COHABITATION AND INSTATE SUCCESSION:

A HUMAN RIGHT PERSPECTIVE.

BY

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A RESEARCH DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF BACHELORS DEGREE

IN LAW AT KAMPALA INTERNATIONAL UNIVERSITY

JUNE 2016

DECLARATION

I, **PILOYA DORAH LILLIAN** declare that this projectis my orignal work and has never been prsented to any other university for award of any academic certificate or anything similar to such. i solemnly bear and stand to correct any inconsistence.

Signature: .....

PILOYA DORAH LILLIAN

DATE: 07/06/2016.

APPROVAL

This is to acknowledge that this research report has been under my supervision as a university supervisor and is now ready for submission.

Signature .....

Date 7th June 2016

WANDERA ISMAIL

DECIDATION

This work is affectionately decidated to my brother for his support, patience and understanding during this period of my study and not forgetting all those who constantly wished me success.

ACKNOLEDGEMENTS

My gratitude first goes to God who has given me the strength and courage to undertake this research.

i also owe a lot of appreciation to my brother Mr NYEKO WILLY BRAND for his financial support throughout my education and to my friends like Musasizi Denis who assisted me in carrying out my research. i am also grateful to my superivsor who tirelessly went through my work and inspired me to dig deeper into my research, his ind criticism, patience and understanding assisted me to finish my work.

special appreciation goes to Mr. Nyeko Willy Brand for the financial support and encoragement towads the course.

i am indebted to friends like musasizi denis, clement who gave me encoragement in time of difficulties. Thanks goes to all the lectures who impacted professinalism into my work.

I wish to thank my family for their love, support and inspiration during my stay in kampala international university.

Finally, i would like to thank all my respondents who within short notice answered the questioned i posed to them without any delay without which my work would not have been possible.

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LIST OF ACRONYMS

CEDAW	Convention for the Elimination of all forms of Discrimination against Women
DECD	Deceased
ECHR	European convention for the protection of human rights and fundamental freedoms
ECtHR	European court of human rights
GC	General Comment
ULR	Uganda law report
GR	General Recommendation
HRC	Human rights committee
ICCPR	International covenant on civil and political rights
ICESCR	International covenant on economic, social, and cultural
PNDC	Provisional national defence council
UDR	Universal declaration of human rights

ABSTRACT

General comment 19 of the international covenant on civil and political rights asks states to recognise and protect all families but leaves how to do this to state discretion. It is silent on whether all families must be protected equally in all circumstances. Often, states make normative distinction between the unmarried cohabitants and married spouses such that cohabitants are normally not given the quality of rights and protections guaranteed to married spouses. Whereas some researchers found that this situation creates disadvantages for cohabitants and argue for equal treatment of cohabitants and married spouses in all matters of concern to the family, others would like to preserve the usual strict distinctions between them. The thesis uses Uganda's intestate succession law as primary data to take a mid way position in this research. It proposes a contextual specific approach to assessing issues of interest to the family taking into consideration the human rights implications so as to determine how appropriate it is to distinguish between cohabitants and married spouses. This suggests that human rights concern should normally determine the essence of differential treatment to avoid discrimination against cohabitants.

CHAPTER ONE

GENERAL INTRODUCTION.

1.1 Introduction

Cohabitation, sometimes called consensual union or de facto marriage, refers to unmarried heterosexual couples living together in an intimate relationship. Cohabitation as such is not a new phenomenon. It has, however, developed into a novel family form in contrast with conventional marriage. Part of this change is associated with the absolute rise in cohabitational relationships. Since the 1970's, many countries, particularly those in North America and Europe, have experienced rapid growth in their cohabitation rates. Although these numbers generally remain small relative to families composed of married couples, the absolute numbers of cohabiting couples have increased dramatically. Cohabitation was obscure and even taboo throughout the nineteenth century and until the 1970's. Non marital unions have become common because the meaning of the family has been altered by individualistic social values that have progressively matured since the late 1940's. As post war trends illustrate, marriage is no longer the sanctified, permanent institution it once was. The proliferation of divorce, remarriage, stepfamilies, and single parenthood has transformed the institution of the family. With these structural changes, attitudes towards non marital unions have become increasingly permissive.

Because cohabitation involves a shared household between intimate partners, it has characteristics in common with marriage .similarities include pooled economic resources, a gender division of labour in the household and sexual exclusivity. However, even though the day-to-day interaction between cohabiting couples parallels that of married couples in several ways, important distinctions remain. While some argue that cohabitation has become a variant of marriage, the available evidence does not support this position. Kingsley Davis (1985) points out that if cohabitation were simply a variant of marriage then its increased prevalence Vis-a Vis marriage would lack significance. Sociologists treat cohabitation as a distinct occurrence not just because it has displaced marriage, but also because it represents a structural change in family relationships.

It has long been observed that most individuals cohabit in life styles differing from marriages only in that they have not made the legal commitments required for either a ceremonial or common law marriages. Some scholars argued that partners in cohabiting relationships should consider the ramifications of cohabitation prior to or early in the development of their relationship in order to avoid devastating legal complications such as may happen when it comes to deciding whether the surviving cohabitant has the right to a share in the properties of the deceased cohabitant. This has been a matter of intense debate within the Scottish Law Commission. The UK Law Commission also began working assiduously on the matter and issued its consultative paper in 2006 recommending the creation of limited legal rights for cohabiting couples. This study seeks to identify the value that shall be added to this ongoing debate about cohabitation and intestate succession as it shall be discussed in a human rights perspective.

Intestate succession.

According to the Uganda law reform, Intestate estate is defined in the Succession Act 1964 as being so much of the deceased's estate as is not disposed by testamentary disposition. Testamentary disposition has a wide meaning and includes any deed taking effect on the deceased's death which disposes any part of the estate or under which a succession thereto arises. Wills are the most common form of testamentary disposition, but other deeds have testamentary effect including destinations in titles to property, marriage contracts and nominations. The housing and furniture and plenishings prior rights are due out of the intestate estate; the cash sum prior right is due out of the intestate estate left after the previous two prior rights; legal rights are due out of the net moveable intestate estate remaining after all the prior rights; and the rules relating to the free estate apply to the net intestate estate left after "inheritance tax and other liabilities of the estate having priority over legal rights, the prior rights of the surviving spouse or civil partner and rights of succession.

Succession Act, Cap 162 The current Succession Act attempted to bring on board the aspirati ons of the people of Uganda over time. The current Succession Act is largely a replica of the p rovisions of the Succession Amendment Decree with its gaps and anomalies as highlighte

d above. As a result, the current succession Act necessitated a review to address the gaps a nd anomalies that had pertained for long time. Over time several studies have been conducted in Uganda and recommendations for amendment of the law of succession have been made based on the identified gaps. Some of these studies include; The Kalema Commission of Inquiry , Ministry of Gender and Community Development study, Ministry of Women in Development, Culture and Youth and the Uganda Law Reform Commission secondary study on the law of Su ccession alongside the study on the Domestic Relations Bill. The studies established severa l challenges within the law and practices of intestate Succession among these were that; the law on succession is largely unused as culture and traditi on was predominantly relied upon to operate in matters of succession, the provisions in the law were evidently discriminatory and that the actors involved in implementation of the Act w ere faced with challenges of implementation as the communities were largely unaware of the l aw and only resorted to the formal institutions when customary procedures had failed. In ad dition, Uganda is a signatory to various international and regional legal instruments that champi on the cause of equality and non discrimination of persons and is therefore under an obligati on to fulfil its commitments to eliminate discriminatory provisions in its laws. The said instr uments include the African Charter on Human and Peoples Rights (ACHPR), The Convention t o eliminate all forms of Discrimination against Women (CEDAW) and the Universal Declaratio n on Human Rights among others (UDHR) among others. The (CEDAW) requires states parties not only to prohibit discrimination but also to take affirmative steps in order to achieve gender equality. This imposes an obligation on state parties to reform laws that are in violation of the convention. The African Charter on Human and Peoples Rights (African Charter) and th e Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (The Womens Protocol to the African Charter) similarly prohibit discriminatory practice against wom en. It was noted that the current laws of succession are not in congruence with Uganda' obligations in the above mentioned international and regional instruments.

1.2 Statement of the problem

Researchers keep pointing out that cohabitation is a form of marital status. Article 1 of the convention on the Elimination of all form of Discrimination against Women (CEDAW) prohibits distinctions based on marital status. The normative differentiation between marriage and

cohabitation then comes with human rights concerns. In Article 26 of the ICCRPR states are obliged to ensure equal protection by the law without discrimination. In paragraph 2 of Genera comment 19, the ICCPR asks states to recognize all forms of family for protection and in paragraph 18 of General Recommendation (GR) 21, CEDAW calls for equal protections in marriage and family relations. CEDAW states that persons in 'de facto' unions should be given equal legal protection.

The black's law dictionary defines cohabitation as the act of a man and woman openly living together as being married to each other. Section 2 of the Kenyan marriage Act defines cohabiting as living in an arrangement in which an unmarried couples live together in a long, term relationship that resembles marriage.

In the case of DIWELLIS VFARNES cohabitation was defined as an arrangement where a man and woman decides to live together as husband and wife but decide not to go through any form of marriage.

Lord penzande in the case of HYDE V HYDE stated that he conceived that marriage as understood in the Christian law may be defined as a voluntary union for life of man and one woman to the exclusion of all others.

1.2.0 Objectives of the study

1.2.1 Main objectives of the study

To examine the Ugandan legislation in relation to cohabitation and the rights of cohabitants in relation to inheriting property from partners.

1.2.2 Specific objectives

- To describe the application of the Ugandan law on intestate succession (Succession Act Cap 139) and to explore if it makes distinctions between cohabitants and married spouses that may amount to discrimination.
- To identify and discuss other issues in the context of the study, apart from non discrimination , that may suggest equal protection of partners in cohabitation and married spouses for purposes of intestate succession.

1.3 Research question?

i) To what extent does the law of intestate succession of Uganda make distinctions between married spouses and cohabitants in the context of intestate succession?

ii) Whether cohabitants have any rights in the context of intestate succession.

iii) What are the challenges in enforcing cohabitation?

1.4 Significance of the study

The study is intended to explore if the right to equal protection of the law under Article 26 of the ICCPR can apply to cohabitants and married spouses in the specific context of intestate succession. This is on the premise that if the existing law can be made to benefit more people than it normally does, then it is economical.

1.5 Scope of study

This study reviewed the existing laws on Succession in Uganda and implementation m echanisms in place and identified the customary and religious practices of succession pertai ning in the different ethnic groups. It identified the gaps and anomalies in existing law, and ad ministrative and implementation challenges which were critically analysed to inform propo sals for law reform so as not discrimination partners cohabiting.

The study was conducted in Northern region of Uganda; Gulu in the parishes of pece prison and senior quarters in laroo division, Gulu municipality.

1.6 Hypothesis

The discrimination against partners in cohabitation relationships in the Uganda's succession laws and the absence of the laws governing cohabitation relationships like the laws governing marriage in Uganda like the Marriage Act Cap 251.

Due to such inefficiency in the law above, there is massive discrimination of partners in cohabitation relationships which leads to the violation of the rights of such people and violation of Article 21 of the 1995 Constitution of the Republic of Uganda which provides for equality and freedom from discrimination.

The independent variable is also known the predictor or explanatory variable. It is the one that influences the dependent variable and it is presumed cause of the variation in the dependent

variable. It explains or accounts for the variation in the dependent variables. In this research the independent variable is the absence of the law to protect cohabitational relationships and the ignorance of partners in the cohabitational relationships about the legal consequences of the relationship.

The dependent variable is also known as the criteria variable. It is the variable of primary interest to the researcher. The researcher's goal is to understand and describe the dependent variable, explain its variability or predict it. In this research the dependent variable is the discrimination against the cohabitants when it comes to intestate succession. This is an area of concern because Article 21 provides for equality freedom from discrimination, therefore by leaving out the cohabitants in matters of intestate succession their rights are violated as well as the constitutional provision.

1.7 Methodology

1.7.0 Introduction

According to the Oxford Advanced Learner's Dictionary seventh Edition, methodology is a set of methods and principles used to perform a particular activity. It is a group of methods used to carry out a task. For example, in carrying out research and teaching. It involves a systematic study of a fact, which can be legal, social, economic, or in any other form as the case may be. The following are the different methods employed in the study.

1.7.1 Interview method.

Interviewing, as a research method, typically involves a researcher asking questions and receiving answers from the people he/she is interviewing called interviewees. So the researcher used it to get society's opinion, attitudes, and motivations about cohabitation and intestate succession, as well as the opinion of partners in cohabitation relationship about the current laws concerning intestate succession. This method offered a flexible basis of finding out facts that a researcher desired to achieve. In this case, the information was first hand, and it was the researcher who recorded what was necessary for the research carried out. Still, it offered the possibility of modifying the researcher's line of inquiry, following up responses and investigating underlying motives in a way that postal questionnaires could not. Non verbal cues also gave messages which helped in understanding the verbal response, which possibly changed

and reversed its meaning. This happened with face-to face interview method, where the interviewer and the interviewee came into contact during the interview. Although interviewing was in no sense soft opinion as a data gathering technique, it had the potential of providing rich and highly clear material, since the interviewer recorded the data by himself.

However much the interview method had all the above advantages, it also got its weaknesses as far as data gathering was concerned. First, interview method was time consuming, and it had the effect of reducing the number of persons willing to participate, since they had their businesses to attend to. Also, all interviews required careful preparation arrangements to visit, securing necessary permissions which took time.

1.7.2 Interview methods used.

Both face-to-face interview method and group interview method were used to gather data from cohabiting partners and those whose partners died while they were still cohabiting; by going to them while in the field.

Face-to-face interview. This involved a researcher coming into contact with the respondents in the process of interviewing. Coming into contact, as far as research is concerned, means a direct interface between the interviewer and the interviewee, where the interviewer asks direct questions and the answers are given there and then, of which the interviewer records. Therefore the researcher came into contact with the respondents, who were religious leaders and community members, This method was used because it tends to give first hand information, since it is the researcher who recorded what was necessary for the research carried out. According to *CP Kothari, Research Methodology 2001,* Face-to Face interview gives the researcher the real expression of the interviewee, as far as the reliability of the information given is concerned. The researcher, in this case, realised that the information gathered from pece prison and senior quarters in Gulu district, where the respondents were found and their response were genuine. The respondents whose male partners died while they were cohabiting stated that they were only eligible to get child support while the rest of the estate was entrusted the others relatives.

Group interview method. This refers to the type of interview where the researcher gets a gathering of respondents and then starts interviewing them as he/she is collecting data. Therefore

the researcher gathered cohabiting couples, who were her neighbours in pece prison as respondents and then got information about cohabitation and intestate succession.

In order to carry out the research, the researcher made an arrangement one week before with the religious leaders in senior quarters in Gulu district, so that the researcher would conduct face-to-face interview.

1.7.3 Documentary method.

Is a technique of gathering data from written documents either private or public. The public documents include; international statues, Uganda Supreme Court cases,. high court and court of appeal cases whose decisions have not been over ruled, Uganda's legislations, text books because they can easily be accessed by the researcher unlike the private documents which consists of confidential reports hence difficult to access. This will involve analyzing such documents so that the researcher considers them in the researcher's opinion of their reliability as far as cohabitation and intestate succession is concerned.

Is a technique of gathering data from written documents either private or public. These included personal papers, commercial records, communication and legislations. For this case, public documents, like Newspapers, text books; were used mostly because they were easily accessed by the researcher, unlike the private, documents , like court ruling concerning intestate succession, which consisted of confidential information, and hence were not accessed.

This involved analyzing such documents and the researcher considered them in his opinion of their reliability as far as cohabitation and intestate succession

The researcher employed the documentary method to investigate how courts consider cohabiting partners in matters of intestate succession. While in the magistrate court Gulu i managed to get changes that were concluded though not yet reported reflects that only 15% of partners in cohabitation relationships whose partners died intestate got letters of administration to administer the estate of the deceased.

1.7.4 Sampling method. Is a method which involves selecting elements from the population in such a way that the sample elements represent the population. In this method, the researcher will extract a portion of widows and widowers in cohabitant relationships from which generalisation to all widows and widowers in cohabitation relationships can be made. The researcher will use this method for proper analysis of cohabitation and intestate succession, since a small number of widows and widowers in cohabitant relationships will be used for gathering data.

This method was used because it enabled the researcher to study a relatively small number of units in place of the whole targeted unit (cohabiting partners), which was so big that getting the data needed would be difficult. In addition, sampling cut costs in terms of money and time compared to when all the cohabitation couples were used for research. If the data were collected for the entire cohabiting partners, as far as cohabitation and intestate succession is concerned, the costs would have been very high for the researcher. It became economical when the data was collected from the cohabiting couples the researcher sampled, as given bellow.

The portion of the research was in cohabiting partners in Gulu , which included areas of ;-pece prison and senior quartes. The researcher selected Gulu region because is where several couples cohabiting are many, especially the above which were sampled.

Conclusion.

Cohabitation is more common among the community in pece prison and senior quarters in Gulu district. This because the cost of marriage is so high among the Acholis mainly because the cost of bride pride is too high there as a result many partners resort to cohabitation as the look for the resources to pay the expensive bride price and as a result many partners end up cohabiting for a very long time, therefore when one partner dies the question of properties tend to arise as to who should acquire the letter of administration to the estate of the deceased. Therefore the data collection methods used by the researcher was the most appropriate ones to acquire information from the respondents who are partners still cohabiting and those whose partners died intestate while they were still cohabiting.

CHAPTER TWO

LITERATURE REVIEW.

2.0 Introduction.

This chapter basically reviews the various secondary sources of literature by different researchers and authors about cohabitation and what their studies also found out. The chapter also reviews some literatures on intestate succession concerning cohabitators.

The book titled ''the law of succession in Uganda, women inheritance law and practices'', gives examples of customary succession laws among the Acholi,madi,lugbara and toro and concludes that customary laws of those tribes donot recognise any trust or equitable contribution of the wife to matrimonial property other chattels. That the family property is presumed to belong to the husband and his family and more especially if the woman is not married legally to the man, she has no say in the family property and it is on rare occasion that courts or laws have applied the doctrine of equity to protect the contributing interest of women to the family property. Futher more, the author discusses the law of inheritance in Uganda laying particular emphasis to state and intestate succession in a social economical and cultural aspect, therefore bunging out the factor that infringe on the rights of the women in succession. The author also points out that the law of succession is a testimony to the fact that Uganda women and partners cohabiting occupy an inferior status to the fact of women in society and this status arose primarily from customary law of succession practices by most indigenous communities in Uganda and so the application of the succession Act as amended which could have improved the inheritance rights which is difficult to apply due to such norms and customs. The author takes judicial approach to women's rights to property leaving out the social economic aspect of it. Futher the fact that the book was written way back in 1993 at the time before the promulgation of the 1995 constitution leaves some gaps to be filled because the constitution in place and with specific provisions on affirmative action and ownership of private property and some laws too had to change and therefore the need for research to find out the relevance of the laws concerning cohabitation and intestate succession.

2.1 Pre marital cohabitation

Haskey citing J Ermisch and M francesconi in his book 'seven years in the lives of British families (policy press, 2001)' stated that pre-marital or trial marriage has increased remarkably. About five percent of married women had lived with their first husbands before their hand in marriage in the 1960s: this proportion had grown to around three-quarters (77 percent) by 1996. Where women had been married before, this proportion rose further, to over four to five (86 percent) in 1992. The median length of pre marital cohabitation has also increased from under six months in the late 1950s (when of course, such cohabitation was anyway rare) to 27 months in 1998, with the slowest quartile cohabiting for at least four years before marrying. Haskey describes pre marital cohabitation as perhaps becoming the modern day equivalent of the courtship period or of 'going steady'. Kiernan suggests that a new form of cohabitation arrived in the 1970's, primary as pre marital cohabitation. This type of cohabitation is reflected in the findings of Arthur et in their settling study comparing divorcing couples and separating cohabitatants. Their study involved a telephone survey of 62 former cohabitants, identified from British social attitudes survey conducted in 2000, followed up by in depth interviews with 18 of them that is 9 men and 9 women. This was part of a larger study examining the separation arrangements of married couples as well. The cohabitants' relationships had lasted a much shorter time on average than the divorcees', with the median length of cohabitation between three and four years, compared to 14 years of marriage. The cohabitants were younger than the divorcees, less likely to be owner occupiers, with only 42 per cent being in this position compared to 74 per cent of the divorcees, and less likely to own in joint names. This picture is broadly in line Haskey's data.

2.2 Cohabitation instead of marriage

However, it is also clear that, whilst currently only a small proportion of the overall numbers of cohabiting couples, more couples are cohabiting for the long term, either as a positive alternative to marriage or for other reasons (which will be explored in the research). Whilst these couples currently make up only a small proportion of the overall numbers of cohabitants, it is predicted 20 percent of the couples cohabiting will marry during their lifetimes in the future, with the total number of cohabiting couples estimated to rise from 4 million in 2015 to 6.8 million in 2031.

The age of the cohabitating population is also projected to rise. Government projections suggest that whilst in 2015, 21 percent of the male and 18 percent of the female cohabitants were aged over 45, by 2031 these proportion will increase to 41 percent of males and 36 percent of females. For couples who in the former times would have regarded marriage as the only morally and socially acceptable living arrangement, cohabitation may present a true alternative to marriage.

2.3 The attitudes of cohabitants and spouses compared.

A number of qualitative research studies have explored the attitudes of cohabitants in order to determine whether the nature of their commitment to each other is different from that of married spouses. The nature of commitment has been used as an issue by law makers to deny cohabitants equal treatment with married spouses. For example the Family law Act 1996, section 41(2) (now repealed) provided that cohabitants has no right to remain in the family home under civil or property law and would be treated less generously than married spouses in terms of protection from domestic violence, with the court required to have regards to the fact that they have not given each other the commitment involved in marriage.

The assertion that cohabitation itself involves a lesser commitment and the inference that it is therefore less deserving of protection has been the subject of empirical enquiry. Smart and Stevens interviewed 20 men and 20 women who had raised children in a cohabiting relationship (though not with each other) and had separated.

Eleven of the women had become pregnant and cohabited as a result; only five were opposed to the institution of married and thus deliberately preferred cohabitation. In the sample of male respondents, six had cohabited because of unplanned pregnancy. This was not because they had felt forced into cohabitation but rather felt the sense of moral obligation to the mother of the child, although two of the six had felt they had gone along with the decision to cohabit rather than been a full party to it. Men were more likely to be opposed to marriage per se than women, with 12 of the 20 so reporting. On the commitment continuum, half (10) were at the contingent end, 6 at the mutual end, and 4 were found to had no commitment to the relationship at all.

2.4 Cohabitants' knowledge of their legal position.

Regardless of how they perceived their relation, and quite apart from the inferences to be drawn from the above evidence, what has emerged clearly from recent research is a strong lack of awareness of the differences in the legal position which the cohabitants occupy compared to married people. This is not surprising as smart and Stevens noted, few ordinary people have a clear and accurate understanding of their legal position and the legal consequences of everyday's actions. Their sample of cohabitants was no different. Very few people had given any thought to their legal position whilst cohabiting. Indeed, they regarded the idea of doing so as antithetical to nature of a trusting, loving relationship. Even on the relationship breakdown, however, when those involved might be thought to recognise the need for legal advice and help, it seems that far fewer turn to lawyers than is the case amongst divorcing population. R Moorhead stated that out in his survey that out of 200 lone parents, 66 percent of the formerly married had consulted a solicitor for legal advice while only 40 percent of the former cohabitants had done so.

But perhaps more worrying is the high level of positive misunderstanding by cohabitants of their actual legal position. This has been demonstrated most forcefully by Barlow and James. They found that 56 per the position of cohabitants have been largely assimilated with that of spouses through legislative reform.

It is in this area of finance and property rights and obligations owed to each other, the subject of this study, the law has been left to slow and haphazard development allowed by case- law cent of their respondents believed that cohabitation for a period of time gives the same legal rights as marriage- the myth of the common law marriage. In fact the concept of common law marriage was abolished in England and Wales in the 1753, when marriage law was codified, but the presence of the belief that it still exist is again unsurprising. First probert has shown that the print media's continued references to common law marriage may help reinforce the popular misapprehension of the law. Secondly, social security rules generally treat married and unmarried couples alike, so that many couples who have had experience of these may assume that the rest of the law does too. Finally, in areas of the law such as inheritance, and has yet to catch up fully current events.

2.5 Cohabitants' property arrangements.

J Haskey reported in 2009 that about one quarter of the cohabitants responding to a large statistical survey stated that they had moved into their partner's existing accommodation when cohabitation began. The rest acquired new accommodation, either having previously lived in their own home or with their parents. Roughly the same proportions of never married men and women moved into their partner's home. By contrast, amongst separated and divorced, it was more common for men rather than women to do so. This was probably because many separated and divorced women retained the former family home as part of a settlement in which they had primary care of the children and the home had been preserved until the children reached adulthood. In general, cohabiting couples were more likely to rent their home than married couples who were likely to be buying their property with the aid of a mortgage.

For example, 46 percent of cohabiting men were renting and 41 percent were buying, compared to the 41 percent of married men renting and 45 percent buying. Similarly, 46 per cent of married women renting and 44 per cent buying.

Whether the property is owned or rented in joint names or by one partner only is an important aspect of legal entitlement. Has key's data show very little difference between men and women regarding this question. Around a third of the cohabiting men and women reported that their home was in their names, a quarter that it was in their partner's name, and around 30 per cent that it was in joint names. However, age made a difference to this issue, with younger cohabitants more likely to hold in joint names. Since cohabitation is concentrated amongst the younger age groups, this may suggest that the vulnerability of some cohabitants, especially women, because of their lack of legal entitlement to occupy, may diminish over time as a higher proportion of the cohabitants acquire homes jointly in the future and may affect relatively few cohabitants overall. Moreover, haskey found that the the length of the time a couple had been cohabiting was generally shortest amongst those where the home was in the man's name and the longest when it was not. This may reflect couples acquiring a new home after living together for a while and putting it in joint names. In any case, in the event of the relationship breaking down, the woman will have been proportionately less disadvantaged because of the shortness of their partner. Finally, as it is discussed in chapter 5, most reform proposals envisage a claimant having to have lived with a partner for at least two years before taking advantage of any adjustive

regime to give him or her a share of the value of the family home. Fewer women might be expected to benefit from such reforms than might therefore have been thought of.

2.6 Intestate succession

According to the Uganda law reform, Intestate estate is defined in the Succession Act 1964 as being so much of the deceased's estate as is not disposed by testamentary disposition. Testamentary disposition has a wide meaning and includes any deed taking effect on the deceased's death which disposes any part of the estate or under which a succession thereto arises. Wills are the most common form of testamentary disposition, but other deeds have testamentary effect including destinations in titles to property, marriage contracts and nominations. The housing and furniture and plenishings prior rights are due out of the intestate estate; the cash sum prior right is due out of the intestate estate left after the previous two prior rights; legal rights are due out of the net moveable intestate estate remaining after all the prior rights; and the rules relating to the free estate apply to the net intestate estate left after "inheritance tax and other liabilities of the estate having priority over legal rights, the prior rights of the surviving spouse or civil partner and rights of succession.

The rules of intestate succession are default rules in that they apply only in the absence of a valid testamentary disposition by the deceased. The rules of intestate succession are shaped by various principles to which each jurisdiction gives different weights and by its own legal tradition. These principles include keeping the property in the deceased's family or kinship group. Accordingly, intestate heirs are generally limited to those related by blood to the deceased. Another principle is the presumed wishes of the deceased. This means that the rules on intestacy should by and large mirror the provisions for their family that people usually make in their wills. Closely linked with this is the principle that the rules of intestacy should be acceptable to a broad spectrum of public opinion. They should constitute, as far as rules of general application can, a fair and rational system that adequately reflects majority views. Finally, the rules should be clear, consistent, free from anomalies and relatively easy to understand and operate. The rules should be as simple as possible in order that people were aware what would happen to their property if they died intestate: if they were unhappy with the result there would be an incentive to make a will.

The pre-1964 law was based on the common law with piecemeal amendments by various statutes. Before 1964 there were separate rules on intestacy for succession to heritage and for succession to moveable's. In neither set of rules was the surviving spouse an heir. Instead the surviving spouse had what were termed legal rights in both the deceased's heritage and moveables. The rights in heritage took the form of a life rent. The widow's right was called terce and amounted to a life rent of one third of the heritage; the widower's right was called courtesy and amounted to a life rent of the whole of his deceased's wife heritage in which she was infeft. Courtesy was claimable only if the husband was the father of a child of the marriage who was at some point the heir presumptive to the wife's heritageThe amount of the surviving spouse's legal right to moveables varied according to the existence of children. Where the deceased was not survived by any children, the surviving spouse was entitled to one half of the net moveable estate but where

2.7 Synopsis.

This research is divided into five chapters. The first chapter gives the general introduction to the subject of discussion. It provides a background to the thesis and shows what the thesis is set to achieve, the statement of the problem, the methods to be employed, and the literature review.

Chapter two will contain the literature review

Chapter three will discuss the over view of Uganda's law on intestate succession (Succession Act cap 163 and the Administrator general's Act cap 157).

Chapter four will discuss the challenges in enforcing cohabitation

And chapter five reviews the findings, conclusion and suggests recommendations for the improvements of the laws to protect the rights of partners in cohabiting relationships.

Conclusion.

Different researchers have different opinions concerning cohabitation and intestate succession, the most common features in their findings is the fact that most of them point to the unfair property rights and the disadvantage the cohabitatees face when it comes intestate succession and how they are left out by the laws and the need to have a law that protects the partners in cohabitational relationships.

CHAPTER THREE

MARRIAGE, COHABITATION AND INTESTATE SUCCESSION IN UGANDAN LAW

2.1 Introduction

This chapter describes the extent to which the Ugandan law on intestate succession treats married spouses different from cohabitants. The difference in treatment observed in this chapter is the main issue for the analysis and discussion in the rest of the study. Since this study is contextualised on the intestate law, I present an overview of it and followed it up with the laws on marriage. Finally I provide contextual analysis of cohabitation and marriage for clarification to make discussions meaningful.

2.1.1 Overview of Uganda's law on intestate Succession (Succession Act Cap 162) and the Administrator General's Act Cap 157

The succession Act, like many laws in Uganda dates back to 1904. The 1972 succession Act amended after the succession ordinance of 1906, which was based on English common law. The succession Act (Amendment) decree was a clear attempt to put in place a uniform law of succession that would apply to both intestate and testate succession. The amendment of the decree was aimed at addressing gender issues, human rights issues and customary laws. As a result, all succession matters shifted from the hands of clan leaders to the courts of law. Subsequently, new sets of rules of inheritance that could neither be classified as customs or as fully statutory were created. The succession Act is divided into two parts; one part deals with properties of persons who die intestate and the second part deals with properties of persons who die without wills (intestate). For this study I will look at the part that deals with intestate succession.

Succession Act Cap 162 is the main legal framework now in force in Uganda that regulates the devolution of the properties (estate) of any person who dies without leaving a valid will. It spells out how such properties are shared among the beneficiary members of the family. Although

everyone above 18 years of age is allowed to make a will, majority of Ugandans die intestate; only ten out of every 100 cases reported to the Administrator General's office die testate.

Administrator General's Act cap 157

The reasons include among others, the superstitution that writing a will hastens one's death. The other reasons include the lack of awareness of the importance of writing a will and lack of ability to write one. As fore mentioned, intestate succession refers to inheritance and distribution of the estate of a deceased who dies without making a valid will. It also occurs where although one had a will, it is invalidated for various reasons like where a testator remarries after writing a will and does not amend it or writes another one.

Section 2,(2), indicate that 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 the Act and in all legal proceedings he or she shall sue by that name and it shall be necessary to state and prove the administrator general's authority and title in the specific estate to which the proceedings may relate, but not her general authority or appointment.

Section 4(1), provides that where a person dies in Uganda, the agent of the area in which the death occurred shall upon receiving notice of the death or upon the death coming to his or her knowledge, forthwith institute inquires 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 ascertainable, to the administrator general. Under sub section 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 death coming to his or her knowledge, forthwith report the death with full particulars of the property to the administrator general

Section 4(3)(e) stipulates that upon receiving such report or upon such death coming to his or her knowledge, if it appears to the administrator general that the person died intestate, the Administrator general may apply to court for letters of administration of the estate of the deceased person, where upon the court shall, except for the good cause shown, make a grant to him or her letters of administration.

Section 16 gives the administrator general power to dispose property. Thus the administrator general may subject to his/ her 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 public auction or private treaty as he or she may deem fit in the best interest of the estate.

Section 27 provides that where any person entitled to a share under the will or the distribution of the estate of a deceased person whose estate is being administered by the administrator general is a minor, the high court may, upon application of the administrator general, appoint the father or the mother of the minor or some other suitable person or the public trustee to receive the share of the minor on his or her behalf.

Section 36 of the Administration General's Act (cap 147) provides that nothing contained in the succession Act shall be taken to supersede the rights, duties and privileges of the administrator general. Thus with regard to cohabitation and intestate succession, the administrator general under section 16 and 27, of the administration general's Act (cap157), should provide protection to children and families that existed under this type of relationship in order to enshrine the rights of the persons as provided for under the 1995 constitution.

THE SUCCESSION ACT (CAP 162)

Distribution of an intestate's property

The black's law dictionary defines intestate succession as where a person dies without leaving a valid testamentary declaration or will.

Section 24 of the succession Act cap 162 provides that a person dies intestate in respect of all property which has not been disposed of by a valid testamentary disposition. Under section 25 all property in an intestate estate devolves upon the personal representative of the deceased upon trust for those personals entitled to the property. The legal effects of intestate succession are that; All property that person owned at the time of his or her death becomes part of the estate. -The estate is kept in trust by the personal representative of the deceased duly appointed by court. Only a few recognised categories of people can inherit the property. In order to manage the

estate, one has to apply to court for letters of administration. In the case of Re Kibiegoit was held that a widow is the most suitable person to obtain a representation to a deceased husband's property. Court further stated that in the normal course of events a widow is a person who will honestly and rightly safeguard the asset of the estate for herself and the children.

Section 26 of the succession Act cap 162 provides 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 principal residential holding, including the house, chattels therein, shall be held by his or her personal representative upon trust of his or her legal heir. In the case of Akullo v Kilenga the court held that where a person dies intestate leaving a widow, letters of administration should be granted to his wife unless courts so holds to execute her personal disqualification or that she had no interest in administering the estate.

Section 27 of the succession Act cap 162 provides that the estate of a person dying intestate excepting his principal residential holding shall be divided as follows, where the intestate is survived by a customary heir, a wife and dependent relative but no lineal descendent, the customary heir shall receive one percent, the wife shall receive 50 percent and the dependent relatives shall receive 49 percent of the whole property of the intestate.In the case of Christine Mooly v Namanda it was stated that the plaintiff was the widow of the deceased because they were validly married, that the mere fact that someone had children with the deceased does not entitle her to benefit from or share from the deceased estate. that she has to be legally married to the deceased in order to benefit from the deceased's estate

Under section 29 no wife of an intestate occupying a residential holding under section 26 and the second schedule of the succession Act shall be required to bring that occupation into account in assessing any share in the property of an intestate person to which the wife or children may be entitled to under section 27. The interest can be for the purpose of assessing any share in the property of an intestate to which that person may be entitled to.

Under section 30, no wife or husband of an intestate shall take any interest in the estate of an intestate if at the time of the death of the intestate he or she was separated from the intestate as a member of the same household. In the case of Mboijana v Mboijanait was held that although the

defendant was a lawful wedded wife of the deceased for over 20 years, she could not lawfully benefit from the estate because they had separated at the time of the deceased's death.

The 1995 constitution guarantees that all persons are equal under the lawand that shall not be discriminated against on any grounds. Further the constitution provides that women shall be accorded full and equal dignity of the person with men and prohibits any laws, culture and traditions which are women's dignity, welfare or interest which undermines their status. The essence of the said rights is that citizens as individuals or groups should be treated in the same manner irrespective of the characteristics or background. The 1995 constitution also stipulates that women and their rights will be protected by the state taking into account their unique status and their natural maternal functions in the society. The said constitution proceeds to state that every person has a right to own property, either individually or in association with others. It is on this aspects that in the matter of the estate of Okello Jacob.His worship Owino Paul granted letters of administration to the widow of the deceased leaving his brother out.

In the matter of the estate of Stephen Wanyoike Muhia where the dispute was whether a woman who cohabited with the deceased and the child she had brought along with her were a widow and a child for succession purposes, the court stated that both the woman and the child were heirs to the estate of the deceased.

Conclusion

The law on succession basically the Administrator general's Act cap 157 and the succession Act cap 162, provides for how property of the deceased person should devolve to the next person. However the law does not provide for cohabitant when it comes to matters of intestate succession but have provisions for how the estate of a deceased person can devolve where a person dies intestate but has legally married. It is on this best that the researcher sees the need for reforms in the law of succession so as to consider and favour partners who opt for cohabitation instead of marriage. This is because in most cases the partner in cohabitation relationships does not acquire the letters of administration to the estate of the deceased even when the deceased was de facto separated from the married spouse. This was reflected in the case of Re Asante (DECD) Owusu v Asante, supra, mary owusu the appellant cohabited with a man in Uganda for more than 10 years and had two children but since the man was already under a strict monogamous system

to another woman living in the UK, they never got married before the man died. She only faced the dictates of the law after the man died and attempted to be treated as a spouse. In that case her cohabitation could never have ended in marriage.

CHAPTER FOUR

CHALLENGES IN ENFORCING COHABITATION.

4.0 Introduction.

As earlier noted that the objectives and purposes of the law under discussion is inconsistent with the rights of partners in cohabitational relations. However findings in chapter three shows that the current application of the law is more likely to disclose a case of discrimination against cohabitants in the context of intestate succession sets the primary legal challenge requiring the challenges in enforcing cohabitation. This chapter basically looks at cohabitation in its entirety and the challenges that faces the partners in cohabitational unions.

It also attracted my attention as to whether the law can really preserve peace and harmony in the family by making normative distinction between the married spouses and cohabitants considering the unique contextual relatedness of cohabitants to married spouses as mentioned earlier.

4.1 Meaning of cohabitation

The black's law dictionary defines cohabitation as the act of a man and woman openly live together without being married to each other. Section 2 of the marriage Actdefines cohabiting as living in an arrangement in which an unmarried couples live together in a long term relationship that resembles a marriage.

In diwells v farnes cohabitation was defined as an arrangement where a man and woman decide to live together as husband and wife but decide not to go through any form of marriage.

The arrangements are not recognised as marriages in Uganda irrespective of the length of time the couple may live or have stayed together or the number of children they had together. It is a common and accepted practice in Uganda for unmarried couples to live together as husband and wife. Some of these couples never contract a legally binding marriage. There is no law in Uganda that legitimises cohabitation unions. cohabitation is currently being looked at as a form of family. Family is the basic social unit of society constituted by at least two people whose relationship may fall in one of the three categories;

- Husband and wife.
- Persons living together in a manner similar to that of spouses recognized by English law which includes cohabitators.
- Persons living together whether related by marriage.

There are certain functions that are most effectively fulfilled by the family and marriage, they include;

- The family helps in resolution of disputes among members.
- It gives status to the parties, privileges and rights. This was historically the main role of the family because it was primarily concerned with the rights which one member of the family could claim over others for example, the right to maintenance, conjugal rights.
- The family is also important for companionship and mutual psychological support in terms of individual stress.

All these functions also apply to couples in cohabitational relationships as they regard their union as a family and in any way those who cohabit with the intention to marry do have the hopes to expand their family.

Accordingly these unions are not formally recognised in Uganda. Consequently, the benefits granted to married spouses are not available to cohabitees whose union is not married by the legal uncertainties. The lack of securities in these unions is primarily realised when the relationship comes to an end. Cohabitees are not eligible for maintenance upon their separation. Furthermore upon death of one party, the surviving party is not ordinarily eligible to inherit from the deceased estate unless they can prove that the survivor evolve from a mere cohabitation to a dependent under the succession Act.

4.2. Distinction between cohabitation and marriage.

Cohabitational relationships are distinct from marital ones in several crucial ways. Although these differences have become less pronounced with the increase in cohabitation (and could this

eventually vanish), the following characteristics define the difference between cohabitation and marriage.

Age. People in cohabitational relationships tend to be younger than people in marital relationships. This supports the argument that cohabitation is often an antecedent to marriage. The majority of cohabitational relationships dissolves because the couples involved get married.

Fertility. Children are less likely to be born into cohabitational relationships than they are in marital relationships. This is because partners in marital relationships look at forming a full family with children which is unlikely in cohabitational relationships.

Stability. Cohabitational relationships are short lived compared to marital relationships. In Canada for example, about 12 percent of cohabitational relationships are expected to last for 10 years. By comparison, 90 percent of first marriages are expected to last this long. The majority of cohabitational relationships terminate within 3 years. Although many of these relationships end because of marriage, the lack of longevity in the cohabitational relationships as such illustrates that these relationships have yet to develop into normative variant of marriage.

4.3 Causes of cohabitation

Cohabitation unions have been on the increase in Uganda perhaps due to the reconfiguration of the family units, as a result of increased urbanisation and increased isolation of the young people from their family network. These unions have become common as the meaning of family continues to increasing transform in the wake of fast changing social valves. The proliferation of divorce, re marriage, step families and single parenthood has liberalised the idea of family from the way it was traditionally understood, with these structural changes, attitudes towards non marital unions have become increasingly permissive in the country.

One of the parties may be previously married. This there becomes difficult for them to contract any further marriage as it will amount to bigamy. Under section 41,any person who commits bigamy is liable to imprisonment for a period not exceeding five years. This was reflected in the case of Re Asante (DECD) Owusu v Asante, supra, mary owusu the appellant cohabited with a man in Uganda for more than 10 years and had two children but since the man was already under

a strict monogamous system to another woman living in the UK, they never got married before the man died. She only faced the dictates of the law after the man died and attempted to be treated as a spouse. In that case her cohabitation could never have ended in marriage.

High financial responsibilities to marriage, most cohabitators are young and there they have accumulated enough wealth to marry and take full responsibilities. For example among the Acholis a groom is expected to pay at least four cows, four goats and four million and others requirements in order to marry. Therefore due to all these demands it really becomes difficult to marriage as the finances involved is too high.

Fear of legalities. Marriage comes will a lot of legalities, for divorce, and matters concerning the legality of the children. These therefore make most couples to opt for cohabitation because they are not willing to be bound by any form of legality while in marriage.

Most cohabitators regard cohabitation as a form of trial marriage. This is because most cohabitants stay there with a slogan that if it works we shall legalise the union and if it fails then we go our separate ways. Due to the fact that almost 30 percent of partners cohabiting intend to marry their partners in the future cohabitation is really a form of trial marriage.

Others regard marriage as irrelevant. This is because most people belief that cohabitation is the same as marriage. People in cohabitation generally believe that rights in marriages apply equally to them. Some even see cohabitation as good as marriage. They keep this in mind until something happens before they really come to understand their lack of legal protection. This explains why the applicant in Ugandan case Re Asante(DECD); Owusu v Asante cohabited with the man for more than ten years, had two children with him and had knowledge and access to his estate during his lifetime but she did nothing to change her marital status until the man died intestate. The fact that she initiated actions to benefit from the estate of the deceased afterwards and pursued through to the supreme court suggest that she was eager to claim her rights but probably she was not fully aware of the implication of her relationship.

4.4 Reasons for cohabitation

There are basically a lot of reasons why people opt to go for cohabitational relationships as opposed to marital relationships. These reasons may be similar to the causes of cohabitation as discussed below.

Socio economic status. Although cohabitation first came to scholarly attention because of the living arrangements of the 1960's college students, these persons were the imitators not the innovators. It had been widely observed that lower education levels and poorer employment status positively became a reason why people cohabit.(chernlin 1992, raley 2000, seltzer 2000,smock and manning, 1997). Researchers argue that economic security is a key factor for formation of marriage. People from poorer backgrounds often delay marriages because of insufficient economic resources. This makes them more likely to form cohabitational relationships than well educated people.

Cohabitants are self selected because of their personal attitudes towards non marital unions because cohabitation occurs against the norms. Cohabitants are partially rejecting the society's dominant value. Those people who enter cohabitational relationships tend to perceive social rules in flexible terms. On the other hand, people with traditional perceptions of the family and religious backgrounds that prohibit premarital unions are unlikely to enter into cohabitational relationships because of their conservative values.

Traditional family breakdown, many observer have assumed that the trend towards cohabitation and later marriage signifies a breakdown of the traditional family. However this standpoint rests on a limited understanding of the family relationship. The notion of the traditional family is mostly a discursive construction and as such, it is ultimately fails to comprehend the historical complexities of the family relationships. For example, Andrew cherlin (1992) points out the pattern of the latter marriage is anomalous only in comparison of the 1920 and 1945 married at earlier ages than any other in the twenth centuries. The notion that cohabitation somehow represents a collapse of the traditional family is accurate considering the historical prevalence of non marital union and broad shifts in the timing of marriage. Indeed, the intensification of cohabitation is associated with factors integral to the institutionalization of the nuclear family.

Gary Becker (1918) argues that a couple marries because they realise economic benefits from each others specialised skills. These skills (which are rooted in the gender division of labour) created economic interdependence between men and women and marriage became the institution that reproduced their economic security. According to Becker, the most important factor underlying social transformation related to lower fertility, divorce and cohabitation has been on the rise in the earning power of women. An essential change in the gender division of labour has

followed women's increased participation in the waged labour force. This change has reduced the economic advantages and necessity of marriage and consequently divorce rates have increased and marriage rates have decreased. The reduced benefit of marriage and the spectre of marital instability have made non marriage more attractive. Reduction in the expected economic gains from marriage has made men and women more hesitant to enter marital unions. but a shared household still offers economic advantages. Cohabitation make good sense because they capitalise on the benefits of a shared household without the economic risk associated with marriage.

Valerie oppenheimer (1994) explains pattern of cohabitation from another economic perspective. She suggests that rather than being a result of women's growing economic independence, the decline in marriage more closely relates to the deterioration of men's position in the labour market. Oppenheimer's theory holds considerable explanatory value because periods with strong labour market. Oppenheimer argues that because marriage timing usually corresponds to men's ability to establish an independent household reduction in their earning power temporarily prices them out of the marriage market. However, even though the economic costs delay marriage, they don't affect the desirability of union as such and because of it is lesser cost, cohabitation has emerged as an important alternative to marital union.

Apart from economic explanations changes in social norms bound up in the rise of individualism also explain the increase in cohabitation. Perhaps more than anything else, it is this shift in thinking that separates contemporary cohabitation from past. For the most part, trends in historical cohabitation were associated with the ambiguity between legal and common law marriage, or with the availability of officials to formalise marriages. By contrast, contemporary cohabitation behaviour is a conscious choice, one that expresses the tension that has devolved between personal goals and social norms. In this respect, cohabitation has increased because marriage can often decrease or disrupt individual goal attainment.

4.5 The myth of legal protection for cohabitants

People in cohabitation generally believe that rights in marriages apply equally to them. Some even see cohabitation as good as marriage. They keep this myth until something happens before

they really come to understand their lack of legal protection. This explains why the applicant in Ugandan case Re Asante(DECD); Owusu v Asante cohabited with the man for more than ten years, had two children with him and had knowledge and access to his estate during his lifetime but she did nothing to change her marital status until the man died intestate. The fact that she initiated actions to benefit from the estate of the deceased afterwards and pursued through to the supreme court suggest that she was eager to claim her rights but probably she was not fully aware of the implication of her relationship.

This means that to a large extent, it is possible to cohabit with a partner for long time as shown in some of the cases above to gradually complete all the customary requirements before marriage is fully consummated. The possibility that cohabitants may feel part of marriage is high in this system. The cases in this study are only cases concluded in the superior courts, it is not known the extent to which cohabitants are claiming some rights in the lower courts. However the facts in the cases discussed show that cohabitants use other pretext such as child protection to demand some benefits under intestate succession law. The fact that these are happening even though it is generally known that cohabitants have no rights indicates some repressed resentment to the legal system and suggest that some cohabitants have feelings of unfavourably being treated under the law.

4.6 Challenges in enforcing cohabitation.

Absence of the law to regulate cohabitation relationships. There is no law regulating cohabitation union in Uganda. The marriage Act cap 251 defines the different types of marriage that may be registered, cohabitation union is not listed. The marriage law in Uganda recognises various system of marriage namely; Christian marriage, civil marriage, Islamic marriage and customary marriage. It is not clear whether these are the only forms of marriage allowed in Uganda so that cohabitation unions fall outside the wagon. In the absence of an express prohibitation, one can legitimately assume that other forms of law are allowed.

In the absence of law regulating cohabitation, courts have traditionally sought reliance on the English common law principal of presumption of marriage as a vehicle through which cohabitation union may be legitimised as amounting to marriage. Section 3 of the judicature Act

defines common law as a source of law in Uganda. As it was stated in **hortensia wanjiku v public trustee** parties seeking to rely on the presumption of marriage must prove these two elements namely; prolonged cohabitation and that they held themselves out to the general public as married couples.

Social acceptance, even with its numerical growth and spread throughout the society, cohabitation is not socially accepted as marriage because society belief it is a sin as the Christian see it as fornication. Fornication basically refers to sex before marriage. Cohabitation is socially tolerated in part because it is expected that cohabiting partners will eventually become married, according to the data collected from northern Uganda in generally, about three quarter of never married cohabitator had definite plans for marriage or belief they would get married eventually to their partners in the near future. The youthful profile of cohabitation shows that marriage is still the preferred choice of union for most couples. If cohabitation were a variant of marriage, it would have a larger prevalence in order cohorts. Although many people have chosen to delay marriage, most people have not rejected it completely.

State recognition, unlike marriage, cohabitation is not sanctioned by the state and persons in non marital unions do not necessarily acquire specific legal rights and obligations through their union without formal ceremony and legal documentation, a couple is not married even if they lived together for many years. This was reflected in the case of Re Asante (DECD) Owusu v Asante, supra, mary owusu the appellant cohabited with a man in Uganda for more than 10 years and had two children but since the man was already under a strict monogamous system to another woman living in the UK, they never got married before the man died. She only faced the dictates of the law after the man died and attempted to be treated as a spouse. In that case her cohabitation could never have ended in marriage.

Cohabitation is also looked as as being immoral and the people in cohabitational relationships are looked at as immoral people. This is because religion teaches people that sex before marriage is a sin as it is fornication. This therefore makes it hard to legislate laws to protect cohabitational union because as immoral thing and liable to be struck down as contrary to public policy. In the case of Diwells v farnes the court stated that any attempt by the woman to claim an interest in the house bought by the man with whom she had been living spelling out an agreement that they should buy it as a joint venture was doomed to fail because it was founded on immoral

consideration because of their cohabitation union. The reflection of cohabitation is mainly to uphold society values. It is argued that by giving to the unmarried rights previously possessed only by the married, the law would be wakening the institution of marriage and thus undermining the family.

The children produced in cohabitational relationships are never recognised in the society, this is because they are usually referred to as bastards and they are usually mocked by the society, among the Acholis for example, when cohabitational relationships fail the whom usually take the children because custom dictates that when a couple is not married the children belongs to the mother, and when they go to their maternal relatives, they are usually mocked to be lazy and not allowed to own any property there because they are considered to be lazy like the father who failed to raise the bride price required to marry their mother.

Conclusion

Although cohabitation has existed throughout the history, modern trends especially important because they are part of a broader pattern of social transformation affecting family. The institution of marriage remains the dominant form of family living but the rapid increase in cohabitation suggests this could change.

Uganda's family law remains silent on the issue of cohabitation unions despite them being a reality in modern date Uganda. There is need to address this lacuna in law because of the significant impact of the cohabitation unions especially on women's economic status, the interests of children born from the union and the proprietary rights that accrue to the parties in these union. In the broad sweep of history, marriage has been dorminant for relatively short period. From this point of view family institutions express the need and value of society at a given time. The dominance of the marriage over the past two centuries should not be taken as evidence that other forms of family living are immoral or illegitimate. If the decline in marriage rates and increase in cohabitation rates tell us one thing it is that the family is a flexible institution.

CHAPTER FIVE

RECOMMENTATION AND CONCLUSION

5.1 Implication for human rights protection and future research.

Although General comment 19 of the ICCPR gives the states the discretion as to how to protect families, this research suggests that cohabitants and married spouses may be protected equally in certain circumstances in line with Article 26 and 23 of the ICCPR. It does not challenge the legal differences between cohabitants and married spouses in all circumstances. It only suggests that whether or not to remove cohabitants from legal

protections of family should depend on the careful balance of human rights interests associated with specific issues.

This is to ensure that differentiation does not occur in situations that may impact heavily on the human rights interests of cohabitants so long as such interests are justifiable. Human rights concerns are primary interest of states for family protection especially where marriage and cohabitation are not discretely separable. This takes a midway position in the debate spelt out in chapter one. It gives more support to those researchers who seek to advance equal protection for cohabitants and married spouses. It also supports the observation by the Canadian Supreme Court in Miron v Trudel, supra, that an unequal treatment of cohabitants on an issue of economic interest to family amounts to discrimination. It is also consistent with the observations by the ECtHR in Marckx v Belgium, supra, that laws applicable to the family should allow those concerned to lead normal family life and that prohibition on the use of property that apply to only cohabitants but not married could amounts to discrimination.

In the particular interest of Uganda and all states with similar contextual problems, I suggest that the existing laws may have to be adjusted to give equal protection to families established in cohabitation and those in marriage. Or a comparable remedy could be structured for cohabitants. To do this a system of cohabitant registration may be developed such that after a certain period of time in cohabitation the relationship could be presumed as marriage for purposes of intestate succession. This is to ensure that the type of cohabitation that may merit protection is that which clearly looks like marriage.

In the long run, I suggest that a single system of marriage should be enforced. This is because polygamy violates human rights as noted by the CEDAW. It is the existence of polygamy in the laws on marriage that seem to make the law less predictable and exposing people to deprivation in the context of intestate succession. The existing system of marriage law (cap 127) which is strictly monogamous could be ideal marriage in the human rights terms. But this suggestion faces the problem of cultural acceptance due to cultural diversity in civil society on the issue of eradicating polygamy. On this issue I agree with Koenig and guchteneire (2007;140) that a context sensitive pluralistic policy design with careful legal education to the public may help promote a system of marriage that respects human rights and still not culturally offensive. This supports Amartya sen (2006; 30) that important human rights tenets will survive open and informed scrutiny and derives from the observation by lindohm (2008;17-18) that each normative cultural divide may have good grounds for principled endorsement of human rights or internally validate them. This respects the cultural diversity among states in terms of respect and incorporation of human rights in domestic systems.

Thus Uganda may have to go back into negotiations with civil society in bid to eradicate polygamous marriages while maintaining important cultural traditions on marriage according to religious, ethnic and other divides. Valid reasons in Uganda context may be identified to support an open and informed scrutiny one of which may be that polygamy exposes several people to vulnerabilities as stressed in this study. Civil society may not oppose monogamy as it happened earlier if comprehensive education is carried out to make it clear among other things that the state has no choice than to respect its human rights obligations in good faith subject to article 31(1) of the Vienna convention on the law of treaties. A single system of marriage will make the laws on marriage clear and foreseeable to reduce the complex interrelation between marriage and cohabitation and the exposure of people to vulnerabilities without legal protection.

In the nutshell, I suggest an intensive social legal research into cohabitation and marriage to confirm or refute the following observations made in the context of this study. Future research may confirm or refute the proposition that the right to marry and family protection enshrined in Article 23 of the ICCPR applies equally to cohabitants. it must be confirmed that cohabitation is a legitimate freedom of persons not to enter into marriage without free and full consent that a

person's choice to establish a family outside strictly legal formalities shall not normally set basis for discrimination in protection of the family by the law as stated in article 26 of the ICCPR. Other areas of discrimination not covered in this study should be explored and perspective from other disciplines on the issues should be advanced to back up the law to justify equal protection of all families.

5.2 Concluding summary of observations and recommendations

Like in most other states, Ugandan laws on marriage actually determine who is a spouse with right to protection under the intestate succession law. Cohabitants are therefore traditionally excluded from protections for intestate succession. However, specific contextual details unique to the Ugandan laws on marriage suggest that the difference in treatment in this context may amount to discrimination against cohabitants.

My research was designed to identify such unique factors to argue a case of equal treatment of cohabitants and married spouses within the context of intestate succession. One important observation is that three different laws on marriage give mixed permission on polygamy. Marriage under customary law and Mohammedans permit polygamy but the marriage Act strictly prohibits polygamy. In section 2.3, I deduced that this situation seems to reduce the quality of precision, foreseability and predictability expected of domestic laws for suitable human rights protection and therefore any misconducts that result on negative consequences on human well being may be blamed on the law.

Cohabitants and married spouses do not seem to be clear of the type of laws operative in particular circumstances to conduct themselves in accordance with the laws on marriage. The presence of legal polygamy in some situations contributes to the prevalence of cohabitation and yet cohabitants of all kinds face serious consequences in situations where the marriage law which prohibits polygamy becomes operative.

On the bases of the above it was deduced that cohabitants face similar hardships as married spouses in the event that their partners died without a valid will to devolve their estates. Considering that the law under discussion is primarily structured to suppress practical hardships in the family in times of death, I contend that it is largely consistent with human rights protection that partners in cohabitation and married spouses are given legal protection in the times of death

intestate of their partners. This suggests that the normative distinction between cohabitants and married spouses may be suspended in this context so as to alleviate the similar threats to human wellbeing that both cohabitants and married spouses may face in times of death intestate of their partners. I find this position plausible having considered that based on contextual facts as noted earlier, a protection of the family that is reserved for married spouses is a partial protection of the family since family establishment often begins with cohabitation.

Further, equal protection of cohabitants and married spouses may not necessarily offend public order, morality, and decency, the institution of marriage and the rights and freedoms of others if is backed by the law since cohabitation is generally well accepted.

The aims pursued by the courts for excluding cohabitants from the rights to intestate succession were also derived and examined. The measure was to protect the institution of marriage, to preserve public order, decency and morality as well as to protect the rights and freedoms of others. These were found to be legitimate limitations in human rights protection. However contextual facts on the relationship between marriage and cohabitation suggest that the public so widely embrace and mixed cohabitation and marriage to the extent that it is very likely that an equal protection of cohabitants and married spouses may cause serious harm to the standards listed, although these concerns may apply in situations where only one system of marriage is legal. Based on the logic of the margin of appreciation the research proceeded as if legitimate aims were found and compared these aims with the seriousness of human rights deprivations that a cohabitant without legal rights may face in the event that the partner dies intestate. I found the human rights interest of the cohabitant for intestate succession is heavier than the public interest in restraining such benefits to cohabitants.

Depriving cohabitants access to the properties that hitherto the death of their partners might deprive the means of survival of the family, may have serious practical consequences on the survival, dignity and well being of the cohabitant. Additionally, the cases used for this study were selected from hundreds of cases concluded in the superior courts for over forty decades span and non of the cases has shown a man contesting in court for intestate succession. This was taken as practical evidence that women are always disadvantaged when the law strictly excludes cohabitants from intestate succession. This contravenes article 2(f) of CEDAW. On the basis of the above, I suggest that there is reduced proportionality between the aims pursued and the

means adopted to achieve them and therefore the circumstances in the context of this study are more likely to disclose a case of discrimination against cohabitants.

Having come to the observation, the research was taken a bit more beyond merely finding discrimination. Two important residual issues were also discussed to give additional support to the observation of discrimination. The theory of Relative Deprivation suggests that even if the law keeps the current normative distinction, it may not preserve the peace and harmony in the family it pursues. This offers social science perspective to improve the law for better human rights protection. Similarly the study suggests that certain legitimate freedoms currently protected by human rights such as the rights of minorities and agnostics give additional support that to some extent equal protection of cohabitants and married spouses is consistent with human rights protection.

The research explored the common notion spouses and therefore that cohabitants do not have the rights as married spouses and therefore protection meant for married spouses cannot be equally extended to cohabitants. Chapter one spelt out the debate among researchers and commentators concerning this usual legal practice of making normative distinction between cohabitants and married spouses in terms of rights to all matters of interest to the family. This research discussed the unique issue within the framework of non discrimination by using Uganda's law on intestate succession for specific data. It proposed that an exclusion of human wellbeing is a difference in treatment that may amount to discrimination. This study affirms this proposition implying that the right to family protection in article 23 of the ICCPR read in conjunction with article 26 suggests equal protection of cohabitants and married spouses at least in the context of intestate succession.

This adds up to legal requirements that elaborate customs, traditions and costs must be satisfied to obtain parental consent before a valid marriage is contracted. These conditions among other things have developed a complex relationship between marriage and cohabitation such that except by religious reasons, people widely accept and practice cohabitation alongside marriage. This makes cohabitation appear often as prolonged part in the process of getting married especially under the polygamous systems. Some of the domestic cases have also shown that prolonged periods of cohabitation often yield similar effects like marriage in terms of child birth; inter dependence and mutual support for property acquisition showing that family establishment

often begins with cohabitation. Cohabitation in this context is properly construed as part of the people's cultural practice on family establishment and not a discretely separate activity or a deviation from normal marriage.

The research has gone through a process to arrive at these observations. I first described the extent to which the intestate succession law of Uganda protects married spouses and not unmarried cohabitants. The situation was assessed within the analytical framework of non discrimination as designed by the European Court of Human Rights in the Belgian Linguistic Case. The study therefore considered if cohabitants and married spouses are in significantly similar situations to merit equal treatment in the context of intestate succession. In support of researchers such as Barlow et al (2005;2-3), I found the similarities in practical effects in terms of child birth, interdependence, degree of permanence and commitment more relevant in this context than the legal differences. This is based on among other things the observation that a person's right to enjoy certain human rights goods does not always depend on what is accepted in law since the law must sometimes change to improve rights protection.

Conclusion

I conclude by acknowledging that some problems may be encountered in future research into cohabitation. Both in law and academics, the view that cohabitants and married spouses do not have the same rights seem to be a settled issue. There is therefore not enough secondary literature and legal judgements on the matter, yet research into the problems facing cohabitants is relevant to the advancement of human rights protection and must be pursued.

REFERENCES

Reports of the law commissions:

Scottish Law Commission Report No 135.

UK Law Commission Consultative paper No 179.

Internet sources

http:// www.encyclopedia .com

http:// www.encyclopedia .com/topic/cohabitation.aspx

Treaties, Declarations and General Recommendations: African Charter on Human and Peoples' Rights, 1981.

Convention on the elimination of all forms of discrimination against women, 1976.

Charter of the United Nations, 1945.

Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities,1992.

European convention for the protection of human rights and foundational freedoms, 1950.

General comment no 19 on the article 23 ICCPR

General recommendation no 21(CEDAW) on equality in marriage and family relations.

International convent on civil and political rights, 1966.

International covenant on economics, social and cultural rights, 1966.

Protocol to the Africa charter on human rights and people's rights on the rights of women in Africa, 2003.

Statute of the international court of justice (ICJ) 26 June 1945, Art.38.

Universal declaration of human rights, 1948.

Vienna convention on the law of treaties, 1969.

Secondary literature: books

- *Aeschlimann, s. Financial compensation upon the ending of informal relationships_ a comparison of the different approaches to ensure the protection of the weaker parties. In common core and better law in European family law. Edited by boeele-woelki. Oxford, (inertia) 2005.pp244*
- Armardottir, oddny. Equality and non discrimination under the European convention on the human rights. Usa, (kluwer law international) 2003.
- *Asland, john. Legalisation of informal relations in Norway. In: common core and better law in European family law. Edited by boele-woelki. Oxfoed, (inertia)2005, pp296*

4.Banning, theo r. G van. The human right to property.(intersentia) 200

5. barlow, anne....(et al.) cohabitation, marriage and the law. Social changes and legal reforms in the 21st century. Oregon, (hart publishing) 2005. Boyle, alan. Soft law in international law making. In; international law 2006, pp141

6. Churchill, paul. Human rights and global diversity. New jersey,(Pearsoneducation inc)2006

7. Cook, Rebecca. Compliance with reproductive rights. In : discrimination and toleration.edited by hastrup, Kirsten and Ulrich, George. The hague, (kluwer law international)2002.pp230

8. Craig, Ronald. Systematic discrimination in employment and the protection of ethnic equality. Boston, (martinus nijhoff publishers) 2007

9. Eide, asbjon. Economic, social and cultural rights on human rights. In : economic social and cultural rights: a textbook. 2nd edition by asbjorn eide, catarina krausa and allan rosas. Usa, (kluwer law international) 2001pp23

10. Fukuyama, francis. The great disruption: human nature and the reconstruction of social order. New York, (the free press) 1999

11. Hastrup, Kirsten. Introduction, the responsiblty of intellectuals. In discrimination and toleration: new perspectives. Edited by hastrup, Kirsten and Ulrich, George. The hague.(kluwer law international) 2002. Pp1

12. Klein, hans. The right to political participation and the information society. In: human rights in the globalinformation society. Edited by Jorgensen, rikke frank. Cambridge,(the MIT press) 2006. Pp190-191

13. Koenig, mathias and guchteneire, paul de. Political governance of cultural diversity. In: democrac and human rights in multicultural societies. Hamsphire,(ashgate publishing limited) 2007.pp14

14. Lindhom, tore. The cross cultural legitimacy of the universal human rights; plural justification across normative divides. In cultural human rights. Edited by francioni, Francesco & scheinin, martin. Neitherlands, (martinus nijhoff publishers) 2007 pp 17-19

15 Morgan, patricia. Marriage- lite; the rise of cohabitation and its consequences. London, (institute for the study of civil society) 2000

16.Nickel, james. Making sense of human rights. 2nd edition. (Blackwell publishing) 2007

17.Nussbaum, Martha. Women and human development; the capabilities approach.usa (cambridge university press) 2000

18.Raikka, juha. Is a membership blind model of justice false by definition? In: do we need minority rights? Conceptual issues. Edited by raikka, juha. The .hague, (kluwar law interanational) 1996. Pp9

19. Rise, Thomas and sikkink, karthryn. The socialisation of human rights norms into domestic practices. Introduction in: the power of human rights: international norms and domestic change. Edited by Thomas rise, Stephen ropp and Kathryn sikkink. Uk.(Cambridge university press) 1999.pp 1-38

20. Saldeen, ake. Cohabitation outside marriage or partnership. In the international survey of family law.edited by dr. Andrew bainham. Bristol, (Jordan publishing ltd) 2005 pp 503

21.Se, amartya. Human rights to development. In development as a human right: legal, political and economic dimensions. Edited by Andreessen, bard and marks, Stephen. USA. (the president and fellows of Harvard college) 2006. Pp 3

22 Scherpe, Jens. The legal status of cohabitants- requirements for the legal recognition. In : common core and better law in European family law. Edited by boele- woelki. Oxford, (inertia) 2005 pp283

23 Smith, Rhone. Textbook on international human rights. 3rd edition. New York, (oxford university press) 2007

Journal articles

Awusabo- asare, k (1990) the new intestate succession law of Uganda, Canadian journal of the African studies, vol. 24, No. 1, P1-16

Bernstein, b e (1977) the family coordinator, vol. 26, No.4 the family and the law, pp361-366

Digest (1985) Uganda; contraceptives are familiar but little used; lactation plays role in limiting fertility. In; international family planning perspectives, vol. 11, No.4 (dec. 1985), pp 121-123.

Meeker, d (1991) the effects of imputation procedures on first birth intervals; evidences from five African fertility surveys in demography, vol.28, and No.2. May 1991

Slaughter, Anne- Marie & ratner, Stephen. Symposium on method in international law. In; the American journal of international law 93(2) 1999.