ANALYSIS OF THE LAW RELATING TO DIVORCE WITH REGARD TO ITS APPLICABILITY & RELEVANCE IN UGANDA TODAY

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DECLARATION

I declare that this thesis is the work of Semugabi Joseph Andrew alone, except where due acknowledgement is made in the text. It does not include materials for which any other university Degree or Diploma has been awarded.

Signature: .....

Date: 25.09.2018

APPROVAL BY THE SUPERVISOR

I certify that I have supervised and read this study and that in my opinion it conforms to acceptable standards of scholarly presentation and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of Bachelor of Law of Kampala International University.

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ABSTRACT

Using the Content Analysis Methodology the study analyzed the Divorce Act, Cap 249 (and other related laws) enacted during the colonial era assessing its continued applicability and relevance in Uganda today. This Act which commenced 1st October, 1904 is now 114 years old and has remained the same to date despite critical legal developments!

Findings from review of reports as well as court cases indicate that, the Divorce Act (and related laws) – like any other law enacted during the colonial era – is overdue for reform to continue to be wholly relevant and applicable in light of the recent legal developments particularly enshrined in the 1995 Constitution.

Besides, the "modification, adaptation, qualification and exception as may be necessary"[1] regarding adopted laws has not been forthcoming as one would expect when it comes to most of the colonial enactments in general and the 1904 Divorce Act in particular. We therefore have in our statute books a law inter alia which on several occasions has been challenged in court for not being in conformity with the current developments in society and some of its key provisions have been rendered null and void.

It was also an important finding of the study that in 2009 the Marriage and Divorce Bill was tabled. And that this proposed legislation more or less deals with the gaps in the colonial laws. It is therefore the recommendation of this study that this Bill be enacted into law as a matter of urgency.

[1] Article 274 (1) of the Constitution of Uganda, 1995.

CHAPTER ONE

INTRODUCTION

1.1 Background to the study

The study analyzed the Divorce Act, Cap 249 (and other related laws) enacted during the colonial era assessing its continued applicability and relevance in Uganda today. This Act which commenced 1st October, 1904 is now 114 years old and has remained the same to date despite critical legal developments!

The Divorce Act is one of the laws that were received from the British when Uganda was a protectorate of her Majesty. To date of the 246 laws that appear in the 2000 Revised Edition of the Laws of Uganda about 50% of these, i.e., 122 laws constitute a colonial legacy that has remained on our statute books since independence. This is critical especially that circumstances typical of the colonial era are very different from the current state of affairs in present day Uganda.

The legislation that introduced these laws to Africa is The Uganda Order in Council, 1902[1]. In its Reception Clause - Article 15(2) the following paragraph is noteworthy:

> " Provided always that the said Common Law, doctrines of equity and the statutes of general application shall be in force in the Protectorate so far only as the circumstances of the Protectorate and its inhabitants, and the limit of His majesty's

[1] Laws of the Uganda Protectorate Revised Edition, 1923, p. 1111. **NB:** The quoted article15 (2) was revoked by Uganda Order in Council, 1911 (p.1149 of the Revised Edition, 1923) but without prejudice to the quoted paragraph.

Jurisdiction permit, and the subject to such qualification as local circumstances render necessary."

It should be noted that they were called "statutes of general application" which by then were the same laws in force in Britain. And whereas in that country these laws have long since undergone substantial reform given developments in that society, in the former colonies such reform has not been forthcoming even when courts have recommended so.

Following Uganda's independence in 1962 literature on post - independence legal developments emphasized the need for law reform. Everything alien had to be seriously reviewed and either adjusted to suit local circumstances or summarily discarded. F. M. Ssekandi[2] identifies a law reform process, which commenced in the early 1960's. The point is that there has always been a noble quest to make the Judicial System indigenous, that is, appropriate and relevant. And that constitutes the spirit of the post- independence legal developments. And the need for such transformation is even greater than ever before as more and more civil war weary African countries are politically maturing and are wholly embracing the rule of law and the stabilizing democratic principles of governance.

E. Veitch[3] however observed that even after independence and despite the spirit of reform and revolution, that is well documented, the facts on the ground showed little or no change at all. There was still a high measure of acceptance of the alien or "received" law ... despite several years of independence.....

[2] F.M. Ssekandi, 'Whither to the Common Law Tradition' (1974) The Uganda Law Focus - Vol. 2, No.2. 87.
[3] E. Veitch, 'A Review of Uganda Tort Law (1960-1970)', (1971) Makerere Law Journal – Vol.1. 16-37.

With this post – independence spirit of law reform emphasizing the quest to indigenize the judicial system (to make it most appropriate and relevant to our evolving social circumstances), it became obvious on preliminary observation of our statute books – and particularly in the area of divorce – that there was a problem worth investigating. There is definitely no problem in adopting a law of general application so long as that law undergoes timely reform to meet the unique needs of a given society. Indeed the Judicature Act Cap 13[4] provides for this "Applied Law" in Section 14 (3), i.e., "The applied law...shall be in force only in so far as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary." This position was also echoed in the 1995 Constitution where in Article 274 (1) [Existing Law] it is provided: "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."

In Uganda Association of Women Lawyers & Others v The Attorney General,[5] Twinomujuni, JA made reference to the history of the Divorce Act and of particular interest in that history are the English concepts of marriage and divorce before and after the enactment of the Matrimonial Causes Act of 1857 (to which our current Act is more or less a replica). He said that "I have no doubt in my mind that the impugned provisions of our Divorce Act are a result of the Englishman's pre-20th Century perceptions that a man was a superior being to a woman and they could not be treated as equals in marriage. It is, in my view, glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-

[4] Laws of Uganda, Volume 2; Revised Edition 2000
[5] Constitutional Petition 3 of 2003

discrimination between the sexes enshrined in our 1995 Constitution. I have no doubt in my mind that the impugned sections are a derogation to articles 21, 31 and 33 of the Constitution."

1.2 Statement of the problem

Ideally, the Divorce Act (and related laws) – like any other law enacted during the colonial era - should be modified, adapted and qualified to continue to be wholly relevant and applicable in light of the recent legal developments particularly enshrined in the 1995 Constitution.

This "modification, adaptation, qualification and exception as may be necessary"[6] regarding adopted laws has not been forthcoming as one would expect when it comes to most of the colonial enactments in general and the 1904 Divorce Act in particular. We therefore have in our statute books a law inter alia which on several occasions has been challenged in court for not being in conformity with the current developments in society and some of its key provisions have been rendered null and void.

If this Act is not brought up to date with by the legislature, then critical issues like equality before the law and discrimination against women will not be addressed as provided for in the Bill of Rights. People, irrespective of who they are, should always have confidence that the judicial system will rely on a law which will effectively adjudicate them fairly giving justice to all in the shortest time possible.

1.3 Purpose of the study

[6] Article 274 (1) of the Constitution of Uganda, 1995.

The purpose of the study was to examine the contents of Uganda's divorce Act (and other related laws) enacted during the colonial period, assess their continued applicability and relevance in present day Uganda and identify reasons why they have taken long to be modified.

1.3.1 The objectives of the study

1. To examine the contents of Uganda's divorce laws;
2. To assess their continued applicability and relevance in present day Uganda;
3. To identify reasons why the divorce law has taken long to be reformed.

1.3.2 Research questions

1. What is the content of Uganda's divorce laws?
2. How applicable and relevant are the divorce laws to present day Uganda?
3. Why have these laws taken long to be reformed in light of the current constitutional developments?

1.4 Scope of the study

The research will analyze contents of Uganda's divorce laws particularly the Divorce Act enacted in 1904 in light of current legal developments and changes in society assessing their continued applicability and relevance. Publications including Court Cases and Reports with regard to the effectiveness of the current legal framework for divorce in Uganda were considered.

1.5 Significance of the study

Whereas there are judicial and academic commentaries about the effectiveness of divorce legislation in Uganda this research is still significant because it does not only seek to analyze the

gaps in the current legal framework but also identify reasons why some laws (enacted way back in the colonial period) have taken long to change despite the fact that substantially they are no longer fit for purpose especially that society has not remained static.

Identification of the obstacles to timely law reform will lead to important recommendations that will, if adopted, improve the effectiveness and efficiency of the legislature in modifying laws to catch up and be in step with a dynamic society.

This study is also significant because it will establish or unearth issues relating to the effectiveness and efficiency of Uganda's law reform policy.

1.6 Literature Review

Commenting on post-inedependent African law Antony Allott[7] said that "Modern African law is ...made in part out of borrowed materials; but it is a new thing because, first, it is a modified version of the imported law, peculiarly adapted to its African environment; and, secondly, because it is a novel blend of local and imported laws, harmonized or integrated together." In other words that Africa still relies on foreign received law as well as local legislation.

The case for the "indigenization "of the Legal System

Post- Independence literature by writers like E. Veitch[8], F.M. Ssekandi[9], B. J. Odoki[10], emphasized the development of a Ugandan jurisprudence reflective of Uganda's sovereignty and a unique political, socio – economic and cultural conditions. The documentation is therefore rife

[7] Antony Allot New essays in African Law (Butterworth; 1970: 69)
[8] Ibid
[9] F.M. Ssekandi, 'Whither to the Common Law Tradition' (1974) The Uganda Law Focus - Vol. 2, No.2. 87.
[10] B.J. Odoki, 'Law Reporting In Uganda' (1975) The Uganda Law Focus - Vol. 3, No.1-2. 1.

with revolutionary appeals to increasingly detach our legal system from foreign systems. Such literature provides a theoretical framework for this particular study.

In his submission on "Law Reform in Uganda", Ssekandi[11] indicates that the urgency for law reform was obvious. Almost every field of law in Uganda, apart from some aspects of the criminal law, is based on the Common Law or Statutory Law of England as it was in 1902. The Common Law was developed by the English courts to meet the peculiar circumstances of England. In the course of time, statutes were passed to replace the case law. As a result, the law in England has since advanced to meet the needs of the English people whereas in Uganda we still regulate the affairs of our people on principles devised a century ago for England. The proposal for law reform was actually to deal with this absurdity! Ssekandi actually noted:

> "In promoting Law Reform, we have to be careful not to borrow wholesale the recent legislation in England. It must be accepted that the people in Uganda have well – developed civilization and this in many respects differs from that of England."

The point is that the law has to be reformed. And the essence of reform is to "indigenize" the law to make it relevant as well as applicable. The issue at hand since independence and which is evident in all this literature is the fact that Uganda should develop her own jurisprudence. And that the legislature can play a big role in the development of our law.

The Matrimonial Causes Act 1857 and its Reform

To appreciate the current laws on divorce in Uganda one should look at the English law enacted in the mid-nineteenth century on which they are premised. And this law was called the Matrimonial Causes Act 1857 which shares a lot of similarities with our own Divorce Act 1904.

[11] Ibid

The said Act undoubtedly had impact in some of Britain's overseas possessions including Uganda. According to Kate Standley[12] the English Act permitted judicial divorce on the ground of adultery by the respondent – a ground which was acceptable to the church because of biblical precedent. In addition to adultery, the petitioner had to prove that there was no collusion, condonation or connivance between the parties. However, divorce was more difficult for wives, as, unlike husbands, they had to prove "aggravated adultery" (adultery plus an additional factor, such as incest, cruelty, bigamy, sodomy or desertion). However, after considerable pressure for reform by the female emancipation movement, aggravated adultery was abolished by the Matrimonial Causes Act 1923.

The Matrimonial Causes Act 1937 added further grounds: cruelty; desertion for a continuous period of at least three years; and incurable insanity. In response to concerns that this more liberal divorce law would undermine the institution of marriage, the 1937 Act introduced an absolute bar on divorce in the first three years of marriage, unless the petitioner could prove exceptional hardship or that the respondent had shown exceptional depravity. The aim of the three-year bar was to deter trial marriages and hasty divorces. Condonation, connivance and collusion remained as bars.

At the end of the Second World War, there was a sharp increase in the number of people wishing to divorce, and a growing dissatisfaction with the law. It seemed wrong to have to prove a matrimonial offence, thereby apportioning blame, when both spouses might be responsible for marriage breakdown. It seemed wrong for a restrictive divorce law to perpetuate a dead marriage which had completely broken down. It was also easy to abuse the system, for example by fabricating adultery.

[12] Kate Standley: Family Law (7th Edition, Palgrave Macmillan 2010; 134).

With Law Commission's recommendations other laws including the Divorce Reform Act 1969, Matrimonial Causes Act 1973, Matrimonial and Family Proceedings Act 1984. These according to Standeley[13] constitute "a hybrid law of divorce made up of fault and non-fault grounds. The retention of fault means that the matrimonial offence doctrine remains, and in fact is particularly prevalent, as many divorces are sought on the basis of the fault grounds of adultery or unreasonable behavior – as these enable a petitioner to obtain a 'quick' divorce."

What this review indicates is that the British society has not been static and the evolution has led to constant reform of their divorce law. Since the 1857 Act there has followed five Acts promptly addressing the needs of a rapidly changing society. Uganda's Divorce Act has technically speaking remained in 1857 and yet some of the reforms incorporated in the subsequent laws duly enacted in the UK address issues that are of universal nature including, for example, equality before the law of both men and women.

1.7 Methodology

Using the research technique of Content (Document) Analysis, the divorce laws were analyzed examining the provisions therein with regard to their continued applicability in Uganda today. These provisions were analyzed in light of commentaries from other documents including court cases and reports.

This being Document Analysis it constituted qualitative research in which documents including the divorce laws as well as court cases and reports analyzing these laws were interpreted by the researcher.

[13] Ibid

The research therefore employed a qualitative method of data collection and analysis. This enabled the researcher to acquire in-depth information from the content of the literary works thus analyzed.

Qualitative Data Analysis

Data from the laws under study and documentary reviews in connection to these laws was analyzed in light of pre-identified themes based on the objectives of the study.

CHAPTER TWO

LEGAL FRAMEWORK

2.1 Introduction

This Chapter briefly deals with international conventions and local laws as well as court cases whose provisions assist one to critically appreciate the Uganda divorce legislation as adopted from the colonial era. These provisions can also inform the reform process of the said law. One key criticism of the said legislation, as seen in light of international and national legal developments, has to do with the breach of the Bill of Rights particularly women rights.

2.2 History of the Divorce Laws

Twinomujuni JA[14] gives a brief history of the Divorce Act thus as a law which was enacted in Uganda in 1904 has got its origins in the Matrimonial Causes Act of 1857 of England. The Act also had its roots in the Common Law of England whereby a valid marriage could only be terminated by the death of one of the parties to it or by a divorce decree pronounced by a court of competent jurisdiction. The Matrimonial Causes Act 1857 provides that a party to a marriage could obtain a decree of divorce on providing that the spouse had committed a matrimonial offence. The only offence that entitled a husband to obtain the decree was adultery. For a wife, it was not enough for her to prove adultery against her husband. She had to prove that the husband was guilty of aggravated adultery (which meant adultery plus another offence e.g., incest, bigamy, cruelty, desertion, etc.) or he had changed his faith from Christianity to some other faith and gone through a form of marriage with another woman. This law was brought into force in Uganda by the enactment of the Divorce Act on 1st October, 1904. Despite the fact that the

[14] Uganda Association of Women Lawyers & Others v. The AG (2/2003) Unreported 14

English have since reformed the Matrimonial Causes Act 1857 by legislation enacted in 1923, 1937, 1969 and 1973, and have abandoned the concept of divorce grated on the basis of proof of matrimonial offences, the 150 years old English Law is still intact and in force in Uganda. As if this is not bad enough, Section 3 of the Divorce Act requires that the courts of this country exercise their jurisdiction under the Act "in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England." It is interesting to note, even at this early stage, that the Constitution of Uganda enjoins the courts to exercise judicial power "in the name of the people and in conformity with the law and with the values, norms and aspirations of the people" (of Uganda).

2.3 International Developments

At the International level these developments have to do with bill of rights promulgated by, for example, United Nations organizations. Nations around the world are usually encouraged to ratify such provisions as well as enact laws that reflect such legal and humanitarian developments.

Article 1 of the **Universal Declaration of Human Rights**[15] provides that: "All human beings are born free and equal in dignity and rights..." Under **Article 2** "everyone is entitled to all the rights and freedoms set forth in this declaration without distinction of any kind, such as....sex...."

The **Convention on the Elimination of all Forms of Discrimination Against Women**[16] (**CEDAW**) is an international treaty adopted in 1979 by the United Nations General Assembly.

[15] Universal Declaration of Human Rights 1948 United Nations (UN)
[16] Convention for the Elimination of all Forms of Discrimination Against Women 1979 United Nations (UN)

Described as an international **bill of rights for women**, it was instituted on 3 September 1981 and has been ratified by 189 states including Uganda.

Article 1 defines discrimination against women in the following terms:

> "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."

Article 2 mandates that states parties ratifying the Convention declare intent to enshrine gender equality into their domestic legislation, repeal all discriminatory provisions in their laws, and enact new provisions to guard against discrimination against women. States ratifying the Convention must also establish tribunals and public institutions to guarantee women effective protection against discrimination, and take steps to eliminate all forms of discrimination practiced against women by individuals, organizations, and enterprises.

Article 3 requires states parties to guarantee basic human rights and fundamental freedoms to women "on a basis of equality with men" through the "political, social, economic, and cultural fields."

Of particular interest is **Part IV (Article 15 and 16)** of the Convention which outlines women's right to **equality in marriage and family life** along with **the right to equality before the law**.

Article 15 obliges states parties to guarantee "women equality with men before the law," including "a legal capacity identical to that of men." It also accords "to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile."

Article 16 prohibits "discrimination against women in all matters relating to marriage and family relations." In particular, it provides men and women with "the same right to enter into marriage, the same right freely to choose a spouse," "the same rights and responsibilities during marriage and at its dissolution," "the same rights and responsibilities as parents," "the same rights to decide freely and responsibly on the number and spacing of their children," "the same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation" "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."

2.4 National Developments

In 1995 Uganda obtained its 4th Constitution which for the first time incorporated the Bill of Rights guaranteeing equal protection of the law to all Ugandans. A constitution is the supreme law of the land and the superstructure upon which all other legislation and government policies are based.

The said Constitution provides for the Protection and Promotion of Fundamental and Other Human Rights and Freedoms under **Chapter 4. Article 20 (1) & (2)** provides that "Fundamental rights and freedoms of the individual are inherent and not granted by the State." And "the rights and freedoms of the individual and groups enshrined in this Chapter shall be respected, upheld

and promoted by all organs and agencies of Government and by all persons." **Article 21 (1) & (2)** provides for Equality and Freedom from Discrimination. "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law." That "...a person shall not be discriminated against on the ground of sex, race, color, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability.

As will be seen later the Divorce laws have majorly been criticized for being inconsistent with these constitutional provisions particularly when it comes to discrimination against women. Article 33 (1) provides that women shall be accorded full and equal dignity of the person with men. Clause 2 of the same Article provides that the state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement. Equally to note is Clause (3) of Article 33 which states that the state shall protect women and their rights, taking into account their unique status and natural functions in society. Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities (Article 33(4)). Clause (5) provides that "...women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

Article 31 (1) provides that "a man and woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age – to found a family; and to equal rights at and in marriage, during marriage and at its dissolution.

2.5 Developments in Case Law

Until the promulgation of the current Constitution in 1995, courts continued to enforce the Divorce Laws despite their blatant discrimination against women in light of international developments. In Petrova Natalia Kasasa v. Paulo Kasasa Gukiina,[17] for example, Francis K. Butagira, J. noted that for the wife to succeed both adultery and cruelty have to be proved in order for the wife to succeed as provided in Section 5(2)(v) of the Divorce Act. In Grace Elizabeth Walusimbi v. Lawrence Walusimbi Kantinti, J.[18] dissolved the marriage. Both the husband and wife petitioned for the said dissolution. It is important to note that the wife's grounds were adultery coupled with desertion as per section 5(2)(b)(vi). The husband only had one ground, i.e., the wife's adultery as per section 5(1) of the Divorce Act.

After 1995 Court cases like The Uganda Association of Women Lawyers (supra) – to be discussed later – started pointing out the inconsistencies in the Divorce Laws in light of the constitutional developments.

In Ajanta Kethan Thakkar v. Thakkar[19] V.F. Musoke-Kibuuka J. accordingly, found that the petitioner had proved to the satisfaction of the court that since the solemnization of her marriage between her and the respondent, in July, 1990, at Harmi, Baroda, India, under the Hindu rite, the respondent had changed his religion from Hinduism to Christianity. That that fact is ground for divorce under Section 9(2)(a)(i) of the Hindu Marriage and Divorce Act, Cap 214. Upon that ground therefore a decree nisi for the dissolution of the marriage issued under section 9 of the Divorce Act Cap 215.

[17] Divorce Jurisdiction Cause No. 3/1976 - Unreported
[18] Divoece Jurisdiction Cause No. 2/1973- Unreported
[19] Divorce Cause No. 3/2002 – Unreported.

With regard to the second issue whether the respondent committed adultery with, one, Anne Piribiri, the petitioner in the petition pleaded adultery coupled with desertion as is required under section 5(2)(vi) of the Divorce Act. The court, however, at the commencement of the trial, advised learned counsel...to abandon the desertion part of the ground. That court considered the provisions of Section 5... in as far as it provided for a husband to prove only adultery as a ground for dissolution and a wife to prove adultery coupled with desertion or cruelty as a ground for dissolution...., to be unconstitutional and of no effect. The court would therefore refuse to apply or give effect to it on that account as required by Art 2 of the Constitution (i.e., the Supremacy Clause).

That as section 5(2)(vi) stands it is in direct conflict with the equality rights and anti-discrimination provisions set out in Art 21. It would also be inconsistent with the provisions of Art 31(1) and 33, providing for equal rights during marriage and at its dissolution and dignity between men and women in all areas of human endeavor. (In this regard an earlier case of Annette Nakalema Kironde v. Apollo Kaddu Mukasa Kironde & Anor – D.C. 6/2001 was followed).

In those circumstances the court applied the provisions of Art 273 of the Constitution which requires courts in this country...to construe all existing laws, "with such modifications, adaptations, limitations and qualifications as may be necessary to bring it into conformity with the Constitution".

The effect of applying Art 273 to Section 5 of the Divorce Act is, quite clearly, that the grounds for divorce provided under that section apply equally to husbands and wives. In other words, if a husband can secure a decree nisi for the dissolution of a marriage between him and his wife, a

wife can equally obtain the same decree upon the same ground but not upon the same ground coupled with some other ground. The latter would be placing the wife under a burden or disadvantage not placed upon the husband under the same law. That would amount to discrimination based upon sex. That is clearly forbidden by the constitution under the equality clause and the equal dignity clauses.

Eldad Mwangusya J. in Vivian Ntanda v. James Kayemba[20] granted the petitioner's prayer for dissolution of marriage upon satisfaction of one ground, i.e., cruelty. It was argued that the provision in the Divorce Act had been subject of a pronunciation by the Constitutional Court in the case of Uganda Association of Women Lawyers and 5 others v. AG (supra) where it was held that each of the grounds for divorce specified in the said law is available equally to both husband and wife and that both adultery and cruelty are distinct grounds upon which each one of them may lead to a decree being granted. It therefore followed that if the petitioner had established cruelty as alleged in her petition and testimony in the court the marriage would be dissolved only on that ground.

Similarly in Julius Chama v. Specioza Rwalinda Mbabazi[21] Court was furnished with the current position on the law of divorce by learned counsel in as far as the requirement to prove the grounds for divorce is concerned. Counsel pointed out the land mark case of Uganda Association of Women Lawyers (FIDA) and 5 others v. AG – Constitutional Petition No. 2 of 2003 where the constitutional court nullified Sections 4(1), (2), 5, 22, 23, 24 and 26 of the Divorce Act Cap 249. B. Kainamura J. therefore held that the said provisions are of no legal consequence and are no longer valid. That this remains the position of the law since the legislature has not stepped in

[20] Divorce Cause No.4/2007 - Unreported
[21] Divorce Cause No. 25/2011 - Unreported

to ameliorate the situation. Han Herman Kock v. Victoria Kayecha, D.C. No. 6/2011 was followed. Also, following Gershom Masiko v. Florence Masiko,, Civil Appeal No. 8/2011 he observed that what the courts have done to bridge the gap is to look at the totality of the facts before them and determine whether the facts lead to the finding that the marriage has irretrievably broken down then divorce would be granted accordingly.

CHAPTER THREE

ANALYSIS AND FINDINGS

3.1 Introduction

The key objective of this study was to analyze the contents of the divorce laws and assess their continued relevance and applicability in Uganda today. This Chapter therefore analyzes the laws that provide for divorce in light of the 1995 Constitution; Case Law; and Reports of studies conducted in connection with the Marriage and Divorce laws in Uganda. Findings are duly discussed using the primary and secondary sources.

3.1.1 Existing State of Affairs

Divorce in Uganda is governed by two sets of laws. The written law, that is, the Divorce Act (Cap.249) applicable to marriages contracted under the Marriage Act 1904 (Cap.251) and the Marriage of Africans Act 1904 (Cap. 253), and the Marriage and Divorce of Mohammedans Act 1906 (Cap.252) applicable to Mohammedan marriages, the Hindu Marriages and Divorce Act, 1961 (Cap. 250) applicable to Hindus, on the one hand, and the customary law on the other hand. The scope of this study however does not include customary law.

3.2 An Overview of the Contents of the Divorce Laws

In this section a synopsis of the three Acts providing for divorce in Uganda is given.

3.2.1 The Divorce Act (Cap. 249)

The Divorce Act is limited to marriages where the petitioner is domiciled in Uganda at the time when the petition for divorce is presented. It also limits the making of a decree of nullity of

marriage unless the petitioner is domiciled in Uganda at the time when the petition is presented or the marriage itself was solemnized in Uganda **(Section 1(a) & (b))**

The jurisdiction of the courts to entertain divorce proceedings under this Act is in two parts. In the first place, where all parties to the proceedings for divorce are Africans or where the petition for damages is lodged claiming damages from any person on the grounds of that person having committed adultery with the wife of the petitioner, the case is heard by a subordinate court of the first class. In all the other cases, it is the High Court which hears and determines the issues. And the High Court in determining such issues exercises its powers in accordance also with the law applied in matrimonial proceedings in the High Court of Justice in England **(Section 3 (1) & (2))**

For **dissolution of marriage**, a husband would apply by way of petition to the court on the ground that since the solemnization of his marriage his wife has been guilty of adultery. But a wife can only succeed in obtaining a divorce if she is able to prove that since the marriage, her husband has changed his profession of Christianity to some other religion , and gone through a form of marriage with another woman, or any one of the following grounds, namely, that the husband has been guilty of incestuous adultery, or of bigamy with adultery or of marriage with another woman with adultery, or of rape, sodomy or bestiality, or of adultery coupled with desertion without reasonable excuse for two years or upwards. **(Section 4 (1) & (2)).**

A husband is required to make the alleged adulterer, a co-respondent to the petition unless the court excuses his so doing. The grounds on which the court will give such excuse are that the wife is leading the life of a prostitute and that he knows of no persons with whom the adultery has been committed, that he does not know the name of the supposed adulterer although he has done his best to discover it, or that the alleged adulterer is dead. **(Section 5)**

The scope of the enquiry by the court is very wide **(Section 6)**. The court has to satisfy itself so far as it reasonably can in relation to the facts alleged, whether or not the person presenting the petition has been in any manner accessory or connived at the going through of any form of marriage or of the adultery complained of or has condoned any such act. The court also considers any counter-charges made by the other party.

When the court is not satisfied that the ground on which the dissolution of the marriage in sought has been proved, it dismisses the petition for divorce. It also will dismiss a petition if it is not satisfied that the party seeking the divorce has been an accessory to or connived at any of the facts alleged for the dissolution of the marriage**. (Section 7).**

Where, however, the court is satisfied that the person seeking the divorce has proved his or her case, it pronounces a decree nisi for the dissolution of the marriage as provided in **Section 8**. A court would not normally pronounce the decree nisi if it finds that the person seeking the divorce has, during the marriage, been guilty of adultery or been guilty of unreasonable delay in presenting or prosecuting the petition for divorce, or of cruelty to the respondent , or having deserted or willfully separated himself or herself from the respondent before the adultery complained of, and without reasonable excuse, or of such willful neglect or of misconduct towards the other party who has conduced to the adultery complained of.

In considering whether adultery has been condoned, the courts consider whether cohabitation has been continued or subsequently resumed **(Section 9).**

Where the party who is sued for divorce 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 to the party

who is sued for divorce or on his or her application, the same relief to which he or she would have been entitled if a petition had been presented seeking such relief and the party whom is sued may give evidence of or relating to such adultery , cruelty or desertion. **(Section 10)**

Sections 11 – 13 provide for Nullity of marriage including the grounds for decree of nullity as well as children of annulled marriage.

Sections 14 – 19 provide for Judicial Separation and Protection Orders. Judicial separation may be awarded on the grounds of cruelty, adultery or desertion without reasonable excuse for two years or upwards, when the court is satisfied of the allegations made and there is no other legal ground that the separation should not be granted. In such cases, the wife continues to be considered as a person who is not married for the purposes of dealing with property or any description which she may have acquired or which may devolve upon her. She thus has the right to deal with any such property as she likes. She remains, however, in all other respects a wife. But if she cohabits again with her husband, then all property to which she may be entitled when the cohabitation takes place, continues be her property for her separate use unless for the purpose of judicial separation they make an agreement other-wise.

For the purposes of contracts generally also, a wife on judicial separation is considered as unmarried, and she will be liable for contracts she enters into and for any wrongs or injuries which she may cause to any other person. She will be sued and may sue as an unmarried woman and her husband will not be required by law to pay for such things. In circumstances where, under the decree, some payments have been ordered , and the husband has not made these payments, then all necessary articles which have been recently purchased by the wife for her maintenance would have to be paid for by the husband , for which purpose the husband could

be sued. Where husband and wife have a joint power, then during the separation, they can come together for the exercise of that power. A husband or wife may, at any time, after the decree of judicial separation, present a petition asking that the decree be reversed on the ground that it is obtained in his or her absence, and where desertion was the ground of such decree, that there was reasonable excuse for the desertion alleged. Where the court is satisfied, it will normally reverse the decree for judicial separation.

It is noteworthy that under the existing divorce law, that is, the Divorce Act, a wife is fairly well protected in her property rights. She can thus apply by petition to the court for an order to protect any property which she may have obtained or may obtain after the desertion where she has been deserted by her husband and there is some property belonging to the wife, in which property the husband has acquired an interest by virtue of the marriage. This protection would be granted as against the husband and his creditors and any person claiming under the husband. When the court is satisfied that the wife is maintaining herself, and that the desertion was without reasonable excuse, it will make this protection order **(Section 18).**

Such an order will normally set the time at which the desertion commenced and would, as regards all persons dealing with the wife in reliance there on, be conclusive as to such time. While such a protection order is in force, the wife is and is deemed to have been from the date of desertion in the like position in all respects with regard to property and contracts and suing or being sued as she would be if she had obtained a judicial separation. The husband, however, or any person claiming under him may apply to the court for the discharge or the variation of the order, and if the desertion has ceased or the court is satisfied that the order should be varied, it would do so. If, during the period that a protection order is in force, a husband or any creditor or person claiming under him, holds or wishes to hold any property of the wife, after notice of any

such order, the wife may, by action, recover such property and also a sum equal to double its value **(Section 18).**

The reversal, discharge or variation to a decree of judicial separation or of a protection order does not normally affect the 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 of reversal, or discharge or variation thereof. Whenever any person in reliance upon a protection order does any act to his detriment, he will be protected and indemnified if he suffers damage and as a result of such reliance **(Section 19).**

Section 20 provides for the Restitution of Conjugal Rights. The husband and wife have the right to seek the assistance of the court in order that either may be restored to the society of the other. This is what is normally referred to as restitution of conjugal rights. And when a court is satisfied that the allegations are true, and that there is no legal ground why the application should not be granted, it makes an order that the offending party should cease to withdraw from the society of the other.

Sections 21 – 42 constitute General provisions which inter alia provide for damages, costs against a co-respondent, alimony pendent lite, permanent alimony, and custody of children as well as procedural provisions in regard to divorce proceedings.

The divorce act therefore also gives a husband by way of petition a right to claim damages from any person on the ground of that person having committed adultery with his wife. A claim of this kind would normally be made either in the petition asking for the dissolution of the marriage, or for judicial separation, or on its own. The courts, in such cases have a mandatory duty to ascertain the amount of damages and to direct that the damages be levied under warrant on the

movable or immovable property of the persons against whom the order is made. The courts also have power to direct the manner in which damages ordered by them, in such circumstances, when recovered, should be paid or applied, including a power to direct that the whole or any part of the damages, when recovered, should be settled for the benefit of the children of the marriage, or as a provision of the maintenance of the wife. In cases where there is no property to be attached, the court has no power to send a person ordered to pay compensation and unable so to pay, to be imprisoned for a period not exceeding six months. When a person is so sent to prison, he is normally released when the amount in question is paid.

A co-respondent to a proceedings relating to the dissolution of marriage may also be ordered to pay the whole or any part of the cost of the proceedings, if adultery with the wife of the petitioner has been established against him. Clearly the court does not make such an order if at the time of the adultery, the correspondent had no reason to believe that the respondent was a married woman, and if the respondent was at the time of the adultery, leaving apart from her husband and leading the life of a woman of easy virtue.

Another power which the court has is to make an order, on the application of the wife, for the payment of alimony pending the determination of proceedings for the dissolution of marriage or for judicial separation. Such alimony normally when granted does not exceed one-fifth of the husbands' average net income calculated on the basis of the net income for the three years preceding the date on which the order is given. The payment of the alimony continues in case of a decree nisi or dissolution or nullity until the decree is made absolute. When a decree is made absolute or a decree of judicial separation is granted, the court has power to order the husband to secure to the wife a sum of money which, having regard to the circumstances, financial and other wise of the wife, the ability of the husband and the conduct of the parties, it thinks reasonable to

give. This alimony may be ordered to be paid in a lump sum or in yearly, monthly or weekly payments for any period not exceeding the life of the wife. The court also has power to order the payment of alimony to be made, either direct to the wife herself, or to a trustee on behalf of the wife, approved by the court, imposing such conditions as the court thinks fit.

This is, perhaps, a form of discrimination against men since payment of alimony, as the law stands, is only on the favor of the wife.

When an order for alimony has been made, and the husband is unable to make further payments, and the court is satisfied of his inability to pay, the order is modified or suspended in whole or in parts, and can be re-imposed in whole or in part.

On the pronouncement of the decree of dissolution of marriage or of judicial separation by reason of adultery of the wife, and in cases where the wife in entitled to any property, the court normally orders the whole or any part of the wife's property to be settled for the benefit of the husband or of the children of the marriage, or both. This is where the scale is tilted a bit in favor of men, and balances, as it were, the discrimination referred to with regard to payment of alimony discussed above.

When a decree absolute or of dissolution or nullity of marriage has been made, the court has power to enquire into the existence of settlements made before or after the marriage, and could 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 the wife, or of the children if any, or of both children and parents as the court deems fit, but normally orders are not made for the benefit of parents at the expense of the children. The court also has power to appoint trustees to whom money under a settlement should be paid, and for the preparation of the necessary instrument, having also power

to order the parties to execute such instruments. The court further has powers to do all other acts as it deems necessary so that directions given by it are carried into effect.

The custody of children is a very important matter which looms large in divorce proceedings, and the court has power at any stage of the proceedings for dissolution of marriage or for nullity of marriage, or for judicial separation, after the declaration of a decree absolute, to make such order as it thinks fit with respect to the custody, maintenance and education of children who are under twenty-one years of age, of the marriage or of placing them under the protection of the court.

The divorce act provides for other matters, including the power to sit *in camera* to hear divorce proceedings.

A decree nisi for the dissolution or nullity of marriage is not made absolute until after the expiration of six months from the date of the decree nisi or such long period as prescribed by High Court. This means, therefore, that on succeeding on a divorce petition, the petitioner has six months within which he is considered under the law to be married. This provision is not made to sport with the feelings of the parties concerned, but it serves this useful purpose that during the period, any person could show a reason why the decree nisi should not be made absolute by reason of the same having been obtained by collusion, or by reason of certain facts material to the issue which were not put before the court during the proceedings. When the court is satisfied on such grounds, the court has power to reverse the decree nisi, or require further enquiry or otherwise deal with the issue as the justice of the case may demand. It is only when a petitioner fails to satisfy the court within a reasonable time as described that a decree absolute is granted and the marriage for all purposes comes to an end.

Kalema's Report[22], when commenting on the divorce act, inter alia noted that the Act takes into account the frailties of human nature, and the unreasonable attitude which people sometimes take when they seek to end their marriage. That it, therefore, provides that when the time limit of 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 is declared to be dissolved or annulled, husband and wife can lawfully come together again and to marry again as if the previous marriage had been dissolved by death.

3.2.2 The Marriage and Divorce of Mohammedans Act (Cap.252)

Divorce under the Marriage and Divorce of Mohammedans Act is required to be given according to the rites and observances of the Mohammedan religion, customary and usual among the tribe or sect in which the divorce takes place. The Minister has the power to appoint a registrar of divorce to whom an application for the registration of a divorce may be made by the man who effected the divorce or by the parties to the divorce jointly.

This Act distinguishes between two kinds of divorce, namely, the one unnamed in the Act and effected by the man but not being Khula **[Section 5 (b) (i)];** and the kind known as Khula, by the parties to the divorce jointly **[Section 5 (b) (ii)]**. Again, as in respect of the registration of a marriage, the registrar has power to make enquiries to satisfy himself that the divorce has been effected by or between the parties, the identity of the parties and any person appearing before him in respect of the divorce, and when he is satisfied, he makes an entry in the appropriate register acknowledging the divorce. Again, three copies of the entries in the registrar are delivered to the parties.

[22] Report of the Commission on Marriage, Divorce and the status of Women 1965 para 137 p. 28

As with marriage, the registrar can refuse to register the divorce and record his reasons for the refusal in the register of divorces. An appeal lies from such refusal to the registrar of marriages of the district in which the registration of the divorce was refused or to the Registrar-General of marriages, whose decision on such refusal is final.

The case of Sumaya Nabawanuka v. Med Makumbi[23] emphasizes that divorce for Muslims is strictly handled by Cap. 252 (supra). In the said case the preliminary objection that the petition was res-judicata since the matter before Court had been finally determined by the Sharia Court of the Muslim Supreme Council was duly upheld. Arguments to the contrary notwithstanding it was pointed out that that the Sharia Courts do exist and are indeed envisaged under the Marriage and Divorce of Mohammedans Act. That, it is not in dispute that the said Act is on our statute books. Section 2 thereof provides: " 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 and sect in which the marriage or divorce takes place shall be valid and registered as provided under the Act."

Therefore B. Kainamura J. consequently held that the Sharia Courts of the Muslim Supreme Council are operating within the law and are competent courts to handle divorce cases and grant relief. That in his view the matter was heard and determined by a competent Court and an attempt to resurrect that matter in this Court would surely run foul of Section 7 of the Civil Procedure Act.

[23] Divorce Cause No. 39/2011 – unreported.

Sharia law permits dissolution of marriage where the marriage has irretrievably broken down. However, it is the method of effecting such dissolution which is discriminatory as it is the unilateral right of the man. Thus a Muslim man may at his will and without the intervening of the courts divorce his wife by simply pronouncing the word *talaq* three times. This has led to several arbitrary divorces among the Muslim community as it permits men to discard their wives at will without giving the corresponding right to divorce their husbands. A Muslim woman can only be granted a divorce from her husband when the latter is in agreement, i.e., through mutual consent.

These double standards sanctioned by the legal regime, perpetuates the inferior status of women.

Divorce based on fault concepts should be abolished and the more realistic ground of "irretrievable breakdown" adopted. This will remove the higher standards of conduct required of wives compared to those required of husbands in a marriage relationship.

3.2.3 The Hindu Marriage and Divorce Act (Cap. 250)

The Hindu Marriage and Divorce Act, applies the provisions of the Divorce Act to marriages solemnized under that Act, and to matrimonial causes relating to such marriages **[Section 8 (1)].** The additional matters refer to additional grounds for the granting of divorce **[Section 8 (2)].** These are that a husband or wife may petition for divorce on the ground that the respondent has ceased to be a Hindu by reason of his conversion to another religion or the respondent has renounced the world by entering a religious order, and has remained in such order apart from the world for a period of at least three years immediately preceding the presentation of the petition. A wife may only petition for divorce on the ground that the husband at the time of marriage to him was married already, or that the husband had married before the commencement of the Act and the other wife was alive at the time of the presentation of the petition.

In **Section 8 (3)** a decree of nullity of marriage will not be granted under this Act on the ground only that the parties are within the prohibited degrees of consanguinity if the custom governing each party permits a marriage between them, and in the case of marriages celebrated before the commencement of the former Act, a decree of nullity will be granted on the ground only that the former husband or wife of either party was living at the time of the marriage and the marriage with such previous husband or wife was then in force. And finally, a decree of nullity will be granted on the ground that consent of a guardian was obtained by force or fraud.

3.3 Analysis and Findings Regarding the Divorce Act

Allot (supra), while analyzing developments in legal systems of formerly colonised countries like Uganda, noted that there has been an outpouring of important judicial decisions on every aspect of the law…which has led to a re-appraisal of many vital features of the existing statutory laws. Indeed this observation is well illustrated in Uganda where the applicability of some sections of the Divorce Act have been analysed by the courts in light of recent Constitution developments.

The Table below shows the particular sections which the courts and legal fraternity have found inconsistent with recent constitutional developments.

Impugned Section	Remark	Article Contravened & Inconsistent with	Judicial Decision
3(3)	Exercise of Jurisdiction in accordance to the High Court of Justice in England.	126(1)[24]	
4 (1)	Grounds for Divorce – provides for one ground for the husband; Husband with more or other grounds not catered for	Articles 21(1)[25] & (2)[26]; 32(1)[27]; 33(1)[28] (4) & (5)[29]	Uganda Association of Women Lawyers (supra)
4 (2)	Compared to men several grounds are required for the wife when petitioning for dissolution of marriage which is discriminatory	Articles 21(1) & (2); 31(1)[30]; 33(1)	
5	**Co-respondent** – provision found discriminatory against women	Articles 21(1) & (2); 31(1) & (6)	
21	**Damages for Adultery** – to the extent that a wife is not permitted to claim compensation from the woman who may have committed adultery with her husband, the law is discriminatory & contravenes the equality	Articles 21(1) & (2); 31(1) & (6)	

[24] Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people. Uganda 1995 Constitution (rev. 2005)

[25] All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law.

[26] Without prejudice to clause (1) of this article, 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 standing, political opinion or disability.

[27] Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them

[28] Women shall be accorded full and equal dignity of the person with men.

[29] Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.
Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.

[30] A man and a woman are entitled to marry only if they are each of the age of eighteen years and above and are entitled at that age- a. to found a family; and b. to equal rights at and in marriage, during marriage, and at its dissolution.

	provisions of the Constitution.		
22	**Costs Against a Co-Respondent:** the Section permits the court to order a co-respondent to pay costs of proceedings if adultery with the wife of the petitioner has been established against him. This provision only applies to the husband not the wife.	Articles 21(1) & (2); 31 (1); 33(1) & (6)	
23	**Alimony Pendente lite:** provides for payment of alimony to wife but there is no similar provision for the wife	Article 21(1); 31(1)	
26	**Settlement of the Wife's Property:** the Act does not contain a similar provision in favour of a wife where divorce or judicial separation is a result of a man's adultery. This is discriminatory and contravenes the constitution.	Article 21(1); 31(1)	

Table 1: Impugned Sections in the Divorce Act

Section 3 (3) of the Divorce Act provides that "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"

The Divorce Act requires that the courts of this country exercise their jurisdiction under the Act in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England. However, this provision contravenes the Constitution of Uganda which enjoins the courts to exercise judicial power in the name of the people and in conformity with the law and with the values, norms and aspirations of the people of Uganda.

The provisions of the Divorce Act indicated in the Table above, i.e., Sections 3(3), 4(1) & (2), 5, 21, 22, 23 & 26 were brought to the attention of the court in the land mark case of Uganda

Association of Women Lawyers & Others v. The AG[31]. The said case which has become an authority in several other decisions constituted a petition challenging those provisions as being inconsistent and in contravention of Article 21(1) & (2), 31(1) and 33(1) & (6) of the 1995 Constitution.

The gist of the evidence contained in the affidavits sworn by the six petitioners – most of whom lawyers – furnishes light about the aforementioned sections of the Act which include:

(a) That the Divorce Act discriminated against women in violation of express provisions of the Constitution;

(b) That the Act perpetuates inequality between sexes;

(c) That the Act is against the dignity, welfare and interest of women and undermines their status;

(d) In the said case it is reported that one male deponent whose marriage broke down in 1996 testified that he had to live in misery because he could not divorce his wife due to his inability to prove adultery against her and to name a co-respondent as required by the Act;

(e) Another male deponent also testified that his marriage broke down shortly after the wedding with his wife due to irreconcilable differences. He is unable to divorce and feels discriminated against in as far as the Act does impose on him different grounds of divorce from those required by his wife. He also finds it cruel, inhuman and degrading to be required to prove adultery of his wife because he is subjected to torture in the process of trying to obtain the necessary evidence.

[31] Constitutional Petition No. 2 of 2003

The Court considered inter alia whether the impugned (challenged) sections of the Divorce Act are in contravention of the Constitution as alleged. And identified 3 Sub-issues in this issue to come to a resolution:

(a) Does the impugned provisions of the Divorce Act derogate (inconsistent/contravenes) the Articles of the Constitution cited above?

(b) Is the derogation (if any) in public interest and therefore justified within the meaning of Article 43[32]

(c) Does the application of Article 273[33] of the Constitution preclude this court from nullification of an Act which was in existence when the Constitution came into force?

(a) Derogation

Under this sub-issue the Judge reminded court of the history of the divorce act, especially, the English concepts of Marriage and Divorce before and after the enactment of the Matrimonial Causes Act of 1857. That he had no doubt in his mind that the impugned provisions of our Divorce Act are a result of the English man's pre-20th Century perceptions that a man was a superior being to a woman and they could not be treated as equals in marriage. That it was

[32] 1.In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest.
2.Public interest under this article shall not permit- a.political persecution; b.detention without trial;
c. any limitation of the enjoyment of the rights and freedoms prescribed by this Chapter beyond what is acceptable and demonstrably justifiable in a free and democratic society, or what is provided in this Constitution.

[33] 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.

therefore glaringly impossible to reconcile the impugned provisions of the Divorce Act with our modern concepts of equality and non-discrimination between the sexes enshrined in the 1995 Constitution. That therefore he had no doubt in his mind that the impugned sections are a derogation to article 21, 31 and 33 of the Constitution.

It was therefore held that all grounds of divorce mentioned in Section 4(1) and (2) are available to both parties to the marriage relating to naming of the co-respondent, compensation, damages and alimony apply to both women and men who are parties to the marriage.

Uganda Association of Women Lawyers (supra) was followed in Jacqueline Uwera v. Venesta Bizimungu where Remmy K. Kasule Ag.J[34] pointed out that for either party to succeed they can rely upon and prove a single ground in a divorce petition.

In Annettee Nakalema Kironde v. Apollo Kaddu Mukasa Kironde & Moses Zizinga[35] V.A. Rwamisazi-Kagaba J pointed out that section 5(2) of the Divorce Act under which the petition was brought conflicted with the provisions of the 1995 Constitution, i.e., Articles 33(1); 33(6); 34(4) as well as Article 273(1) & (2); Article 2(1)[36] & (2). And that therefore this petition would have been incompetent for disclosing no grounds for dissolution of marriage. In other words it would be plaint/petitioner that discloses no cause of action against the respondent.

The effect of all these constitutional provisions is to show that sections 5 and 6 of the Divorce Act are inconsistent with the Constitution in that they create different sets of rights, opportunities and treatment for men and women to the same institution of marriage.

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[34] Divorce Cause No. 3 of 2006 - Unreported

[35] Civil Divorce Cause No. 006/2001 - Unreported

[36] 1.This Constitution is the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda.
2.If any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.

If Sections 5 and 6 of the Divorce Act are to be given effect, their aspects which infringe the above quoted provisions of the constitution cannot be enforced or relied upon as good law.

The principle of equal rights and opportunities before the law, therefore, requires that the wife may sue for divorce of her marriage on the ground of adultery alone, in the same way as the husband is entitled to do under that section.

In the result, therefore, the judge held that the petitioner's petition as well as the respondent's cross-petition are both competent and validly before the court.

Similarly in Julius Chama v. Specioza Rwalinda Mbabazi[37] Court was furnished with the current position on the law of divorce by learned counsel in as far as the requirement to prove the grounds for divorce is concerned. Counsel pointed out the land mark case of Uganda Association of Women Lawyers and 5 Others v. AG – Constitutional Petition No. 2 of 2003 where the constitutional court nullified Sections 4(1), (2), 5, 22, 23, 24 and 26 of the Divorce Act Cap 249. B. Kainamura J. therefore said that the said provisions are of no legal consequence and are no longer valid. That this remains the position of the law since the legislature has not stepped in to ameliorate the situation. Han Herman Kock v. Victoria Kayecha[38] was followed. And also following Gershom Masiko v. Florence Masiko[39] he observed that what the courts have done to bridge the gap is to look at the totality of the facts before them and determine whether the facts lead to the finding that the marriage has irretrievably broken down then divorce would be granted accordingly.

3.4 Findings Regarding Objective 3

[37] Divorce Cause No. 25/2011 - Unreported
[38] Divorce Cause No. 6/2011 - Unreported
[39] Civil Appeal No. 8/2011 - unreported

Objective 3 of this research poses an important question as to why the legislature has taken very long to effect changes or all together overhaul the divorce laws of Uganda. Documentary as well as case reviews have shown that there are many gaps that require attention. Of recent even a Bill[40] was tabled to capture all the recent developments pertaining to marriage and divorce in Uganda but still the legislature has remained reluctant if not indifferent to enact the said law.

When the Marriage and Divorce Bill first came up it was reported in the media[41] that Parliament spent two weeks haggling over the said Bill which seeks to reform and consolidate all the laws relating to marriage and divorce in Uganda. That the proposed law has been on the agenda for the last 47 years!? However, the new proposals in the Bill that seek to legalise cohabitation and sharing of property, provide for recognised types of marriages, marital rights and duties, and divorce are among the issues that have stalled the Bill.

In an interview with the then Chairperson of the Uganda Women Parliamentary Association (UWOPA) Ms Betty Amongi the following information was obtained when asked the following questions:

1. For the last two weeks there has been a lot of quibbling about the Marriage and Divorce Bill. What is this Bill all about?

It is a proposed law meant to reform and consolidate all the laws relating to marriage, separation and divorce. It provides for recognised types of marriages in Uganda, marital rights, marital duties, grounds for breakdown of marriage and rights of parties on the dissolution of marriages. The Bill is a product of a comprehensive study carried out by the Uganda Law Reform Commission, including other studies like the report and commission of inquiry into the marriage,

[40] Marriage and Divorce Bill 19/2009
[41] Sunday Monitor 17/3/2013

divorce and status of women (The Kalema Report of 1965). It also considered reports from the ministry of women in development, culture and youth of 1980 and 1993 respectively.

The Bill is reforming the current existing laws on marriage and divorce enacted as far back as 1904 and some of the provisions in the current Divorce Act and the Marriage Act which were nullified by the Constitutional Court ruling in petition number 2 of 2003 in which all the constitutional court judges unanimously agreed and ordered a declaration that inter alia Section 4(1) of the current Divorce Act (Cap 249) contravenes and is inconsistent with articles 21(1) and 2 and 31(1) and (6) of the 1995 Constitution and therefore there is need for reforms in the current law.

2. What has prompted the law and why now?

The Constitutional Court ruled that the provisions are inconsistent with the current law. It is only justifiable that we reform and make a law that is consistent with the 1995 Constitution. Also currently there are other constitutional provisions in relation to the principle of consent to marriage which is by two parties. The law we are operating under was passed in 1904.The Constitution talks about laws and cultures which undermine the status of women. When you look at the current ruling, judges were very clear on the issue of divorce - that the laws were made by the Europeans.

The laws re-enforce superiority of men and inequality which contravene the Constitution. The Bill is in line with the emerging challenges in the country. People think it's a new law but we are just reforming it. The current law is incorporating the Ugandan aspect and colonialism. We have moved out of colonial tendencies, hence we need laws made for Ugandans. The law will help us move the society forward.

3. There are a number of controversial clauses that have been cited in the Bill, for example the clause on cohabitation, sharing of property, denial of conjugal rights and the grounds for divorce. What are you doing to address them?

In this context we have agreed that the issue of cohabitation be dropped. We have now began on the research for a common law on when cohabitation can be legalised. In Zambia, their law gives conditions under which cohabiters are presumed married, for example when one shows intent to marry and cannot afford, they are recognised by the law.

Also those who have lived together for five years are presumed to be married. We are considering laws from the US, UK and South Africa so that we come up with a comprehensive law on cohabitation since majority Ugandans are cohabiting. On property sharing, most Ugandans are not aware of what is pertaining in respect to property sharing. The question of how property will be shared will be determined by the judges based on one's contribution. The Bill recognises separate property which is not subjected to division which include property acquired before marriage. Ancestral property and family land cannot be shared.

Matrimonial property includes matrimonial home, household property and any other property acquired jointly or where a spouse has made a contribution and it's shared according to evidence presented. Clause 117 and 118 talks about property agreement regarding property sharing although some men and church are opposed to this, saying it's not tenable to subject marriage to be founded on suspicion but we shall look at it.

The clause on the breakdown of marriage: in the old law the grounds were flimsy and would make it easier to divorce but in the new Bill you must prove why you want to walk away. We are also introducing grounds for divorce, which include homosexuality, incest, bestiality and sodomy. We are trying to reinforce the moral preaching of the church.

4. Church says it was never consulted. How can you deliberate on a Bill without engaging key stakeholders?

The Parliamentary committee on Legal and Parliamentary Affairs, during public hearing consulted Uganda Joint Christian Council (UJCC) .UWOPA, during their workshops, consulted UJCC and Uganda Women's Network. We have had several consultations with the church. We dropped the clause on cohabitation due to the compromise we had with the religious leaders. We cannot be held accountable to their internal mechanism. The church is vehemently opposed to the clause that legislates for divorce but as Parliament we do not make laws based on one side of society. We have identified divorce exists and we recognise that very many church leaders have divorced using the old Act.

They have been party to the wedding couples who are re-marrying. This is reality. I once perused divorce files at the High Court and of the 30 files that I saw, 25 were for married couples. I want church to recognise that much as they argue to the contrary, their believers are undergoing divorce. We want to accommodate the interests of church believers. They should do more of moral preaching and strengthen reconciliation.

5. The male MPs are not comfortable with the Bill and think women are plotting to steal their property. They also say women want to misuse the law to deny them conjugal rights. Have you brought your male colleagues on board?

We have agreed to have more dialogue to appreciate the Bill. The law protects separate property and allows spouses to enter into a contract of how sharing of property will be done. We want to narrow down issues they want. We shall be accommodative on issues of conjugal rights.

6. Ugandans are concerned that the entire Marriage and Divorce Bill legislates for women and men and completely leaves out children. What is their fate in all this?

Children are not featuring anywhere because currently we have a comprehensive law called the Children's Act. Any judge will use the Children's Act to address the interests of children in respect to their property. The rights of children take priority and we are bringing an amendment to indicate that priority shall be given as per the Children's Act.

7. It is believed that women MPs and civil society who are pushing for the Marriage and Divorce Bill have failed in their marriages and want to create disharmony in society or even grab men's property. Is that so?

This is not true because it is a government Bill brought out of the concern that real challenges exist. Those who divorce who are not MPs are many. Divorce is not only in Uganda but everywhere. Uganda Law Reform Commission also indicated to us that 67 percent of women are cohabiting and we should address this reality.

The Highlights of bill with regard to Divorce include the following sections:

Section 140: A spouse shall not petition for divorce before the expiry of two years from the date of marriage and a spouse must prove that he or she is suffering exceptional hardship in marriage.

Clause 147: Empowers courts of law to decide whether or not a marriage has irretrievably broken down. Such grounds are adultery, sexual perversion on the part of the respondent, cruelty whether mental or physical, desertion of the petitioner for a continuous period of at least two years, incest, change of religion, among others.

Clause 115 and 116: The property acquired before marriage is not shared upon dissolution of marriage unless it becomes matrimonial property.

In conclusion, since the promulgation of the 1995 Constitution with the Bill of Rights the courts have consistently declared 8 sections of the Divorce Act as discussed above as contravening and inconsistent with the provisions of the said Constitution. According to Article 274 (1) the Constitution provides that "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." This is what the courts have done with the impugned sections of the divorce law having found that they are inconsistent and contravene some constitutional provisions. It remains for the legislature to enact a divorce law that is in tandem with current constitutional and social developments.

CHAPTER FOUR

RECOMMENDATIONS AND CONCLUSION

4.1 Introduction

In light of the findings as par the objectives of this study this Chapter gives recommendation and conclusions accordingly. The objectives of the study included examining the contents of Uganda's divorce laws enacted during the colonial period; assessment of their continued applicability and relevance in present day Uganda; and identification of reasons why the current legal regime on divorce has taken long to be reformed.

4.2 Contents of the Uganda Divorce Laws – Findings & Recommendations

Using various studies as well as reports; the 1995 Constitution and court judgments/rulings the contents of the Divorce laws were analyzed and gaps were found especially in connection with inconsistencies and contravention of the equality and discrimination provisions of the bill of rights in the Constitution.

The research also reveals that there is a Bill on Marriage and Divorce[42] which deals with all these gaps found in the current legal regime in the divorce laws. This Bill is briefly discussed below.

It is the recommendation of this study, therefore, that this Bill be enacted as a matter of urgency. Beside the laws on Divorce in Uganda should not only measure up to recent international and national legal developments they should be codified and consolidated into one law on divorce.

[42] Bill No. 19 of 2009

4.2.1 The Marriage and Divorce Bill

It is noteworthy that this Bill was tabled over 9 years ago. In an interview[43] regarding the same as to its purpose and why it was drafted the following inter alia were highlighted:

- It is a proposed law meant to consolidate all the laws relating to marriage, separation and divorce.
- It provides for recognised types of marriages in Uganda, marital rights, marital duties, grounds for breakdown of marriage and rights of parties on the dissolution of marriages.
- The Bill is reforming the current existing laws on marriage and divorce enacted as far back as 1904 and some of the provisions in the current Divorce Act and the Marriage Act which were nullified by the Constitutional Court ruling in petition number 2 of 2003 in which all the constitutional court judges unanimously agreed and ordered a declaration that inter alia Section 4(1) of the current Divorce Act (Cap 249) contravenes and is inconsistent with articles 21(1) and 2 and 31(1) and (6) of the 1995 Constitution and therefore there is need for reforms in the current law.
- That the current laws re-enforce superiority of men and inequality which contravene the Constitution. That therefore the Bill is in line with the emerging challenges in the country.

The Memorandum to the Marriage and Divorce Bill[44] is actually very indicative of the fact that reform in the marriage and divorce laws is overdue. It states inter alia that:

1. The object of this Bill is to reform and consolidate the law relating to marriage, separation and divorce; to provide for the types of recognized marriages in Uganda, marital rights and duties,

[43] Sunday Monitor 17/3/2013
[44] Bill No.19 of 2009

recognition of cohabitation in relation to property rights, grounds for breakdown of marriage, rights of parties on dissolution of marriages and for other connected purposes.

2. The Bill is the product of a comprehensive study by the Uganda Law Reform Commission[45] in which all relevant stakeholders were consulted and several seminars and workshops held, and which takes full account of previous similar studies carried out in Uganda including-

   (a) The Report on the Commission of Inquiry into the Marriage, Divorce and Status of Women[46];

   (b) The Study by FIDA[47]; and

   (c) The Ministry of Women in Development, Culture and Youth Report.[48]

In the report of the study from which the Bill emanated, the Commission made several recommendations which will result in a law that is fair and achieve social justice, addresses the issues of poverty; protects the human rights of all members of the family; is enforceable and accessible to the Ugandan population and is in line with the Constitution and international legal obligations of Uganda.

This study does not intend to reinvent the wheel and therefore adopts the said recommendations accordingly as indicated below:

(a) Current Legal Regime should be consolidated

Indeed the Bill seeks to provide for the several types of marriages obtaining in Uganda and seeks to consolidate and replace all the following family laws-

- The Customary Marriage (Registration) Act (Cap 248);
- The Divorce Act (Cap 249);
- The Hindu Marriage and Divorce Act (Cap 250);
- The Marriage Act (Cap 251); and

[45] Study report on marriage and divorce in Uganda Kampala, Uganda : Uganda Law Reform Commission, 2010.
[46] Kalema Report 1965
[47] U Report on the draft Domestic Relations Bill, 1980
[48] On the draft 1980 Domestic Relations Bill, 1980 (W.I.D. Working paper and Tororo Report) 1993.

- The Marriage of Africans Act (Cap 253).

(b) One Law to deal with all marriages

In Kalema's Report[49] -21 "One major criticism leveled at the existing state of affairs in respect of marriages regulated by legislation is that they are so many of them. There was complete unanimity amongst all who appeared before us or sent memoranda, that there ought to be one legislation governing all marriages, be they Christian marriages, Mohammedan marriages or marriages of customary law. There was also the charge of discrimination, even in legislation on this matter…

Such a small country as Uganda, one of whose preoccupations at the moment is the channeling of much energy towards the attainment of unity, should not lend itself to such divisions based upon religion, etc. Whatever may be ones views, whether marriage is a mere social contract of a mystical union, all are agreed that one legislation in Uganda to govern marriage is needed. We are happy to report that all sections of the community are agreed on this.

The Bill therefore deals with civil marriages, Christian marriages, customary marriages, Hindu marriages and Bahai marriages.

(c) The Law should reflect recent constitutional developments

Indeed the Bill in particular seeks to conform with the Constitution and specifically deals with the age of marriage, consent to marriage as required by Article 31(3) of the Constitution, forms of marriage, solemnization of marriage, prohibited degrees of relationship for marriage, conditions for polygamy, cohabitation and its legal effect, marriage gifts, responsibility for maintenance, sexual rights, the offences of adultery and demanding the return of bride price and dowry;

[49] Report of the Commission on Marriage, Divorce and the Status of Women 1965; Under the Chairmanship of The Hon. W.W. Kalema, M.P. para 99 – 102; p. 20 - 21

property rights and divorce; prescribing no fault divorce, otherwise known as irretrievable break down of marriage to apply to all forms of marriage to which the Bill relates.

The Bill is sum gives effect to the principle in Article 31(1) of the Constitution that men and women are entitled to equal rights in marriage, during marriage and at its dissolution.

(d) The Bill introduces "irretrievable breakdown" as a more realistic ground for divorce to replace divorce based on fault concepts. This will remove the higher standards of conduct required of wives compared to those required of husbands in a marriage relationship.

4.3 Delay in enacting the law

The study reveals that it has taken 47 years (since Kalema's Report refered to above) for the legislature to enact a new law on marriage and divorce. As if that is not enough even after tabling the Bill nine years down the road the new Act is yet to come to our statute books. Whereas the judicially has made up its mind about the old law the executive and legislative arm of government are yet to come to terms with this new law regulating marriage and divorce. The study thinks that there are still so many interests – political and socio-cultural – threatened by the new law. Until political factors are dealt with law reform will take long to be realized!

The interview sited above revealed among other things that

The male MPs are not comfortable with the Bill and think women are plotting to steal their property. They also say women want to misuse the law to deny them conjugal rights. The Church with its conservative views about marriage also claimed that it was never consulted.

And it is also believed that women MPs and civil society who are pushing for the Marriage and Divorce Bill have failed in their marriages and want to create disharmony in society or even grab men' property.

4.4 Conclusion

In conclusion there is no doubt that the current divorce legal regime is overdue for change. And this is basically because the political, socio-cultural and legal circumstances typical of the colonial era in which most of these legislations were enacted have long since changed. International developments as well as the current Constitution of Uganda especially in the area of the Bill of Rights cannot permit continued reliance on most parts of these archaic laws.

As advocated in various Reports of studies on Marriage and Divorce as well as Judicial decisions, reform is not only necessary but it is overdue. And a Bill has been enacted to this effect. There is therefore need for political will on part of the Legislature and Executive to enact it into law as a matter of urgency. And to ensure that law reform continues to take place in a dynamic society.

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