

MARRIAGE, COHABITATION AND INTESTATE SUCCESSION:

Assessing Ghana's Intestate Succession Law for Non-discrimination



Supervisor: Maria A. Lundberg

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ABRAHAM T. AFRIM-NARH

UNIVERSITY OF OSLO

Faculty of Law

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ABSTRACT

General Comment 19 of the International Covenant on Civil and Political Rights asks states to recognize 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 unmarried cohabitants and married spouses such that cohabitants are normally not given the quality of rights and protections guaranteed to married spouses (Barlow et al, 2005). Whereas some researchers found that this situation creates disadvantages for cohabitants and argued 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. My thesis uses Ghana's intestate succession law as primary data to take a mid-way position in this debate. It proposes a context 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 concerns should normally determine the essence of differential treatment to avoid discrimination against cohabitants.

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ACRONYMS

CEDAW	Convention for 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
GLR	Ghana 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 Rights
LI 1515	Legislative Instrument Number 1515
PNDC	Provisional National Defence Council
UDHR	Universal Declaration of Human Rights

1 INTRODUCTION

Article 23 (1) of the International Covenant on Civil and Political Rights (ICCPR) acknowledged the family as an important basis of society and that it is entitled to protection by state and society. The right to marry and to found family in Article 23(2) of the ICCPR provides direct link of marriage to family establishment. However, the Human Rights Committee reminds states in paragraph 2 of its General Comment Number 19 that other valid systems of family establishment exist such as heterosexual cohabitation¹ and these must also be recognized for family protection.

The nature of family protection is left to state discretion with no indication of whether the various family systems should be treated equally. State practices however indicate that marriage is often taken to be the key determinant of family protection (Barlow et al, 2005:2). The quality of automatic rights of protection given to married spouses in all circumstances is not extended as such to unmarried spouses (ibid). Sometimes cohabitants are excluded entirely from protection. Yet not much attention is drawn to the possibility that this normative distinction may raise human rights concerns in some specific contexts.

This thesis identifies intestate succession² as an important issue in family protection and discusses the essence of differentiating between married partners and cohabitants in this context using the framework of non-discrimination as prohibited in international human rights law. Specifically, the thesis looks into Ghana's law on intestate succession (PNDC L

¹ Cohabitation as used in this thesis is heterosexual relationships in which a man and woman have in practice consented to establish a family but have not satisfied the legal requirements of marriage.

² The rights of a person to share in the properties of the partner who dies without making a valid will.

111, 1985)³ for data to demonstrate a situation where the exclusion of unmarried cohabitants from legal protections reserved for married spouses could raise human rights concerns that may amount to discrimination.

The thesis seeks to apply the ‘equal protection by the law’ in Article 26 of the ICCPR to cohabitants and married spouses in the context of intestate succession. It proposes that the normative separation of cohabitants from married spouses in family protection may amount to discrimination depending on the context and the human rights implications of the issue involved. It therefore suggests a context specific assessment of issues related to family protection by considering the human rights implications so as to determine how appropriate it is to treat cohabitants differently from married spouses. This is not to justify the moral and legal rightness of cohabitation or marriage. It is an academic exercise on how to determine if a difference in treatment amounts to discrimination.

This thesis is a contribution to a current debate among researchers, commentators and legal practitioners on how to compare and treat cohabitants and married spouses in terms of rights and protection of the family (Barlow et al, 2005:2). Some commentators would like to preserve the outlook of the traditional family in which important rights are determined by marriage. Fukuyama (1999) in his volume ‘the Great Disruption’ sees the rise in cohabitation as a breakdown of the family and Morgan (2000) sees it as “evidence of a rise in moral decline, selfish individualism and loss of commitment”. Some also argue that cohabitants should themselves consider the legal ramifications earlier so as to avoid devastating legal complications in their relationships (Bernstein, 1977:361).

On the other hand, some researchers claim that on the basis of in-depth studies into cohabitation and marriage, it is generally no longer feasible to define family rights solely on the grounds of legal commitments (Barlow et al, 2005:2). They found that people

³ PNDC L111 (1985) derives its name from the Provisional National Defense Council, the then ruling Government which concluded the promulgation of the Intestate Succession Law. Henceforth, I may simply refer to it as the Law.

cohabit due to different rationalities rather than legal rationality and strongly recommend legal reforms to protect cohabitants in all spheres of life such as is usually provided for married couples (ibid:51). Scherpe (2005:283) argues that the “fact that cohabitation exists and that people may cohabit for long periods of time demands that legal protection is necessary at least to protect the weaker persons in such relations”. My thesis takes a mid-way position in this debate by suggesting a context specific approach to looking at issues of interest to the welfare of the family considering the human rights implications to determine if a differential treatment is appropriate. I therefore do not argue for general equality between cohabitants and married spouses in all aspects of life given that my thesis is limited to a particular issue.

The issue further attracted some attention in legal practice. The Canadian Supreme Court found in *Miron v. Trudel*⁴ that an unfavourable treatment of cohabitants compared to married spouses in the context of claims to insurance benefit which has implication for human wellbeing was discrimination based on marital status. And although the European Court of Human Rights did not accept in *Marckx v. Belgium* that all legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage,⁵ it found in the same case that laws applicable to families should allow those concerned to lead normal family life.⁶ By this the court suggests that the practical significance of an issue to the wellbeing of the family should normally determine if such differential treatment is acceptable.

⁴ *Miron v. Trudel*, 1995, CanLII 1997 (Supreme Court of Canada)

⁵ Refer to paragraph 67 of the case *Marckx v. Belgium*, 1979 ECHR 13/06/1979.

⁶ *Ibid*, paragraph 31.

1.1 Problem Statement

Researchers keep pointing out that cohabitation is a form of marital status (Barlow et al, 2005). Article 1 of the Convention on the Elimination of all Forms 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 ICCPR states are obliged to ensure equal protection by the law without discrimination. In paragraph 2 of General 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. Do these provisions suggest equal treatment of partners in cohabitation and those in marriage if states are to interpret their treaty obligations in good faith as required by Article 31(1) of the Vienna Convention on the Law of Treaties?

Ghana commits itself to non-discrimination in Article 17 of its 1992 Constitution and links the protection of human rights in Article 33(5) to the security of human dignity and freedom. However, it will be shown in chapter two of this thesis that Ghana's law on intestate succession gives rights to married spouses to inherit part of the estate of their deceased partners but it excludes cohabitants from such protection. If this differentiation is looked at in light of the human rights provisions listed above, it is tempting to say outright that the situation amounts to discrimination against cohabitants. On the other hand considering the controversies on cohabitation presented earlier, it is also tempting to say that cohabitants should not be treated similar to married spouses. But a difference in treatment does not amount to discrimination unless it is assessed through a standard framework of investigation (Arnardottir, 2003:14). These indicate that there is considerable dilemma as to whether Ghana's law on intestate succession amounts to discrimination against cohabitants.

1.2 Research Objectives

1. To describe the application of the Ghanaian law on intestate succession (PNDCL 111, 1985) and to explore if it makes distinctions between cohabitants and married spouses that may amount to discrimination.
2. To identify and discuss other issues in the context of this 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 Questions

1. Does Ghana's law on intestate succession (PNDCL 111, 1985) discriminate against cohabitants?
 - (I) To what extent does the law make distinction between cohabitants and married spouses in the context of intestate succession?
 - (II) Are cohabitants and married spouses in significantly similar situation in the context of intestate succession?
 - (III) Does the distinction created under the application of the law pursue any legitimate aims?
 - (IV) Is there reasonable proportionality between the aims pursued by excluding cohabitants from intestate succession and the means adopted to achieve them?
2. What other issues apart from non-discrimination may suggest an improvement in the law for equal protection of partners in cohabitation and married spouses?

1.4 Rationale and Relevance of the Study

The thesis generally tries to explore if the right to equal protection of the law under Article 26 of the ICCPR could 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. If the law is found to discriminate against cohabitants then there can be justified reasons to simply adjust its application for improved human rights protection without discrimination against cohabitants. If it is found not to discriminate against cohabitants then there can be justified reasons to structure different remedies for cohabitants in the context of intestate succession. The idea is to ensure that matters that may affect the dignity and wellbeing of cohabitants are not just dismissed unless there are very strong reasons to do so since human wellbeing is most important to human rights protection. The objectives and questions of this thesis are therefore framed to fit some basic requirements in determining if a difference in treatment amounts to discrimination. A difference in treatment is discriminatory only if it pursues no legitimate aim or the aim sought is not proportional to the means used (Arnardottir 2003:15; Craig, 2007:30).⁷ The second objective rests on the realization that cohabitants are the disadvantaged party in need of extra protection for equality with married spouses.

The relevance of this thesis to human rights protection is captured in Article 23 of the ICCPR which sees the family as an important and fundamental unit of society that must be protected by the state and society. A study into non-discrimination in matters of intestate succession is relevant for economic, social and cultural protection of the family. Also as a student training in human rights protection the thesis offers me basic practical training on how to discern if a particular differential treatment amounts to discrimination. This will serve as starting point for me to go into advanced studies on discrimination against specific interests such as those of women and minorities. It is important for persons interested in human rights activities to be equipped with basic tools to address simple questions on discrimination. This is because discrimination has become a common terminology such

⁷ This is the major task of the study. The second objective is subsidiary to fit the thesis into existing human rights protection.

that any differential treatment is construed negatively as discrimination without looking for necessary conditions to that effect (Hastrup, 2002:1).

More importantly this thesis may help reduce needless litigation between cohabitants and states. In some parts of the world, cohabitants are already claiming to be victims of discrimination when they are not treated fairly as compared with married spouses. This was the issue in the Canadian case *Miron v. Trudel, supra*. Ghana has also been addressing cases in which cohabitants use other pretexts such as child protection to demand benefits under the intestate succession law as it appeared in the case *In Re Asante (DECD); Owusu v. Asante, infra*. Succession to properties directly relate to source of livelihood and sustenance to most people and matters concerning the wellbeing and dignity of humans are central to human rights protection (Nickel, 2007:53; Nussbaum, 2000:91-2).

1.5 Methodology

1.5.1 Thesis Scope, Design and Sources of Data

The focus of analysis is non-discrimination. Discrimination is a broad concept and its application can be legally complicated. The type of discrimination I examine here is the most basic requirement that entities in similar situations should be treated alike (Arnardottir, 2003:5). This is not to say that other aspects of non-discrimination may not apply. For instance it could be suggested that cohabitants and married spouses be treated differently because they are significantly different as noted in the *Thlimmenos case, infra*⁸. However, considering the object and purpose of the law being assessed in this thesis, I will argue in chapter three that cohabitants and married spouses are more similar than different within the context of this study. Formal non-discrimination is most suitable for this thesis.

Since discrimination is essentially a legal issue, the largest part of my thesis takes the legal approach to enquiry. In human rights protection, there is an established analytical

⁸ This will be shown later in chapter three.

framework to follow so as to determine if a difference in treatment is discriminatory or not. This has earlier been designed by the European Court of Human Rights in the *Belgian Linguistic Case*.⁹ According to that criterion, there must be found a difference in treatment. It must be assessed if the distinction has objective and reasonable justification taking into consideration the aims and effects of the measure. And there must also be reasonable proportionality between the aims pursued and the means adopted to achieve them. This framework has been built upon by the Court in most of its cases and other Human Rights adjudicating institutions such as the Human Rights Committee adopt it. This focuses my thesis on the practical aspects of human rights protection.

My approach is more into critical legal methods of analysis with a blend of feminist jurisprudence (Slaughter and Ratner, 1999:293-294). This is due to the realization that the case law on intestate succession has followed strict legal positivist precedence over time and seems to overlook important contextual details and variables which have created disadvantages for cohabitants especially women. My approach is therefore to identify such contextual details to argue a case for equal treatment of cohabitants and married spouses in the context of intestate succession. This thesis should therefore not be construed as making complex inferences into legal documents. Domestic law including judgments on cases and legislations are used as sources of research data.¹⁰ This is because in human rights terms states are expected to interpret their treaty obligations in good faith as stipulated in article 31(1) of the Vienna Convention on the Law of Treaties. Human rights issues are often assessed on country basis.

Ghana is a common law country and follows judicial precedence. I therefore look at how the Ghanaian Supreme Court rules on the issue because it is the final court of appeal in Ghana and its decisions will represent Ghana in international case situations. Some cases

⁹ The analytical framework is in paragraph 10 of the case “Relating to Certain Aspects of the Laws on the use of Language in Education in Belgium v. Belgium (merits), judgment of 23 July 1968.

¹⁰ The cases used for the thesis have been selected from all cases concluded in the Superior Courts (the High Court, Appeals Court and Supreme Court) from the early 1960s and 2007. Although only few cases have been found of relevance to cohabitants the data are quite representative of how the Supreme Court compares cohabitants and married spouse in the context of intestate succession.

from the Appeals Court and the High Court are used only if their decisions have not been re-tried in the Supreme Court. The lack of legal rights for cohabitants to intestate succession seems to have been a settled issue and therefore not many cases are published on it. Yet the few cases identified have followed the same precedence over time. To avoid extreme repetitions, a major case and few supporting ones were used as data.

My approach is to fit the decisions of the Ghanaian Superior to the analytical framework on non-discrimination, thus how the law should have been in human rights perspective. Cohabitation is a concept with broad implications. Since the study is contextualised it required that both domestic and international human rights cases and research findings are used as sources of data. According to Boyle (2006:141) state practice is relevant soft law in international law-making. Although Ghana is not party to the European Convention on Human Rights, most human rights cases are adopted from the European Court of Human Rights because the Court is an advanced human rights adjudication institution. One relevant case has been adopted from the Canadian Supreme Court. And reference is made to reports of the UK Law Commission as well as different researchers and publicists. All these are based on Article 38 (c) and (d) of the Statute of the International Court of Justice which accepts “general principles of law recognized by civilized states” and the teachings of the most highly qualified publicists” for determining rules of law.

Marriage, cohabitation and intestate succession are basically social issues so the thesis makes some non-legal inferences as well. Towards the end of the thesis it was found necessary to assess the practical possibility of the law under discussion to keep its current protection of married spouses in exception of cohabitants considering the current debates on the relationship between cohabitation and marriage. On this issue the study goes a bit into the social sciences by very briefly applying the theory of Relative Deprivation which has been popular in Political Science and Psychology. As will be shown later, this aspect demonstrates the importance of assessing issues affecting the survival, dignity and wellbeing of humans in other perspectives apart from the law. Also both legal and non-

legal research findings on cohabitation were used for analysis in most parts of the study. Generally this study is best described as semi-legal in design.

No interviews and surveys are conducted since the facts of the cases in the judgements are sufficient for purposes of analyses. The use of cases as sources of data has reduced research biases because the facts are cross-examined during court proceedings. More importantly, legal statements often make provision for dissenting opinions so that opinions expressed in this study may be challenged yet the unique contextual details may new insights into the situation of cohabitants in legal systems.

1.5.2 The Focus on the Intestate Succession Law of Ghana

Focusing the study on a Ghanaian Law does not imply that the problem of cohabitation is unique to Ghana. As shown earlier, it seems general practice the world over that cohabitants and married spouses do not have the same rights of protection. However, in chapter two of this thesis, I will present unique features in the law that makes an assessment of the differentiation between cohabitants and married spouses interesting for discussion in human rights perspective. For instance it will be shown how marriage and cohabitation are closely interrelated. Also there are what may be unforeseen consequences of the different laws on marriage accepted in Ghana which contribute to the prevalence of cohabitation and suggest that cohabitation is not just a choice to be different but also an outcome of inconsistencies in the laws on marriage. Like most other countries Ghana is bound by several human rights treaties under the United Nations and the African Union. The Ghanaian situation provides a good opportunity to contribute to the global discourse on cohabitation pointing out that differences between cohabitants and married spouses should be assessed on context bases.

1.5.3 Structure of Thesis

Chapter two forms the main descriptive part of the thesis. It also contains the data used for analysis and discussion in the rest of the thesis. In chapter two, an overview of the intestate succession law has been presented and spells out the provisions of the spouse compared to other beneficiaries for intestate succession. Then the three different legal systems of marriage are presented with an analysis of their social contexts and relationship with cohabitation. Chapter two therefore establishes the difference in treatment to be discussed in the thesis. Chapter three and four are devoted to discussion of the materials in chapter two. Chapter three is more analytical and discursive on non-discrimination being the main task of the study. It finds the similarities between cohabitants and married spouses, assesses the aims of differentiation and tests for proportionality.

Chapter four is more inferential and discusses two non-legal issues emerging from the study that give additional support to the findings in chapter three. As part of this, a contribution from the Relative Deprivation Theory and inferences into special protections for minorities and agnostics have been forwarded to back up discussions on non-discrimination to improve the law for equal protection of cohabitants and married spouses for intestate succession. Chapter five concludes the thesis with summary of observations and suggestions as well as implications for human rights protection and future research.

No complex terminologies are used in this study except cohabitation which must be clarified. Cohabitation as used in the thesis is a union between a man and woman in a marriage-like relationship but they are not married. It is used interchangeably as concubinage whether in polygamous or monogamous relations. Readers may meet some few but necessary repetitions to build important trends, clarifications and emphasis in the discussions.

2 MARRIAGE, COHABITATION AND INTESTATE SUCCESSION IN GHANAIAN LAW

2.1 Brief Introduction

This chapter describes the extent to which the Ghanaian law on intestate succession treats married spouses different from cohabitants. The difference in treatment observed in this chapter is the main issue for analysis and discussion in the rest of the thesis. Since this study is contextualized on the intestate succession law I first 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 Ghana's Law on Intestate Succession (PNDCL 111, 1985) as Amended by Intestate Succession (Amendment) Law 1991(PNDCL 264)

PNDCL 111(1985) is the main legal framework now in force in Ghana 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. Section 1(1) and 1(2) indicate that the Law devolves only personal estates and excludes stool, skin or family properties inherited by the deceased during his life time. Under section 2(1) and 2(2) a person shall be deemed to have died intestate if at the time of his death he has not made a will disposing of his estate or partially intestate if a valid will devolves only part of his estate. The law is therefore not a general law of inheritance. Other systems of inheritance such as the Wills Act are not part of this study.

PNDCL 111(1985) makes provisions for defined categories of surviving members of the family. Sections 4-8 of the Law list the surviving spouse, the child and the parents of the deceased as the key beneficiaries under the Law. In the event that none of these beneficiaries are identified, the estate may devolve to the Republic as indicated under Section 11(2) of the Law. Once the beneficiaries are identified the Law makes a clear formula as to which portions of the estate legitimately devolve to each defined category of beneficiaries. The estate of the deceased is classified into two; namely, household chattels¹¹ and residue.¹² It is stipulated in section 3 that “where the intestate is survived by a spouse or a child or both, the spouse or child or both of them, as the case may be, shall be entitled absolutely to the household chattels of the intestate”. Members of the extended family take share only in the residue of the estate.

The formula for the devolution of the residue of the estate where the intestate is survived by spouse and child is spelt out in Section 5 of the Law.

It provides:

- A) Three-sixteenth of the estate to the surviving spouse;
- B) Nine-sixteenth to the surviving child;
- C) One-eighth to the surviving parent;
- D) One-eighth in accordance with customary law.

Where the intestate is survived by spouse only, Section 6 devolves the estates as follows:

- A) One-half to the surviving spouse;
- B) One –fourth to the surviving parent;
- C) One-fourth in accordance with customary law.

The Law has special protective provisions for the beneficiaries. Section 16A prohibits ejection of spouses and children from the matrimonial home before the distribution of the estates. In connection with these protections, section 17 b (iii) makes it an offence with

¹¹ Household Chattels include all household appliances, equipments and materials for daily use by the family.

¹² The Residue of the estate includes all other properties left after the household chattels are selected.

prescribed punishment if anyone unlawfully ejects a surviving spouse from the matrimonial premises or deprives such a person of the use of the properties which hitherto the death of the intestate defined their sustenance. It prohibits intermeddling¹³ in such properties. This is where the Law gives direct effect to the protection of economic, social and cultural rights. This study only looks at the portion of the spouse and whether a cohabitant could also get the protection provided for the spouse. When PNDCL 111(1985) came into force, it repealed other enactments that hitherto regulated intestate succession for persons under different systems of marital relations.

Section 18 of the Law operationally defines the 'child, estate, parents, household chattels, will, residue and rules of private international law. It leaves the clause 'surviving spouse' undefined. In section 2.2 below, I will show how the clause 'surviving spouse' has been defined by judicial precedence since the 1960s and consistently applied to create a normative distinction between cohabitants and married spouses in the context of intestate succession. Before this I show in the next section the relationship between cohabitation and marriage as it appears in the Ghanaian Context.

2.1.2 A Complex Relationship between Marriage and Cohabitation

This section briefly depicts the threshold at which a union between a man and a woman is legally recognized as marriage and figures out how this applies to cohabitants. This section argues that within the Ghanaian context, cohabitation and marriage often appear to be different stages in the process of getting married and not always discretely separable.

In *Barake v. Barake*,¹⁴ a man who was married under the Marriage Ordinance (Cap 127) with strict prohibitions on polygamy claimed that he was married under a different law,

¹³ The prohibition against intermeddling is demonstrated in the case of *In Re Apau (DECD); Apau v. Ocansey [1993-94] 1 GLR 146-159*. The brother of the deceased sold some cars before the devolution of the estate and he was prosecuted accordingly.

¹⁴ *Barake v. Barake [1993-94] GLR 635-668*

Cap 129, which permits polygamy. The Accra High Court took the opportunity to explain the different systems of marriage recognized in Ghanaian law and relations that are popularly seen as marriage but actually null and void in legal terms. It indicates that for a union between a man and woman to be considered as marriage, it must have achieved the threshold of 'presumed legality and validity'.¹⁵ Ordinance Marriage, Mohammedan Marriage and Customary Marriage are three different systems of marriage legally recognized as far as they comply with stipulated legal formalities.

Marriage celebrated under the Marriage Ordinance, 1951 (CAP. 127)¹⁶ is strictly monogamous such that section 44 of this law places strict limitation on married person to contract another marriage even under native law or customs. The same section however makes it clear that other marriages outside the Ordinance system are legally valid and unaffected by the provisions of this Ordinance. Public notice is required for this marriage to take place and anyone who has reason to object to the marriage has right to enter a caveat to be addressed in court under sections 24 and 25 of the Ordinance. With all conditions satisfied the marriage has to be celebrated within three months of the date of notice and certificates are issued to legalise such marriages. It is worth noting that Cap 127 only prohibits cohabitation or another marriage during the subsistence of ordinance marriage. But to some extent marriage under CAP 127 accepts cohabitation before the celebration of marriage. Judge Amua-Sekyi explains in the case *In Re Asante (DECD); Owusu v. Asante, supra*, that even persons married under customary law may re-marry under Cap 127 indicating no limit to how long persons intending to marry may cohabit before celebrating the marriage.

Another system of marriage that is legal and valid for intestate succession is marriage under the Marriage of Mohammedans Ordinance, 1951 (Cap 129)¹⁷. Like the marriage under Cap 127, marriage under Cap 129 also follows legal formalities and requirements

¹⁵ Refer to page 12 of the instant case. Marriage registrations processes are followed to ensure that all customs and legal requirements are satisfied.

¹⁶ Henceforth, it may be referred to as Cap 127.

¹⁷ Henceforth it could be referred to as Cap 129.

that are spelt out in the Law. The unique feature of this law is that the celebration of marriages is consistent with Muslim religious beliefs and practices. Celebration of this marriage is done by Licensed Mohammedan Priests. After the celebration of the marriage, Section 6 of Cap 129 spells out how the marriage should be registered. Since the application of this law is tied to Muslim practices on marriage it permits polygamy. One man can legally marry up to four wives and according to the precedence set by the Judicial Committee of the Privy Council in *Coleman v. Shang*¹⁸ all four wives could share the 'spouse' portion of the estate.

The third and the most universal system of marriage in Ghana is marriage under customary law. At least 80% of marriages are concluded under customary law and even marriages intended to be celebrated under Ordinance or Muslim Law are first celebrated under customary law (Awusabo-Asare, 1990:4-5). Under this system, marriage differs according to the different customs and traditions of the different ethnic groups in Ghana. To be legally recognized any customary marriage must be registered under the Customary Marriage and Divorce (Registration) Law, 1985 (PNDCL 112) as amended in 1991 by PNDCL 263. Section 14 requires that customary marriages must be legally contracted indicating that all customs and traditions required to obtain parental consent must be exhausted. Section 15(1) states that "the provisions of the Intestate Succession Law, PNDCL 111(1985) shall apply to any spouse of a customary marriage registered under this Law. Thus like the other systems of marriage, the spouse under this Law must also attain legal recognition to benefit from intestate succession. Like the Mohammedan marriage, marriage under customary law is often described as 'potentially polygamous'¹⁹ since there is no limit on the number of wives that can be registered for one person. This system of marriage is very tolerant to cohabitation as part of the marriage process since elaborate traditions, customs and costs must be completed to get married.

¹⁸ Facts contained in 1(b) on page 1 of *Coleman v. Shang [1961] GLR 145-152*

¹⁹ Judge Hayfron-Benjamin JSC described this on page 33 of the case *In Re Asante (DECD); Owusu v. Asante, supra*.

2.2 Marriage and Cohabitation in the Context of Intestate Succession

In this section, I briefly show how differently partners in cohabitation are treated as compared with married spouses in the context of intestate succession. The right of a spouse to share in intestate succession depends on the system of marriage contracted in the lifetime of the deceased.²⁰ Where the deceased is survived by a spouse married under Cap 127, order 2 rule 7 of the Probate and Administration Rules, 1991(LI1515) puts the surviving spouse in the first priority for the administration of the estate. Where the deceased was married under a pluralistic system such as marriage under customary law and under the Mohammedan system, all the surviving spouses share in the spouse portion of the estate. Judge Amua-Sekyi points out in the case *In Re Asante (DECD); Owusu v. Asante, supra*, that “the law offers no definition of the word ‘spouse’ but it may be taken in its ordinary meaning of husband and wife. A person, who is not the husband or wife of the deceased according to the law of the marriage the person entered into in his lifetime, is not entitled to claim the whole or any part of the portion allotted to the spouse or spouses of the deceased”.

The precedence as noted earlier has been that cohabitants are not considered as beneficiaries of intestate succession. In *Yaotey v. Quaye, supra*, the children and all wives of the deceased asked the High Court, Accra to determine who could share in the estate. One of the women was a cohabitant to the deceased in legal terms. She was the only person removed from the beneficiaries to the estate because she was by definition not a wife but a concubine.²¹ The situation of Mary Owusu in the case *In Re: Asante (DECD) Owusu v. Asante, supra*, confirms the precedence. On page 22 of the judgement the Supreme Court made it clear that Mary Owusu the appellant was a concubine and she has no legal standing in matters of intestate succession. She has no right whatsoever to ask for letters of administration to administer the estate of the deceased. According to the court

²⁰ Ibid, fourth paragraph on page 35.

²¹ Cohabitants are legally referred to as concubines. The facts are in paragraph 6 on page two of the judgement.

this is because “she does not fall within any of the categories with regard to the order of priority of grant as set out in order 2, rule 7 of LI1515)”. These explain how the law looks at cohabitants within the context of intestate succession. They are not spouses and cannot make legal claims in case they are denied access to the estate of their deceased partners. However, the children of the cohabitant are legitimate beneficiaries of intestate succession.

The option left for cohabitants in such situations is judicial sympathy and discretion of the judges. The case *In Re: Asante (DECD) Owusu v. Asante, supra*, was first tried in the High Court. The Judge who tried the case in the High Court used judicial sympathy and discretion to include the cohabitant among those allowed to administer the estate of the deceased. This action was as a response to an earlier suggestion by a High Court Judge that the courts should muster enough courage to ensure that their judgments reflect current situations in society.²² However, the Appeals Court and the Supreme Court both criticised her discretion and sympathy as wrongful exercise of judicial discretion and accordingly reversed her decision noting that judicial sympathy cannot be a principle of law.²³

2.3 Background and Contextual Analysis of the Marriage Systems

In Ghana marriage must be approved by the extended family so that all marriages celebrated without the consent of the family were rejected by the family (Awusabo-Asare, 1990:2). Parental consent is always required in all marriages because it is generally believed that marriage must unite not only the intending partners but entirely broad families (ibid). The requirement that all marriages must satisfy parental consent means that all customs and costs dictated by the parents must be settled before marriage is approved (ibid). This makes marriage very expensive and may go through customary processes for

²² The suggestion was reported on page 5 of the Supreme Court case *Martin Alamisi Amidu v. John Agyekum Kufour, the Attorney General, Jake Obetsebi-Lampsey, Elizabeth Ohene and Joshua Hamidu (25/04/2001) Civil Motion No. 8/2001*.

²³ Her criticism was re-emphasised in the first paragraph on page 29 of the judgement.

years before marriage is finalized. This is why prolonged cohabitation is part of most marriages in Ghana. Beginning in 1884 alternative systems of marriage such as Ordinance marriage and Mohammedan marriages were enacted and amended but throughout history all these are subsidiary to customary marriage (ibid).

It became necessary to maintain three different systems of marriage so as to satisfy different marital interests in the Ghanaian society. In 1961, the Marriage, Divorce and Inheritance Bill was introduced to make marriage strictly monogamous in Ghana but it was rejected in Parliament (ibid: 3). The Chiefs who strongly opposed the introduction of monogamy as the only form of legal marriage instigated this action (ibid: 13). On the other hand the women's wing of the Christian Council of Churches advocated without success for monogamy to be the only form of legal marriage. And the Muslims wanted to marry up to four wives according to Muslim Law. The end result was that all attempts by the state failed to eliminate polygamous marriage but rather institutionalised it (ibid). Most marriages contracted in Ghana are finalized under customary law but if the parties intend to proceed to Ordinance/Church Marriage they must still go through all the customs and costs to obtain parental consent (ibid:5).

The above is just an example of attempts made by the state to stop polygamy but it failed to do so due to the involvement of civil society. This situation shows evidences of the conflicts and tensions that may arise as states attempt to respect their human rights obligations. The attempts to legalise only monogamous marriages pursued a good human rights agenda according to how CEDAW interpreted Convention Article 5(a) in General Recommendation 21. Further, according to Article 25(a) of ICCPR the state was also justified to involve stake holders such as the chiefs, women and religious organizations on issues that affect them so as to get broad representation of their concerns.

In the *Belgian Linguistic Case*, Belgium was justified to have set different language requirements in the interest of education in different provinces. This gives further justification that a state may adopt context specific political methods to manage cultural

diversity (Koenig and Guchteneire, 2007:14) within its jurisdiction. And General Recommendation 19 of the ICCPR agrees that states could maintain different systems of marriage. However, the effects that such broad consultations produce also matters. The influence of civil society has brought in certain features into the laws on marriage that seem to make it unlikely that the people may conduct themselves in accordance with the law. I take the attempts to remove polygamy as evidence of a realization that it was a problem or flaw in the laws on marriage. For instance polygamy goes contrary to existing human rights standards. In paragraph 14 of General Recommendation 21, CEDAW notes that a state violates Article 5(a) of the Convention if it permits polygamy in line with customary practices. Further, the acceptance of polygamy in some laws on marriage and prohibiting it in one law also creates legal uncertainties which seem to be contributing to the prevalence of cohabitation.

Judge Hayfron-Benjamin observed in the case *In Re Asante (DECD); Owusu v. Asante, supra*, that countless number of persons even married under the strict monogamous system are still contracting other liaisons including concubinage.²⁴ Prolonged cohabitation was practiced in the era pre-dating PNDCL 111(1985). In *Coleman v. Shang, supra*, the respondent lived and cohabited with the man and had ten children before she was later married to him under customary law.²⁵ In this case, the woman was a cohabitant to an already married man. The woman had no problems with the law and comfortably cohabited with the man for the ten years in expectation of marriage because the law applicable to the man permitted polygamy. In the case *In Re Asante (DECD); Owusu v. Asante, supra*, Mary Owusu the appellant, cohabited with a man in Ghana for more than ten years and had two children but since the man was already married under the 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 she attempted to be treated as a spouse. In that case her cohabitation could never have ended in marriage.

²⁴ In Ghanaian legal language, concubine is used to describe cohabitation as operationally defined in this study.

²⁵ Fact noted in the head note on page one of the case.

It is important to infer into how the legal systems contribute to the prevalence of cohabitation through the institutionalization of polygamy. Some of the cases suggest the possibility that some people are deceived into cohabitation and others may be confused of the multiple legal systems on marriage. In the instant case Mary Owusu, for being a cohabitant and not a wife clearly had no legal rights to administer or share in the estate of the man. But after the man died she contested from the High Court to the Supreme Court to be joined in the administration of the estate. Her actions indicate that she was eager to pursue her interests according to law. This brings more doubt as to why she could not change her marital status with the man before he died. Probably she did not know the full implication of cohabiting with that man for more than ten years. Either she was confused of the system of marriage applicable to the man or she was deceived to that effect.

There was a strong possibility of deceit in the case. The facts of the case disclose that the man was able to conceal information on all his properties from his legal wife who for many years was resident in the UK. It was Mary Owusu the cohabitant in Ghana who made known facts about his properties and their relationship after his death. Mary Owusu was also susceptible to the same concealment of information as he did to the legal wife. Even if she knew that the man was married she still could cohabit with him for long time expecting to be married if the man convinced her that the marriage applicable to him permitted polygamy.

Barake v. Barake, supra, is yet another case which suggests the possibility of deceit and confusion in the systems of marriage. In that case one Mr. Barake who should have known that he was married under the strict monogamous system contested in the High Court that he was married under Mohammedan Law after he contracted a second marriage. He claimed not to have understood the English Language in which the marriage was contracted but the court found this to be untrue. Also he made conscious efforts to hide his marriage identity by changing his religion to Islam where he was allowed to marry more than one wife and claimed that Mohammedan Marriage Law applied to him.

Two deductions could be drawn from this case. Either the man was telling lies as the court suggested or he was confused of the marriage systems. Taken that he truly did not know under which system he was married, the case is evidence that the different systems of marriage acceptable in law may be confusing people contracting marriages. Such a situation may contribute to the prevalence of extra-marital cohabitation if the partners belief that the marriage applicable to them permits polygamy. On the other hand if the man acted deceitfully, the case suggests that it is possible for married persons to attract new partners into cohabitation by adopting conscious efforts such as changing religions or other means to hide their true marriage identities.

The above indicate that a complex relationship between marriage and cohabitation exists within the Ghanaian context. Cohabitation could be a prolonged period with practical effects as marriage; children are born, interdependence is formed and mutual support for property acquisition may take place in cohabitation. Sometimes cohabitation ends up in marriage or not. Also married men often cohabit with different women aside their regular marriages but such forms of cohabitation may not end up in marriage as shown above leaving mostly women vulnerable to threats of deprivation after the death of their partners.

In purely legal terms, no one can plead ignorance of the law. Persons who do not conduct themselves according to the laws on marriage may have to face the rigors of the law such as has been in the case *In Re Asante (DECD)*; *Owusu v. Asante, supra*, where after ten years cohabitation, the cohabitant was denied any access to the estate because the applicable law prohibited polygamy. But in human rights terms, domestic laws must be formulated with sufficient clarity, precision and foreseeability to enable people conduct themselves according to law. The European Court of Human Rights stressed the importance of the quality of the law to human conduct in *Leyla Sahin v. Turkey*²⁶, *infra*. This ensures that no defects in the law expose people to dire consequences for not

²⁶ Refer to paragraph 84 of the case.

following the dictates of the law otherwise the inability of people to follow the law may be blamed on the law itself.

Although the court accepts in *Kokkinakis v. Greece*²⁷ that the law may have some degree of vague terms to avoid excessive rigidity, the multiple system of marriage described above cannot be described as precise and foreseeable enough for persons to avoid cohabitation with married persons that may expose them to threats of deprivation as shown in some of the cases above. This is because extra-marital cohabitation is legal in certain respects and illegal in other settings. In situations where only one strictly monogamous system of marriage is legal, the precision and foreseeability requirements of the law are clear and persons entering into prohibited relationships may justifiably have themselves to blame. In such systems married partners are readily observable and the limitations on polygamy are clear. The only option left if marriage goes bad is divorce. But in this context where additional marriage can be contracted and the most obvious option if marriage goes bad is to begin cohabitation with another person outside the matrimonial home. I view persons locked up in such prolonged cohabitation that exposes them to deprivations in terms of intestate succession as vulnerable persons due to the lapses in the laws on marriage.

The scope of cohabitation is big. Cohabitation before marriage usually happens in marriage under customary law due to the demands of elaborate customs and traditions. These legal requirements contribute to prolonged cohabitation in the process of marriage. Thus by law all persons in marital relations preparing to get married are cohabitants. All persons within marital unions that cannot be legalised are cohabitants. All persons in marital relations that fall short of the legal requirements are also cohabitants. And all persons who simply decide not to legalise their relations are also cohabitants. Within this context, marriage and cohabitation are not discretely separable and most women become vulnerable victims of deceit and confusion. Family formation begins with cohabitation. Chapter Three discusses the justification of this unequal treatment in the framework of non-discrimination.

²⁷ Refer to paragraph 40 of *Kokkinakis v. Greece* Judgment of 25 May 1993.

3 DISCUSSION 1: PROTECTING MARRIED SPOUSES FOR INTESTATE SUCCESSION AND DISCRIMINATION AGAINST COHABITANTS

The main objective of this study has been to find out if the distinction created by the application of PNDCL 111(1985) between cohabitants and married partners within the context of intestate succession may amount to discrimination. A first step to determine discrimination is to establish that there is a significant difference in treatment between entities in comparable or analogous situations (Arnardottir, 2003:38; Craig, 2007:35; Smith, 2007:176).²⁸ The preceding chapter has shown the difference in treatment by showing that the application of PNDCL 111(1985) protects married spouses and excludes cohabitants in matters of intestate succession. It is left to be shown that cohabitants and married spouses are in significantly similar situations in the context of intestate succession for purposes of comparison.

3.1 Finding the Similarities between Cohabitants and Married Spouses

This section answers sub-question II of the first question of the thesis. I adopt two levels under this section to assess the extent to which cohabitants and married spouses could be in significantly similar situations in the context of intestate succession for purposes of assessing non-discrimination. I first look for confirmed similarities in practical effect between cohabitants and married spouses and follow it up with an assessment of the relevance of the legal differences between them in relation to the object and purpose of the law as shown in section 3.1.2 below.

²⁸ See paragraph 44 of the ECtHR case *Thlimmenos v. Greece* (Judgment of 6 April 2000).

3.1.1 Similarities in Practical Effects

Researchers and legal practitioners have considerable agreement that cohabitation has significantly similar practical effects as marriage. In most parts of the world an increasing number of children are born to cohabitants as to married spouses (Ake Saldeen, 2005:503; Barlow et al, 2005:2). Cohabitation may last in a degree of permanence and creates interdependence among the partners as it is in marriage (Barlow et al, 2005:101). This indicates that partners in cohabitation may utilize mutual support for property acquisition as it is in marriage. In legal terms it could be argued that cohabitants are not committed to their relationships as married partners. Researchers have however found cohabitants practically committed to their relationships as married spouses (ibid: 101). It was suggested that the increased divorce rates among married persons and the observation that the statistical rate of cohabitation is increasing worldwide while the rate of marriage is generally on the decline confirms the insignificance of variations in commitment expected of married spouses and cohabitants (ibid:2). By implication both cohabitants and married spouses may face similar practical difficulties that the Law under discussion seeks to suppress in the event that their partners died intestate.

The similarities in practical effect noted of cohabitation and marriage were confirmed in some domestic cases introduced earlier in this study. In the case *In Re Asante (DECD); Owusu v. Asante, supra*, the appellant cohabited with the deceased for more than ten years and had two children. In *Coleman v. Shang, supra*, the cohabitants had ten children before they finally got married. In *Yaotey v. Quaye, supra*, there was reference to a cohabitant who had many children with the deceased. Prolonged cohabitation observed in these cases suggests that interdependence existed among the cohabitants as could be in regular marriages. This thesis posits that significant similarity in practical effect exists between married partners and unmarried cohabitants. The death intestate of their partners may pose similar threats of hardship to the surviving partners whether married or cohabitant.

3.1.2 Relevance of Legal Difference between Married Spouses and Cohabitants for Intestate Succession

The only confirmed difference is the presence of legal commitments in marriage and the absence of legal commitment in cohabitant (Bernstein, 1977:361). It does not matter whether persons in cohabitation are in the process of getting married or never planned to do so. This is the most significant legal ground that is usually responsible for the variations in treatment cohabitants and married spouses. In chapter two, I drew out that in Ghanaian law it is strictly a person who is legally married under any of the three systems of marriage that has legal access to the estate of the deceased partner. It was noted that any relationship that takes the form of marriage must attain 'presumed legality and validity' for purposes of intestate succession. Consequently the legal differentiation of cohabitation from marriage really matters if a spouse could make claims under the provisions of PNDCL 111(1985). This indicates that cohabitants and married spouses are not placed on similar status within the context of intestate succession.

It must be ascertained the extent to which in the specific context of inheritance to the estate of a deceased partner, the legal difference between cohabitants and married spouses is really significant ground to suggest that the two entities are not in similar situations for purposes of equal treatment.²⁹ An advanced answer to this may be a complex legal issue beyond the level of this study. However it is instructive to look at this issue in relation to the object and purpose of the Law under assessment, PNDCL 111(1985). A careful inference into the preparatory work that developed into the Law indicates that the main object and purpose of the Law is to alleviate human suffering and not necessarily to regulate marital relations. In his judgment on the case *In Re Asante (DECD); Owusu v. Asante, supra*, His Lordship Judge Adade (JSC) interpreted section 4 of PNDCL

²⁹ Discrimination can also be assessed based on the significant differences among entities. This was demonstrated by the European Court of Human Rights in *Thlimmenos v. Greece*, RJD 2000-IV, 263 (Judgment of 6 April 2000). Considering the object and purpose of the law under discussion, thus to suppress the practical difficulties death poses to partners, this thesis finds cohabitants and married spouses significantly similar than different in terms of equal need of protection to alleviate human suffering.

111(1985) as evidence that the lawmakers had intended to protect the economic interests of the nuclear family in the event that a spouse died intestate. His Lordship Judge Amua-Sekyi (JSC) made a similar observation in the same case noting that the Intestate Succession Law sought to suppress the hardships caused to the family when men whose estates were governed by matrilineal inheritance died.³⁰

In the preceding chapter it is noted that for purposes of regulating marital relationships, specific laws such as the Marriage Ordinance (Cap 127), Marriage of Mohammedans Ordinance (Cap 129) and the Customary Marriage and Divorce Registration Act (1985) were enacted to regulate different marital interests. The Matrimonial Causes Act, 1971 (Act 367) spells out how matters affecting persons who choose to bind themselves with the rules of marriage should be resolved. If the judges single out the Law as intended mainly to alleviate threats of economic hardships that death may cause to the family and not to establish or enforce the legal status of spouses then it is plausible to infer that the presence of a threat of hardship should normally be enough to require the protection by the Law.

This suggests that a surviving person should not necessarily require a legalized relationship with the deceased to benefit from the Law so long as the death intestate of the partner poses potential economic and other threats to the wellbeing of the person. Strictly legalized relationship with the deceased as is expected of spouses may be useful but should not normally be a hindrance to inheritance in this context. This suggestion has an implicit support from the provisions of the Law itself. To a large extent the Law provides for other beneficiaries apart from the spouse whose relationships with the deceased do not require strict legal confirmation. For instance section 5(d) of the Law provides for the customary successor whose relationship with the deceased may only be confirmed by ‘word of mouth’ from the family as noted by the Accra High Court in *Kwakyee v. Tuba* and others [1961] GLR 720-725. Again, any child that the deceased by any action acknowledged as his offspring during his life time has legitimate share of the estate without requiring

³⁰ These statements are respectively on pages 14 and 24 of the judgment.

extreme legal confirmations. This is why in Ghanaian Law even children born out of illegitimate unions are legally protected when it comes to intestate succession.³¹

In purely legal terms, it is predictable that an attempt to remove the legal difference between cohabitants and married spouses for purposes of intestate succession may generate complex legal debates. Judges of the Canadian Supreme Court were divided in *Miron v. Trudel, supra* on whether to place unmarried partners on equal status with married spouses in a context of accident insurance claims that have economic implications on the wellbeing of the partners. Majority of the Judges, although, held the view that an unequal treatment of unmarried partners in that context was discriminatory. It is noted earlier in the methodology section that this study should not be construed as an attempt to make complex legal reformulations and arguments. This thesis simply assesses the issue within the framework of human rights protection. My task herein is to find out how the legal differentiation between cohabitants and married spouses makes sense if the object and purpose of the Law is considered within the framework of human rights protection.

As noted earlier the object and purpose of the law being assessed in this study is protection against hardships to the person whose partner dies intestate. Although the European Court of Human Rights did not accept in *Marckx v. Belgium, supra*, that “all the legal effects attaching to marriage should apply equally to situations that are in certain respects comparable to marriage”,³² it finds in the same case that it is discriminatory to make distinctions between legitimate and illegitimate families in terms of respect for family life.³³ It also found that a limitation on the use of properties that applies to only unmarried partners but not married partners would serve no legitimate aims and therefore amount to discrimination.³⁴ These indicate that for legal distinctions to be acceptable between cohabitants and married spouses depend on the context. By implication the case

³¹ Explanation contained on page 25 of *In Re Asante (DECD); Owusu v. Asante, supra*. Children born to cohabitants also have equal protection under the Law as children born in wedlock.

³² Paragraph 67

³³ Paragraph 31

³⁴ Paragraph 64

demonstrates that unfavourable treatment of cohabitants unlike married spouses is not acceptable where the issue threatens the survival, dignity and wellbeing of cohabitants.

Successful inheritance to properties comes mostly with economic, social and cultural rights. Depending on the properties owned in the lifetime of the deceased intestate, inheritance to properties may come with rights to adequate standard of living, protection against forced evictions and adequate housing as provided for in the Law under discussion. If a person's right to inherit the properties of the deceased partner is determined by the legal status of the relationship of the person to the deceased, it implies that a person's right to enjoy the economic rights that derive from inheritance to properties depends solely on what is accepted in law. From all indications however, a person's right to enjoy a certain human rights good does not always depend on what the state accepts in law. Banning (2002:187) sees legal protection alone as insufficient protection to property. He differentiates legal protection from human rights protection noting that human rights protection goes beyond what is stipulated in law (ibid:185). Consequently, it is commonly found in most human rights litigations that where a state's law is found to be inconsistent with the protection of human rights, legal amendments are often recommended. By implication even though the cohabitant may not have legally accepted relationship with the partner, human rights considerations may require legal amendments to that effect so long as there are justified reasons to trigger legal amendments.

Some commentators have emphasised that the need to remove human suffering may go beyond just what is provided in law. Nickel (2007:7) explains that a need for human rights protection emerges so long as a particular situation poses threat to important interests of the individual. This captures Henry Shue's contribution to the justification of human rights that human rights are justified demands of social guarantees against "standard threats" (ibid). The purpose of PNDCL 111(1985) to alleviate human suffering therefore has much in common with the core purpose of human rights protection and must be assessed on that ground. Threats of hardship arise when a person is deprived of the properties which hitherto the death of the partner might be the source of livelihood to the family.

Finally it is possible to look up to human rights monitoring bodies to resolve this issue. In paragraph 18 of General Recommendation 21, CEDAW complains that persons in de-facto relationships are often not protected in law. It therefore recommends to states parties that persons in de-facto relationships should be given equal legal protection to get access to properties. In paragraph of General Comment number 19, the Human Rights Committee that states should protect all the forms of the family. This also signifies that a lack legalized should not really be a strong limitation on access to important human rights goods since not all relations are legally structured as marriage. These puts to question the validity of restricting de-facto families an access to intestate succession for want of legalized relationships. Article 31(1) of the Vienna Convention on the Law of Treaties asks states to interpret their treaty obligations in good faith, considering also the context and the object and purpose of the treaties. My thesis contends on these bases that a strict legal differentiation between cohabitants and married spouses in the context of intestate succession is less significant if it is looked at in good faith within the state obligations under CEDAW and the ICCPR. This is consistent with the object and purpose of human rights protection due to the contextual relevance of properties to human wellbeing.

On the bases of the above presentations, this thesis contends that it is less significant to deny cohabitants the right to intestate succession for want of legal commitments. Considerations of the wellbeing of cohabitants should take importance beyond their lack of legal recognition so long as cohabitation cannot be seen as social deviance or criminal relationship. Having shown earlier that cohabitants and married spouses are practically in similar situation in times of death of their partners and having argued that to a large extent the lack of legal status of the cohabitant should not normally be a hindrance to inherit the properties of the partner, I find it sufficient to assert that cohabitants and married spouses are in significantly analogous situations in the context of intestate succession for purposes of comparism. In the next section I explore the grounds of discrimination on which cohabitants and married spouses may be compared.

3.2 Finding the Grounds of Differentiation

Usually, discrimination is prohibited on certain grounds. Article 2 of the UDHR lists race, colour, sex, language, religion, political opinion, national or social origin, property, birth and other status as the prohibited grounds of non-discrimination. The ICCPR maintains the list in the UDHR whereas other human rights instruments have slight modifications of the list in the UDHR. For instance, Article 14 of ECHR adds discrimination based on ‘association with a national minority’ and the African Charter on Human and Peoples’ Rights uses the word ‘fortune’ in place of properties. It remains necessary to identify the grounds to assess non-discrimination between cohabitants and married spouses.

Equal protection by the law as stated in Article 26 of the ICCPR is the core target for this thesis. Discrimination based on marital status seems a possible description that may be derived from the clause “other status” as listed in the human rights instruments. However, this position may attract fierce criticism in view of the general notion that married spouses and cohabitants are different on legal grounds. Another option is to equate cohabitants and married spouses on social status of persons in marital relationships who are likely to be adversely affected by the death intestate of their partners. Non-discrimination based on social status is fairly broad and may apply to cohabitants and married spouses alike.

Even if it is difficult to find a prohibited ground of non-discrimination that may apply in this context, it is still possible to balance interests between these entities because the lists of grounds of non-discrimination are just illustrative and not exhaustive per se. In the case of *Kavanagh v. Ireland*³⁵ the Human Rights Committee assessed the right to equal protection by the law in Article 26 of the ICCPR without necessarily looking for any ground of non-discrimination. It appears that the most relevant condition to prompt an assessment of non-discrimination is whether the entities in consideration are in significantly similar situations but this does not really mean the entities must be in exactly the same level within a specific status.

³⁵ Communication No. 819/1998, HRC, 4 April 2001.

3.3 Assessing the Aims Pursued by Excluding Cohabitants from Intestate Succession

This section answers sub-question III of the first main question. The preceding sections have argued that cohabitants and married spouses are in significantly similar situations in need of protection for intestate succession. Yet they are not treated equally for such purposes. This is a differential treatment but discrimination is not yet established at this stage unless there cannot be found justifiable reasons why the difference in treatment exists. In this section I utilise the Ghanaian Supreme Court case *In Re Asante (DECD); Owusu v. Asante, supra*, as the main source of data to derive the reasons that are cited by the courts to justify why cohabitants are not protected as married spouses under PNDCL 111(1985). Towards the end I will show that there are good aims pursued but considering the specific facts in the context of this study the aims are largely not strong enough to justify why cohabitants are not protected as spouses.

In his judgment on the case just cited above, His Lordship Judge Adade (JSC) stressed that a man's concubine to apply for letters to administer his estate will raise a "spectre of unholy assault on the sanctity of marriage".³⁶ He cautions the courts to be careful not to set the precedence for cohabitants to begin asking for letters of administration to administer the estate of the deceased in the pretext of protecting the interest of their children because according to him "this will not augur well for public morality and decency".³⁷ His Lordship Amua-Sakyi (JSC) also stated "that our laws cater adequately for children and wives but leave out concubines³⁸ and inter-meddlers not for nothing, adding "that the sanctity of the marriage institution ought to be protected".³⁹ He asserts further that it would

³⁶ This statement is in the last paragraphs on page 12 of the judgment.

³⁷ He issues this caution in paragraph two on page 24 of the judgment.

³⁸ As noted earlier, concubine and cohabitant are used interchangeably in Ghanaian legal language.

³⁹ His statement is in the last paragraphs on page 25 of the judgment.

be painful for a widow to sit at table with the 'other woman' to discuss properties of her deceased husband suggesting a need to protect the rights and freedoms of others.

From the above it appears that cohabitants are not given rights to share in the estate of their deceased partners as it is for married partners to protect the sanctity of marriage, to protect public morality and decency, and to protect the rights and freedoms of others. The judges offered no explicit explanations of why the protection of cohabitants for intestate succession is perceived as offensive to the standards listed above. It is however possible to infer from the cases why cohabitation is perceived as offensive to public morality and decency, the sanctity of marriage, as well as to hinder the rights and freedoms of others.

Human rights protection requires that except rights that are non-derogable the protection of the basic rights and freedoms of individuals should be subjected to legitimate limitations. The need to protect public order, morality and decency as well as to safeguard the rights and freedoms of others are legitimate limitations in the provisions of all human rights instruments. For instance the UDHR Article 29, ICCPR Articles 18-21 and ECHR Articles 8-11 all include these standards as possible limitations on the liberties that people may enjoy. It is really consistent with human rights protection that the Supreme Court should consider the impact that equal treatment of cohabitants and married spouses may have on public order, morality and decency as well as the rights and freedoms of others. But it is more important to explore how relevant are these reasons within the context in which they are sought. I discuss these aims one after the other.

There is no clear answer to whether equal treatment of cohabitants and married spouses may offend public order, public morality or public decency. One possibility that an inclusion of cohabitants on intestate succession may lead to such problems is the existing lack of legal recognition of cohabitation for such purposes. In human rights protection it is often required that any treatments the state gives out to persons within its jurisdiction are

provided by law.⁴⁰ It is where legitimate claims are not protected in existing law that Article 2(2) of the ICCPR requires legal amendments to give effect to such rights. Legal regulation is therefore important to secure public order, morality and decency. There may definitely be public disorder if states permit individuals to take actions that are not provided by law.

In chapter two it was noted that there are three main legal systems to establish marriage in Ghana. The systems cater broadly for different interests. People who are more oriented into traditions and customs may marry under traditional law and this is 'potentially polygamous'. Christians and others who would not accept polygamy could marry under the Marriage Ordinance (CAP 127) meant to be strictly monogamous. People in the Muslim Faith could marry under the Mohammedans Marriage Ordinance (Cap 129) which also permits polygamy. These indicate that the law makers were quite democratic on marriage.

In the *Belgian Linguistic Case*, supra, Belgium was justified to have enacted different linguistic requirements for education in different provinces. This provides an example that it is lawful for states to enact laws that satisfy different interest within the same jurisdiction. Ghana could therefore enact laws that satisfied different segments of the society with different marital interests. If cohabitants are left out of protection it could not be an oversight but possibly an outcome of deliberation on its feasibility. If suddenly the courts begin to recognize cohabitation in legal application without the necessary legal amendments it may impact negatively on public order. From the above discourses it is though evident that the lack of legal protection for cohabitants is not an inherent problem in cohabitation. It is more of a problem created by lack of institutional support and cannot be a strong argument against cohabitation.

In chapter two, it was spelt out that within the specific context of Ghana, marriage and cohabitation are closely interrelated such that in most cases cohabitation and marriage

⁴⁰ See for example Article 12(3) of ICCPR

appear to be parts of the process of getting married. This suggests that the public generally accept and practice cohabitation besides marriage. Meekers (1991:250) observed that in Ghana cohabitation usually begins marriage and many ethnic groups are very tolerant to pre-marital cohabitation and child-bearing. It does not therefore seem likely that legal protection of cohabitation in such a social context would greatly offend public morality and decency. In the introductory chapter to this thesis, I spelt out research findings showing increasing rates of cohabitation in many parts of the world. It is possible that the forces of globalization may influence public perception on cohabitation. On an academic level, this thesis contends that considering the nature of relationship between cohabitation and marriage in the context of study cohabitants may share in the estates of their deceased partners without serious harm to public morality and decency if it is provided by law.

The suggestion that cohabitants are not given rights of intestate succession so as to protect the institution of marriage brings back the debate on whether family protection should be defined solely on the framework of the traditional family that is underpinned by legal formalities. As noted in the introduction, some commentators would like the traditional family to remain as the basis of family formation. Other researchers such as Barlow et al (2005) also provide data on the changing trends in family formation arguing that cohabitation is increasingly gaining grounds as another option for family formation. And in fact some countries such as the UK are in the process of making legal amendments to protect cohabitants. It is therefore becoming less relevant that the traditional family may be protected by excluding unconventional forms of family formation such as cohabitation.

It was also noted that cohabitants and married spouses are not given equal protection so as to protect the rights and freedoms of others. The most probable way in which cohabitation may offend the rights and freedoms of others is when cohabitation occurs in a context where polygamy is prohibited. As His Lordship Judge Amua-Sakyi noted in the case *In Re Asante (DCED); Owusu v. Asante, supra*, it would be unacceptable for a widow married under the monogamous system of marriage to share the husband's estates with a concubine

who has no such rights.⁴¹ She may feel deprived of her rights to sole recognition. This contributed to the instant case being protracted through to the Supreme Court. But a careful analysis of the context of marriage under discussion suggests that the presence of a cohabitant may be offensive only because it is not supported in law. This is because it is not only cohabitation that may result in polygamy.

Chapter two indicated that two systems of marriage actually permit polygamy. Where two or more wives survive the death of one man, the word 'spouse' is interpreted in the plural and all wives share the spouse portion of the estate without problems. This suggests that even if cohabitation occurs in a context of polygamy a cohabitant may equally share part of the estate without problems. To this end, I suggest that if cohabitation is operationally defined in the context of intestate succession and recognized for such purposes, it may be offensive to the rights and freedoms of others only when it occurs in marital context where cohabitation or marriage to a second person is legally prohibited. Thus cohabitation in prohibited polygamy may have similar effects as marriage in prohibited polygamy unless the former is not supported by law.

The above analyses are only academic. In a purely legal sense it is not plausible to just assert that the aims discussed above are illegitimate outright. This is so considering the nature of the issue under discussion. It was shown in the chapter on introduction that the question as to whether cohabitants and married spouses should generally be treated equally has generated a lot of debate among researchers and legal practitioners alike. This indicates that people have wide range of views on the rights in cohabitation and marriage. When states are faced with issues that have varied public opinion such as this the European Court of Human Rights has developed what is commonly known as the doctrine of the 'margin of appreciation' to deal with such issues.

⁴¹ His statement is in the last paragraphs on page 25 of the judgment.

In its judgment on the case of *Leyla Sahin v. Turkey*⁴² the Court explains the dynamics of the doctrine of the margin of appreciation by reiterating that matters “on which opinion in a democratic society may reasonably differ widely, the role of the national decision-making bodies must be given special importance”. This is especially so when the meaning or impact associated with a particular issue may differ with “time and context”. To deal with issues which attract different opinions the Court maintains that “national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to preserve public order” are important considerations left to the national authorities to determine the extent to which particular freedoms may apply. International human rights institutions may play monitoring roles but they are subsidiary to the national decision-making bodies on matters relating to traditions. Yet states do not enjoy absolute freedom under this doctrine but human rights monitoring institutions have the task to determine the extent to which the measures taken by the states are justified and proportionate in terms of aims pursued and means to achieve them.

The central issue in this study relating cohabitants to married spouses has already attracted different views as shown in chapter one. It may be suggested that the national courts know better of the implications of cohabitation and intestate succession and therefore their reasons are more legitimate than what may be found in a simple academic work. But considering the nature of relationship between cohabitation and marriage presented earlier, I contend that the aims pursued by excluding cohabitants from intestate succession are not strong. Thus the concerns raised against cohabitants do not appear to matter much within the social context. This observation should normally be enough to suggest that the differential treatment is discriminatory against cohabitants. However this may still be contested in view of the controversies around cohabitant rights. I presume therefore that the aims sought are legitimate and continue in the next section to test for proportionality.

⁴² ECHR (Grand Chamber) Judgment on *Leyla Sahin v. Turkey* 10 November 2005, Strasbourg, par. 109

3.4 The Test for Proportionality and Main Observation⁴³

This section answers sub-question IV of the first main question. Taken that the preceding section has found weak but legitimate aims pursued by the courts it must further be ascertained whether there exists reasonable proportionality between the aims pursued and the means adopted to achieve them. In the case of *Metropolitan Church of Bessarabia and others v. Moldova*⁴⁴, Moldova refused to provide legal recognition for the applicant church so as to protect public order and public safety.⁴⁵ The ECtHR found that these aims pursued by the state were legitimate.⁴⁶ The Court however observed that a lack of legal recognition of the church deprived it of legal personality. Consequently the church could not defend itself nor perform important functions without contravening national law.⁴⁷ The Court therefore found no proportionality between the state's action and the consequences it has on the church's freedom of religion and accordingly found a violation to that effect.⁴⁸ This indicates that it is the relationship between the consequences of the state's action and the aims it seeks to achieve that matters when it comes to testing for proportionality.

The preceding sections show that the state's measure or action of interest is the exclusion of cohabitants from protections for purposes of intestate succession. Section 3.3 suggests that the state measure pursues legitimate aims to protect the institution of the traditional family, to protect public order, morality and decency as well as to protect the rights and freedoms of others. These are considered as the public interest in keeping the law. This thesis must balance the public interest with the individual interest of the cohabitant to enjoy some human rights benefits that may come with legal protection to inherit part of the properties of the deceased.

⁴³ The test of proportionality defines the scope of permissible limitations and controls the outcome of cases *Arnardottir* (2003:46). It is seen as the test of fair balance between public interest in a certain measure and the individual interest to enjoy a certain right.

⁴⁴ See *Metropolitan Church of Bessarabia v. Moldova*, ECtHR judgment of 5 December 2001.

⁴⁵ Paragraph 111

⁴⁶ Paragraph 113

⁴⁷ Paragraph 29

⁴⁸ Paragraph 130

Earlier I drew attention to the significance of properties to human survival, dignity and wellbeing. If a person whether married or cohabitant has during the lifetime of the partner become dependent on a particular property of the family, a lack of legal protection to inherit part of that property may result in serious economic consequences. This is especially if the partners died without leaving will to devolve their estates. Consider the situation where no alternative means of survival such as social security exists. Any person without access to needed properties in the event of the death intestate of the partner faces threats of economic deprivation. All human rights that come with successful access to properties for survival become dysfunctional.

Depending on the properties owned by the family in the lifetime of the deceased, the surviving person deprived of right to intestate succession risks threats to forced eviction, discontinued improvement in adequate standard of living (ICESCR Article 11), family intimidation and abuse, poverty, exposure to diseases and mental stress (Article 12.1 of ICESCR) and most likely indebtedness. Most of these consequences also challenge the provisions in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa. These include Article 15 which protects food security, Article 16 which ensures adequate housing for women irrespective of their marital status and Article 24 which makes special protections for women in distress. This may be felt more in a context of prolonged cohabitation as it was in some of the cases presented earlier in which interdependence has been formed among the partners and children were born.

Apart from the consequences above, the law practically appears to contribute indirectly to gender inequality which is prohibited in human rights protection. In other words there seems to be implicit consequences of the law against Article 11(2) of CEDAW which prohibits discrimination against women on the grounds of marriage and Article 2(f) of CEDAW which expects states to abolish existing laws, regulations, customs and practices which constitute discrimination against women. I did not focus on gender equality. However, the facts of available domestic cases indicate that the net effect of the legal

practice of excluding cohabitants from legal protection for intestate succession has heavier impact on women than men considering the social context within which it takes place.⁴⁹

In the case of *Yaotey v. Quaye, supra*, the cohabitant removed from benefiting from the estate was a woman. It was the same in the case *In Re Asante (DECED); Owusu v. Asante, supra*. A woman in *Coleman v. Shang, supra*, was saved only because she was married after ten years of cohabitation. Other cases not presented for this study have shown similar trends. In statistical terms therefore, women are more prone to hardships and deprivation when the law disinherits a cohabitant from intestate succession. The fact that men do not normally appear in court as cohabitants trying to access intestate properties is physical evidence that they are least affected by the death intestate of their partners or that they have cultural advantages in getting access to needed property for survival than it could be for women. Although the disparate impact of the application of the law on women may be unintended, Article 2(f) of CEDAW puts states under obligation to identify and correct such laws. The practical disparate consequences of the law on women than men make a clear case against the aims pursued in the practice of the law.

All these important human rights concerns may be suspended but only with very strong justifications. As noted in section 3.3, some aims pursued by excluding cohabitants from intestate succession were identified but these appeared to be weak considering that cohabitation is often part of most marriages. Since the public generally practice cohabitation it is unlikely that a legal protection of cohabitants for intestate succession will seriously harm public order, morality and decency so long as legal guarantees are provided. Also as shown earlier, researchers have challenged and proven why it is no more necessary to deprive cohabitants some protection in order to protect the traditional family (Barlow et al, 2005:2) and some legal systems are making amendments to that effect.

⁴⁹ For this study, I sieved through cases that are published since the late 1950s until 2007. I have not come across a case in which any man contested in court as cohabitant trying to benefit from intestate succession. This is physical evidence that problems about access to property is heavier on women perhaps indicating cultural inequalities between men and women to retain property without family resentments. My personal experience of the cultural system confirms that women are disadvantaged in this regard.

Similarly, I argued earlier that the fear that legal protection of cohabitants may offend the rights and freedoms of others may apply in situations where marriage is strictly monogamous. But in the context of study several wives could share the spouse portion of the estate without problems because they are backed by law. The perceived negative impacts that protection of the cohabitants may have on the rights of others may be insignificant if it is also backed by law. The public generally does not view cohabitation as a social deviance or a prohibited crime. On the whole, it appears the fears that a protection of cohabitants for intestate succession may bring unfavourable consequences are perceptual and may not be really intensive in this study context.

From the above, I established the difference in treatment for discussion. I also assessed the similarities between cohabitants and married spouses in the context of intestate succession. I continued to assess the aims pursued in the application of the Law but only partially agreed that the aims may be presumed to be legitimate based on the caution in the doctrine of margin of appreciation. However I found the negative effects that the law has on important human rights interests of cohabitants to be too strong than the aims pursued. At the same time the law contradicts certain human rights provisions especially in CEDAW. It appears the relationship between the aims pursued and the means to achieve them is not proportional in this context. I suggest that the circumstances within the context of this study are more likely to disclose a case of discrimination against cohabitants in real case situations. The law maintains a clear normative distinction between cohabitants and married spouses based on the legal differences without taking note of contextual details of the similarities in practical effect and the deficiencies in the laws on marriage.

Having come to this observation the core objective of this study is achieved. It suggests that the current application of the law is more likely to contravene Article 2 of UDHR, Article 2 and 26 of ICCPR, Article 2(2) of ICESCR, Articles 2 and 5(a) of CEDAW and many other restrictions on discrimination.

Earlier, I made the observation that the object and purpose of the law itself is to suppress human suffering and to maintain peace and harmony in the family system. I noted that this is clearly consistent with the essence of human rights protection. However, the observation that the Law is more likely to discriminate against a group of persons it could have equally protected suggest that it may have to be improved to be consistent with human rights protection. The finding of discrimination is not enough to suggest this change for obvious reasons. Dealing with discrimination has followed a clear legal framework thereby making it difficult to discuss all issues emerging from the context of this study. Also the study is not exhaustive on discrimination because it concentrated only on formal equality for lack of writing space. Further, it is noted earlier that the discourse on marriage and cohabitation usually attracts divergent opinions in academics and legal practice. I therefore devote the next chapter to discussing two important but non-legal observations emerging from the context of this study that give additional support to the observation that the law seems to discriminate against cohabitants. They offer additional grounds to improve the Law for better human rights protection.

4 DISCUSSION 2: IMPROVING THE LAW FOR BETTER HUMAN RIGHTS PROTECTION

I earlier noted that the object and purpose of the law under discussion is consistent with human rights protection. However the finding in chapter three 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 changes in the Law for improved human rights protection. This chapter is meant to give additional support to this position by discussing two important contextual observations that may serve as additional bases to improve the law for human rights protection. It answers the second main question of the thesis.

First, I deduced from the object and purpose of the Law noted earlier and the reasons cited by the courts as noted in section 3.3 that the main aim of the law is to preserve peace and harmony within the family set-up. As a student with initial training in Psychology it attracted my attention as to whether the law can really preserve peace and harmony in the family by making normative distinction between cohabitants and married spouses considering the unique contextual relatedness of cohabitants to married spouses discussed earlier. I explore this dilemma in section 4.1 below with the Relative Deprivation Theory. Secondly, I observed that cohabitants in this context are rather vulnerable to threats of deprivations due to lapses in the legal system and not as a result of social deviance or not always being cohabitants by choice. I address this in section 4.2 below.

4.1 Improving the Law with Relative Deprivation Theory⁵⁰

Section 3.3 of this thesis has spelt out the main aims being pursued by the law, namely, to preserve the institution of marriage, public order, decency and morality as well as the rights and freedoms of others. Together these suggest that the law aims to achieve peace and harmony in the family system and to suppress human suffering which are important objectives consistent with human rights protection. However, considering that it discriminates against a section of the family system by paying less attention to the nature of contextual factors that may give reason for cohabitants to compare their situation to married spouses, it remains a dilemma if the Law as it is practically preserves peace and harmony in the family. I borrow briefly into the Relative Deprivation Theory on this issue.

In his study on ‘When Men Revolt and Why’, Davies (1997:294) states that “relative deprivation is the basic precondition of civil strife of any kind and the more widespread and intense deprivation is felt among members of a population, the greater is the magnitude of strife or conflict in one form or another”. Relative deprivation has been defined as peoples’ perception of difference between the value they expect⁵¹ and the values they are actually capable⁵² of getting (ibid). In short, the theory says that if a group of people believe that they deserve a certain level of better treatment as it is for a comparable group and they feel they are actually treated less favourably, and this belief is relatively widespread within the population, it results into conflicts and disorders of any kind (ibid). It is difficult to use punishment or coercion to suppress the conflicts that come from perceptions of relative deprivation indicating that the best solution to avoid the feelings of relative deprivation between comparable groups is to prevent it (ibid).

⁵⁰ This theory is applied mostly in Psychology and Political Science to address possible conflicts that may arise in situations where an entities (herein cohabitants) have reason to compare their treatment given to them with what pertains to others in comparable situations (herein married spouses).

⁵¹ These are the goods and conditions of life that people believe they are justifiably entitled to have.

⁵² The amount of goods and conditions people think they are really made to get and keep.

Applying this to the study, the theory suggests that if cohabitants relatively expect better treatment as compared to married spouses and they really feel that they are deprived of reaching that target they may relatively deprived of better treatment which may cause social conflicts in the family set up. This study does not need to delve too much into this theory. It is sufficient to identify facts within the context of this study which suggest that cohabitants may expect better treatment in terms of intestate succession as compared with married spouses and the possibility that these conditions and beliefs may become widespread among the population. Once these conditions are found to exist, it is sufficient to expect that relative deprivation may set in if the Law continues to deprive cohabitants the legal protection to inherit their partners. Below I discuss two factors that may contribute to perceptions of relative deprivation.

4.1.1 The Myth of Legal Protection for Cohabitants

In their study on why people cohabit, Barlow et al (2005:28-247) described research findings that people in cohabitation generally believe that rights in marriages apply equally to them. Some even see cohabitation as good as marriage (ibid). They keep this myth until something happens before they really come to understand their lack of legal protection. This perhaps explains why the applicant in the Ghanaian case *In Re Asante (DECD); Owusu v. Asante, supra*, cohabited with the man for more than ten years, had two children with him and had knowledge and access to the man's 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 suggests that she was eager to claim her rights but probably she was not fully aware of the implication of her relationship.

In section 2.2 I have shown that within the particular context of this study, marriage and cohabitation appear often as parts of the process of getting married; they are closely interrelated. It was also shown that three different systems of law exist to establish marriage but only one explicitly prohibits polygamy and extra-marital cohabitation. This

means that to a large extent, it is possible to cohabit with a partner for a long time as shown in some of the cases above to gradually complete all the customary requirements before marriage is finally consummated. The possibility that cohabitants may feel part of marriage is high in this system. The cases used 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 pretexts 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 such rights indicates some repressed resentment to the legal system and suggest that some cohabitants have feelings of unfavourably treatment under the Law.

4.1.2 International developments on cohabitation

Current developments in the international system relative to cohabitation may also contribute to the spread of relative deprivation among cohabitants. The issue of cohabitation is not unique to a particular state. Many states face the same situation but with varied legal responses. Even in states where marriage and cohabitation are discretely separated, the rates of cohabitation are very high. In the United Kingdom, the Law Commission reports statistics from the 2001 census showing that in England and Wales, two million couples were cohabitants. It showed further that cohabitation has increased by 67% within the previous ten years and it is observed that cohabitation is more commonly adopted for a first relationship than marriage. Couples are increasingly cohabiting before they marry thereby depicting cohabitation and marriage as stages in the 'marital continuum'. The Government Actuary Department predicted based on the trend of statistics, that by the year 2031 every 10 million married couples will out-number cohabitants only with a margin of 3.8 million.⁵³ The UK Law Commission has been working seriously on the matter and issued its consultative paper⁵⁴ in 2006 recommending the creation of legal rights for cohabiting couples. Cohabitation has been an issue of

⁵³ Refer to page 12-13 of the UK Law Commissions' consultative paper no 179 (overview).

⁵⁴ The full consultative paper is available at www.lawcom.gov.uk/cohabitation.

intense debate within the Scottish Law Commission also which after several studies recommended legal protection for some cohabitants.⁵⁵

In Switzerland about 10% of the population were already cohabiting in 1990 and the number has since increased (Aeschlimann, 2005:244). To deal with the concerns of cohabitants three legal responses are adopted by the courts. Sometimes no separate statutory provisions are applied. There could also be some form of registration for cohabitants and most often statutory regulations are applied to cohabitant relations (ibid). In Norway about 22% of all couples were cohabitants in 2006.⁵⁶ Norway keeps one system of marriage which is strictly monogamous similar to the Ordinance Marriage in Ghana. In terms of cohabitation, a Committee of Experts was appointed by the Government in 1996 to systemise the rules and regulations related to ‘marriage-like’ relationships (Asland, 2005: 296). In its report of 1999, it made drafts for “amendments to existing legislations as first steps towards an act on informal cohabitation” (ibid). In Sweden there were about 1.2 million cohabitees⁵⁷ in the year 2000 and about half of the parents of the 91,500 Swedish children born in 2001 were cohabitees (Saldeen, 2005:503). And Canada has even ruled that a differential treatment of cohabitants from that of married spouses was discrimination based on marital status.⁵⁸

Thus in many states the problems of cohabitants are progressively attracting favourable legal interventions. These also show that cohabitation is increasingly accepted as a legitimate option of people’s freedoms to establish their families. This formed the basis of the arguments by some researchers that the traditional conception of family formation underpinned by strict legal formalization is no longer tenable (Barlow et al, 2005:2). The choice of a person to be a cohabitant falls within legitimate choices of freedoms that people make with implications on the dignity and worth of humans. Through the forces of globalization beyond the control of governments (Klein, 2006:190-191) international

⁵⁵ Refer to page 1 of the Scottish Law Report Number 135.

⁵⁶ Source: Statistics Norway

⁵⁷ The term ‘Cohabitees’ is same word as ‘Cohabitants’

⁵⁸ The Canadian Supreme Court Case of *Miron v. Trudel* cited earlier confirms discrimination.

developments on cohabitation may eventually create perceptions in the minds of cohabitants that they deserve better treatment in family relations and may feel relatively deprived of claim to rights of protection. According to Risse et al (1999:1-38) when norms that relate to human freedoms gain acceptance in the international system, states will eventually come to accept those norms into the national system as a result of processes of state socialization to abide by human rights standards.

By implication, the more cohabitants tend to believe that it is not necessary to discriminate against them on issues such as intestate succession the less likely it is that the Law can keep peace in the family set-up by discriminating against cohabitants. The theory of relative deprivation therefore suggests that it may be in the interest of the state to upgrade the Law by developing remedies for the kind of cohabitants who may have reason to compare themselves to married spouses. This will improve the Law to achieve its aims and purposes without conflicts. Some of these conflicts may appear as increased litigations or undefined domestic violence that may not necessarily come to court. On the whole if the Law up-grades to protect cohabitants in addition to the married spouses it currently protects and at the same time it can preserve its aims and purposes then there is an improvement in the Law towards human rights protection.

4.2 The Inherent Vulnerability of Cohabitants and the Need of Extra Protection

This section discusses the second observation identified earlier that most cohabitants appear to be disadvantaged persons in marital relations due to their lack of legal protection for purposes of intestate succession. I argue herein that the core idea of human rights protection requires extra protection for disadvantaged and vulnerable persons rather than setting basis for discrimination against them. First I briefly review what human rights protection really involves.⁵⁹ From this I derive the protection of minorities to deduce that it

⁵⁹ This review is to the benefit of readers without basic knowledge on human rights to appreciate the basis of the observations in this study.

is consistent with human rights protection that cohabitants and married spouses as equally protected as enshrined in Article 26 of the ICCPR.

The notion of human rights which appeared as core principle of the United Nations in Article 1(3) of the Charter and set the basis for the Universal Declaration of Human Rights (UDHR) was aimed at improving respect for human dignity (Cook, 2002:230). Nickel (2007:9) explains that the UDHR links human rights in Article 1 to the worth and dignity of the human person. He then simply defines human rights as high priority norms. Thus a person for just being human has dignity and worth that must be treated as high priority. This implies that respect for the dignity and worth of the human person is the core priority when it comes to making decision on how to deal with the choices and freedoms people make and seek to enjoy so far as these choices are significantly legitimate. Thus although not all choices and freedoms are permissible, human rights protection demands that great care is taken before humans are deprived of the freedoms and choices they make especially when such choices bear on the dignity and worth of the human person.

To ensure that these priorities guide the manner in which humans are treated, the UDHR enumerated a number of substantive human rights that are traditionally grouped into civil and political rights on the one hand and economic, social and cultural rights on the other, though all rights are increasingly seen as interdependent and mutually enforcing (Eide, 2001:17-19). With the individual being the right holder, the state bears the duty to respect, protect or fulfil (ibid: 23) such rights in a manner that is friendly to the dignity and worth of the human person. Specific treaties have been concluded and regional as well as international human rights institutions have been developed to monitor state's compliance with human rights obligations. However, human rights protection usually involves the balancing of different interests and this makes the principle of non-discrimination very central to human rights protection.

This very notion of human rights protection brings out the essence of giving special and extra protections for disadvantaged persons such as minorities. In chapter two I indicated

that the different laws on marriage have institutionalized polygamy. I further deduced from the cases how polygamy appears to create possibilities of extra-marital cohabitation which ultimately creates situations of vulnerability to most cohabitants especially women when the law which prohibits polygamy becomes operative. Further, I noted that elaborate traditions and costs for parental consent to contract marriages are unique contextual issues that contribute to cohabitation before marriage. Yet all cohabitants especially women face threats of economic deprivation and threats to human wellbeing due to the lack of legal protection in the event that their partners died intestate. Since cohabitation is not construed as social deviance, this situation depicts cohabitants as disadvantaged and vulnerable groups in marital relations enforced by lapses and deficiencies in the law. Barlow et al (2005:65) also stressed the vulnerability of cohabitants. They observed that cohabitation takes the form of prelude to marriage, as variety of marriage and as an alternative to marriage. These different outlooks on cohabitation make most cohabitants susceptible to deprivations since they view cohabitation as equal to marriage but not (ibid: 67).

The disadvantages that confront cohabitants in family matters can be likened to the disadvantages minorities face in national systems. This is not to say that cohabitants are included in the definition of minorities as known in human rights protection. Yet most scholars observed that the term minority is applicable to any categories of disadvantaged persons (Raikka, 1996:9). For cohabitants, the identifying mark that set them apart and exposes them to vulnerabilities is the lack of legal definitions in their relations. For minorities it could be their languages, religion or ethnicity that set them apart from the majority. Article 8(4) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities indicates that human rights protection sometimes require extra protection for vulnerable groups in order to preserve the dignity and worth of humans. To the extent that the uniqueness of minorities cannot be considered as deviance but legitimate freedom to differ, it is likewise plausible to construe cohabitants in similar position. Cohabitants may be seen as persons with minority inclinations and freedoms to differ in family affairs rather than social deviants.

This thesis does not distinguish between those who cohabit by choice and those compelled to cohabit in a process of marriage. But even if it is argued that cohabitants have just not consented to enter into marriage, the right to marry in Article 23 of the ICCPR which requires free consent to enter into marriage may still protect them. In *Dahlab v. Switzerland* the European Court of Human Rights noted that the freedom of religion in Article 9 of its Convention is an important element that makes up the identity of believers and their conception of life but it is also “a precious asset for atheists, agnostics, sceptics and the unconcerned”. This suggests that apart from persons who actively utilise specific human rights provision, there may be corresponding group of persons who may passively derive protection from the benefits enshrined. That is why agnostics and the unconcerned are also protected by freedom of religion. By implication the right to enter into marriage with free consent may at least passively apply to partners in cohabitation even if they do not actively utilize the right to marry in Article 23 of the ICCPR as married spouses do. Cohabitation on this basis may be taken as a legitimate right to slightly differ in marital relations. Since family establishment may begin with cohabitation, equal protection by the law as in Article 26 of the ICCPR applies to cohabitants otherwise a protection of marriage is partial protection of the family.

On the basis of the above I suggest that in certain contexts such as described in this thesis, cohabitants should be perceived as persons with minority inclinations in marital affairs requiring extra protection rather than targets of discrimination. Article 27 of the ICCPR tasks states at least not to deny basic freedoms to persons with minority identities and may also include positive obligations to protect them when necessary. If cohabitants are perceived in this way there can be basis to improve the law to give them equal protection.

5 CONCLUSION

5.1 Concluding Summary of Observations and Recommendation

The thesis explored the common notion that cohabitants do not have rights as married spouses and therefore protections 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 (Barlow et al, 2005:2). This thesis discussed this unique issue within the framework of non-discrimination by using Ghana's law on intestate succession for specific data. It proposed that an exclusion of cohabitants from legal protection offered to married spouses in the context of issues relevant to 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 its Article 26 suggests equal protection of cohabitants and married spouses at least in the context of intestate succession.

Like in most other states, Ghanaian 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 Ghanaian laws on marriage suggest that the difference in treatment in this context may amount to discrimination against cohabitants. My thesis 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 the three different laws on marriage give mixed permission on polygamy. Marriage under Customary Law and Marriage of Mohammedans permit polygamy but Ordinance Marriage strictly prohibits polygamy. In section 2.3 I deduced that this situation seems to reduce the quality of precision, foreseeability 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.

This adds up to legal requirements that elaborate customs, traditions and costs must be satisfied to obtain parental consent before 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.

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 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 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 it is backed by law since cohabitation is generally well accepted.

The thesis has gone through a process to arrive at these observations. It first described the extent to which the Intestate Succession Law, PNDCL 111(1985) of Ghana protects married spouse 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 human rights protection.

The aims pursued by the courts for excluding cohabitants from 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 not 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 thesis 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 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 define the means of survival of the family, may have serious practical consequences on the survival, dignity and wellbeing 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 none 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 bases 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 this observation, the thesis 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.

5.2 Implications for Human Rights Protection and Future Research

Although General Comment 19 of the ICCPR leaves gives states the discretion as to how to protect the families, this thesis suggests that cohabitants and married spouses may be protected equally in certain circumstances in line with Articles 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 the family should depend on a careful balance of the 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 take 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 as Barlow et al (2005) 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 the 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 a prohibition on the use of property that apply to only cohabitants but not married spouses could amount to discrimination.

In the particular interest of Ghana 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 in cohabitation the relation 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 above by CEDAW. It is the existence of polygamy in the laws on marriage that seem to make the law less predictable and exposing people to deprivations in the context of intestate succession. The existing system of Ordinance Marriage (CAP 127) which is strictly monogamous could be the ideal marriage in human rights terms. But this suggestion faces the problem of cultural acceptance due to the cultural diversity in civil society on the issue of eradicating polygamy. On this issue I agree with Koenig and Guchteneire (2007:14) 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 (2006:3) 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 (Churchill, 2006:108). This respects the cultural diversity among states in terms of respect and incorporation human rights into domestic systems.

Thus Ghana may have to go back into negotiations with civil society in a bid to eradicate polygamous marriages while maintaining important cultural traditions on marriage according to religious, ethnic and other divides. Valid reasons in the Ghanaian 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 and 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 perspectives from other disciplines on the issues should be advanced to back up the law to justify equal protection of all families.

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.

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