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AN ANALYTICAL OVERVIEW OF ASPECTS OF MARRIAGE AND DIVORCE BILL 2017

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Abstract

The paper takes an overview of the Ugandan Marriage and Divorce Bill which seeks to consolidate the diverse laws relating to different categories of marriage. The paper takes on aspects such as property rights, cohabitation among others

1.1 Introduction

Marriage in the civil point of view is the union of man and woman in love and in covenant as long as they are alive to set up their own family the subsistence of which, neither of them is at liberty to contract any form of marriage. This reasoning was fortified by **Hyde vs. Hyde (1863) LR P & D 130** which was noted with approval in the case of **Alia vs. Uganda (1967) EA 416** as a voluntary union of one man and woman to the exclusion of all others. However contrary to the civil point of view of the institution of marriage, which considers it to be monogamous, in the perception of the African tradition and between persons professing the Mohammedan religion marriage is considered to be polygamous.

The Marriage and Divorce Bill consolidates the law relating to Civil, Christian, Hindu, and customary marriages in Uganda, also intends to provide for marital rights and duties, recognition of cohabitation in relation to property rights, and consequences of separation and divorce. It intends to reform and redress the gender imbalance that has existed in the marriage and divorce acts in Uganda, both dating from 1906. Its aim is to ensure equal rights for men and women at marriage, separation and divorce. It also seeks to protect property rights of persons in cohabiting relationships

1.2 Back Ground

The history of the Marriage and Divorce Bill of 2017 stretches back from 2003 where the Bill was referred to as the **Domestic Relations Bill** and later on referred to as the **Marriage and Divorce Bill of 2009**. In the year of 2013 this Bill faced rigid confrontation from Parliamentarians, men and religious groups and consequently it was passed into law.

Following the rigid confrontation from various stake holders, several clauses that were considered problematic were dropped and now the Bill is referred to as the **Marriage Bill** and before long it will be re assembled in Parliament. The Marriage

Bill emanates from an ample study by the Uganda Law Reform Commission due to the pressing call for of a systematic analysis or and review in the Ugandan family law regime to reflect current day realities and shifting social, economic and cultural trends. These changes demand a responsive modification in the law and come up with a unified and comprehensive law governing domestic relations in Uganda. The national wide research undertaken by the Uganda law reform commission also stretched back from a commission of inquiry into marriage, divorce and status of women commonly referred to as the **(Kalema Report) of 1965**. [¹]

The present day family realities that the Bill intends to put into consideration notably include inter alai, the Court rulings such as the highly celebrated **Constitutional Court Petition Number 2 of 2003**[²] in which Constitutional Court judges, their lordships unanimously well thought out and decided through a declaration that Section 4(1) of the current **Divorce Act (Cap 249)** contravenes and is inconsistent with Articles 21(1) and 2 and 31(1) and 6 of the Constitution.³

The Bill in its current state provides for several types of marriages notably Customary, Hindu Bahai, Civil and Christian marriages and it leaves out the Islamic type of marriage since consultations are still under way from the Muslim community about this intended law.

1.3 Traditional Practices and the Current Marriage Bill

There are a number of problematic clauses in the bill and the legal implication of these clauses will outlaw a number of traditional practices and also make property sharing mandatory in a divorce and gives cohabiting partners property rights.⁴ This might be interpreted to encourage African tradition violations in the institution of marriage yet **Article 37 of the 1995 Constitution of the Republic of Uganda** accords all Ugandans the right to enjoy and practice their culture.

It must be noted however that the customs should not be contrary to the principles of natural justice and morality. This is the spirit of the law apparent in **Section 14 of the Judicature Act Cap 13** which enjoins courts of judicature to apply customary law ipso facto in adjudication of matters before it provided the customs are not repugnant to natural justice and morality. Similarly **Article 33 (6) of the Constitution** prohibits

¹. W.W Kalema (1965) Uganda Commission on Marriage, Divorce and Status of Women (the Kalema Commission Report) available on www.worldcat.org. Accessed on 30th December, 2019

². Uganda Association of Women Lawyers & Others Vs. Attorney General Constitutional Court ruling Petition Number 2 of 2003

³. The 1995 Constitution of the Republic of Uganda as amended

⁴. Clause 118 enables spouses/cohabiters to make agreements during marriage or cohabitation with respect to the ownership and distribution of property on dissolution of the marriage or cohabitation.

laws, cultures, and customs or traditions that are against the welfare or interest of women or that undermine their rights. The same legal proposition was also forfeited by the Court of Appeal of Eastern Africa in Kenya. Civil appeal No.17 of 1965: **Kinyanjui Kimani vs. Muiru Gikanga and another [1965] EA 735** where it was vehemently stated that repugnant customs should not be upheld in the society

1.4 Arguments in support of the Marriage Bill 2017

Having looked at the brief background of the Bill I now turn to advancing my arguments in support of the Bill over some of the African traditions that are considered to be outdated and deserve no attention in the present society

1.4.1 Marriage gifts (Bride Price) not mandatory

I agree with the Marriage Bill of 2017 because it stipulates that Marriage gifts are not an essential requirement for any marriage in Uganda. [5] The term bride price was defined in the case of **Mifumi (U) Ltd and 12 Ors v AG Constitutional Appeal No. 2 of 2014** Court held inter alia as follows:

- a) Bride price and dowry refer to payments made at the time of marriage in many cultures.
- b) It is usually paid by the groom or the groom's family to that of the bride.
- c) Any payment of bride price must be conditioned upon voluntary consent of the two parties to the marriage and not a third party.

Traditionally, the payment of bride price is notorious and time-honored. It is argued that it is given on the basis that the wealth received compensates the bride's family for the time, money and trouble taken to raise a daughter who is later sent off to live with another family. This implies that bride price is an indispensable requirement of marriage as was demonstrated again in the case of **Uganda V Eduku (1975) HCB 359** Court in this case held that since bride had not been paid in full, there was no subsisting

Marriage between the complainant and the adulterous woman for they were not considered as husband and wife.⁶

However it must be noted that African custom is not uniform among all ethnic groups in Uganda. According to the **Uganda Law Reform Commission Report**[7] states

⁵. Clause 14 (1) of the Marriage Bill 2017 demands that marriage gifts are no longer an essential requirement for any marriage, any gifts given shall not be non refundable hence its an offence to demand the return of bride price.

⁶. This has been the reasoning in other cases like Amulan Orwang V Edward Ojok, Florence Kemitungo Vs. Yolamu Katuramu

that bride price varies from tribe to tribe, clan to clan and family to family depending on one's economic status. That in *Ankole*, opinion leaders estimated it to consist, on average, of four heifers and some goats, and in *Teso* the number of cows used to range from 18-25 but after insurgency it stands at 2-7 heads of cattle and cash money. The report goes on to say that in **Buganda**, the mandatory items are *kanzu* (long white tunic for men) for the father-in-law, *gomesi* (dress) for mother-in-law, *mwenge bigele* (local brew), a cock which is given to the brother-in-law and *-mutwalo*" (a specified sum of money). Other writers such as **Dr. Peter Atekyereza** in his Article "*Bride Wealth in Uganda: A Reality of Contradictions*" The Uganda Journal, November 2001, include meat or a cow among items in the bride price of the *Baganda*.

In light of the above, it is my humble submission that payment of bride price, puts a woman in a vulnerable inferior position and reduces her to a chattel and not equal to her husband and in many instances it implies that a man has purchased the wife to provide labour and hence this African tradition deserves no attention and preservation in the current society since it against rules of equity, good conscience and contrary to the constitution.

1.4.2 Demand for return or bride price at dissolution of marriage.

Turning to the return of bride price, it is considered to be unconstitutional and now an offence under Clause 14 (2) of the Bill.⁸ This provision is intended to put into consideration of the jurisprudence established in **Mifumi (U) Ltd anor Vs A.G 2 others Constitution Appeal No. 02/2014** where it was observed that husbands can no longer demand that bride price be returned in the event of dissolution of a customary marriage. It is contrary to the constitution regarding equality in contracting during marriage and its dissolution.[⁹] The lead justice Jotham Tumwesigye said that it was unfair for the parents of the woman to be asked to refund the bride price after years of marriage, saying it was unlikely they would have kept the property that had changed hands

It must be noted that this kind of practice has been so notorious in the *Bakiga* (a tribe in the south western part of Uganda) and the negotiations over payment take place between male representatives of the two families and women are not allowed to take part. This kind of custom makes woman subjected to abuse, making it difficult for her

⁷. Uganda Law Reform Commission Consultative Meeting on Gender Related Legislation for MPS, held from 17th-19th and 24th—26th September 2009

⁸. Clause 14 (2) of the Marriage and Divorce Bill 2017

⁹. Article 31 (1) (b) and 33 (1) of the 1995 Constitution of the Republic of Uganda

to leave, especially where her family cannot afford to return the bride price or is unwilling to do so. Consequently this has contributed to domestic violence.

It is my considered view that this custom of payment of bride price and return of bride price at the dissolution of marriage is repugnant to natural justice, equity and good conscience and we must do away with it.

Article 32 (2) of the Constitution prohibits customs, cultures and traditions that are against the dignity, interest or welfare of women. **Article 5 of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)**,¹⁰ affirms the same principle when it urges states to modify social and cultural patterns of conduct of men and women with a view to achieving elimination of prejudices, customary and other practices which are based on the ideas of inferiority or superiority of either of the sexes.

1.4.3 Widow Inheritance

The term —Marriage‖ in the civilized society’s insight, it is a legally sanctioned contract between man and woman who have the capacity to enter into such an agreement, mutually promise to live together in the relationship of husband and wife in law for life, or until the legal termination of the relationship.

Traditionally we have a custom in Uganda practiced by some ethnic tribes which allows men to inherit widows the moment their husbands are dead. This kind of custom is considered repugnant to the provisions of the constitution and need not to be protected as was stated in the case of **Ebiju & Anor V Echodu**.¹¹ In the new proposed legislation, Marriage through the practice of widow inheritance is prohibited,¹² and this protects the constitutional rights of a person to marry upon a free consent hence making the custom of marriage through inheritance of women unnecessary and we need not preserve it.

1.4.4 Ownership of Property

The Bill recognizes separate property which is not subjected to division,¹³ which includes property acquired before marriage. Ancestral property and family land cannot be shared.¹⁴ In the African tradition a woman is regarded as a property of the

¹⁰. (CEDAW) was adopted on 18th December 1979 by the United Nations general assembly, it however entered into force as an international treaty on 3 September 1981

¹¹. Ebiju & Another V Echodu (Civil Appeal No. 43 of 2012) [2015] UGHCCD 122 (17 December 2015)

¹². Clause 13 of the Marriage and Divorce Bill of 2017

¹³. Dr. Specioza Kazibwe Naigaga Vs. Eng. Charles Nsubuga Kazibwe Divorce Cause No. 03/2003. Court held that where property is in the name of the party that is entitled to exclusive ownership at dissolution

¹⁴. Julius Rwabinumi Vs. Hope Bahimbisomwe (Civil Appeal No. 10 Of 2009) [2013] UGSC 5 (20 March 2013) court held that ancestral grounds cannot be shared

man and totally incapable of holding property of her own independently of man. However the new proposed legislation sets up an avenue in line with **Article 26 of the Constitution** which grants every individual a right to own property in their individual capacity or in association with others.

The issue of owning individual property by spouses came out clearly in the case of **Julius Rwabinumi V Hope Bahimbisomwe** [¹⁵] where the court held that a spouse can own individual property as per Article 26 or jointly with his or her spouse. Further it was held that **Article 31 (1) (b)** of the Uganda Constitution 1995 guarantees equality in treatment of either the wife or the husband at divorce, it does not, in my opinion, require that all property either individually or jointly acquired before or during the subsistence of a marriage should in all cases, be shared equally upon divorce, it was concluded that the question whether it should be divided equally on divorce depends on the facts of each individual case

When it comes to the issue of how Court should determine a contributing spouses share in joint property came up in the case of **Kagga V Kagga. High Court Divorce Cause No. 11 of 2005 (unreported)** for example where, **Mwangusya J.** observed that our courts have a principle which recognizes each spouses contribution to acquisition of property and this contribution may be direct, where the contribution is monetary or indirect where a spouse offers domestic services...when distributing the property of a divorced couple, it is immaterial that one of the spouses was not as financially endowed as the other as this case clearly showed that while the first respondent was the financial muscle behind all the wealth they acquired, the contribution of the petitioner is no less important than that made by the respondent||.

1.4.5 Grounds for Divorce

The clause on the breakdown of marriage in the old law the grounds were flimsy and would make it easier to divorce but in the new proposed legislation you must prove why you want to walk away. For instance the Bill demands that a spouse shall not petition for divorce before the expiry of two years from the date of marriage and a spouse must prove that he or she is suffering exceptional hardship in marriage. Further the grounds of divorce have been made uniform available to either spouse as it was held in the case of **Uganda Association of Women Lawyers & Others V Attorney General Constitutional Petition No.2 Of 2003**[¹⁶]

¹⁵. ibid

¹⁶. Uganda Association of Women Lawyers & Others Vs. Attorney General, Constitutional Petition No.2 of 2003

Therefore I find no reason to fault the new proposed legislation governing marriage since it is intended to put into consideration most of the judicial finds which are in conformity with the 1995 Constitution of the Republic of Uganda.

1.5 African traditions preserved by the Bill.

Without prejudice to the above to a small extent the Bill preserves some African tradition customs. For example marriage cannot take place when the parties are under the prohibited degrees of marriage whether natural or legal.¹⁷ This African tradition came out very clearly the case of **Bruno Kiuwa Vs. Ivan Sserunkuma High Court Civil Suit No. 56 of 2006** Remy Kasule J; held that the intended marriage was illegal, null and void because of the Baganda custom, both parties to it being of the same clan which is prohibited by the *Kiganda* custom

I entirely agree and support this African tradition that is totally in line with the existing marriage laws and the new proposed legislation where marriage between relatives is totally discouraged and categorized as falling under the prohibited degrees of marriage.

1.6 Conclusion

It is only justifiable that we reform and make a law that is only consistent with the 1995 Constitution of the Republic of Uganda. The laws we are operating under some were made in 1904. The Constitution prohibits laws and cultures which undermine the status of women yet the current laws on marriage enforce superiority of men and inequality which contravene the constitution. African tradition which is contrary to equity and good conscience such as marriage through inheritance of widows, return of bride price at dissolution of marriage and should be totally disregarded, abandoned and no need to preserve them. To a large extent I support the Bill over some African traditions

¹⁷. Clause 17 of the Marriage and Divorce Bill of 2017

