireligious 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.[917] Accordingly, the Constitution should be amended to do away with legal pluralism.

(b) Abolition of polygyny

Uganda should abolish polygyny gradually.[918] The main obstacle to equality, regardless of how progressive the law reform initiatives may be, is polygyny; as long as the number of women in a relationship with one male is not controlled, equality of the sexes and even the modified community of property marital regime may not work well, if at all. A better approach in tackling polygyny is to treat not the symptoms but the causes of the practice. It could be that some women accept polygyny as a coping strategy to deal with poverty. This is the greater reason why women's poverty alleviation must become a priority to the government if it is to make outlawing polygyny feasible.[919] 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 programme of affirmative action. Article 4 of the CEDAW provides that "temporary special measures or affirmative action in favour of women is not discriminatory." Loans, if well utilized, may go a long away in addressing the financial needs of women. Furthermore, there is need to adopt a national employment policy promoting equal opportunities for both sexes.[920]

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[916] The South African Law Reform Commission adopted this method by accepting ideas from the public, initiating discussion papers and organising public seminars. See South African Law Reform Commission site http://www.law.wits.ac.za/salc/function.html. Accessed 15 November 2005.

[917] 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.

[918] This is what the CEDAW Committee prefers. See Chapter One (1.0).

[919] Outlawing polygyny would over time render some reforms to Islamic and customary law redundant.

[920] See Chapter One (1.0). The CEDAW Committee in 2002 urged Uganda to adopt an employment policy that promotes equal employment opportunities for men and women.

The government, using the mass media, and especially radio programmes, should institute awareness campaigns about the dangers of having many wives and how this subsequently complicates succession to property. Programmes of reform in the laws of succession promoting gender equality should be executed concurrently with the government-sponsored gender sensitization campaigns on eliminating polygyny. This sensitization should highlight the virtues of a modified community of property marital regime and the new laws of succession complementing it.

(c) Land reform

In Uganda, most land is communal, implying that even the male owners have no certificates of titles. That most 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 modified community of property marital regime requires the government to initiate a nation-wide land registration exercise. Initiating such a land registration programme 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".[921] Given that the Ugandan government has been able to sustain a war in the northern part of the country for twenty years, it should divert some of the financial resources available from the war 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.

The South African legislation of Communal Lands Act No 11 of 2004 is a good model for implementing land registration in Uganda. It provides in section 4(1) and (2) that "old order rights (rights to communal land registered or not, in existence before the enactment of this new law), held by a married person are, despite any law, practice, usage or registration to the contrary, deemed to be held by all spouses,

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[921] See Robert Home & Hilary Lim "Introduction: demystifying the mystery of capital" in Robert Home & Hilary Lim (eds): *Demystifying the Mystery of Capital: Land Tenure and Poverty in Africa and the Caribbean, 3.*They warn that the beneficiaries of land registration especially the poor must actively participate in any such exercise if it is to achieve its desired effect.

irrespective of the matrimonial property regime". Such rights "must be held jointly by all spouses in undivided shares and be registered in the names of all spouses concerned".[922] Similarly, Uganda's registration exercise, in areas where land is communal, should proceed along the said South African approach

(d) Registration of births, deaths and marriages

Whereas it is desirable that girls should not marry until they are eighteen years of age,[923] and whereas the Constitution[924] provides for that age, the lack of a functional compulsory registration of births, marriages and deaths in Uganda means that, in the absence of a birth certificate, to some people the ages of intended spouses are determined by misleading physical appearance. Early marriages on the part of girls deny them an education and the possibility of earning a livelihood that would enable them to acquire properties of their own as married women. A compulsory registration of all births, marriages and deaths should be instituted as part of a campaign to stop early marriages. This would best be realized when the institutions to do this exercise are made accessible both financially and geographically through decentralization and by not charging fees.

(e) Socialization

The proposed long-term solution to patriarchy in Uganda is socialization: a new humanist culture with aspects of gender equality should be promoted, not only through curricula of schools, but also through churches, mosques, law enforcement and other agents of socialization, to influence people to abandon male chauvinism and retrogressive attitudes towards women. The state should come out to address gender stereotypes in society through implementing all aspects of the CEDAW by establishing Equality Courts to ensure that all provisions of the CEDAW are implemented. Gender sensitized magistrates should preside over Equality Courts and

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[922] See The Communal Lands Act No 11 of 2004.

[923] Mass illiteracy of women in Africa is attributable to early marriages, hence the lack of skills and unemployment, thus aggravating poverty.

[924] Article 33(1) of Uganda's Constitution provides that "men and women of the age of eighteen years and above have a right to marry and to found a family and are entitled to equal rights at marriage, during marriage and at its dissolution."

issue orders as to what should be done when there are breaches of the CEDAW. Cultural norms and practices promoting patriarchy would be challenged at the Equality Courts. This idea would not be unique to Uganda, given that South Africa has already established Equality Courts and also enacted legislation to this effect, the Prevention of Discrimination Act 2000.[925] Related to the foregoing, it is crucial that Uganda ratifies the optional protocol to the CEDAW allowing individuals to file complaints against state parties.[926]

(f) Education

What has been proposed is an overhaul of the relevant provisions of the laws regulating rights to property in marriage, upon divorce and upon death of a spouse. Such radical reforms call for the judicial training of all those involved in implementing the law. It is necessary to establish a judicial training institute to offer continuous gender-sensitive training to lawyers, *Khadhis*, judges and magistrates that will enable them to deal sensitively with marital disputes in the Family and *Khadhis* courts. The institute should research the state-made and non-state-made customary and Islamic family laws regulating marriage, divorce and succession to property, with a view to purging them of any discriminatory tendencies that could emerge, and to introducing therein other CEDAW principles. The said institute should also raise public awareness about Uganda's obligations under the CEDAW.[927]

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[925] See Chapter Six.

[926] Article 3 of the Optional Protocol to the CEDAW provides that "the CEDAW Committee considers individual communications if it concerns a country that has become a party to the Protocol", and to date Uganda is not such.

[927] See Chapter One (1.0). The CEDAW Committee while considering Uganda's third periodic report urged the country "to introduce public education and legal literacy campaigns relating to the CEDAW and the Constitution to raise awareness of the State's international and national commitments to the elimination of discrimination against women".

Chapter Eight

8.0 Concluding remarks

Chapter one of the present study has identified why Uganda's laws of marriage and succession should be reformed; the CEDAW Committee at its 575th and 576th meetings on 9 August 2002, when considering Uganda's third periodic report expressed, among others, concern over the country's subordinate laws regulating women's rights in marriage and family relations that conflict with both her Constitution and the CEDAW commitments. Concern was also expressed over Uganda's slow progress in removing *de jure* discrimination and elimination of *de facto* discrimination against women. As a state party to the CEDAW, Uganda is obliged to implement Articles 2(a)-(f) and 16(1)(h) thereof that prescribe substantive equality between men and women in marriage and family relations.

The present study has juxtaposed Uganda's laws and institutions regulating rights of succession to property with the above CEDAW standards and proposed ways of making the former compliant with the latter. Although the focus of the study has been laws and institutions regulating rights of succession to property, because the laws of marriage, divorce and succession are closely inter-related, an effort has been to a large extent made to include rights to property in marriage and upon divorce.

Chapter two has discussed the evolution and importance of the CEDAW to realizing women's human rights. It has also discussed the meticulous procedures followed by the CEDAW Committee when considering state reports pointing out that the comments are a clear indication of the extent to which a state party has complied with the CEDAW, and a state party with adverse comments ought to improve its record. The same chapter has highlighted the various matrimonial property regimes and identified the community of property matrimonial regime as the most compliant with the CEDAW. It is important that laws regulating rights to property in marriage are compliant with the CEDAW because they influence the laws regulating rights of succession to property.

The prevalence of legal pluralism in Uganda and its adverse effect on women was one of the concerns raised by the CEDAW Committee at its said 575th and 576th meetings. Practices such as polygyny, legitimate under customary and religious laws, promote inequalities and increase women's insecurity and vulnerability to discrimination as married people. In chapter three, to highlight the genesis of legal pluralism, the study, prior to examining the weaknesses with Uganda's present laws, discussed the historical origins of the laws regulating rights in marriage, upon divorce and death of a spouse. The study has found that owing to Uganda's archaic state made laws, poor enforcement and the prevalence of patriarchal customary and Islamic family laws, women's rights to property in marriage, upon divorce and death of a spouse are not regulated in a manner compliant with the CEDAW.

One of the purposes of comparative law is "to avail models for law reform" given that legal systems seldom progress without studying how other jurisdictions solve problems brought to their notice. Accordingly, in the gathering of ideas to reform Uganda's laws, in chapters four, five and six the English, Scottish and South African laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse have been examined. The choice of these three jurisdictions was purposeful: Uganda's state-made laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse are modelled on English law of the colonial era and the present English laws, therefore, are a prediction of what state-made laws and institutions capable of advancing women's rights to property should be like. Furthermore, Scots law, especially that of succession, with provisions against disinheritance in terms of fixed shares, provides alternatives to protecting women's rights to property in Uganda; and South Africa provides instructive lessons in making customary and Islamic family laws compliant with a constitution that advances women's rights.

Prior to examining the relevant laws in force, there has been a selective description of the historical origin of the laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse in England, Scotland and South Africa. The purpose of this description was to show how rights to property in the said jurisdictions have evolved to advance the rights of women. This historical evolution reinforces the view that however unsatisfactory women's rights to property at a

particular point in time, they can evolve for the better, as a phenomenon that can happen in Uganda as well.

Chapter four has found that women's entitlement to property under the discretionary Matrimonial Causes Act 1973 as amended varies with the circumstances of individual cases and, contrary to what the CEDAW requires, there is no legislation providing for equal sharing of matrimonial property upon divorce. What should also be apprcciated is that English family law, contrary to what the CEDAW Committee has recommended in General Recommendation No 21 that married and unmarried women be treated equally, does not cater for women in extra marital cohabitation. There are, however, many ideas Uganda could adopt from England. For example, as regards protecting rights of succession to property, the Inheritance (Provision for Family and Dependants) Act 1975 empowers courts with antiavoidance powers to reverse transactions effected six years before one's death which are meant to defeat a dependant's entitlement in one's estate. English courts exercise judicial discretion, however, when dealing with applications for awards under the said Inheritance (Provision for Family and Dependants) Act.

Chapter five has found that under section 25(2) Family Law (Scotland) Act 1985 there is "a presumption of equal shares in household goods not rebutted merely by the fact that while the partics were married and living together, the goods in question were purchased from a third party by either party alone or by both in unequal shares". This provision of Scots law has addressed one of the key problems with the separate property marital regime; often the household property belongs to the wage earner only and during the marriage it may not be easy for the economically weaker party who attends to unpaid child raising duties to acquire as much property as the wage earning partner.

The Family Law (Scotland) Act 2006 creates for cohabitants, a discretionary claim to share in household goods. The status of a cohabitant is not automatic, the court must determine if one was a cohabitant by having regard to the length of the period the two people have been living together, the nature of their relationship during that period, and the nature and extent of any financial arrangements subsisting, or which subsisted, during that period. Compared with Ugandan family laws that do not protect

property rights of cohabitants, the Family Law (Scotland) Act 2006 is a laudable legislation.

As regards protection against disinheritance, the guiding principle of the Scots law of succession unlike English law is entitlement rather than judicial discretion.

Chapter six has found that in South Africa, unlike Uganda, there are many endeavours with varying success to make the patriarchal customary and Islamic family laws compliant with the 1996 Constitution that provides for equality and prohibits unfair discrimination. The Constitutional Court has also declared patriarchal aspects of customary law and certain apartheid legislation null and void including provisions of the Black Administrations Act 1927 that denied black people the right to have their estates administered under the more gender-sensitive state-made laws of succession. South Africa has also enacted progressive laws to implement the CEDAW, for example, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000. The objectives of the Act are to "further the obligations imposed in terms of CEDAW and to give effect to the letter and spirit of the 1996 Constitution". Furthermore, in addition to the proposed reforms in the laws of marriage and succession, the South African government has invested in social services, provided micro finance credit for women, and involved men in gender issues.

Chapter seven, based on ideas borrowed from England, Scotland and South Africa but modified to suit the realities of Uganda and coupled with intuition, shows a detailed description of the matrimonial property regime, laws of succession and institutions that should be adopted in order to comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

What has been proposed is a modified community of property marital regime. The important characteristics are joint ownership of the matrimonial home and household property. There is separate property such as inherited land and income, though a spouse's contribution to enhancing the value of these items would in the course of the marriage or upon divorce be ascertained by the family or *Khadhis* courts and rewarded. The unity of interest in most household property during marriage and the difficulties of ascertaining and adequately rewarding the non-financial contributions

of the homemaker spouse when a marriage ends by divorce or death also justify Uganda's adoption of a modified community of property marital regime.

The laws of marriage, divorce and succession in Uganda, whether state-made or non-state-made, should henceforth reflect the fact that during the marriage and after the demise of one of the spouses, there are equal rights to property, at least with regard to the usually most important possessions of the average couple, i.e., the matrimonial home and household property.

Further proposals have also been made to enable Uganda comply with Articles 2(a)-(f) and 16(1)(h) of the CEDAW. They include unifying the legal system and abolishing polygyny gradually.

The CEDAW does not discriminate between married and unmarried women in cohabitation and it has been accordingly suggested that the proposed laws and institutions regulating rights to property in marriage, upon divorce and death of a spouse should apply to both equally. The adoption of the above propositions should enable Uganda to comply, if not fully, at least better with Articles 2(a)-(f) and 16(1)(h) of the CEDAW.

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APPENDIX 1

s. 40.

Substituted Ord. 32 of 1958, s. 2.

SECOND SCHEDULE.

FEES.

	Shs.
Filing every notice and entering same	10
On issue of each certificate or certified copy thereof ...	5
Certifying any extract	5
On every marriage in registrar's office	10
Special licence	200
Fees, where both parties to the marriage are Africans of Uganda -	
(i) on registration of the marriage (including certificate)	5
(ii) for certified copy of entry	5

CHAPTER 212.

THE MARRIAGE OF AFRICANS ACT.

ARRANGEMENT OF SECTIONS.

SECTION.

1. *Short title.*
2. Marriages of Christian and Mohammedan Africans.
3. Application of the Marriage Act.
4. Persons by whom marriages may be celebrated, and place.
5. Formalities preliminary to marriage.
6. Consent to marriage of minors.
7. Certificate.
8. Registry.
9. Fees.
10. Certain Mohammedan marriages valid.

CHAPTER 212.

THE MARRIAGE OF AFRICANS ACT.

[1ST APRIL, 1904.]

An Act Relating To The Marriage Of Africans.

Ords.—
14 of 1903.
6 of 1906.
2 of 1912.
S.I. 134 of 1964.

Short title. Cap. 15.

1. [Omitted—Acts of Parliament Act, section 12.]

Marriages of Christian and Mohammedan Africans.

2. Notwithstanding anything contained in the Marriage Act, marriages may be celebrated under this Act between Africans both of whom profess the Christian or Mohammedan religions.*

Application of the Marriage Act.

3. Except as otherwise provided in this Act, the provisions of the Marriage Act shall apply to marriages celebrated under this Act.

Persons by whom marriages may be celebrated, and place.

Amended Ord. 2 of 1912, s. 2. S.I. 134 of 1964.

4. Such marriages shall ordinarily be celebrated by a minister of the religion to which the parties belong, and in such places only as are licensed by the Minister for the celebration of marriages, and shall be celebrated with open doors between the hours of six o'clock in the morning and six o'clock in the afternoon.

Formalities preliminary to marriage.

Cap. 211.

5. The formalities preliminary to marriage established, usual or customary for the Africans in the religion to which the parties belong, shall apply to marriages under this Act, and sections 7 to 17, inclusive, of the Marriage Act shall not apply.

Consent to marriage of minors.

6. In cases where the consent of any person to the intended marriage is necessary, the minister to celebrate the intended marriage shall be deemed to be a registrar of marriages for the purpose of such consent, and if there be no parent or guardian in any particular case capable of consenting, then such minister may consent in writing to such marriage, upon being satisfied, after due inquiry, that the marriage is a proper one.

*But see section 2 of Cap. 213.

Certificate.

7. The marriage certificate shall be in the form usual with African Christian or Mohammedan marriages, or if there is no such form, then in the form prescribed by the Marriage Act.

Registry. Amended S.I. 134 of 1964.

8. For the purpose of the registration of marriages under this Act, the minister in charge of each place of public worship licensed under section 6 of the Marriage Act shall, in the absence of any special appointment by the Minister, be a registrar and shall be deemed to be a registrar of marriages within the meaning of the Marriage Act, except that it shall not be necessary for him to transmit to the Registrar General a certified copy of the entries made by him in the Marriage Register Book more than once in three months.

Cap. 211.

Fees. Added Ord. 6 of 1906, s. 2.

9. The fees chargeable under this Act shall be as follows—

	Shs.
(*a*) on registration of the marriage (including certificate)	2
(*b*) for certified copy of entry	2

Certain Mohammedan marriages valid.

10. Nothing in the Marriage Act shall be deemed to prevent, invalidate, or make an offence the celebration of a Mohammedan marriage under this Act by reason only of a former marriage, provided that such subsequent marriage is valid by Mohammedan law.

CHAPTER 251

THE MARRIAGE ACT.

Commencement: 1 April, 1904.

An Act to make provision for marriages.

1. Interpretation.

In this Act, unless the context otherwise requires—

(a) "district" means a marriage district constituted under this Act;

(b) "registrar" means a registrar of marriages, and includes a deputy registrar when acting as registrar;

(c) "Registrar General" means any officer appointed to act as Registrar General for the purposes of this Act.

2. Constitution of marriage districts.

The Minister shall, by statutory order, divide Uganda into districts for the purposes of this Act, herein referred to as marriage districts, and may, from time to time by like order, alter the marriage districts, either by alteration of boundaries or by union or subdivision of districts, or by the formation of new districts.

3. Appointment of registrars.

(1) The Minister shall, from time to time, appoint a fit and proper person to be the registrar of marriages for each marriage district, and may revoke such appointments; and may also from time to time appoint a deputy registrar of marriages for any district to act in the absence or during the illness or incapacity of the registrar, and may revoke such appointment.

(2) For the purposes of this section, absence means absence from the place at which, as provided by section 4, the office of the registrar is situate.

4. Offices of registrars.

Every registrar shall have an office at such place in his or her district as the Minister shall from time to time direct.

5. Places of worship to be licensed.

The Minister may license any place of public worship to be a place for the celebration of marriages, and may at any time cancel such licence, and in either case he or she shall give notice thereof in the Gazette.

Preliminaries to marriage.

6. Notice of marriage.

Whenever any persons desire to marry, one of the parties to the intended marriage shall sign and give to the registrar of the district in which the marriage is intended to take place a notice in Form A in the First Schedule to this Act.

7. Signature of notice by person unable to write or to understand English.

If the person giving the notice of marriage is unable to write or is insufficiently acquainted with the English language, or both, then it shall be sufficient if he or she places his or her mark or cross to the notice in the presence of some literate person who shall attest to it, which attestation shall be in Form B in the First Schedule to this Act.

8. Registrars to supply forms of notice free of cost.

Every registrar shall supply forms of notice gratuitously to any persons applying for them.

9. Notice to be entered in Marriage Notice Book and published.

(1) Upon receipt of a marriage notice the registrar shall cause it to be entered in a book to be called the "Marriage Notice Book" which may be inspected during office hours without fee.

(2) The registrar shall also publish the notice by causing a copy of it to be affixed on the outer door of his or her office, and to be kept exposed there until he or she grants his or her certificate under section 10, or until three months have elapsed.

10. Registrar to issue certificate on proof of conditions by affidavit.

(1) The registrar, at any time after the expiration of twenty-one days and before the expiration of three months from the date of the notice, upon payment of the prescribed fee, shall thereupon issue his or her certificate in Form C in the First Schedule to this Act; except that he or she shall not issue the certificate until he or she has been satisfied by affidavit—

(a) that one of the parties has been resident within the district in which the marriage is intended to be celebrated at least fifteen days preceding the granting of the certificate;

(b) that each of the parties to the intended marriage (not being a widower or widow) is twenty-one years old, or that, if he or she is under that age, the consent hereafter made requisite has been obtained in writing and is annexed to the affidavit;

(c) that there is not any impediment of kindred or affinity, or any other lawful hindrance to the marriage;

(d) that neither of the parties to the intended marriage is married by customary law to any person other that the person with whom such marriage is proposed to be contracted.

(2) The affidavit required by subsection (1) may be sworn before the registrar or before a magistrate.

(3) The registrar or magistrate taking the affidavit required by subsection (1) shall explain to the person making it the prohibited degrees of kindred and affinity and the penalties which may be incurred under other provisions of this Act.

11. Marriage to take place within three months after date of notice.

If the marriage shall not take place within three months after the date of the notice, the notice and all proceedings consequent on it shall be void; and fresh notice must be given before the parties can lawfully marry.

12. Minister's power to grant licence to marry.

The Minister, upon proof being given to him or her by affidavit that there is no lawful impediment to the proposed marriage, and that the necessary consent, if any, to the marriage has been obtained, may, if he or she shall think fit, dispense with the giving of notice, and with the issue of the certificate of the registrar, and may grant his or her licence, which shall be according to Form D in the First Schedule to this Act, authorising the celebration of a marriage between the parties named in that licence by a registrar, or by a recognised minister of some religious denomination or body.

13. Caveat may be entered against issue of certificate.

Any person whose consent to a marriage is required by this Act, or who may know of any just cause why the marriage should not take place, may enter a caveat against the issue of the registrar's certificate, by writing at any time before its issue the word "Forbidden" opposite to the entry of the notice in the Marriage Notice Book, and appending to the word his or her name and place of abode, and the grounds upon or by reason of which he or she claims to forbid the issue of the certificate; and the registrar shall not issue his or her certificate until the caveat shall be removed under sections 14 to 16.

14. When caveat entered question to be referred to court.

Whenever a caveat is entered against the issue of a certificate, the registrar shall refer the matter to the High Court, and that court shall thereupon summon the parties to the intended marriage, and the person by whom the caveat is entered, and shall require the person by whom the caveat is entered to show cause why the registrar should not issue his or her certificate, and shall hear and determine the case in a summary way, and the decision of the High Court shall be final.

15. Removal of caveat.

(1) If the High Court decides that the certificate ought to be issued, the judge shall remove the caveat by cancelling the word "Forbidden" in the Marriage Notice Book in ink, and writing in the Marriage Notice Book, immediately below that entry and cancellation, the words "Cancelled by

order of the High Court" and signing his or her name to the removal of the caveat.

(2) The registrar shall then issue his or her certificate and the marriage may proceed as if the caveat had not been entered, but the time that has elapsed between the entering and the removal of the caveat shall not be computed in the period of three months specified in section 10.

16. Compensation and costs.

The High Court may award compensation and costs to the party injured, if it appears that a caveat was entered on insufficient grounds.

Consent to marriage in certain cases necessary.

17. Consent to marriage of minors.

If either party to an intended marriage, not being a widower or widow, is under twenty-one years of age, the written consent of the father, or if he is dead or of unsound mind or absent from Uganda, of the mother, or if both are dead or of unsound mind or absent from Uganda, of the guardian of that party, must be produced annexed to the affidavit as required by section 10 before a licence can be granted or a certificate issued.

18. Signature of consent by person unable to write or to understand English.

(1) If the person required to sign a consent to marriage is unable to write, or is insufficiently acquainted with the English language, or both, then he or she shall sign his or her consent by placing his or her mark or cross to the consent in the presence of any judge, magistrate, justice of the peace, district commissioner, chief registrar of the High Court, registrar of marriages, registrar of deeds, medical officer in the service of the Government or minister of religion.

(2) The signature made under subsection (1) shall be attested by a person specified in that subsection in Form B in the First Schedule to this Act.

19. Consent where no parent or guardian capable of consenting.

If there is no parent or guardian of the party under twenty-one years of ag residing in Uganda and capable of consenting to the marriage, then th Minister or a judge of the High Court may consent to the marriage in writing upon being satisfied after due inquiry that the marriage is a proper one; an that consent shall be as effectual as if the father or mother had consented.

Celebration of marriage.

20. Marriage in licensed place of worship by recognised minister.

(1) Marriages may be celebrated in any licensed place of worship b any recognised minister of the church, denomination or body to which th place of worship belongs, and according to the rites or usages of marriage observed in that church, denomination or body.

(2) Notwithstanding subsection (1), the marriage shall be celebrate with open doors between the hours of eight o'clock in the forenoon and si o'clock in the afternoon, and in the presence of two or more witnesse besides the officiating minister.

21. Minister not to celebrate marriage if impediment nor withou licence, etc.

A minister shall not celebrate any marriage if he or she knows of any jus impediment to the marriage, nor until the parties deliver to him or her th registrar's certificate or the Minister's licence.

22. Place of celebration of marriage.

A minister shall not celebrate any marriage except in a building which ha been duly licensed by the Minister, or in such place as the Minister's licenc may direct.

23. Registrars etc. to be provided with books of certificates.

(1) The Minister shall cause to be printed and delivered to th several registrars and to the recognised ministers of licensed places o

orship, books of marriage certificates in duplicate and with counterfoils in Form E in the First Schedule to this Act.

(2) The books of marriage certificates shall be kept by the several registrars and the recognised ministers for the time being of the licensed places of worship under lock and key and be in custody of those registrars and ministers respectively.

24. Entries to be made in marriage certificate.

Immediately after the celebration of any marriage by a minister, the officiating minister shall fill out in duplicate a marriage certificate with the particulars required by Form E, and state also and enter in the counterfoil the number of the certificate, the date of the marriage, names of the parties and the names of the witnesses.

25. Signature of certificate in duplicate.

(1) The certificate shall then be signed in duplicate by the officiating minister, by the parties and by two or more witnesses to the marriage.

(2) The minister having also signed his or her name to the counterfoil, shall sever the duplicate certificate therefrom, and shall deliver one certificate to the parties, and shall within seven days thereafter transmit the other to the registrar of marriages for the district in which the marriage takes place, who shall file it in his or her office.

26. Marriage in a registrar's office.

After the issue of a certificate under section 10 or 15, or of a licence under section 12, the parties may, if they think fit, contract a marriage before a registrar, in the presence of two witnesses in his or her office, with open doors, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, and in the following manner—

The registrar, after production to him or her of the certificate or licence, shall, either directly or through an interpreter, address the parties thus—

> "Do I understand that you (*name*), and you (*name*), come here for the purpose of becoming man and wife?"

If the parties answer in the affirmative, he or she shall proceed thus—

> "Know you that by the public taking of each other as man and wife in my presence, and in the presence of the persons now here, and by the subsequent attestation of that taking by signing your names to that effect, you become legally married to each other, although no other rite of a civil or religious nature shall take place, and that this marriage cannot be dissolved during your lifetime, except by a valid judgment of divorce; and if either of you before the death of the other shall contract another marriage while this remains undissolved, you will be thereby guilty of bigamy and liable to punishment for that offence."

Each of the parties shall then say to the other—

> "I call upon all persons here present to witness that I, (*name*), do take thee, (*name*), to be my lawful wife (*or* husband)".

27. Marriage certificate to be signed.

The registrar shall then fill out, and he or she and the parties and witnesses shall sign, the certificate of the marriage in duplicate, and the registrar shall then fill out and sign the counterfoil as prescribed in section 24 in the case of a marriage by a minister, and shall deliver one certificate to the parties and shall file the other in his or her office.

28. Marriage under Minister's licence.

Whenever the Minister's licence authorises the celebration of marriage at a place other than a licensed place of worship, or the office of a registrar of marriages, the registrar of the district in which the marriage is intended to take place, upon the production of the licence, shall deliver to the person producing it a blank certificate of marriage in duplicate, and the minister or registrar celebrating the marriage shall fill out the certificate, and observe strictly all the formalities hereinbefore prescribed as to marriages in a licensed place of worship, or registrar's office, as the case may be.

29. Conversion of marriage by customary law into legally binding marriage.

Whenever after the 1st July, 1914, any persons already married or professing to be married to each other by customary law desire to convert that marriage into a marriage by which they are legally bound to each other as man and wife so long as both shall live by a ceremony before a registrar, such provisions of this Act as apply to a marriage before a registrar under section 26 shall apply to the conversion as though it were a marriage under that section; but in that case the Forms G, H, I, J and K in the First Schedule to this Act shall be used in lieu of the Forms A, C, D, E and F and the following forms shall be used in lieu of, and shall have the same effect as, those provided in section 26.

In lieu of the first form set out there, the following—

> "Do I understand that you (*name*), and you (*name*), have been heretofore married to each other by customary law and that you come here for the purpose of binding yourselves legally to each other as man and wife so long as both of you shall live?"

In lieu of the second form set out there, the following—

> "Whereas you (*name*), and you (*name*), profess that you have been heretofore married to each other by customary law and whereas that marriage does not bind you by law to each other as man and wife so long as both of you shall live and whereas you desire to bind yourselves legally each to the other as man and wife so long as both of you shall live: Know you that by the public taking of each other as man and wife so long as both of you shall live, in my presence and in the presence of the persons now here, and by the subsequent attestation of that taking by signing your names to that effect, you become legally bound to each other as man and wife so long as both of you shall live although no other rite of a civil or religious nature shall now take place, and that hereafter your marriage cannot be dissolved during your lifetime, except by a valid judgment of divorce; and if either of you before the death of the other shall illegally contract another marriage while your marriage to each other remains undissolved, you will be thereby guilty of bigamy, and liable to punishment for that offence."

And in lieu of the third form set out there, the following—

> "I call upon all persons here present to witness that I, (*name*), take you (*name*), to be my lawful wife (*or* husband) so long as both of us shall live."

30. Facilities for marriages between British subjects resident in Uganda and British subjects resident in England, etc.

(1) Where marriage is intended to be solemnised or contracted in Uganda between a British subject resident in Uganda and a British subject resident in England, Scotland, Northern Ireland or the Republic of Ireland, a certificate of marriage issued in England by a superintendent registrar or a certificate for marriage issued by a registrar, or a certificate of proclamation of banns in Scotland, or a certificate for marriage issued by a registrar in Northern Ireland or the Republic of Ireland shall in Uganda have the same effect as a certificate for marriage issued by a registrar under section 10.

(2) Where a marriage is intended to be solemnised or contracted in England, Scotland, Northern Ireland or the Republic of Ireland, as the case may be, between a British subject resident therein and a British subject resident in Uganda, a certificate for marriage may be issued by a registrar under section 10 in the like manner as if the marriage was to be solemnised or contracted in circumstances requiring the issue of such a certificate and as if both British subjects were resident in Uganda.

(3) For the purposes of this section, "certificate for marriage" in reference to certificates issued in Scotland shall mean a certificate of due publication of notice of intention to marry.

Registry and evidence of marriages.

31. Marriage certificates to be registered.

(1) The registrar of marriages in each district shall forthwith register in a book to be kept in his or her office for that purpose, and to be called "The Marriage Register Book", every certificate of marriage which shall be filed in his or her office, according to Form F in the First Schedule to this Act; and every such entry shall be made in the order of date from the beginning to the

end of the book, and every entry so made shall be dated on the day on which it is so entered, and shall be signed by the registrar, and the book shall be indexed in such manner as is best suited for easy reference to it.

(2) The registrar shall at all reasonable times allow searches to be made in the Marriage Register Book, and shall give certified copies from it upon payment of the prescribed fee.

(3) Within ten days after the last day of each month, every registrar shall send to the Registrar General a certified copy of all entries he or she made during the preceding month in the Marriage Register Book of his or her district, and the Registrar General shall file the copy in his or her office.

32. Correction of clerical errors in marriage certificates.

Any registrar, when authorised by the Registrar General, may correct any clerical error in any certificate of marriage filed in his or her office, upon production to him or her of the certificate delivered to the parties, and shall authenticate every correction by his or her signature and the date of the correction.

33. Evidence of marriage.

Every certificate of marriage which shall have been filed in the office of the registrar of any district, or a copy of it, purporting to be signed and certified as a true copy by the registrar of that district for the time being, and every entry in a Marriage Register Book or a copy of it, certified as aforesaid, shall be admissible as evidence of the marriage to which it relates, in any court of justice or before any person now or hereafter having by law or consent of the parties authority to hear, receive and examine evidence.

Valid and invalid marriages.

34. Circumstances invalidating marriage.

(1) No marriage in Uganda shall be valid which, if celebrated in England, would be null and void on the ground of kindred or affinity, or where either of the parties to it at the time of the celebration of the marriage is married by customary law to any person other than the person with whom the

(2) A marriage shall be null and void if both parties knowingly and wilfully acquiesce in its celebration—

(a) in any place other than the office of a registrar of marriages or a licensed place of worship, except where authorised by the Minister's licence;
(b) under a false name or names;
(c) without the registrar's certificate of notice or Minister's licence duly issued; or
(d) by a person not being a recognised minister of some religious denomination or body, or a registrar of marriages.

(3) No marriage shall, after celebration, be deemed invalid by reason that any provision of this Act, other than the foregoing, has not been complied with.

35. Marriages under this Act valid.

All marriages celebrated under this Act shall be good and valid in law to all intents and purposes.

36. Marriages under customary law.

Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable, during the continuance of that marriage, of contracting a valid marriage under any customary law, but, except as aforesaid, nothing in this Act shall affect the validity of any marriage contracted under or in accordance with any customary law, or in any manner applied to marriages so contracted.

Expenses and fees.

37. Certain expenses to be defrayed from public funds.

The Minister may defray out of monies provided by Parliament all proper expenses connected with the transmission or delivery of the marriage registers, or which may otherwise become necessary to be incurred in carrying out this Act.

38. Fees.

(1) The fees specified in the Second Schedule to this Act shall be paid to the registrars for the several matters to which they are applicable and shall be paid by them into the Consolidated Fund.

(2) The Minister may, by statutory order, amend the Second Schedule to this Act.

39. Fee may be remitted.

The Minister may, when he or she is satisfied of the poverty of the parties, reduce the amount of the fees specified in the Second Schedule, or remit them altogether; and, if they have been paid into the Consolidated Fund, order their refund.

40. Minister may receive customary fees.

This Act shall not preclude a minister from receiving the fees ordinarily paid to a minister of his or her denomination for the celebration of marriage.

Offences and penalties.

41. Bigamy.

Any person who commits bigamy is liable to imprisonment for a period not exceeding five years.

42. Marriage with a person previously married.

Any person who, being unmarried, goes through the ceremony of marriage with a person whom he or she knows to be married to another person, commits an offence and is liable on conviction to imprisonment for a period not exceeding five years.

43. Making false declarations, etc. for marriage.

Any person who in any declaration, certificate, licence, document or [illegible] for the purposes of a marriage,

she does so without having taken reasonable means to ascertain the truth or falsity of that matter, commits an offence and is liable on conviction to imprisonment for a period not exceeding one year, or if he or she does so knowing that the matter is false, is liable on conviction to imprisonment for a period not exceeding five years.

44. False pretence of impediment to marriage.

Any person who endeavours to prevent a marriage by pretence that his or her consent to it is required by law, or that any person whose consent is so required does not consent, or that there is any legal impediment to the performing of the marriage, shall, if he or she does so knowing that the pretence is false or without having reason to believe that it is true, commits an offence and is liable on conviction to imprisonment for a period not exceeding two years.

45. Unlawfully performing marriage ceremony.

Any person who performs or witnesses as a marriage officer the ceremony of marriage, knowing that he or she is not duly qualified to do so, or that any of the matters required by law for the validity of the marriage has not happened or been performed, so that the marriage is void or unlawful on any ground, commits an offence and is liable on conviction to imprisonment for a period not exceeding five years.

46. Wilful neglect of duty to fill up or transmit certificate of marriage.

Any person who, being under a duty to fill out the certificate of marriage celebrated by him or her, or its counterfoil, or to transmit the certificate to the registrar of marriages, wilfully fails to perform that duty, commits an offence and is liable on conviction to imprisonment for a period not exceeding two years.

47. Personation in marriage.

Any person who personates any other person in marriage, or marries under a false name or description, with intent to deceive the other party to the marriage, commits an offence and is liable on conviction to imprisonment for a period not exceeding five years.

48. Fictitious marriage.

Any person who goes through the ceremony of marriage, or any ceremony which he or she represents to be a ceremony of marriage, knowing that the marriage is void on any ground, and that the other person believes it to be valid, commits an offence and is liable on conviction to imprisonment for a period not exceeding five years.

49. Contracting marriage when already married by customary law.

Any person who contracts a marriage under this Act, or any modification or reenactment of this Act, being at the time married in accordance with customary law to any person other than the person with whom such marriage is contracted, commits an offence and is liable on conviction to imprisonment for a period not exceeding five years.

50. Contracting marriage by customary law when already married under this Act.

Any person who, having contracted marriage under this Act or any modification or reenactment of this Act, during the continuance of that marriage contracts a marriage in accordance with customary law, commits an offence and is liable on conviction to imprisonment for a period not exceeding five years.

51. Forms.

The forms contained in the First Schedule to this Act may be used in the cases to which they are applicable, with such alterations as may be necessary.

SCHEDULES

First Schedule.

Forms.

ss. 6, 7, 10, 12, 23, 24, 29, 31, 38.

Republic of Uganda

Form A.

s. 6.

Notice of Marriage.

The Marriage Act.

To the registrar of marriages for the _____ district of Uganda.

I give you notice that a marriage is intended to be had within three months from the date of this notice between me, the undersigned, and the other party named in the notice.

Name	Condition	Occupation, rank or profession	Age	Dwelling or place of abode	Consent (if any) and by whom given
Bridegroom	Bachelor or widower				
Bride	Spinster or widow				

Witness my hand, this _____ day of _____, 20 ____.

_____

Signature

CHAPTER 249

THE DIVORCE ACT.

Arrangement of Sections.

Section

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20. Restitution of conjugal rights.

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CHAPTER 249

THE DIVORCE ACT.

Commencement: 1st October, 1904.

An Act relating to divorce.

Preliminary.

. Limitations of Act.

lothing in this Act shall authorise—

(a) the making of any decree of dissolution of marriage unless the petitioner is domiciled in Uganda at the time when the petition is presented;

(b) the making of any decree of nullity of marriage unless the petitioner is domiciled in Uganda at the time when the petition is presented or unless the marriage was solemnised in Uganda.

. Interpretation.

n this Act, "minor children" means—

(a) in the cases of Africans, Indians and Pakistanis, boys who have not attained the age of fifteen years and girls who have not attained the age of thirteen years;

(b) in other cases, it means unmarried children who have not attained the age of eighteen years.

. Jurisdiction.

(1) Where all parties to a proceeding under this Act are Africans or vhere a petition for damages only is lodged in accordance with section 21, urisdiction may be exercised by a court over which presides a magistrate grade I or a chief magistrate.

(2) In all other cases jurisdiction shall be exercised by the High Court only.

(3) Such jurisdiction shall, subject to this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.

Dissolution of marriage.

4. Grounds for divorce.

(1) A husband may apply by petition to the court for the dissolution of his marriage on the ground that since the solemnisation of the marriage his wife has been guilty of adultery.

(2) A wife may apply by petition to the court for the dissolution of her marriage on the ground that since the solemnisation of the marriage—

(a) her husband has changed his profession of Christianity for the profession of some other religion, and gone through a form of marriage with another woman; or

(b) has been guilty of—

(i) incestuous adultery;

(ii) bigamy with adultery;

(iii) marriage with another woman with adultery;

(iv) rape, sodomy or bestiality;

(v) adultery coupled with cruelty; or

(vi) adultery coupled with desertion, without reasonable excuse, for two years or upwards.

5. Corespondent.

Where the husband is the petitioner, he shall make the alleged adulterer a corespondent to the petition unless he is excused by the court from doing so on one of the following grounds—

(a) that the respondent is leading the life of a prostitute, and that he knows of no person with whom the adultery has been committed;

(b) that he does not know the name of the alleged adulterer although he has made due efforts to discover it; or

(c) that the alleged adulterer is dead.

6. Scope of inquiry by the court.

The court shall satisfy itself, so far as it reasonably can, as to the facts alleged, and also whether or not the petitioner has been in any manner accessory to or conniving at the going through of the form of marriage or the adultery complained of, or has condoned it, and shall also inquire into any countercharge which may be made against the petitioner.

7. When petition shall be dismissed.

The petition shall be dismissed if the court is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed, or finds that during the marriage the petitioner has been accessory to or conniving at the going through of the form of marriage or the adultery or has condoned it, or finds that the petition is presented or prosecuted in collusion with either the respondent or corespondent.

8. When petition shall be granted.

(1) If the court is satisfied that the petitioner's case has been proved, and does not find that the petitioner has been accessory to or has connived at the going through of the form of marriage or the adultery, or has connived at or condoned it, or that the petition is presented or prosecuted in collusion, the court shall pronounce a decree nisi for the dissolution of the marriage.

(2) Notwithstanding subsection (1), the court shall not be bound to pronounce the decree if it finds that the petitioner has during the marriage been guilty of adultery, or been guilty of unreasonable delay in presenting or prosecuting the petition, or of cruelty to the respondent, or of having deserted or wilfully separated himself or herself from the respondent before the adultery complained of, and without reasonable excuse, or of such wilful neglect of or misconduct towards the respondent as has conduced the adultery.

9. Condonation of adultery.

Adultery shall not be deemed to have been condoned unless conjugal cohabitation has been continued or subsequently resumed.

10. Grant of relief to the respondent.

If the respondent opposes the relief sought on the ground, where the petitioner is the husband, of his adultery, cruelty, or desertion without reasonable excuse, or, where the petitioner is the wife, on the ground of her adultery, the court may give the respondent, on his or her application, the same relief to which he or she would have been entitled if a petition had been presented seeking that relief, and the respondent may give evidence of or relating to the adultery, cruelty or desertion.

Nullity of marriage.

11. Petitions for nullity of marriage.

A husband or a wife may present a petition to the court praying that his or her marriage may be declared null and void.

12. Grounds for decree of nullity.

(1) The following are the grounds on which a decree of nullity of marriage may be made—

(a) that the respondent was permanently impotent at the time of the marriage;

(b) that the parties are within the prohibited degrees of consanguinity, whether natural or legal, or affinity;

(c) that either party was a lunatic or idiot at the time of the marriage;

(d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with the previous husband or wife was then in force;

(e) that the consent of either party to the marriage was obtained by force or fraud, in any case in which the marriage might be annulled on this ground by the law of England.

(2) If the court finds that the petitioner's case has been proved, it shall pronounce a decree nisi declaring the marriage to be null and void.

13. Children of annulled marriage.

Where a marriage is annulled on the ground that a former husband or wife was living, and it is found that the subsequent marriage was contracted in

good faith and with the full belief of the parties that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the decree nisi is made shall be specified in the decree, and shall be entitled to succeed in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.

Judicial separation and protection orders.

14. Grounds for judicial separation.

A husband or wife may apply by petition to the court for a judicial separation on the ground of cruelty, adultery, or desertion without reasonable excuse for two years or upwards, and the court, on being satisfied that the allegations of the petition are true, and that there is no legal ground why the application should not be granted, may decree judicial separation accordingly.

15. Property of wife after judicial separation.

Where judicial separation has been decreed under this Act, the wife shall, from the date of the decree, and while the separation continues, be considered as unmarried with respect to property of every description which she may acquire or which may come to or devolve upon her, and that property may be disposed of by her in all respects as if she were an unmarried woman, and on her decease, if she dies intestate, shall go as it would have gone if her husband had then been dead; but if she again cohabits with her husband, all property to which she may be entitled when that cohabitation takes place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband while separate.

16. Contracts, etc. of wife after judicial separation.

Where judicial separation has been decreed under this Act, the wife shall, while the separation continues, be considered as an unmarried woman for the purposes of contracts, wrongs and injuries, and of suing and being sued in any civil proceedings, and her husband shall not be liable in respect of any contract, act or costs entered into, done, omitted or incurred by her during the separation; except that—

(a) where alimony has been decreed or ordered to be paid to the wife upon the judicial separation, and it is not duly paid, the husband shall be liable for necessaries supplied for her use; and

(b) nothing in this Act shall prevent the wife from joining at any time during the separation in the exercise of a joint power given to herself and her husband.

17. Petition to reverse decree of judicial separation.

(1) A husband or wife upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may at any time thereafter present a petition praying for the reversal of the decree on the ground that it was obtained in his or her absence, and that where desertion was the ground of the decree there was reasonable excuse for the desertion alleged.

(2) The court may, on being satisfied of the truth of the allegations of the petition, reverse the decree accordingly.

18. Protection orders.

(1) Any wife, in whose property the husband has acquired an interest by virtue of the marriage may, if deserted by him, apply by petition to the court for an order to protect any property which she may have obtained or may obtain after the desertion, against him and his creditors and any person claiming under him.

(2) The court may, if satisfied that the desertion was without reasonable excuse, and that the wife is maintaining herself, make that order.

(3) The order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance on the order, be conclusive as to that time.

(4) While the order is in force, the wife shall be, and be deemed to have been from the date of the desertion, in the like position in all respects with regard to the property and contracts, and suing and being sued, as she would be if she had obtained a decree of judicial separation under this Act.

(5) The husband, or any other creditor or person claiming under him, may apply to the court for the discharge or variation of the order, and the court may, if the desertion has ceased, or if for any other cause it thinks fit so to do, discharge or vary the order accordingly.

(6) If the husband or any creditor or person claiming under him, seizes or continues to hold any property of the wife after notice of any such order, the wife may by action recover the property, and also a sum equal to double its value.

19. Effect of reversal, etc. of judicial separation or protection order.

(1) The reversal, discharge or variation of a decree of judicial separation, or of a protection order, shall not affect any rights or remedies which a person would otherwise have had in respect of any contracts or acts of the wife entered into or done between the dates of the decree or order and of the reversal, discharge or variation of the decree or order.

(2) Any person who, in reliance on any such decree or order, makes any payment to or permits any transfer or acts to be made or done by the wife shall, notwithstanding the decree or order may then have been reversed, discharged or varied or the separation of the wife from her husband may have ceased, or at some time since the making of the decree or order has been discontinued, be protected and indemnified as if at the time of the payment, transfer or act the decree or order were valid and still subsisting without variation, and the separation had not ceased or been discontinued, unless at the time of the payment, transfer or other act that person had notice of the reversal, discharge or variation of the decree or order of the cessation or discontinuance of the separation.

Restitution of conjugal rights.

20. Restitution of conjugal rights.

(1) If a husband or wife has without reasonable excuse withdrawn from the society of the other, the wife or husband may apply by petition to the court for restitution of conjugal rights.

(2) The court, on being satisfied that the allegations of the petition are true, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(3) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be a ground for a suit for judicial separation or for a decree of nullity of marriage.

General.

21. Damages for adultery.

(1) A husband may, by petition, claim damages from any person on the ground of his having committed adultery with the wife of the petitioner.

(2) Such claim may be made either in a petition for dissolution of marriage or for judicial separation, or by petition for that purpose only.

(3) The court shall ascertain the amount of damages and may direct that the damages be levied under warrant on the movable or immovable property of the person ordered to pay and may direct in what manner the damages, when recovered, shall be paid or applied, and may direct that the whole or any part of the damages shall be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

(4) Where the officer having execution of a warrant for the recovery of damages ordered under subsection (3) reports that no property or insufficient property exists upon which the damages may be levied, the court may by warrant commit the person ordered to pay to imprisonment for a period not exceeding six months.

(5) Every person so committed to prison shall be released from prison before the expiration of his sentence—

(a) on the amount of the damages being paid to the officer in charge of the prison; or

(b) by order of the court if the court is satisfied that the damages have otherwise been fully paid.

22. Costs against a corespondent.

A corespondent may be ordered to pay the whole or any part of the costs of the proceedings if adultery with the wife of the petitioner has been established against him; except that he shall not be ordered to pay the costs of the petitioner—

(a) if at the time of the adultery he had no reason to believe the respondent to be a married woman;

(b) if the respondent was at the time of the adultery living apart from her husband and leading the life of a prostitute.

23. Alimony pendente lite.

In any suit under this Act the wife, whether or not she has obtained a protection order, may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just; except that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution or nullity of marriage until the decree is made absolute.

24. Permanent alimony.

(1) On a decree absolute declaring a marriage to be dissolved, or on a decree of judicial separation obtained by a wife, the court may order the husband to secure to the wife such sum of money as, having regard to her fortune, if any, to the ability of the husband, and the conduct of the parties, it thinks reasonable.

(2) The court may direct the alimony to be paid either in a lump sum or in yearly, monthly or weekly payments for any period not exceeding the life of the wife, and for that purpose may cause a proper instrument to be executed by all necessary parties.

(3) The court may direct the alimony to be paid either to the wife herself or to a trustee to be approved on her behalf by the court, and may impose such terms and restrictions, and may direct the execution of such trust deeds as it may think fit, and may from time to time appoint a new trustee.

25. Discharge or alteration of order for alimony.

Where an order has been made for the payment of alimony, and the husband from any cause subsequently becomes unable to make the payments, the court may discharge or modify, or suspend the order in whole or in part, and may again revive the order in whole or in part.

26. Settlement of the wife's property.

When a decree of dissolution of marriage or of judicial separation is pronounced on account of adultery by the wife, and the wife is entitled to any property, the court may, notwithstanding the existence of the disability of coverture, order the whole or any part of the property to be settled for the benefit of the husband, or of the children of the marriage, or of both.

27. Power to vary settlements.

After a decree absolute of dissolution or of nullity of marriage, the court may inquire into the existence of antenuptial or postnuptial settlements made on the parties whose marriage is the 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 seems fit; except that no order for the benefit of the parents, or either of them, shall be made at the expense of the children.

28. Powers of the court as to settlements.

Where the court has power to direct any property to be settled, or to vary the terms of an existing settlement, it may appoint trustees to whom the money shall be paid, and may order the necessary instruments to be prepared containing such provisions as it may think fit, and may order all necessary parties to execute the instruments, and may from time to time appoint new trustees, and may do all such other acts as it may deem necessary for carrying such directions into effect.

29. Custody of children.

In suits for dissolution of marriage, or for nullity of marriage or for judicial separation, the court may at any stage of the proceedings, or after a decree

ıbsolute has been pronounced, make such order as it thinks fit, and may from ime to time vary or discharge the orders, with respect to the custody, naintenance and education of the minor children of the marriage, or for ılacing them under the protection of the court.

30. Procedure.

Subject to the provisions of this Act, all proceedings under this Act shall be egulated by the Civil Procedure Act.

31. Petitions.

(1) Every petition shall state, as distinctly as the nature of the case ermits, the facts on which the claim is based, and shall be verified as if it vere a plaint, and may at the hearing be referred to as evidence.

(2) Petitions for dissolution of marriage, or for nullity of marriage, r for judicial separation, shall state that there is not any collusion or onnivance between the petitioner and the respondent.

32. Service of petition.

very petition under this Act shall be served on the party to be affected by it, ither within or without Uganda, in such manner as the court may, by general r special order, from time to time direct; except that the court may dispense vith such service in case it seems necessary or expedient so to do.

33. Examination of witnesses.

The witnesses in all proceedings shall be examined orally; except that the arties may verify their respective cases by affidavit, but so that the deponent nay be orally cross-examined and reexamined either on the application of he other party or by direction of the court.

34. Husband and wife compellable witnesses.

On any petition presented by a wife for the dissolution of her marriage on the ground of adultery coupled with cruelty or desertion without reasonable excuse, the husband and wife respectively shall be competent and compellable to give evidence relating to the cruelty or desertion.

35. Sittings in camera.

The court may hear the whole or any part of the proceedings under this Act with closed doors.

36. Adjournment.

The court may adjourn the hearing of any petition under this Act, and may require further evidence on the petition.

37. Making decrees nisi decrees absolute.

(1) No decree nisi of dissolution or nullity of marriage shall be made absolute till after the expiration of six months from the date of the decree, or such longer period as the Chief Justice may by rules prescribe.

(2) During that period any person may show cause why the decree should not be made absolute by reason of the same having been obtained by collusion, or by reason of material facts not having been brought before the court.

(3) On cause being so shown the court shall make the decree absolute, or reverse the decree nisi, or require further inquiry, or otherwise deal with the case as justice may demand.

(4) The court may order the costs arising from such cause being shown to be paid by the parties or such one or more of them, including the wife if she has separate property, as it thinks fit.

(5) Where a petitioner fails to move within a reasonable time that the decree nisi be made absolute, the court may dismiss the suit.

38. Enforcement of orders and appeals.

All decrees and orders made by the court in proceedings under this Act shall be enforced, and may be appealed from, as if they were decrees or orders made by the court in the exercise of its original civil jurisdiction; except that—

(a) in suits for dissolution or nullity of marriage a respondent or co-respondent not appearing and defending the suit on the occasion

of the decree nisi being made shall not appeal against the decree being made absolute, unless the court gives leave to appeal at the time of the decree being made absolute; and

(b) no appeal from an order absolute for dissolution or nullity of marriage shall lie in favour of any party who, having had time and opportunity to appeal from the decree nisi, has not appealed from it.

39. Remarriage of the parties.

When the time limit for appealing against a decree of dissolution or nullity of marriage has expired, and no appeal has been presented, or when in the result of any such appeal, any marriage shall be declared to be dissolved or annulled, but not sooner, the parties to the marriage may marry again as if the prior marriage had been dissolved by death.

40. Clergyman of Church of Uganda not bound to marry a divorced guilty party.

No clergyman in Holy Orders of the Church of Uganda shall be compelled to solemnise the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnising, or refusing to solemnise, such marriage.

41. Another may perform service.

When a clergyman in Holy Orders or other minister of religion in charge of any church or chapel refuses to perform such marriage service between persons who would, but for the refusal, be entitled to be married in the church or chapel, he or she shall permit any other clergyman in Holy Orders of the Church to perform the service in the church or chapel.

42. Rules of court.

The Chief Justice may make rules of court with respect to all matters of procedure under this Act, and may also prescribe the forms to be used and the fees to be paid in proceedings taken under this Act.

History: Cap. 215.

Cross Reference

Civil Procedure Act, Cap. 71

CHAPTER 213.

THE MARRIAGE AND DIVORCE OF MOHAMMEDANS ACT.

ARRANGEMENT OF SECTIONS.

SECTION.

1. *Short title.*
2. Marriage Act and Marriage of Africans Act not to apply in certain cases.
3. Mohammedan marriages and divorces.
4. Minister may appoint registrars.
5. Registrars to keep books.
6. Marriages and divorces to be registered.
7. Registrar to make inquiry.
8. If satisfied, registrar shall register.
9. By whom registers must be signed.
10. Free copies of entries to parties.
11. Record of refusals to register.
12. Appeals from refusals.
13. Quarterly returns.
14. Safe custody of returns and books, etc.
15. Registers, etc., to be open for inspection, and copies to be obtainable.
16. Rules.
17. Savings.
18. Penalties.
19. Jurisdiction in divorce cases.

Schedule—Register books.

CHAPTER 213.

THE MARRIAGE AND DIVORCE OF MOHAMMEDANS ACT.

[15TH APRIL, 1906.]

An Act Relating To Marriage And Divorce Of Mohammedans.

Ord. 7 of 1906. L.N.10 of 1963.

1. [Omitted—Acts of Parliament Act, section 12.]

Short title. Cap. 15.

2. The Marriage Act and the Marriage of Africans Act shall cease to apply to the celebration of marriages between persons both of whom profess the Mohammedan religion, and neither of whom is a party to an existing marriage, under or declared valid by the said Acts, with any person other than a Mohammedan; and every such marriage celebrated between Mohammedans before the commencement of this Act shall be, and shall be deemed to have been from the time of the celebration thereof, a legal and valid marriage.

Marriage Act and Marriage of Africans Act not to apply in certain cases. Cap. 211. Cap. 212.

3. All marriages between persons professing the Mohammedan religion, and all divorces from such marriages celebrated or given according to the rites and observances of the Mohammedan religion customary and usual among the tribe or sect in which the marriage or divorce takes place, shall be valid and registered as herein provided.

Mohammedan marriages and divorces.

4. The Minister may by statutory order appoint any person, hereinafter called a registrar, to register Mohammedan marriages and divorces which have been effected within certain specified limits; and the registrar may appoint persons to be deputy registrars within the said limits, and hereinafter "registrar" shall include a deputy registrar.

Minister may appoint registrars. Amended L.N. 10 of 1963.

5. Every registrar shall keep up the following register books, which shall be supplied to him by the Minister—

Registrars to keep books. Amended L.N. 10 of 1963.

(*a*) Book 1—Register of marriages in the Form A in the Schedule to this Act; and

(*b*) Book 2—Register of divorces in the Form B in the said Schedule.

Marriages and divorces to be registered.

6. (1) Application for registration shall be made within one month from the date of the marriage or divorce, before a registrar in the manner and by the persons following, that is to say—

(*a*) in the case of a marriage, by the husband, or in the event of his death before the expiration of one month from the date of the marriage, by the widow:

Provided that if either party whose duty it is to apply is a minor, the application shall be made by his lawful guardian, and if the widow be a purdah-nisheen such application shall be made by her personally or on her behalf by her duly authorised vakil;

(*b*) in the case of a divorce—

(i) other than of the kind known as Khula, by the man who effected the divorce; and

(ii) of the kind known as Khula, by the parties to the divorce jointly:

Provided that if the woman be a purdah-nisheen such application may be made on her behalf by her duly authorised vakil.

(2) Nothing in this section shall prevent a woman or, if she be a purdah-nisheen, her authorised vakil, or her guardian applying for the registration of a marriage or divorce if the man fails to apply, or a minor from so applying if his guardian fails to apply.

Registrar to make inquiry. Amended L.N. 10 of 1963.

7. On application being made to a registrar for registration under this Act, and upon the receipt by him of such fee as the Minister may by statutory order direct, he shall satisfy himself whether or not such marriage or divorce has been effected by or between the parties, and also as to the identity of the parties; and, further, in the case of a person appearing as a guardian or a vakil, as to the right of such person to appear.

If satisfied, registrar shall register.

8. If the registrar be satisfied on the above points, and not otherwise, he shall make an entry of the marriage or divorce in the appropriate register.

By whom registers must be signed.

9. (1) The entries in the appropriate registers shall be signed by the persons following—

(*a*) in the case of a marriage, by the husband and wife or the guardians or vakil, as the case may be, and by two witnesses to the marriage;

(*b*) in the case of a divorce—

(i) other than of the kind known as Khula, by the man who has effected the divorce, the witness who identifies him, and, if the man be of the Shiah Sect, by two witnesses to the divorce being effected; and

(ii) of the kind known as Khula, by the man and woman, or by her vakil if she is a purdah-nisheen, parties to the divorce, by the persons identifying the man and woman, and if the man is of the Shiah Sect, by two witnesses to the divorce being effected.

(2) All the entries in the registers shall be signed by the registrar.

Free copies of entries to parties.

10. On completion of the registration of any marriage or divorce the registrar shall deliver free of charge to each of the parties to the marriage or divorce an attested copy of the entry.

Record of refusals to register.

11. Every registrar refusing to register a marriage or divorce shall make an order of refusal, and record his reasons for such order in a book to be kept for that purpose.

Appeals from refusals. Cap. 211.

12. An appeal shall lie against an order made by a registrar under the last preceding section to the registrar of marriages for the district in which the registration was refused appointed under the Marriage Act, or to the Registrar General of Marriages so appointed (hereinafter called the Registrar General), and the order made upon such appeal shall be final, and shall be communicated to the registrar who has refused to register, and who shall record it in the book mentioned in the last preceding section, and in the event of his order being reversed or altered he shall comply with the terms of the order.

Quarterly returns.

13. Every registrar shall, at the expiration of every three months, send certified copies of all entries made by him during the preceding quarter in the registers and books, which he is required by this Act to keep, to the Registrar General, who shall file the same in his office.

Safe custody of returns and books, etc.

14. Every registrar shall keep safely such registers and books until the same shall be filled, and shall then, or earlier, if he leaves the limits of the area for which he is appointed or his appointment is revoked, forward them to the Registrar General or to such other person as the latter may direct.

Registers, etc., to be open for inspection, and copies to be obtainable.

15. The registers, and the copies thereof which are filed with the Registrar General, shall be open to inspection by any person applying to inspect the same, and copies of any entry or of any certified copy of any entry shall be given to any person applying for such copy on the payment of a fee of two shillings.

Rules.

Amended L.N. 10 of 1963.

16. The Minister may from time to time make such rules as he thinks fit for carrying out the purposes of this Act.

Savings.

17. Nothing in this Act shall be construed to—

(*a*) render invalid, merely by reason of its not having been registered, any Mohammedan marriage or divorce which would otherwise be valid;

(*b*) render valid, by reason of its having been registered, any such marriage or divorce which would otherwise be invalid;

(*c*) authorise the attendance of any registrar at the celebration of a marriage except at the request of all the parties concerned;

(*d*) affect the religion or religious rites of any persons in Uganda;

(*e*) prevent any person who is unable to write from putting his mark instead of the signature required by this Act.

Penalties.

18. Any person, who being required by this Act to apply for registration of a marriage, or divorce, fails to make such application shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one month and to a fine not exceeding two hundred shillings.

Jurisdiction in divorce cases.

Cap. 215.

19. Nothing in the Divorce Act shall authorise the grant of any relief under that Act where the marriage of the parties has been declared valid under this Act:

Provided that nothing herein contained shall prevent any competent court from granting relief under Mohammedan law; and the High Court and any court to which jurisdiction is specially given by the Minister by statutory instrument shall have jurisdiction herein.

SCHEDULE.

s. 5.

FORM A.

BOOK I—REGISTER OF MARRIAGES.

1. Consecutive No.	
2. Name and tribe of bridegroom and that of his father, with their respective residences	
3. Name and tribe of the bride and that of her father, with their respective residences	
4. Whether the bride is a spinster, a widow, or divorced by a former husband, and whether she is adult or otherwise	
5. Name of the guardian of the bridegroom (if the bridegroom is a minor) and that of the guardian's father, with specification of the guardian's residence, and of the relationship in which he stands to the bridegroom.	
6. Name of the guardian of the bride (if she is a minor) and that of his father, with specification of his residence, and the relationship in which he stands to the bride	
7. Name of the bride's vakil, and of his father, and their residences, with specification of the relationship in which the vakil stands to the bride	
8. Name of the witnesses to the due authorisation of the bride's vakil, with names of their father and residences, and specification of the relationship in which they stand to the bride	
9. Date on which the marriage was contracted	
10. Amount of dower	
11. How much of the dower is Moajjul (prompt) and how much Mowujjul (deferred)	
12. Whether any portion of the dower was paid at the moment. If so, how much ?	
13. Whether any property was given in lieu of the whole or any portion of the dower, with specification of the same	
14. Special conditions (if any)	
15. Names of village or town, and the area in which the marriage took place	
16. Name of the person in whose house the marriage ceremony took place, and that of his father	
17. Date of registration	

APPENDIX 2.

CHAPTER 157

THE ADMINISTRATOR GENERAL'S ACT.

Arrangement of Sections.

Section

1. Interpretation.
2. Administrator General.
3. Limitation on liability of Administrator General and agents for acts done in performance of duties.
4. Death to be reported to Administrator General, who may apply for grant of letters of administration.
5. Notice of application for letters of administration to be given to Administrator General.
6. Notice of application for letters of administration to be given by Administrator General.
7. Grant to Administrator General may be revoked and grant made to other person.
8. Administrator General not precluded from applying for grant within one month of death of deceased.
9. Court may grant certificate where value of estate does not exceed 2,000 shillings.
10. Administrator General to transmit accounts to Minister.
11. Intermeddling with property of deceased.
12. Surviving partner to furnish sworn statement.
13. Power to call for sworn statement as to wages due to deceased.
14. Agent may take possession to protect property.
15. Death of agent of person not residing in Uganda.
16. Power to dispose of property.
17. Administrator General to make inventory and keep accounts.
18. Notice to creditors and claimants; distribution of estate.
19. Unclaimed balance.
20. Fees and expenses.
21. Power to incur expenditure.
22. Actions against Administrator General.
23. Right of Administrator General to costs.
24. Property existing in neighbouring territories.
25. Payments to executor, etc. in country of domicile.

26. Assets received from outside Uganda.
27. Court may appoint persons to receive minor's share.
28. Court may order partition of immovable property.
29. No security or oath required from Administrator General.
30. Power to apply to court for directions.
31. Power to administer oath.
32. False evidence.
33. Accounts to be filed in court.
34. Power to file interim account.
35. Liability of Government.
36. Succession Act not to supersede rights of Administrator General.
37. Disposal of insignificant balances.
38. Power to make rules.
39. Application of Act.
40. Transfer of balance of enemy estates to custodian of enemy property.

CHAPTER 157

THE ADMINISTRATOR GENERAL'S ACT.

Commencement: 15 August, 1933.

An Act relating to the administration by the Administrator General of estates of deceased persons.

1. Interpretation.

In this Act, unless there is anything repugnant in the subject or context—

(a) "Administrator General" includes a deputy and an assistant Administrator General;

(b) "agent" means an agent of the Administrator General, duly appointed under section 2(4);

(c) "assets" or "property" means all property movable and immovable of a deceased person which is chargeable with and applicable to the payment of the deceased person's debts and legacies or available for distribution among his or her heirs and next of kin and includes books, papers and documents;

(d) "court" means the High Court, or any court subordinate to it to which jurisdiction has, or hereafter may have, been given;

(e) "immovable property" includes land, incorporeal tenements and things attached to the earth or permanently fastened to anything which is attached to the earth;

(f) "letters of administration" includes any letters of administration, whether general or with a copy of the will annexed or limited in time or otherwise, and also includes probate in favour of the Administrator General;

(g) "movable property" means property of every description except immovable property;

(h) "next of kin" includes a widower or widow of a deceased person, or any other person, who by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased;

(i) "taxing officer" means the registrar of the High Court or an officer duly appointed to act for the registrar.

2. Administrator General.

(1) Subject to any written law relating to the appointment of persons to the public service, there shall be appointed an Administrator General and such deputy and assistant administrators general as may be necessary for the purposes of this Act.

(2) The Administrator General shall be a corporation sole by the name of the Administrator General of Uganda with perpetual succession and an official seal; and in all proceedings under this Act and in all legal proceedings he or she shall sue and be sued by that name, and it shall be necessary to state and to prove the Administrator General's authority and title in the specific estate to which the proceedings may relate, but not his or her general authority or appointment.

(3) The Administrator General or a deputy or an assistant Administrator General or an agent shall be entitled to appear in court, either in person or by counsel, in any proceedings to which the Administrator General is a party.

(4) The Minister may appoint any person in the public service or any chief of the rank of gombolola chief or of an equivalent or a higher rank to be the agent of the Administrator General in any area of Uganda; but the Administrator General may appoint any person, whether eligible to be appointed by the Minister under this subsection or not, as the Administrator General shall think fit to be his or her agent in respect of any particular estate or in respect of any matter arising out of any particular estate.

(5) The Administrator General may, at his or her discretion, delegate to an agent any or all of the powers and duties conferred or imposed upon him or her by this Act but, in default of any directions by the Administrator General to the contrary, every agent appointed by the Minister may, in the administration of estates of persons dying intestate and leaving property within his or her area which does not appear to exceed two thousand shillings in gross value, exercise all the summary powers of the Administrator General under this Act.

(6) An agent shall in all respects act under the direction of the Administrator General who shall not be answerable for any act or omission on the part of the agent which is not in conformity with the power or duty

delegated by the Administrator General or which shall not have happened by the Administrator General's own fault or neglect.

(7) An agent, other than an agent appointed by the Minister, shall find security to the satisfaction of the Administrator General for the performance of his or her duties and may be remunerated either by salary or such fees as the Minister may from time to time prescribe.

3. Limitation on liability of Administrator General and agents for acts done in performance of duties.

(1) Neither the Administrator General nor any of his or her agents shall be personally liable to any person in respect of goods or chattels in the possession at the time of his or her death of any person whose estate is administered by the Administrator General or any of his or her agents which are sold by the Administrator General or the agents unless the Administrator General or agent knows or has actual notice before the sale that the goods or chattels were not in fact the property of the person whose estate he or she is administering, and generally neither the Administrator General nor any agent shall be liable for any act he or she does bona fide in the supposed and the intended performance of his or her duties unless it is shown that the act was done not only illegally but wilfully or with gross negligence.

(2) In case of any sale by the Administrator General or any agent of goods or chattels belonging in fact to any third person, the amount realised by the sale shall be paid over to the owner upon proof by the owner of such ownership unless the same has already been applied in payment of the debts of the deceased or has been distributed in the ordinary course of administration while the Administrator General or agent was in ignorance and without actual notice of the claim of such person to the goods or chattels sold.

4. Death to be reported to Administrator General, who may apply for grant of letters of administration.

(1) 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.

(2) When a person dies elsewhere than in Uganda leaving property within Uganda, the agent of the area in which the property is situate shall, upon receiving notice of the death or upon the death coming to his or her knowledge, forthwith report the death with full particulars of the property to the Administrator General.

(3) Upon receiving such report or upon such death coming to his or her knowledge, if it appears to the Administrator General—

(a) that the deceased has left a will appointing the Administrator General as sole executor;

(b) that the deceased having made a will devising or bequeathing his or her estate or any part of it has omitted to appoint an executor;

(c) that the person or persons named as executor or executors in the will have predeceased the testator or renounced probate of the will;

(d) that probate or letters of administration have not been obtained within two months from the death of the testator; or

(e) that the person died intestate,

the Administrator General may apply to the court for letters of administration of the estate of the deceased person, whereupon the court shall, except for good cause shown, make a grant to him or her of letters of administration.

(4) The Administrator General shall be deemed to have a right to letters of administration, other than letters pendente lite, in preference to—

(a) a creditor;

(b) a legatee, other than a universal legatee; or

(c) a friend of the deceased,

but the Administrator General may waive such right.

(5) Notwithstanding subsection (4)—

(a) when the peculiar circumstances of the case appear to the court so to require, for reasons recorded in its proceedings, the court may if it thinks fit, of its own motion or otherwise, after having heard the Administrator General, grant letters of administration to the Administrator General or to any other person even though there are persons who, in the ordinary course, would be legally entitled to administer or who have already been administering

and for this purpose may call in and revoke any grant of probate or letters of administration previously made by the court; and

(b) where it appears to the Administrator General that the gross value of the property of a deceased person dying intestate, or of a deceased person dying leaving a will in such circumstances that the Administrator General may apply for leave to administer as hereinbefore provided, does not exceed twenty thousand shillings, the Administrator General may, notwithstanding anything contained in this Act, without any letters of administration or other formal proceedings or notice, take possession of the estate and realise the same by sale or otherwise and pay thereout any debts or charges and pay, remit or deliver any surplus to such person as may appear to him or her to be entitled to it; and the Administrator General shall not be liable to any action, suit or proceedings in respect of anything done bona fide under this paragraph unless it is shown that the thing was done not only illegally but wilfully or with gross negligence.

(6) The Administrator General shall cause a record and account of every such estate to be kept in such form as may be prescribed.

5. Notice of application for letters of administration to be given to Administrator General.

(1) No grant shall be made to any person, except an executor appointed by the will of the deceased or the widower or widow of the deceased, or his or her attorney duly authorised in writing, authorising that person to administer the estate of a deceased person, until the applicant has produced to the court proof that the Administrator General or his or her agent has declined to administer the estate or proof of having given to the Administrator General fourteen clear days' definite notice in writing of his or her intention to apply for the grant.

(2) The provisions of subsection (1) with respect to notice to the Administrator General shall also apply in the case of any person petitioning the court, verbally or otherwise, for the appointment of the Administrator General.

(3) On receipt of any such notice the Administrator General may call upon the applicant for such particulars as he or she may reasonably require in order to determine whether to oppose or consent to the grant being made.

6. Notice of application for letters of administration to be given by Administrator General.

(1) The Administrator General shall cause notice of his or her intention to apply for letters of administration to be published in the Gazette at least fourteen days before making the application, and the cost of the publication shall in every case be deemed to be a testamentary expense and be payable out of the estate of the deceased whether the estate be administered by the Administrator General or any other person.

(2) Upon the application the High Court may grant letters of administration to the Administrator General accordingly.

(3) Notwithstanding subsection (1), in any case where the High Court is satisfied that the estate or any portion of it might otherwise be pilfered, lost, destroyed or damaged or that great expense would be incurred by delay in the matter, the notice of intention to apply may be dispensed with.

7. Grant to Administrator General may be revoked and grant made to other person.

(1) At any time after grant of letters of administration to the Administrator General under this Act or the making of an order under section 24, any person to whom the High Court might have committed administration if no such grant or order had been made may apply to the High Court for revocation of the grant or order and for grant to himself or herself of probate or letters of administration; but no application shall be made until seven days after notice in writing of intention to make it shall have been given to the Administrator General.

(2) Upon the application the High Court, after hearing the Administrator General if he or she appears, may revoke the grant to the Administrator General or the order made and grant probate or letters of administration to the applicant subject to such limitations and conditions as it may think fit; except that letters of administration granted to the Administrator General shall not be revoked as aforesaid unless the

application is made within six months after the grant to the Administrator General and the court is satisfied that there has been no unreasonable delay in making the application or in transmitting the authority under which the application is made.

(3) Upon such revocation and new grant, all the interest, powers, rights and duties of the Administrator General in regard to the estate affected by the grant, and all liabilities of the Administrator General under any contract or agreement entered into by him or her in relation to the estate or any part of it shall cease, and such portion of the estate as is left unadministered by the Administrator General shall vest in the executor or administrator obtaining the new grant, subject, nevertheless, to all lawful contracts previously made relating to the estate and to the allowance and payment of all outlays, disbursements, costs, fees, charges and expenses, reasonably incurred in the administration of it.

(4) This section shall apply in the case of estates of which the Administrator General has taken possession under section 4(5)(b) in like manner as if there had been a grant of letters of administration to the Administrator General on the date upon which he or she took possession.

8. Administrator General not precluded from applying for grant within one month of death of deceased.

Nothing in this Act shall be deemed to preclude the Administrator General from applying to the court for letters of administration in any case within a period of one month from the death of the deceased.

9. Court may grant certificate where value of estate does not exceed 2,000 shillings.

(1) Where it appears to the court that the gross value of the assets or property of a deceased person does not exceed two thousand shillings, the court, on the application of any person to whom probate or letters of administration, as the case may be, might be granted, may, at any time after the expiration of fourteen days after the death of the deceased, with the assent in writing of the Administrator General, without granting probate or letters of administration, grant to that person a certificate entitling him or her to administer the estate of the deceased person and to pay out of it any debts or

charges and to pay, remit or deliver any surplus to the person or persons entitled to it according to law or as may be directed by the court.

(2) Sections 5 and 7 shall apply to all applications made to the court under this section.

10. Administrator General to transmit accounts to Minister.

(1) When the accounts of the Administrator General in connection with the estate of an officer in the public service have been passed by the court, the Administrator General shall forthwith transmit to the Minister or a person generally or specially appointed by the Minister an office copy of the accounts filed in the court, of the affidavit in verification and of the certificate of the passing thereof.

(2) If an administration is not completed within six months from the date of the death of such officer, the Administrator General shall report the same to the Minister or a person generally or specially appointed by the Minister stating the cause of delay in the completion of the administration.

11. Intermeddling with property of deceased.

(1) When a person dies, whether within or without Uganda, leaving property within Uganda, any person who, without being duly authorised by law or without the authority of the Administrator General or an agent, takes possession of, causes to be moved or otherwise intermeddles with any such property, except insofar as may be urgently necessary for the preservation of the property, or unlawfully refuses or neglects to deliver any such property to the Administrator General or his or her agent when called upon so to do, commits an offence; and any person taking any action in regard to any such property for the preservation of the property shall forthwith report particulars of the property and of the steps taken to the agent, and if that person fails so to report he or she commits an offence.

(2) Any person who commits an offence under this section is liable on conviction to imprisonment for a period not exceeding three months or to a fine not exceeding two hundred shillings or to both, but without prejudice to any civil liabilities which he or she may have incurred.

12. Surviving partner to furnish sworn statement.

(1) When a person dies being a member of a partnership carrying on business in Uganda, the surviving partner or partners shall, as soon as possible and in no case later than two months after the death, furnish to the Administrator General a full and true statement of the affairs of the partnership at the time of the death; except that when no surviving partner is in Uganda at the time of the death, the statement shall be furnished within not later than two months after the arrival of any partner in Uganda.

(2) Such statement shall be verified by affidavit and shall contain—

(a) particulars, including values, of the freehold and leasehold property of the partnership;

(b) particulars of cash of the partnership in hand or in the bank;

(c) particulars of the book and other debts of the partnership showing the names and addresses of the debtors;

(d) particulars of the stock-in-trade, plant, machinery, fittings and all other personal estate of the partnership not included under paragraphs (a) to (c) of this subsection;

(e) particulars of the liabilities of the partnership with the names and addresses of the creditors; and

(f) such other particulars as the Administrator General upon reasonable notice may require.

(3) The surviving partner shall, if called upon to do so by the Administrator General or an agent, produce at the office of the Administrator General or the agent of the area for inspection all books, papers and documents of whatever kind belonging to the partnership and shall also, if so required, allow the Administrator General or an agent or their representative, duly appointed in writing, a full and unhindered inspection of any of the partnership premises or property.

(4) Any person failing to comply with this section commits an offence and is liable on conviction to imprisonment for a period not exceeding six months or to a fine not exceeding one thousand five hundred shillings or to both such imprisonment and fine.

13. Power to call for sworn statement as to wages due to deceased.

(1) If the Administrator General has reason to believe or to suspect that there is due and owing by any person, firm or company to the deceased, whose estate he or she is administering, any salary, wages, remuneration or commission, he or she may call upon the person, firm or company by notice in writing to furnish within a period to be stated in the notice a statement verified by affidavit showing the amount so due and giving full details as to how the same is arrived at or that no amount whatever is due to the deceased.

(2) Any person failing to comply with the terms of any such notice commits an offence and is liable on conviction to imprisonment for a period not exceeding three months or to a fine not exceeding two hundred shillings or to both such imprisonment and fine.

14. Agent may take possession to protect property.

(1) When any person dies leaving property within Uganda, the agent of the area in which any such property is situated may, when he or she deems it advisable for the protection of the property, take possession of it; and in such case he or she shall forthwith report his or her action to the Administrator General, who shall give such directions and take such proceedings in the matter as he or she thinks fit.

(2) Any fees recoverable or costs or expenses so incurred shall be a first charge on the property, and the Administrator General may decline to hand over the property to any person empowered by the court to receive it until he or she has been paid such fees, costs and expenses.

15. Death of agent of person not residing in Uganda.

(1) Whenever the agent in charge of any property in Uganda belonging to any person not residing in Uganda or belonging to a company not incorporated in Uganda dies without leaving any responsible person in charge of the property, the court may, upon the application of the Administrator General or any person interested in the property or in the due administration of it, direct the Administrator General to collect and take possession of the property and to hold, possess, realise and dispose of it according to the directions of the court, or in default of any such directions

according to the provisions of this Act so far as they are applicable to the property.

(2) Any order of the court made under this section shall entitle the Administrator General—

(a) to maintain any suit or proceedings for the recovery of such property;

(b) if he or she thinks fit, to apply for letters of administration of the estate of such deceased person; and

(c) to retain out of the property any fees chargeable under rules made under this Act, and to reimburse himself or herself for all payments he or she made in respect of the property which a private administrator might lawfully have made.

16. Power to dispose of property.

The Administrator General may, subject to any wishes which may be expressed by the next of kin of the deceased, dispose of the property of an estate under his or her administration either wholly or in part and either by public auction or private treaty as he or she in his or her discretion may deem to be in the best interests of the estate.

17. Administrator General to make inventory and keep accounts.

The Administrator General shall—

(a) make a complete inventory of every estate which he or she is administering;

(b) keep an account of all receipts, payments and dealings with every such estate;

(c) retain all letters received and copies of all letters written by him or her, and all deeds, writings and papers of or relating to each estate;

(d) on application in writing by any person having an interest in an estate under his or her charge and upon payment of the prescribed fee, allow the inspection of any document, excluding minutes and private notes, relating to the estate in which the applicant has an interest provided that the document is duly specified in the application;

(e) on the application of any such person and on payment of the prescribed fee, issue a copy of any document relative to the estate

in which the applicant has an interest provided the document is duly specified in the application,

but the Administrator General may, in his or her discretion, destroy any books, private papers, bills, receipts, memoranda and other similar documents of no value which he or she has received along with the estate and which are not claimed by the beneficiaries, next of kin or the persons entitled to them within six months after accounts have been passed.

18. Notice to creditors and claimants; distribution of estate.

(1) In every estate, the administration of which has been committed to him or her by the court, the Administrator General shall cause a notice to be published in the Gazette, and also in one or more local newspapers should he or she so consider advisable, calling upon creditors and others having claims against the estate to file and prove their claims against the estate on or before the date mentioned in the notice, which shall not be less than one month after the date of the publication of the notice.

(2) The Administrator General may require any claimant to satisfy him or her of the validity of the claim by affidavit or otherwise or to institute proceedings to establish the claim within the period aforesaid or within such further period as he or she may stipulate.

(3) The Administrator General shall, at the expiration of such period, be at liberty to distribute the assets or any part of them in discharge of such lawful claims as have been proved before him or her, having regard to any claim in respect of which proceedings may have been instituted as provided in subsection (2), and if the whole thereof cannot be paid he or she shall pay a dividend thereon; if the Administrator General shall collect any further assets after making such payment, he or she shall, in case any part of the debts proved remain unpaid, pay the same and any claims subsequently proved before him or her or a dividend thereon; but such debts, as shall be subsequently proved, shall first be paid a dividend in proportion to the amount equal to the dividend paid to the creditors having previously proved their debts.

(4) After payment of all debts, fees and expenses incident to the collection, management, and administration of such estate, the Administrator General shall pay over the residue to the persons beneficially entitled to it, and where such persons are resident outside

referred to in this section, shall be a full and complete discharge to the public trustee so far as regards the share.

16. Power to make rules.

The Minister may make rules for the safe custody, deposit and investment of funds which come into the hands of the public trustee and for better carrying out or rendering effective the provisions of this Act.

History: Cap. 141.

Cross Reference

Trustees Act, Cap. 164.

CHAPTER 162

THE SUCCESSION ACT.

Arrangement of Sections.

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CHAPTER 162

THE SUCCESSION ACT.

Commencement: 15 February, 1906.

An Act relating to succession.

PART I—PRELIMINARY.

1. Act to constitute the law of Uganda in cases of succession.

Except as provided by this Act, or by any other law for the time being in force, the provisions in this Act shall constitute the law of Uganda applicable to all cases of intestate or testamentary succession.

2. Interpretation.

In this Act, unless the context otherwise requires—

(a) "administrator" means a person appointed by a court to administer the estate of a deceased person when there is no executor;

(b) "child", "children", "issue" and "lineal descendant" include legitimate, illegitimate and adopted children;

(c) "codicil" means an instrument explaining, altering or adding to a will and which is considered as being part of the will;

(d) "court" means the High Court or a magistrate's court other than a magistrate's court presided over by a magistrate grade II;

(e) "customary heir" means the person recognised by the rites and customs of the tribe or community of a deceased person as being the customary heir of that person;

(f) "daughter" includes a stepdaughter, an illegitimate daughter and a daughter adopted in any manner recognised as lawful by the law of Uganda;

(g) "dependent relative" includes—

(i) a wife, a husband, a son or daughter under eighteen years of age or a son or daughter of or above eighteen years of age who is wholly or substantially dependent on the deceased;

(ii) a parent, a 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 necessaries of life suitable to a person of his or her station;

(h) "executor" means a person appointed in the last will of a deceased person to execute the terms of the will;

(i) "grandchild" means a son or daughter of a son or daughter;

(j) "grandparent" means a parent of a parent;

(k) "husband" means a person who at the time of the intestate's death was—

(i) validly married to the deceased according to the laws of Uganda; or

(ii) married to the deceased in another country by a marriage recognised as valid by any foreign law under which the marriage was celebrated;

(l) "illegitimate child" means an illegitimate child recognised or accepted by the deceased as a child of his or her own;

(m) "immovable property" includes land, incorporeal tenements and things attached to the earth or permanently fastened to things attached to the earth;

(n) "legal heir" means the living relative nearest in degree to an intestate under the provisions set out in Part III to this Act together with and as varied by the following provisions—

(i) between kindred of the same degree a lineal descendant shall be preferred to a lineal ancestor and a lineal ancestor shall be preferred to a collateral relative and a paternal ancestor shall be preferred to a maternal ancestor;

(ii) where there is equality under subparagraph (i) of this paragraph, a male shall be preferred to a female;

(iii) where there is equality under subparagraph (ii) of this paragraph, the elder shall be preferred to the younger;

(iv) if no legal heir is existing and reasonably ascertainable under subparagraphs (i), (ii) and (iii) of this paragraph, the husband or the senior wife of the intestate, as the case may be, shall be the legal heir;

(o) "minor" means any person who has not attained the age of twenty-one years, and "minority" means the status of such person;

(p) "movable property" means property of every description except "immovable property";
(q) "parent" includes a stepparent and an adoptive parent;
(r) "personal representative" means the person appointed by law to administer the estate or any part of the estate of a deceased person;
(s) "probate" means the grant by a court of competent jurisdiction authorising the executor named in the testator's last will to administer the testator's estate;
(t) "residential holding" has the meaning assigned to it by section 26;
(u) "senior wife", in the case of a polygamous marriage, means the wife who was married first in time to the deceased intestate;
(v) "son" includes a stepson, an illegitimate son and a son adopted in a manner recognised as lawful by the law of Uganda;
(w) "wife" means a person who at the time of the intestate's death was—
(i) validly married to the deceased according to the laws of Uganda; or
(ii) married to the deceased in another country by a marriage recognised as valid by any foreign law under which the marriage was celebrated.

3. Interests and powers not acquired nor lost by marriage.

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 or she could have done if unmarried.

PART II—DOMICILE

4. Succession to a deceased person's immovable and movable property.

(1) Succession to the immovable property in Uganda of a person deceased is regulated by the law of Uganda, wherever that person may have had his or her domicile at the time of his or her death.

(2) Succession to the movable property of a person deceased is regulated by the law of the country in which that person had his or her domicile at the time of his or her death.

(3) For the purposes of subsection (2), a person dying intestate shall be deemed to have had his or her domicile in Uganda if—
(a) for a period of not less than two years preceding his or her death that person was ordinarily resident in Uganda; and
(b) he or she was survived by a spouse or child who was, at the time of his or her death, ordinarily resident in Uganda.

5. Domicile in respect of succession to movables.

A person can have one domicile only for the purpose of succession to his or her movable property.

6. Domicile of origin of a person of legitimate birth.

The domicile of origin of every person of legitimate birth is in the country in which, at the time of his or her birth, his or her father is domiciled, or, if he or she is a posthumous child, in the country in which his or her father was domiciled at the time of the father's death.

7. Domicile of origin of an illegitimate child.

The domicile of origin of an illegitimate child is in the country in which, at the time of his or her birth, his or her mother was domiciled.

8. Continuance of domicile of origin.

The domicile of origin prevails until a new domicile has been acquired.

9. Acquisition of a new domicile.

A man acquires a new domicile by taking up his fixed habitation in a country which is not that of his domicile of origin; except that a man is not to be considered as having taken up his fixed habitation in Uganda merely by reason of his residing there in the exercise of any profession or calling.

(2) Every generation constitutes a degree, either ascending or descending; a man's father is related to him in the first degree, and so likewise is his son; his grandfather and grandson in the second degree; his great-grandfather and great-grandson in the third.

21. Collateral consanguinity.

(1) Collateral consanguinity is that which subsists between two persons who are descended from the same stock or ancestor, but neither of whom is descended in a direct line from the other.

(2) For the purpose of ascertaining in what degree of kindred any collateral relative stands to a person deceased, it is proper to reckon upwards from the person deceased, to the common stock, and then downwards to the collateral relative, allowing a degree for each person, both ascending and descending.

22. Persons held for the purpose of succession to be similarly related to the deceased.

For the purposes of succession, there is no distinction between those who are—

(a) related to the deceased by the full blood and those who are related to the deceased by the half blood; or

(b) born during the deceased's lifetime and those who are conceived in the womb at the date of death and subsequently born alive.

23. Mode of computing degrees of kindred.

(1) In the table of kindred in the First Schedule to this Act, the degrees are computed as far as the sixth, and are marked by numeral figures.

(2) The person whose relatives are to be reckoned and his cousin-german or first cousin are, as shown in the table, related in the fourth degree, there being one degree of ascent to the father, and another to the common ancestor, the grandfather, and from him one of descent to the uncle, and another to the cousin-german, making in all four degrees.

(3) A grandson of the brother and a son of the uncle, that is, a great-nephew and cousin-german, are in equal degree, being each four degrees removed.

(4) A grandson of a cousin-german is in the same degree as the grandson of a great-uncle, for they are both in the sixth degree of kindred.

PART IV—INTESTACY.

24. Property of a deceased dying intestate.

A person dies intestate in respect of all property which has not been disposed of by a valid testamentary disposition.

25. Devolution of property of a deceased dying intestate.

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.

PART V—DISTRIBUTION OF AN INTESTATE'S PROPERTY.

26. Devolution of residential holdings.

(1) The residential holding normally occupied by a person dying intestate prior to his or her death as his or her principal residence or owned by him or her as a principal residential holding, including the house chattels therein, shall be held by his or her personal representative upon trust for his or her legal heir subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act.

(2) Any other residential holding possessed by the intestate at his or her death shall be held by his or her personal representative upon trust and, subject to the rights of occupation and terms and conditions set out in the Second Schedule to this Act, shall be dealt with in accordance with the remaining provisions of this Part.

(3) Any dispute arising as to the exact area of any portion of land subject to this section or as to what person has the right to occupy the land or any part of it shall be settled by the personal representative.

(4) Any person who is aggrieved by any decision of the personal representative under subsection (3) may appeal from the decision to a magistrate.

27. Distribution on the death of a male intestate.

(1) Subject to sections 29 and 30, the estate of a person dying intestate, excepting his principal residential holding, shall be divided among the following classes in the following manner—

(a) where the intestate is survived by a customary heir, a wife, a lineal descendant and a dependent relative—
  (i) the customary heir shall receive 1 percent;
  (ii) the wives shall receive 15 percent;
  (iii) the dependent relative shall receive 9 percent;
  (iv) the lineal descendants shall receive 75 percent of the whole of the property of the intestate,

  but where the intestate leaves no person surviving him capable of taking a proportion of his property under paragraph (a)(ii) or (iii) of this paragraph, that proportion shall go to the lineal descendants;

(b) where the intestate is survived by a customary heir, a wife and a dependent relative but no lineal descendant—
  (i) the customary heir shall receive 1 percent;
  (ii) the wife shall receive 50 percent; and
  (iii) the dependent relative shall receive 49 percent,

  of the whole of the property of the intestate;

(c) where the intestate is survived by a customary heir, a wife or a dependent relative but no lineal descendant—
  (i) the customary heir shall receive 1 percent; and
  (ii) the wife or the dependent relative, as the case may be, shall receive 99 percent,

  of the whole of the property of the intestate;

(d) where the intestate leaves no person surviving him, other than a customary heir, capable of taking a proportion of his property under paragraph (a), (b) or (c) of this subsection, the estate shall be divided equally between those relatives in the nearest degree of kinship to the intestate;

(e) if no person takes any proportion of the property of the intestate under paragraph (a), (b), (c) or (d) of this subsection, the whole of the property shall belong to the customary heir;

(f) where there is no customary heir of an intestate, the customary heir's share shall belong to the legal heir.

(2) Nothing in this section shall prevent the customary heir from taking a further share in the capacity of a lineal descendant if entitled to it in that capacity.

(3) Nothing in this or any other section of this Act shall prevent the dependent relatives from making any other arrangement relating to the distribution or preservation of the property of the intestate provided that the arrangement is sanctioned by the court.

28. Distribution between members of the same class.

(1) All lineal descendants, wives and dependent relatives shall be entitled to share their proportion of a deceased intestate's property in equal shares.

(2) Any child of a deceased lineal descendant, whose descent is not traced through any living lineal descendant and who survives the intestate, shall take the share which the deceased lineal descendant would have taken under subsection (1) had he or she survived the intestate.

29. Reservation of a principal residential holding from distribution.

(1) No wife or child of an intestate occupying a residential holding under section 26 and the Second Schedule to this Act shall be required to bring that occupation into account in assessing any share in the property of an intestate to which the wife or child may be entitled under section 27.

(2) No person entitled to any interest in a residential holding under section 26(1) shall be required to bring that interest into account in assessing any share in the property of an intestate to which that person may be entitled under section 27.

30. Separation of husband and wife.

(1) No wife or husband of an intestate shall take any interest in the estate of an intestate if, at the death of the intestate, he or she was separated from the intestate as a member of the same household.

(2) This section shall not apply where such wife or husband has been absent on an approved course of study in an educational institution.

(3) Notwithstanding subsection (1), a court may, on application by or on behalf of such husband or wife, whether during the life or within six months after the death of the other party to the marriage, declare that subsection (1) shall not apply to the applicant.

(4) Section 38(5) shall apply *mutatis mutandis* to an application made under subsection (3) in determining whether a declaration under this section should be made.

(5) A declaration made under subsection (3) shall authorise the applicant to take no more than a proportion of the intestate's property entitled to him or her under section 27.

31. Notice to be given by a customary heir.

(1) Upon the appointment of a customary heir of an intestate, the heir shall give or cause to be given notice of the appointment in the form set out in the Third Schedule to this Act to the personal representative and to the Administrator General.

(2) All signatures on the notice shall be attested by any one of the following—

(a) any agent appointed by the Minister under the Administrator General's Act;
(b) a justice of the peace;
(c) an advocate;
(d) a notary public;
(e) a bank manager;
(f) a minister of religion authorised to celebrate marriages within Uganda;
(g) a medical practitioner;
(h) any other person authorised in that behalf by the Minister by statutory order.

(3) If no notice has been received by the personal representative or by the Administrator General within one year from the date of death of the intestate, the personal representative shall proceed to distribute the estate of the intestate on the basis that there is no customary heir.

32. Interest of the State on default.

(1) If, under sections 26 to 31, there is no person existing or reasonably ascertainable entitled to take any part of the property of an intestate, that part or the whole, as the case may be, shall belong to the State.

(2) If, at any time after such property or part of the property has been made over to the State, a person entitled to take it as his or her share pursuant to section 27 is ascertained, the Minister may return that property or the proceeds of the property to that person in such manner as the Minister may think fit.

33. Children's advancement.

Where a share in the property of an intestate is due to a child or any lineal descendant of a child of the intestate, no money or other property which the intestate may, during his or her life, have paid, given or settled to, or for the advancement of, the child to whom or to whose descendant the share is due shall be taken into account in estimating the share.

PART VI—EFFECT OF MARRIAGE AND MARRIAGE SETTLEMENTS ON PROPERTY.

34. Effect of marriage between persons only one of whom is domiciled in Uganda.

If a person whose domicile is not in Uganda marries in Uganda a person whose domicile is in Uganda, neither party acquires by the marriage any rights in respect of any property of the other party not comprised in a settlement made previous to the marriage, which he or she would not acquire by the marriage if both were domiciled in Uganda at the time of the marriage.

35. Settlement of minor's property in contemplation of marriage.

The property of a minor may be settled in contemplation of marriage, provided the settlement is made by the minor with the approbation of the

minor's father, or if he is dead or absent from Uganda, with the approbation of the High Court.

PART VII—WILLS AND CODICILS.

36. Persons capable of making wills.

(1) Every person of sound mind and not a minor may by will dispose of his or her property.

(2) A married woman may by will dispose of any property which she could alienate by her own act during her life.

(3) A person who is deaf or dumb or blind is not thereby incapacitated for making a will if he or she is able to know what he or she does by it.

(4) A person who is ordinarily insane may make a will during an interval in which he or she is of sound mind.

(5) No person can make a will while he or she is in such a state of mind, whether arising from drunkenness or from illness or from any other cause, that the person does not know what he or she is doing.

37. Provision for the maintenance of dependents to be made in every will.

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.

38. Power of the court to order payment out of the estate of the deceased for maintenance of dependents.

(1) 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 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.

(2) The provision for maintenance to be made by an order under subsection (1) shall—

(a) subject to subsection (3), be, where the deceased's estate produces an income, by way of periodical payments; and the order shall provide for their termination not later than—

(i) in the case of a wife or husband, her or his remarriage;

(ii) in the case of a daughter who has not been married, or who is, by reason of some mental or physical disability, incapable of maintaining herself, her marriage or the cessation of her disability, whichever is the later;

(iii) in the case of an infant son or a son who is, by reason of some mental or physical disability, incapable of maintaining himself, his attaining the age of twenty-one or the cessation of his disability, whichever is the later;

(iv) in the case of other dependent relative, his or her attaining the age of twenty-one,

or in any case, his or her death; or

(b) where the deceased's estate does not produce any income or sufficient income, authorise the applicant to receive such share as the applicant would be entitled to in the distribution of the estate of an intestate under section 27.

(3) The court may, if it sees fit, make an order providing for maintenance, in whole or is part, by way of a lump sum payment.

(4) In determining whether, and in what way, and as from what date, provision for maintenance ought to be made by an order, the court shall have regard to the nature of the property representing the deceased's estate and shall not order any provision to be made as would necessitate a realisation that would be improvident having regard to the interests of the deceased's dependents and of the persons who, apart from the order, would be entitled to that property.

(5) The court shall, on any application made under this section—

(a) have regard—

(i) to any past, present or future capital or income from any source of the dependent of the deceased to whom the application relates;

(ii) to the conduct of that dependent in relation to the deceased and otherwise; and

(iii) to any other matter or thing which in the circumstances of the case the court may consider relevant or material in relation to that dependent, to persons interested in the estate of the deceased, or otherwise;

(b) have regard to the deceased's reasons, so far as ascertainable—

(i) for making the dispositions made by his or her will, if any;

(ii) for refraining from disposing by will of his or her estate; or

(iii) for not making any provision, or any further provision, as the case may be, for a dependent,

and the court may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the deceased and dated, so, however, that in estimating the weight, if any, to be attached to any such statement the court shall have regard to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement.

39. Time within which application must be made.

(1) Except as provided by section 42, an application under section 38 shall not, without the permission of the court, be made after the end of the period of six months from the date on which representation in regard to the estate of the deceased is first taken out; except that where letters of administration are revoked and probate is granted, time begins to run from the date of the grant of probate.

(2) Sections 38 and 42 shall not render the personal representatives of the deceased liable for having distributed any part of the estate of the deceased after the expiration of the period of six months on the ground that they ought to have taken into account the possibility that the court might permit an application under this Act after the end of that period, but this subsection shall be without prejudice to any power to recover any part of the estate so distributed arising by virtue of the making of an order under this Act.

40. Effect and form of an order for maintenance.

(1) Where an order is made under section 38, then, for all purposes, the will shall have effect, and shall be deemed to have had effect, as from the deceased's death, subject to such variations as may be specified in the order for the purpose of giving effect to the provision for maintenance made in the order.

(2) Any order under section 38 providing for maintenance by way of periodical payments may provide for payments of a specified amount, or for payments equal to the whole or part of the income of the net estate or of the income of any part to be set aside or appropriated under this Act of the net estate, or may provide for the amount of the payments or any of them to be determined in any other way the court thinks fit.

(3) The court may give such consequential directions as it thinks fit for the purpose of giving effect to an order made under this Act, but no larger part of the net estate shall be set aside or appropriated to answer by its income the provision for maintenance made by the order than such a part as, at the date of the order, is sufficient to produce by its income the amount of the provision.

41. Variation of orders.

(1) On an application made at a date after the expiration of the period specified in section 39(1), the court may make an order as provided in this subsection, but only as respects property the income of which is at the date applicable for the maintenance of a dependent of the deceased, that is to say—

(a) an order for varying the previous order on the ground that any material fact was not disclosed to the court when the order was made, or that any substantial change has taken place in the circumstances of the dependent or of a person beneficially interested in the property under the will; or

(b) an order for making provision for the maintenance of another dependent of the deceased.

(2) An application to the court for an order under subsection (1)(a) may be made by or on behalf of a dependent of the deceased or by the trustees

(2) Any guardian acting by virtue of section 44 or appointed under section 45 shall act jointly with the mother of the infant, unless the court otherwise directs.

47. Will obtained by fraud, coercion or importunity.

A will or any part of a will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

48. Will may be revoked or altered.

A will is liable to be revoked or altered by its maker at any time when he or she is competent to dispose of his or her property by will.

49. Form of will.

A testator may, at his or her discretion, adopt for use the form of the will set out in the Fourth Schedule to this Act.

PART VIII—EXECUTION OF UNPRIVILEGED WILLS.

50. Execution of unprivileged wills.

Except as provided by this Act or other law for the time being in force, every testator not being a member of the armed forces employed in an expedition or engaged in actual warfare, or a mariner at sea, must execute his or her will according to the following provisions—

(a) the testator shall sign or affix his or her mark to the will, or it shall be signed by some other person in his or her presence and by his or her direction;

(b) the signature or mark of the testator or the signature of the person signing for him or her shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) the will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his or her mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his or her signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

51. Incorporation of papers by reference.

If a testator, in a will or codicil duly attested, refers to any other document then actually written, as expressing any part of his or her intentions, that document shall be considered as forming a part of the will or codicil in which it is referred to.

PART IX—PRIVILEGED WILLS.

52. Privileged wills.

Any member of the armed forces being employed in an expedition or engaged in actual warfare, or any mariner being at sea, may, if he or she has completed the age of eighteen years, dispose of his or her property by a will made as is provided in section 53 (hereafter referred to as a "privileged will").

53. Mode of making privileged wills.

(1) Privileged wills may be in writing or may be made by word of mouth.

(2) The execution of a privileged will shall be governed by the following provisions—

(a) the will may be written wholly by the testator with his or her own hand, and in that case it need not be signed nor attested;

(b) the will may be written wholly or in part by another person, and signed by the testator, and in that case it need not be attested;

(c) if the instrument purporting to be a will is written wholly or in part by another person, and is not signed by the testator, it shall be considered to be his or her will if it is shown that it was written by the testator's directions, or that he or she recognised it as his or her will; but if it appears on the face of the instrument that the execution of it in the manner intended by the testator was not completed, the instrument shall not, by reason of that

circumstance, be invalid, if his or her nonexecution of it can be reasonably ascribed to some cause other than the abandonment of the testamentary intentions expressed in the instrument;

(d) if the testator has written instructions for the preparation of his or her will, but has died before it could be prepared and executed, such instructions shall be considered to constitute his or her will;

(e) if the testator has, in the presence of two witnesses, given verbal instructions for the preparation of his or her will, and they have been reduced into writing in his or her lifetime, but he or she has died before the instrument could be prepared and executed, such instructions shall be considered to constitute his or her will, although they may not have been reduced into writing in his or her presence, nor read over to him or her;

(f) a testator may make a will by word of mouth by declaring his or her intentions before two witnesses present at the same time;

(g) a will made by word of mouth shall be null at the expiration of one month after the testator has ceased to be entitled to make a privileged will.

PART X—ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

54. Effect of gift to attesting witnesses.

(1) A will shall not be considered as insufficiently attested by reason of any benefit given by the will, either by way of bequest or by way of appointment, to any person attesting it, or to his wife or her husband, but the bequest or appointment shall be void so far as concerns the person so attesting, or the wife or husband of that person, or any person claiming under either of them.

(2) A legatee under a will shall not lose his or her legacy by attesting a codicil which confirms the will.

55. Witness not disqualified by interest or by being executor.

No person, by reason of interest in, or of his or her being an executor of, a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity of the will.

56. Revocation of will by testator's marriage.

(1) Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over which the power of appointment is exercised would not, in default of the appointment, pass to his or her executor or administrator or to the person entitled in case of intestacy.

(2) Where a person is invested with power to determine the disposition of property of which he or she is not the owner, he or she is said to have power to appoint that property.

57. Revocation of unprivileged will or codicil.

No unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil or by some writing declaring an intention to revoke the unprivileged will or codicil, and executed in the manner in which an unprivileged will is in this Act required to be executed, or by the burning, tearing or otherwise destroying of the will or codicil by the testator, or by some person in his or her presence and by his or her direction, with the intention of revoking it.

58. Effect of alteration in unprivileged will.

No obliteration, interlineation or other alteration made in any unprivileged will after the execution of the will shall have any effect, except so far as the words or meaning of the will have been thereby rendered illegible or undiscernible, unless the alteration is executed in like manner as is in this Act required for the execution of the will; except that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses are made in the margin or on some other part of the will opposite or near to the alteration or at the foot or end of, or opposite to, a memorandum referring to the alteration, and written at the end or some other part of the will.

59. Revocation of privileged will or codicil.

(1) A privileged will or codicil may be revoked by the testator, by an unprivileged will or codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give

person until a citation has been issued, calling upon the executor to accept or renounce his or her executorship.

(2) When one or more of several executors have proved a will, the court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved.

195. Form and effect of renunciation.

A renunciation may be made orally in the presence of a magistrate, commissioner for oaths or justice of the peace or by writing signed by the person renouncing, and, when made, shall preclude him or her from ever thereafter applying for probate of the will appointing him or her executor.

196. Procedure where executor renounces or fails to accept within time limited.

If an executor renounces, or fails to accept, the executorship within the time limited for the acceptance or refusal of the executorship, the will may be proved, and letters of administration with a copy of the will annexed may be granted to the person who would be entitled to administration in case of intestacy.

197. Grant of administration to universal or residuary legatee.

Subject to section 4 of the Administrator General's Act, when the deceased has made a will—

(a) but has not appointed an executor;

(b) when he or she has appointed an executor who is legally incapable, or refuses to act, or has died before the testator, or before he or she has proved the will; or

(c) when the executor dies after having proved the will, but before he or she has administered all the estate of the deceased,

a universal or a residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him or her of the whole estate, or of so much of the estate as may be unadministered.

198. Administration by representative of deceased residuary legatee.

When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his or her representative has the same right to administration with the will annexed as the residuary legatee.

199. Grant of administration where no executor nor residuary legatee, nor representative of such legatee.

When there is no executor, and no residuary legatee or representative of a residuary legatee, or he or she declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he or she had died intestate, or any other legatee having a beneficial interest, or the Administrator General, may be admitted to prove the will, and letters of administration may be granted to him or her or them accordingly.

200. Citation before grant of administration to legatee other than universal or residuary.

Letters of administration with the will annexed shall not be granted to any legatee other than a universal or a residuary legatee, until a citation has been issued and published in the manner hereafter provided, calling on the next of kin to accept or refuse letters of administration.

201. Order in which connections entitled to administer.

When the deceased has died intestate, those who are connected with the deceased either by marriage or by consanguinity are entitled to obtain letters of administration of his or her estate and effects in the order and according to the provisions hereafter contained.

202. Entitlement to administration.

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.

230. Provisions as to grants of effects unadministered.

In granting letters of administration of an estate not fully administered, the court shall be guided by the same provisions as apply to original grants, and shall grant letters of administration to those persons only to whom original grants might have been made.

231. Administration when limited grant expired.

When a limited grant has expired by effluxion of time, or the happening of the event or contingency on which it was limited, and there is still some part of the deceased's estate unadministered, letters of administration shall be granted to those persons to whom original grants might have been made.

Alteration in grants.

232. Errors may be rectified by court.

Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of probate or letters of administration may be altered and amended accordingly.

233. Procedure where codicil discovered after grant.

If, after the grant of letters of administration with the will annexed, a codicil is discovered, it may be added to the grant on due proof and identification, and the grant altered and amended accordingly.

Revocation of grants.

234. Revocation or annulment for just cause.

(1) The grant of probate or letters of administration may be revoked or annulled for just cause.

(2) In this section, "just cause" means—

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though the allegation was made in ignorance or inadvertently;

(d) that the grant has become useless and inoperative through circumstances; or

(e) that the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with Part XXXIV of this Act, or has exhibited under that Part an inventory or account which is untrue in a material respect.

PART XXXI—PRACTICE IN GRANTING AND REVOKING PROBATES AND LETTERS OF ADMINISTRATION.

235. Jurisdiction to grant probate and letters of administration.

(1) Jurisdiction to grant probate and letters of administration under this Act shall be exercised by the High Court and a magistrate's court in accordance with the Administration of Estates (Small Estates) (Special Provisions) Act.

(2) Any reference in this or any other Part of this Act to "a district delegate" shall be construed as a reference to a magistrate's court.

236. General powers of district delegate.

A district delegate shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected with the granting of probate and letters of administration, as are by law vested in him or her in relation to any civil suit or proceeding pending in his or her court.

bond in his or her own name as if the bond had been originally given to him or her instead of to a judge of the High Court or a district delegate, and shall be entitled to recover on it, as trustee for all persons interested, the full amount recoverable in respect of any breach of the bond.

262. Time for grant of probate and administration.

No probate of a will shall be granted until after the expiration of seven clear days, and no letters of administration shall be granted until after the expiration of fourteen clear days, from the day of the testator's or intestate's death.

263. Filing of original wills of which probate or administration with will annexed granted.

A judge of the High Court or district delegate shall file and preserve all original wills of which probate or letters of administration with the will annexed may be granted by him or her among the records of his or her court, until some public registry for wills is established; and the Minister shall make regulations for the preservation and inspection of the wills so filed.

264. Grantee of probate or administration alone to sue, etc. until grant revoked.

After any grant of probate or letters of administration, no person other than the person to whom the same has been granted shall have power to sue or prosecute any suit, or otherwise act as representative of the deceased, until the probate or letters of administration has or have been recalled or revoked.

265. Procedure in contentious cases.

In any case before the High Court in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit according to the provisions of the law relating to civil procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant.

266. Payment to executor or administrator before probate or administration revoked.

Where any probate is or letters of administration are revoked, all payments bona fide made to any executor or administrator under the probate or administration before its revocation shall, notwithstanding the revocation, be a legal discharge to the person making the payments; and an executor or administrator who has acted under any revoked probate or administration may retain and reimburse himself or herself in respect of any payments he or she made, which the person to whom probate or letters of administration shall be afterwards granted might have lawfully made.

267. Appeals from orders of district delegate.

Every order made by a district delegate by virtue of the powers hereby conferred upon him or her shall be subject to appeal to the High Court under the civil procedure rules applicable to appeals.

PART XXXII—EXECUTORS OF THEIR OWN WRONG.

268. Intermeddling, etc.

A person who intermeddles with the estate of the deceased or does any other act which belongs to the office of executor, while there is no rightful executor or administrator in existence, thereby makes himself or herself an executor of his or her own wrong; except that—

(a) intermeddling with the goods of the deceased for the purpose of preserving them, or providing for his or her funeral, or for the immediate necessities of his or her own family or property; or

(b) dealing in the ordinary course of business with goods of the deceased received from another,

does not make an executor of his or her own wrong.

269. Liability of executor of his or her own wrong.

When a person has so acted as to become an executor of his or her own wrong, he or she is answerable to the rightful executor or administrator, or to any creditor or legatee of the deceased, to the extent of the assets which may have come to his or her hands, after deducting payments made to the rightful

executor or administrator, and payments made in due course of administration.

PART XXXIII—POWERS OF AN EXECUTOR OR ADMINISTRATOR

270. Disposal of property.

An executor or administrator has power to dispose of the property of the deceased, either wholly or in part, in such manner as he or she may think fit, subject to section 26 and the Second Schedule.

271. Purchase of deceased's property.

If an executor or administrator purchases, either directly or indirectly, any part of the property of the deceased, the sale is voidable at the instance of any other person interested in the property sold.

272. Powers of several executors, etc. exercisable by one.

When there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any one of them who has proved the will or taken out administration.

273. Survival of executors or administrators.

Upon the death of one or more of several executors or administrators, all the powers of the office become vested in the survivors or survivor.

274. Administrator of effects unadministered.

The administrator of effects unadministered has, with respect to those effects, the same powers as the original executor or administrator.

275. Administrator during minority.

An administrator during minority has all the powers of an ordinary administrator.

276. Married executrix or administratrix.

When probate or letters of administration have been granted to a married woman, she has all the powers of an ordinary executor or administrator.

PART XXXIV—DUTIES OF AN EXECUTOR OR ADMINISTRATOR

277. Deceased's funeral.

It is the duty of an executor to perform the funeral of the deceased in a manner suitable to his or her condition, if the deceased has left property sufficient for the purpose.

278. Inventory and account.

(1) An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character; and shall in like manner within one year from the grant, or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his or her hands, and the manner in which they have been applied or disposed of.

(2) On the completion of the administration of an estate, other than an estate administered under the Administration of Estates (Small Estates) (Special Provisions) Act, an executor or an administrator shall file in court the final accounts relating to the estate verified by an affidavit two copies of which shall be transmitted by the court to the Administrator General.

(3) The Chief Justice may from time to time prescribe the form in which an inventory or account under this section is to be exhibited.

(4) If an executor or administrator, on being required by the court to exhibit an inventory or account under this section, intentionally omits to comply with the requisition, he or she shall be deemed to have committed an offence under section 116 of the Penal Code Act.

(5) The exhibition by an executor or administrator of an intentionally false inventory or account under this section shall be deemed to be an offence under section 94 of the Penal Code Act.

279. Property of deceased.

An executor or administrator shall collect, with reasonable diligence, the property of the deceased, and the debts that were due to him or her at the time of his or her death.

280. Expenses to be paid in priority.

Funeral expenses to a reasonable amount, according to the degree and quality of the deceased, and deathbed charges, including fees for medical attendance, and board and lodging for one month previous to his or her death, are to be paid before all debts.

281. Expenses to be paid next after such expenses.

The expenses of obtaining probate or letters of administration, including the costs incurred for or in respect of any judicial proceedings that may be necessary for administering the estate, are to be paid next after the funeral expenses and deathbed charges.

282. Wages and other debts.

Wages due for services rendered to the deceased within three months preceding his or her death by any labourer, artisan or domestic servant are next to be paid, and then the other debts of the deceased.

283. All other debts to be paid equally and rateably.

Except as provided in sections 280, 281 and 282, no creditor is to have a right of priority over another by reason that his or her debt is secured by an instrument under seal, or on any other account; but the executor or administrator shall pay all such debts as he or she knows of, including his or her own, equally and rateably, as far as the assets of the deceased will extend.

284. Payment of debts where domicile not in Uganda.

If the domicile of the deceased was not in Uganda, the application of his or her movable property to the payment of his or her debts is to be regulated by the law of Uganda.

285. Creditor paid in part to bring payment into account.

No creditor who has received payment of a part of his or her debt by virtue of section 284 shall be entitled to share in the proceeds of the immovable estate of the deceased unless he or she brings that payment into account for the benefit of the other creditors.

286. Debts to be paid before legacies.

Debts of every description shall be paid before any legacy.

287. Executor, etc. not bound to pay legacies without indemnity.

If the estate of the deceased is subject to any contingent liabilities, an executor or administrator is not bound to pay any legacy without a sufficient indemnity to meet the liabilities whenever they may become due.

288. Abatement of general legacies.

If the assets, after payment of debts, necessary expenses and specific legacies, are not sufficient to pay all the general legacies in full, the latter shall abate or be diminished in equal proportions; and the executor has no right to pay one legatee in preference to another, nor to retain any money on account of a legacy to himself or herself or to any person for whom he or she is a trustee.

289. Nonabatement of specific legacy.

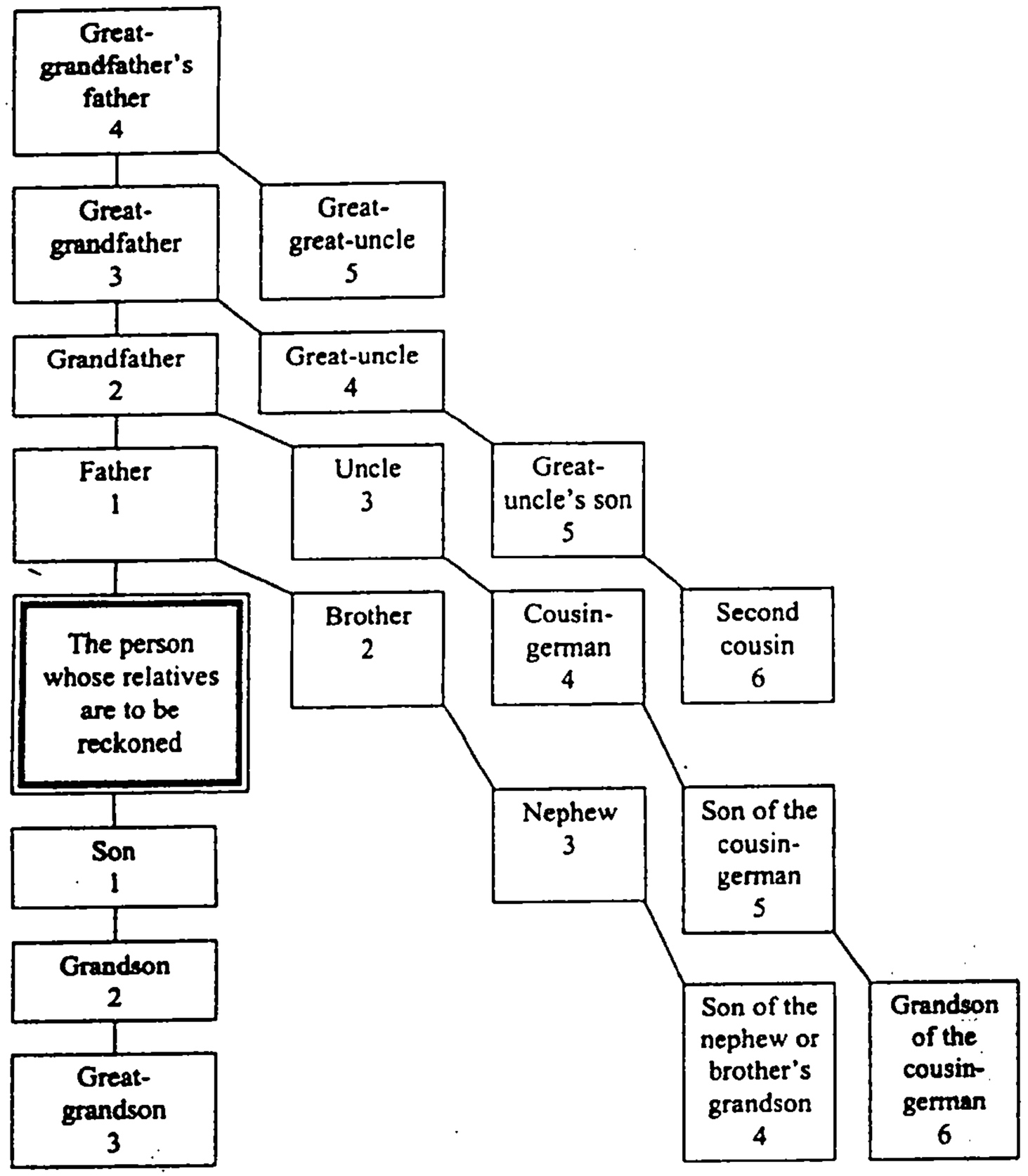
Where there is a specific legacy, and the assets are sufficient for the payment of debts and necessary expenses, the thing specified must be delivered to the legatee without any abatement.

SCHEDULES

First Schedule.

s. 23.

Table of consanguinity.



Second Schedule.

s. 26.

Rules relating to the occupation of residential holdings.

1. Persons entitled to occupation.

(1) In the case of a residential holding occupied by the intestate prior to his or her death as his or her principal residence, any wife or husband, as the case may be, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it.

(2) In the case of a residential holding owned by the intestate as a principal residential holding but not occupied by him or her because he or she was living in premises owned by another person, any wife or husband, as the case may be, and any children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident with the intestate prior to his or her death, shall be entitled to occupy it.

(3) In the case of any other residential holding owned by the intestate, any wife, or children, under eighteen years of age if male, or under twenty-one years of age and unmarried if female, who were normally resident in the residential holding shall be entitled to occupy it.

(4) Any other premises owned by the intestate and not falling under subparagraph (1), (2) or (3) of this paragraph, shall form part of the estate of the intestate and shall be distributed in accordance with section 27 of this Act.

2. Rights of cultivation, etc.

Any wife, husband or child who normally cultivated, farmed or tilled any land adjoining a residential holding owned by an intestate prior to his or her death shall have the right to cultivate, farm and till the land as long as he or she continues to be resident.

3. Procedure where minor entitled.

Where a child or children are entitled to occupation under paragraph 1 of this Schedule and in fact occupy a residential holding, the person legally entitled to the custody of the child or of the majority of the children shall either himself or herself occupy or appoint some other suitable adult person or persons to occupy the residential holding for so long as any such child or any of such children continue to do so and the person so occupying shall be subject to the duties and liabilities of an occupier hereunder; except that in default of occupation by the person entitled to custody or his or her appointee, a magistrate may, on application of the personal representative or any person interested or on his or her own motion, appoint a person or persons to occupy as aforesaid.

4. Certificate of occupancy.

Upon being satisfied by affidavit or otherwise that the person, if any, properly entitled to occupation hereunder has taken occupation of the residential holding with a bona fide intention to continue the occupation or that there is no person entitled to occupation, the court shall issue a certificate in Form B of the Third Schedule to this Act to the personal representative and a duplicate of the certificate to the occupant, if any.

5. Assent.

The personal representative may assent in writing to the vesting of the residential holding or part of it in such person or persons as may be entitled to it under this Act subject if appropriate to occupancy of the residential holding in accordance with these Rules, but any writing purporting to effect the assent shall be void unless the certificate issued under paragraph 4 of this Schedule is recited in the writing and the certificate or a certified copy of it is annexed to the writing; except that a purchaser for value from the personal representative without notice shall not be concerned to see whether the certificate has been issued or not.

6. Registration.

(1) Occupancy of a residential holding hereunder shall be deemed to be an interest in land capable of protection by a caveat under the Registration of Titles Act, and the interest of any other person in the residential holding

shall be subject to that interest and shall be incapable of alteration subject to that interest; but the occupancy shall not be a tenancy.

(2) The occupancy referred to in subparagraph (1) shall not prevail against a mortgagee under a mortgage created before the death of the intestate.

7. Residential holding subject to covenants, etc.

The occupant of a residential holding shall be bound by all covenants, conditions and encumbrances to which the residential holding or any part of it was subject at the death of the intestate and, in addition, shall perform and observe the following stipulations and conditions—

(a) the occupant shall pay and discharge all existing and future rates, taxes, charges, duties, assessments and outgoings rated, charged, imposed or assessed upon the residential holding or upon its owner or occupier and shall pay the rent and other payments reserved by the lease, if any, under which the residential holding is held;

(b) the occupant shall keep all buildings at any time situated on the residential holding and all sewers and drains and the hedges, fences and walls of the residential holding in good and tenantable repair and condition and decoration, fair wear and tear only excepted; except that the occupant shall be under no obligation to put the buildings in a better condition they were in at the death of the intestate;

(c) the occupant shall not assign, let, charge or part with or share possession of the residential holding or any part of it;

(d) the occupant shall permit the person entitled to the legal estate in the residential holding subject to the occupancy or his or her duly authorised agent with or without workers and others at reasonable times to enter upon and examine the condition of the residential holding, and thereupon such person may serve upon the occupant notice in writing specifying any repairs necessary to be done and require the occupant forthwith to execute the repairs; and if the occupant shall not within two months after service of the notice proceed diligently with the execution of the repairs, then the occupant shall permit such person to enter upon the residential holding and execute the repairs and the cost of the repairs shall, if the occupant continues

to occupy the residential holding, be a debt due from the occupant to such person and be forthwith recoverable by action;

(e) the occupant shall farm any land on the residential holding which is usually so farmed in a good and husbandlike manner and so as not to impoverish or deteriorate the land and shall keep and leave the land in good heart and condition;

(f) the occupant shall not cut or fell any timber on the residential holding without the consent of the person entitled to the legal estate subject to the occupancy except such as may be reasonably required for domestic purposes by the occupant;

(g) the occupant shall not build or permit or suffer to be built or erected any building on the residential holding nor make any additions or alterations to any buildings on the residential holding without the consent of the person entitled thereto subject to the occupancy;

(h) upon the receipt of any notice, order, direction or other thing from any competent authority affecting or likely to affect the residential holding or any part of it, whether the same shall be served directly on the occupant or the original or a copy of it be received from any other person, the occupant will so far as the notice, order, direction or other thing or the Act, regulations or other instrument under or by virtue of which it is issued or the provisions of this paragraph require him or her so to do, comply therewith at his or her own expense and will forthwith deliver to the person entitled to the legal estate subject to the occupancy a copy of the notice, order, direction or other thing;

(i) the occupant shall not do or permit or suffer to be done anything in or upon the residential holding or any part of it which may be or become a nuisance or annoyance or cause damage or inconvenience to the person entitled to the legal estate subject to the occupancy or to the neighbourhood or by which any insurance for the time being effected on the residential holding may be rendered void or voidable or by which the rate of premium on it may be increased;

(j) the occupant shall not without consent of the person entitled to the legal estate subject to the occupancy use the residential holding or any part of it for any other purposes than the purpose for which the it was used immediately prior to the death of the intestate;

(k) upon the termination of the occupancy the occupant shall yield up the residential holding and all additions to it and all fittings and fixtures on it in good and tenantable repair in accordance with the stipulation in that behalf set out in this section.

8. Termination by events.

The occupancy of a residential holding hereunder shall be terminated automatically on the happening of any of the following events—

(a) upon the remarriage of the occupant where the occupant is a wife;

(b) upon the death of the occupant or all the occupants;

(c) upon the occupant, being a child, or all the occupants, being children, attaining the age of eighteen in the case of males and attaining the age of twenty-one or marrying in the case of females;

(d) upon the occupant or occupants ceasing to occupy the residential holding for a continuous period of six months;

(e) upon surrender in writing signed by the occupant if adult or endorsed by the court if the occupancy is by a minor or minors; except that where any child or children of the description contained in paragraph 1 of this Schedule was or were resident with and dependent upon the occupant at the residential holding immediately before such event, the occupancy shall not terminate but the child or children shall succeed to it.

9. Termination by court order.

(1) Any court having jurisdiction over the residential holding, having regard to its value upon application by the registered proprietor for the time being of the holding or any part of it, may order the termination of the occupancy of the residential holding or any part of it upon proof of existence of any one or more of the following grounds—

(a) that the occupant has persistently failed to comply with one or more of the provisions of paragraph 7 of this Schedule;

(b) that suitable alternative accommodation is available for the occupant and any persons resident with and dependent on the occupant who would suffer no hardship by occupying the alternative accommodation instead of the residential holding;

(c) that no hardship would be occasioned to the occupant or any person resident with and dependent upon the occupant if the occupant is paid a sum of money to be assessed by the court instead of being permitted to occupy the residential holding or part of it as the case may be and the applicant will immediately pay that sum to the occupant.

(2) The court shall not be bound to order the termination even where someone or more grounds as above exist.

(3) Where such application is made within one year from the death of the intestate and where there is any other person or persons who would have been entitled to occupancy but for the existence of the occupant, such person or persons shall be made party to the suit and the court may, after hearing such evidence in the matter as may be presented, order that the occupancy shall pass from the occupant to such person or one or more of such persons.

(4) Any person entitled to occupancy under this paragraph who is aggrieved by the decision of the court may within thirty days appeal against the court's order.

10. Offences.

It shall be an offence punishable with imprisonment not exceeding six months or a fine not exceeding one thousand shillings or both for any person to evict or attempt to evict from a residential holding prior to the issue of a certificate under paragraph 4 of this Schedule any wife or child of an intestate who normally resided there at the date of death of the intestate or to do any act calculated to persuade or force any the wife or child to quit such holding prior to the issue of the certificate.

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Third Schedule.

s. 31

Forms.

Republic of Uganda

Form A.
Form of Notification of Appointment of Customary Heir.
The Succession Act.

To: Personal representative of _____ and
To: The Administrator General,

Estate of _____, deceased.
Probate and Administration Cause No. _____ of 20 ____.

We _____ *(appointing authority under customary law)* of _____ and I, _____ *(customary heir)* of _____, give you notice pursuant to section 31 of the Succession Act that on the _____ day of _____, 20 ____, at _____ in the district/area of _____ that _____ *(heir)* was duly appointed to be the heir and successor of _____, the deceased, in accordance with the customary law of the _____ clan/tribe of which _____, the deceased, was a member, and I, _____, *(heir)* claim the interest in the property of _____, the deceased, due to me as the customary heir.

_____
Signature

_____
Signature

_____
Witness to signatures

_____
(*State office*)

———

Form B.

Certificate of Occupancy.

In the High Court of Uganda at _____.

Probate and Administration Cause No. _____.

Be it known that _____ of _____ in the district/area of _____ is certified/there is no person entitled to be the lawful occupant(s) under section 26 of, and the Second Schedule to, the Succession Act of the land known as _____ and registered at the Registry of Titles under Title No. _____ delineated in the plan annexed hereto and edged red.

(Court seal)

Fourth Schedule. s. 49.

Statutory Will Form.

The Succession Act.

1. Name of person making will	Name								
	Address								
2. Names of executors									
3. Appointment of heir									
4. Name of guardian or guardian of young children									
5. Names of persons who are given specific gifts in this will (which can be money, land or other property)						Names	Property given		
6. Names of persons who are given a share in the will maker's property or if gifts have been given in paragraph 5 the property left after the gifts have been given						Names	Share given		
7. Signature or mark of will maker									

CHAPTER 161

THE PUBLIC TRUSTEE ACT.

Arrangement of Sections.

Section
1. Appointment of public trustee.
2. Public trustee to be a corporation sole.
3. Power of public trustee to appoint agents, etc.
4. Powers and duties of public trustee.
5. Appointment of public trustee as trustee by person creating trust by trust deed.
6. Procedure in case of appointment of a public trustee as trustee under a will.
7. Appointment of public trustee by court.
8. Transfer of legacy, etc. of infant or lunatic to public trustee.
9. Security not required from public trustee.
10. Government liability for acts of public trustee.
11. Fees chargeable.
12. Accounts to be audited.
13. Court orders.
14. Powers to incur expenditure.
15. Payments to minor beneficiaries in cases of small estates.
16. Power to make rules.

CHAPTER 161

THE PUBLIC TRUSTEE ACT.

Commencement: 15 July, 1937.

An Act to make provision for the appointment and duties of a public trustee.

1. Appointment of public trustee.

The Minister, by notice in the Gazette, may appoint some fit and proper person to be public trustee for Uganda, and may in like manner appoint a deputy or deputies to assist him or her, and every deputy so appointed shall, subject to the control of the public trustee, be competent to discharge any of the duties and exercise any of the powers of the public trustee, and when discharging those duties, or exercising those powers, shall have the same privileges and be subject to the same liabilities as the public trustee.

2. Public trustee to be a corporation sole.

The public trustee shall be a corporation sole by the name of the public trustee and as such shall have perpetual succession and an official seal, and may sue and be sued in his or her corporate name, but any instrument sealed by him or her shall not, by reason of his or her using a seal, be rendered liable to higher stamp duty than if he or she were an individual.

3. Power of public trustee to appoint agents, etc.

(1) A district commissioner shall be the agent in his or her area of the public trustee; but the public trustee may appoint such other person as he or she shall think fit to be his or her agent in that area either generally or in any particular trust estate or in any matter arising out of any trust estate.

(2) The public trustee may, at his or her discretion, delegate to an agent any or all of the powers and duties conferred or imposed upon him or her by this Act.

(3) An agent shall, in all respects, act under the direction of the public trustee who shall not be answerable for any act or omission on the part of the agent which is not in conformity with the power or duty delegated by the public trustee or which shall not have happened by the public trustee's own fault or neglect.

(4) An agent, other than an officer of the Government, shall find security to the satisfaction of the public trustee for the performance of his or her duties and may be remunerated either by salary or such fees as the Minister may from time to time by rule prescribe.

(5) The public trustee or a deputy public trustee or an agent shall be entitled to appear in court, either in person or by counsel, in any proceedings to which the public trustee is a party.

(6) The public trustee shall be at liberty, without the previous leave of the court, to instruct and employ an advocate in any case as he or she shall think fit; and that advocate shall be remunerated out of the funds of the particular trust estate concerned.

4. Powers and duties of public trustee.

(1) Subject to and in accordance with this Act and any rules made under it, the public trustee may, if he or she thinks fit—

(a) act as an ordinary trustee; or

(b) be appointed trustee by a court of competent jurisdiction.

(2) Except that the Trustees Act and any enactment amending or replacing it shall apply to him or her, and subject as is hereafter expressly otherwise provided, the public trustee shall have the same powers, duties and liabilities and be entitled to the same rights and privileges and be subject to the same control and orders of the court as any other trustee acting in the same capacity.

(3) The public trustee may decline either absolutely, or except on such conditions as he or she may impose, to accept any trust.

(4) The public trustee shall not accept any trust under any composition or scheme or arrangement for the benefit of creditors nor of any estate known or believed by him or her to be insolvent.

(5) The public trustee shall not, except as provided by any rules made under this Act, accept any trust which involves the management or carrying on of any business.

(6) The public trustee shall always be the sole trustee, and it shall not be lawful to appoint the public trustee to be trustee with any other person.

5. Appointment of public trustee as trustee by person creating trust by trust deed.

(1) Any person intending to create a trust otherwise than by will, being a trust which the public trustee is not prohibited from accepting under the provisions of this Act, may, by instrument creating the trust, and with the consent of the public trustee, appoint him or her by that name or any other sufficient description to be the trustee of the property subject to the trust; but the consent of the public trustee shall be recited in the instrument, and the instrument shall be duly executed by the public trustee.

(2) Upon such appointment the property subject to the trust shall vest in the public trustee and shall be held by him or her upon the trusts declared in the instrument.

6. Procedure in case of appointment of a public trustee as trustee under a will.

(1) When the public trustee has been appointed trustee under any will, the executor of the will or the administrator of the estate concerned, after obtaining probate or letters of administration with will annexed, shall immediately notify the appointment to the public trustee in writing, and shall supply him or her with a certified copy of the will and of any trust instrument and other documents affecting the trust, and such particulars as to the nature and value of the trust property, and the liabilities, if any, attaching to such property or the holder of the property, and the names, ages and addresses of any beneficiaries under the trust, and such other information as the public trustee may consider desirable to obtain in any particular case.

(2) After having been supplied with such information as provided under subsection (1), the public trustee shall decide whether the trust shall be accepted or refused, and shall give the executor or administrator notice of such acceptance or refusal, and in case of acceptance shall signify in writing

his or her consent to act in the trust and the terms upon which his or her consent is given.

7. Appointment of public trustee by court.

If any property is subject to a trust, other than a trust which the public trustee is prohibited from accepting under the provisions of this Act, and there is no trustee within the limits of Uganda willing or capable to act in the trust, the court may on the application of any interested party or of the public trustee make an order for the appointment of the public trustee to be the trustee of such property; but where the application is not made by the public trustee, no such order shall be made without his or her consent.

8. Transfer of legacy, etc. of infant or lunatic to public trustee.

If any infant or lunatic is entitled to any gift, legacy or share of the estate of a deceased person, it shall be lawful for the person by whom the gift is made, or the executor or administrator by whom the legacy or share is payable or transferable, or for any trustee of any gift, legacy or share, with the consent of the public trustee, to transfer the gift, legacy or share by an instrument in writing to the public trustee by that name or any other sufficient description; but the consent of the public trustee shall be recited in the instrument and the instrument shall be duly executed by the public trustee.

9. Security not required from public trustee.

The public trustee shall not be required by any court to enter into any bond and security on his or her appointment in any capacity under this Act.

10. Government liability for acts of public trustee.

The Government shall be liable to make good out of the public funds of Uganda all sums required to discharge any liability which the public trustee, if he or she were a private trustee, would be personally liable to discharge, except when the liability is one to which neither the public trustee nor any of his or her officers or agents has in any way contributed, and which neither he or she nor any of his or her officers or agents could by the exercise of reasonable diligence have averted, and in that case the public trustee, his or her officers or agents shall not, nor shall the Government, be subject to any liability.

11. Fees chargeable.

There shall be charged in respect of the duties of the public trustee such fees, whether by way of percentage or otherwise, as the Minister may prescribe by rules made under this Act; except that in respect of any fee that may be charged by percentage on the annual income accruing for the benefit of any trust, either from money invested or from properties held in trust, the Minister may prescribe the maximum percentage that may be charged and the public trustee, with the approval of the Minister, may fix the actual percentage that shall be charged on that annual income year by year.

12. Accounts to be audited.

The accounts of the public trustee shall be audited at least once annually, and at any other time if the Minister so directs, by the prescribed person and in the prescribed manner.

13. Court orders.

The court may make such orders as it thinks fit respecting any trust property vested in the public trustee or the interest or the produce of the trust property.

14. Powers to incur expenditure.

The public trustee may, in addition to any other powers of expenditure lawfully exercisable by him or her, incur expenditure on such acts as may be necessary for the proper care and management of any property belonging to any trust administered by him or her.

15. Payments to minor beneficiaries in cases of small estates.

Where any property is held by the public trustee for any minor beneficiary, and at the time when it came into the care of the public trustee, it was of less value than two thousand shillings, the public trustee, at his or her discretion and without any application to the court, may apply the whole or any part of that property for or towards the maintenance, education, advancement or expenses of the minor beneficiary, or pay or transfer the property to the father or mother of the minor or some other suitable person, on behalf of the minor, and the receipt of the father or mother of the minor, or of the other person

CHAPTER 156

THE ADMINISTRATION OF ESTATES (SMALL ESTATES) (SPECIAL PROVISIONS) ACT.

Arrangement of Sections.

Section
1. Interpretation.
2. Jurisdiction to grant probate, etc. of small estates.
3. Application for grant of probate, etc.
4. Grantee of probate or administration alone to sue.
5. Effect of payment to executor or administrator.
6. Appeals.
7. Appeals to the Court of Appeal.
8. Probate rules.
9. Punishment for false averment in petition or declaration.
10. Application.
11. Saving for jurisdiction of the High Court.
12. Administrator General not precluded from grant.

CHAPTER 156

THE ADMINISTRATION OF ESTATES (SMALL ESTATES) (SPECIAL PROVISIONS) ACT.

Commencement: 6 June, 1972.

An Act to confer jurisdiction on magistrates courts to grant probate or letters of administration in respect of small estates of deceased persons and for other matters connected therewith.

1. Interpretation.

In this Act, unless the context otherwise requires—

(a) "Minister" means the Minister to whom functions under this Act are assigned;

(b) "small estate" means any estate the value of which is specified in section 2(1).

2. Jurisdiction to grant probate, etc. of small estates.

(1) Notwithstanding any provision of the Succession Act or the Administrator General's Act to the contrary, jurisdiction to grant probate or letters of administration in respect of small estates of deceased persons shall be exercised by—

(a) a magistrate grade II, where the total value of the estate does not exceed ten thousand shillings;

(b) a magistrate grade I, where the total value of the estate exceeds ten thousand shillings but does not exceed fifty thousand shillings;

(c) a chief magistrate, where the total value of the estate exceeds fifty thousand shillings but does not exceed one hundred thousand shillings.

(2) Grant of probate or letters of administration shall be made in the prescribed form under the seal of the court, and the grant shall have effect over all the property of the deceased, movable and immovable, in all parts of Uganda and shall be conclusive evidence as to the representative title against

all debtors of the deceased and all persons holding property which belongs to the deceased.

(3) No grant shall be made by a magistrate's court—

(a) in any case in which there is contention until the contention is disposed of;

(b) in respect of an estate of a deceased person who at the time of his or her death had no fixed place of abode within the jurisdiction of the court.

(4) The grant of probate or letters of administration may be revoked, altered or annulled for just cause, and any errors appearing in the grant of probate or letters of administration may be rectified by the court.

(5) A grant of probate or letters of administration shall not be revoked or annulled for want of jurisdiction if during the administration of the estate it is subsequently discovered that the total value of the estate is greater than the total value of the estate declared in an application for the grant unless the court is satisfied that the interests of the beneficiaries are thereby prejudiced.

(6) The Minister may, by statutory order, amend the jurisdiction of magistrates courts under subsection (1).

3. Application for grant of probate, etc.

An application for the grant of probate or letters of administration shall be made in the prescribed form and shall contain such matters as may be prescribed.

4. Grantee of probate or administration alone to sue.

After any grant of probate has or letters of administration have been made, no person other than the holder of the grant may sue or otherwise act as representative of the deceased, until the grant is revoked.

5. Effect of payment to executor or administrator.

Where any probate is or letters of administration are revoked, all payments bona fide made to any executor or administrator under the probate or

administration before its revocation shall, notwithstanding the revocation be a legal discharge to the person making the payments; and an executor o administrator who has acted under the revoked probate or administratio may retain and reimburse himself or herself in respect of any payments mad by him or her, which the person to whom probate or letters of administratio shall be afterwards granted might have lawfully made.

6. Appeals.

An appeal shall lie—

(a) from any order or decision of a magistrate's court presided ov by a chief magistrate or a magistrate grade I in the exercise of i original jurisdiction, to the High Court;

(b) from any order or decision made in appeal by a chief magistra to the High Court;

(c) from any order or decision of a magistrate's court presided ov by a magistrate grade II to a court presided over by a chi magistrate.

7. Appeals to the Court of Appeal.

(1) An appeal shall lie to the Court of Appeal from any order decision made in appeal by the High Court on any of the following groun namely that—

(a) the order or decision is contrary to law or usage having the fo of law;

(b) the order or decision has failed to determine some material po of law or usage having the force of law; or

(c) a substantial error in the procedure has occurred which may h produced error or defect in the decision of the case upon mer

(2) No appeal shall lie to the Court of Appeal in any probate act where the value of the subject matter of the action is less than ten thous shillings, unless special leave is obtained from the Court of Appeal.

8. Probate rules.

The Minister may, in consultation with the Chief Justice, make rules—

(a) for regulating the practice and procedure of the magistr courts in probate business;

CHAPTER 155

THE ADMINISTRATION OF ESTATES OF PERSONS OF UNSOUND MIND ACT.

Arrangement of Sections.

Section

1. Interpretation.
2. Management of estates of persons of unsound mind.
3. Inquiries by the court.
4. Power of manager in respect of estate.
5. Inventory, statement and annual accounts.
6. Removal of managers.
7. Termination of appointment of manager.
8. Procedure on a person ceasing to be of unsound mind.
9. Powers of court in regard to property of person where no manager is appointed.
10. Pension of person of unsound mind when no manager appointed.
11. Power to make orders concerning affairs of persons of unsound mind.
12. Execution of conveyances and powers by manager or other person under order of court.
13. Power to order transfer of property of person of unsound mind residing out of Uganda.
14. Power of Chief Justice to delegate power to magistrates.
15. Power to make rules.

CHAPTER 155

THE ADMINISTRATION OF ESTATES OF PERSONS OF UNSOUND MIND ACT.

Commencement: 13 September, 1951.

An Act to make provision for the administration of the estates of persons of unsound mind.

1. Interpretation.

For the purposes of this Act, unless the context otherwise requires—

(a) "court" means the High Court;

(b) "estate" includes all the movable or immovable property of any person;

(c) "person of unsound mind" means any person adjudged to be of unsound mind under section 4 of the Mental Treatment Act or any person detained under section 113 or 117 of the Magistrates Courts Act;

(d) "relative" includes a member of a clan or other customary organisation.

2. Management of estates of persons of unsound mind.

The court may appoint a manager of the estate of a person of unsound mind on the application of a superintendent or other person in charge of a mental hospital, the commissioner of prisons or a relative of any such person of unsound mind.

3. Inquiries by the court.

(1) On application being made under section 2 for the appointment of a manager of the estate of a person of unsound mind, the court shall inquire of the applicant or any other person whom it may summon whether or not the person of unsound mind has any suitable relative who is willing to manage that person's estate.

(2) If as a result of inquiries made under subsection (1), the court is satisfied that a relative of a person of unsound mind is a suitable person to act as manager of the estate of the person of unsound mind and that he or she is willing so to act, the court shall appoint him or her to be the manager of that estate if it is of the opinion that a manager should be so appointed.

(3) If as a result of the inquiries made under subsection (1), the court is of the opinion that there is no suitable relative of a person of unsound mind who is willing to act as the manager of that person's estate, then if the court is of the opinion that a manager should be appointed it shall appoint the Administrator General as manager.

4. Power of manager in respect of estate.

(1) Where a manager has been appointed under section 3, the court may direct by the order of appointment, or by any subsequent order, that the manager shall have such general or special powers for the management of the estate as to the court may seem necessary and proper, regard being had to the nature of the property, whether movable or immovable, of which the estate may consist; except that—

(a) a manager so appointed shall not, without the special permission of the court—

(i) mortgage, charge or transfer by sale, gift, surrender, exchange or otherwise, any immovable property of which the estate may consist;

(ii) lease any such property for a term exceeding five years; or

(iii) invest in any securities other than those authorised by the Trustees Act; and

(b) no manager may invest any funds belonging to the estate of which he or she is manager, in any company or undertaking in which he or she himself or herself has an interest nor shall he or she invest any such funds on the purchase of immovable property, without the prior consent of the court.

(2) If the person appointed to be manager of an estate under section 3 is unwilling to act gratuitously, the court may fix such fees or allowances to be paid out of the estate of the person in respect of whom the manager has been appointed as, in the circumstances of the case, the court may think fit.

5. Inventory, statement and annual accounts.

(1) Every person appointed by the court to be the manager of the estate of a person of unsound mind shall within six months of the date of his or her appointment or such other time as the court may order, deliver to the court an inventory of the property belonging to the person of whose estate he or she has been appointed manager and of all such sums of money, goods and effects as he or she shall receive on account of the estate together with a statement of all debts due by or to such person, and every such manager shall furnish to the court annually or at such other periods as the court may order within three months of the close of the year or such other period, an account of the property in his or her charge, showing the sums received and disbursed on account of the estate during that year and the balance then remaining in his or her hands.

(2) The inventory, statement and account shall be in such form as the court shall direct.

(3) Any person may, on payment of such fee as may be prescribed, inspect and obtain a copy of any inventory, statement or account delivered to the court under subsection (1).

(4) Where any person, by petition to the court, impugns the accuracy of any inventory or statement, or of any account prepared under this section, the court may summon the manager and inquire summarily into the matter and make such order on the matter as it thinks proper, or the court, in its discretion, may refer any such petition to a magistrate having jurisdiction in the place in which the property belonging to the estate concerned is situate for inquiry and report, and upon receipt of the report the court may make such order as it thinks fit.

6. Removal of managers.

The court may, for any cause which seems to it sufficient, remove any manager appointed by it under section 3 and may appoint any other fit person in his or her place, and may make such order as it considers necessary to ensure that the person so removed makes over the property in his or her hands, and of which he or she was manager, to his or her successor and accounts to that successor for all money received or disbursed by him or her in connection with the property.