
**‘A roof over my head’: The rights of a civil marriage wife
under family law to the matrimonial home registered in
the sole name of her husband.**

Emilia Muchawa

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Introduction

In 2004 Justice Makarau passed judgment in the matter of *Muswere Godfrey v Gertrude Rudo Makanza* HH16-2005.¹ Doctor and Mrs Makanza married in 1973 and the marriage subsisted at the time of the trial with unhappy differences between the two, though there were no divorce proceedings pending or contemplated. During the subsistence of the marriage, the parties purchased a piece of land commonly known as number 5 Best Close Mutare (the property). The property was registered in the sole name of Dr Makanza. They proceeded to establish this as their matrimonial residence. On 25 October 2002, Dr Makanza sold the property to one Godfrey Muswere, who paid the full purchase price and had ownership transferred to him and held a deed of transfer by the time of trial. Thereafter Dr Makanza left the property and relocated to Nyanga, his rural home and invited Mrs Makanza to join him. Mrs Makanza turned down the invitation on the grounds that she was still employed in Mutare and could not conceivably commute to and from work from Nyanga. She refused to vacate the property in favour of Godfrey Muswere alleging that she should have been consulted and should have given consent prior to the sale of the property as she was a co-owner by virtue of her marriage to Dr Makanza and by virtue of her direct and indirect contribution towards the acquisition of the property. She further alleged that the property had been sold at a low price in an effort to defraud her of her entitlement to her true share in the property.

The issue for determination in both applications was the legal relation of a wife to property registered in the sole name of her husband. Justice Makarau noted that this issue had dogged the courts for a long time and posed difficulties for the courts. Similar observations were made in the matter of *Muzanenhamo and Anor v Katanga and Ors* 1991 (1) ZLR 182 (SC) in which McNally J observed:

‘I turn secondly to consider whether she may have a right of occupation arising from her status as a wife. This is always a difficult problem for the courts to solve.’

In this case the husband, Mr Katanga sold the matrimonial home to Muzanenhamo while in the process of divorcing his wife who only came to know of the sale when Muzanenhamo came to take occupation. She refused to vacate the house and the matter found its way to the Supreme Court as her eviction was sought. The court found no reason to intervene on behalf of Mrs Katanga as the house was registered in the husband’s name.

In Justice Makarau’s opinion, the problems for the courts are as a result of the law being unsatisfactory and palpably unjust. The law reveals a yawning gap between the law of property and the common law of husband and wife with the former failing to recognize the rights that the latter gives to spouses *inter se*.

Under our law of property, the right of ownership over property of whatever nature confers the most complete and comprehensive control one can have over property. The right of an owner of land, for instance, to sell that land is almost untrammelled. It is also a cornerstone of the law of property that ownership of land is proved by way of registration of title. Thus, whoever has his or her name endorsed on the deed conveying title is at law *prima-facie* recognized as the owner of the land with the most complete and comprehensive control over that land.

The misfit between the individualistic approach and clear cut principles of property law and the reality in marriage where two people in a union merge their wealth generation capacities for mutual benefit is the basis for most problems and Justice Makarau observed as follows:

‘It is not uncommon for married couples to jointly acquire property during the subsistence of the marriage. It is further not uncommon for married couples to jointly acquire land in unclear, unstated and undefined ratios of contribution towards that acquisition. It is further not uncommon, as occurred

¹ Hearing of this matter was consolidated with that of *Gertrude Rudo Makanza v Godfrey Muswere and others* as the two matters involved the same subject matter.

in this matter that the land will be registered in the name of one of the spouses, usually but not exclusively, the husband and head of the family' (HH16-2005: 3).

Upon termination of such a marriage through either death or divorce, the principles of both family law and the law of inheritance recognize the joint matrimonial estate, which is then distributed as between the spouses, regardless of whose name appears on the deed conferring title to the land or property. The problem is that while family law and the law of inheritance in Zimbabwe recognize, to a large extent, the existence of a joint matrimonial estate which is brought into being by the fact of marriage, and whose distribution depends on the parties contributions, both directly and indirectly, the law of property does not.

Lord Hodson, in the matter of *National Provincial Bank Limited v Ainsworth* [1965] 2 ALL ER 472 put this succinctly when he said that he saw no reason why a wife's personal rights against her husband, which are derived from her status as such, should enter the field of real property so as to clog up the title of an owner. Justice Makarau commented as follows in respect to this holding:

'It is my view that the remarks of Lord Hodson are reflective of an era where the wife's gender role, as that was the spouse under the spotlight then, especially where she was not gainfully employed, was completely overlooked. Times have changed and in this jurisdiction, courts are enjoined by statute to consider the gender role of spouses when distributing matrimonial estates. The courts have awoken to the realization that wives who stay at home work even if there is no income directly accruing to the family from their endeavours as they move from stove to washing line and back.' (HH16-2005: 4).

After making these important observations Justice Makarau expressed that her hands were tied to make any other finding and held that a wife cannot stop her husband from selling the matrimonial home or any other immovable property registered in his sole name but forming the joint matrimonial estate unless there is evidence that the husband is disposing of the property at an under valued price and to a scoundrel. Mere knowledge that the seller of the property is a married man who does not have the consent of his wife to dispose of the property is not enough. This is the sad reality that most Zimbabwean women come face to face with after a misguided belief that their civil marriage makes them joint partners in title to the matrimonial home.

The decision in respect of the *Makanza* matter was as follows:

'On the basis of the above, it clearly presents itself to me as the position at law that a wife in the position of Mrs Makanza has no real right in immovable property that is registered in her husband's sole name, even if she contributed directly and indirectly towards the acquisition of that property. Her rights in relation to that property are limited to what she can compel her husband to do under family law to provide her with alternative accommodation. Her rights, classified at law as personal against her husband only, are clearly subservient to the real rights of the husband as owner of the property' (HH16-2005:5).

In spite of that decision which Justice Makarau unhappily reached, she felt that the principles she had applied were 'anachronistic and had outlived their *raison d'être* and that there was no sound jurisprudential basis for holding that the rights that a wife has to the matrimonial estate during the lifetime of her husband have inferior content to her rights upon divorce or the death of her husband.

This paper takes up Justice Makarau's challenge to provide a basis upon which future superior courts can venture to hold that the bedrock upon which the rights that a wife has under family law to matrimonial property registered in the sole name of her husband rests, is outdated and has long outlived its purpose.

What is the ideal situation?

The Universal Declaration of Human Rights in article 16(1) provides that all men and women of full age are entitled to equal rights as to marriage, during marriage and at its dissolution. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is the international bill of rights for women, in article 16(1)(h) enjoins states parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations on the basis of equality of men and women. States are urged to ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property. As illustrated in the *Makanza* case, the rights of a woman married in terms of civil marriage are inadequately protected by the law that provides for separation of property.

General Recommendation No. 21 of CEDAW relates article 16 to article 15(1) which guarantees women equality with men before the law. A woman's right to own, manage, enjoy and dispose of property is noted as central to a woman's right to enjoy financial independence and in this paper it is central to a woman's dignity for her and her children to have a roof over their heads.

At the regional level, in the African Charter on Human and People's Rights in article 18(3), the state undertakes to ensure elimination of every discrimination against women and also ensure the protection of the rights of the woman and child as stipulated in international declarations and conventions. This implies that this is thus subject to the provisions of CEDAW and the Universal Declaration of Human Rights, as explained above.

The latest Protocol to the African Charter on Human and People's Rights is still to be ratified by Zimbabwe. It does provide in article 6(j), which deals with marriage, that states parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

‘... during her marriage, a woman shall have the right to acquire her own property and to administer and manage it freely.’

Further, in article 13(h) states parties are to adopt and enforce legislative measures to guarantee women equal opportunities in work and career advancement and other economic opportunities and take the necessary measures to recognize the work of women in the home.

In article 6.1.3 of the Zimbabwean National Gender Policy it is stated that housing remains a critical area in Zimbabwe and that ownership of immovable property by women is yet to be realized. One of the strategies proposed to address this issue is to advocate for the re-registration of properties to include both spouses.

What is required is a law that ensures gender equality as defined below:

‘...gender equality, equality between men and women, entails the concept that all human beings, both men and women, are free to develop their personal abilities and make choices without the limitations set by stereotypes, rigid gender roles and prejudices. Gender equality means that the different behaviour, aspirations and needs of women and men are considered and valued and favoured equally’ (ILO, 2000:48).

What is the bedrock upon which a wife's rights to her husband's sole immovable property rests?

Carol Smart (1984:4) states that ‘the law itself reproduces and perpetuates the most secure foundations of patriarchal relations, namely the family and gender divisions’. The use of the term ‘patriarchal relations’ signals

that gender divisions are not neutral but are imbued with power relations and hierarchy. Smart's study of English family law from the 1950s establishes that the family is a collection of ideological, cultural and economic factors, imbued with certain power relationships between family members and constantly idealized as the goal to which we should all aspire. This paper will illustrate the power dynamics with respect to ownership and control of the matrimonial home and how this is largely a result of social constructs of ideals and codes by which men are defined as men in masculinity. Masculinity will thus be recognized as a key aspect of gender and it will be shown how masculinity can and does change. This will be the basis for proposing reforms to the law.

The case of *Ainsworth* that has been cited with approval by local courts in matters such as *Muzanenhamo*, *Cattle Breeders* and *Makanza* aptly brings out some of the ideological factors in respect of the wife's rights to her husband's sole immovable property. Lord Upjohn had this to say:

'The first essential is to examine the rights and obligations of husband and wife *inter se*. These rights and obligations stem from two basic concepts which flow from the status of marriage- **(i) the right and duty of the spouses to live together, and (ii) the duty of the husband to maintain his wife**. If one spouse refuses to live with the other the latter may obtain a decree for restitution of conjugal rights..., but the law has never adjudicated between the spouses where and how to live. It is for the spouses to decide where and in what state they and the family are to live, be it in the Ritz or a caravan. The choice from time to time of the matrimonial home is entirely a matter for decision within the domestic forum; though, no doubt, ..., where there is a difference of opinion between the spouses as to the place of the matrimonial home someone must have the casting vote. A wife on entering a matrimonial home, the property of her husband, has no rights even inchoate in that home which the law will recognize and protect.'

The right and duty of the spouses to live together

Lord Upjohn in the *Ainsworth* case observed that one of the concepts from which the rights and duties of husband and wife *inter se* flows, is the right and duty of spouses to live together. Indeed Dr Makanza in the *Makanza* matter sold the matrimonial home and invited his wife to join him in the rural home, implying that his wife had a duty to live with him in the rural home even though she was still employed in town. Here we see the law trying to hold together the ideal family even where there are differences between spouses by excluding the woman from control and ownership of the matrimonial home. Because of her lack of rights and no protection from the law, a woman may be forced to follow a husband with whom she has differences just to have a roof over her head. In fact she is at the mercy of the husband who can alter the relationship at any stage by leaving her, returning or providing alternative accommodation.²

In Zimbabwe the application for restoration of conjugal rights is no longer available, largely a result of the changing context where marriage is no longer as sacred, with divorce more common and the difficulty of ensuring enforcement of the court order.³

The duty of the husband to maintain his wife

Both the Roman Dutch law and African customary law place a reciprocal duty of maintenance on spouses during the subsistence of a marriage. This includes provision of accommodation, food, clothing, medical care and other subsistence needs. Each party contributes according to their means. This duty extends beyond separation and the break up of the joint household but a deserting or adulterous spouse would not qualify under common law. The Maintenance Act however leaves this to the discretion of the court but similarly places a

² See *Nat. Prov. Bank v Ainsworth* at page 477D.

³ See also section 68 of the Criminal Law (Codification and Reform) Cap 9:23 which states that it shall not be a defence to a charge of rape that the female person was the spouse of the accused person.

reciprocal duty of maintenance on spouses. The duty of a husband to maintain his wife is thus largely legal fiction and does not correspond to people's lived reality.

In practice, however, very few men claim maintenance from their wives as that is not considered manly. Real men provide for their wives and children. In the *Muzanenhenhamo* case and the *Cattle Breeders* case, the court considered the following:

‘A long line of cases seem to have laid down the proposition that even if the husband may be the defaulting party, he may eject the wife from the matrimonial home, provided he offers her suitable alternative accommodation or offers her the means of acquiring such suitable accommodation.’

This is partly recognition that the men have better means of maintaining their wives due to their better economic standing whilst women by performing the homemaker's role, also maintain the husband and children. It is therefore ironic that the law proceeds to provide for separation of property as a property regime.

Separation of property: whose interests?

It is a settled principle of Roman Dutch common law that the proprietary consequences of marriage are governed by the law of the country of the husband's domicile at marriage in cases where there is no ante nuptial contract. This rule is absolute and admits of no exceptions so that the law of the husband's domicile determines the property regime of the spouses at all times.⁴ This principle flies in the face of equality as it has no other basis except that the husband is considered to be head of the household and the decision maker.

In 1929 the Married Persons Property Act Chapter 38 in Zimbabwe reversed the Roman Dutch common law position which automatically made all marriages entered into without the execution of ante nuptial contracts, marriages in community of property. The effect of the Married Persons Property Act was to make all marriages governed by the general law automatically out of community of property and profit and loss, and exclude marital power unless an ante nuptial contract has been executed creating community of property. This creates a rigid separation of property, with mutual and total legal independence. Such legislation is a result of treating men and women as if they are equal. The law presumes women and men are equally free to work or stay at home, to own property individually or jointly, and to acquire assets. Such a law was remarked on as follows,

‘...any law of matrimonial property, which does not recognize and make allowances for the difference in general economic function of husband and wife is likely to operate with great unfairness to married women’.⁵

The lived reality of most married women is that their position is structurally different from their husbands.

Ncube (1989) makes these comments about the separation of property: there are two advantages which are the theoretical simplicity and the absence of community debts which prevents a prodigal spouse from ruining his or her prudent marriage partner. The disadvantages are more, however, as separation of property disregards the practical circumstances of most households where there is a *de facto* merger of the spouses' estates. Russell L. J., in *Wilson v Wilson* [1963] 2 All E. R. 447 (at page 452) had this to say:

‘... but there will be many cases where, after many years of happy married life, frequently with one common banking account to which both contribute and no one taking much heed as to who pays for what, the ownership of property has become so inextricably entangled or become legally incapable of solution that an equitable knife must be used to sever the Gordian knot.’

⁴ See Ncube (1989: 163)

⁵ Rt Hon. Sir Jocelyn Simon, President of the Probate, Divorce and Admiralty Division, 1964, page 18.

Furthermore, in many marriages spouses agree on an internal division of responsibilities, with one spouse paying for the family's daily subsistence needs whilst another saves resources for the purchase of immovable and other durable property. Because of the indirect contributions of the one spouse, separation of property does not do justice between the spouses.

The injustice is more evident where one of the spouses, the wife in most cases, works at home 'moving from the stove to washing line and back',⁶ as housekeeper and rearer of children. This role is disregarded by a system of separate property and this disadvantages many women in Zimbabwe as most families are set up with the husband playing the breadwinner role in paid employment and the woman as homemaker. Because of the current economic challenges in Zimbabwe, these homemakers are always involved in some informal sector activity in order to augment the husband's salary, hence contributing both directly and indirectly. Their respective roles are therefore complementary and should be treated as equal. Ncube (1989) cites Gray (1976) with approval when he says:

'...the wife's domestic effort (should be) regarded as a dynamic causal factor in the acquisition of matrimonial property, since the performance of her supportive and complementary role is a functional sine qua non of the viability of the family as an economic unit'(Gray, 1976:35).

Contributions of spouses in the acquisition of land

Access to freehold tenure land in urban areas on the open market depends on one's capacity to access the required money and loan facilities. For most women who are homemakers, engaged in the informal sector or, if employed, direct their incomes to the demands of the subsistence needs of the family, their capacity to acquire urban houses on the open market is extremely limited. In a study conducted by WLSA (1997), only three out of twenty-eight women interviewed in the urban area had independently acquired land in the urban area without any linkage to a male person. In the majority of cases, women combined their incomes with those of their husbands to raise firstly the required deposit and to qualify for mortgage facilities. In instances of contributing to the mortgage requirements, the women's names would be registered as co-owners. In all other instances, the property would be registered in the sole name of the husband but the property would be perceived by the family as family property before death or divorce. It was the WLSA finding that in the families where the matrimonial home was registered as the sole property of the husband and the wife was in paid employment or engaged in some other income-generating activity, her income was often devoted to the subsistence needs of the family which included purchase of food, toiletries, clothing, payment of school fees and other family needs. This freed the husband to direct his income to the payment of the mortgage and sometimes the purchase of household goods and effects (Ncube *et al.*,1997: 63).

One of the reasons why the man would take on payment of the mortgage and purchase of household goods and effects whilst the woman attended to the subsistence needs of the family, are tied to societal definitions of what a man should be and also what a woman should be in marriage. In most cases the man earns more and the woman has difficulties in getting loan facilities due to her lower income. Beyond that, however, the man as head of the household, both culturally and religiously, is regarded as having the primary duty and responsibility for acquiring the family's property. Most women are therefore content to have their husbands play that role and are ignorant of the legal implications in cases of dissolution of marriage. In fact most women do not keep any record of their contributions and all the professional women interviewed by Ncube (1986) did not bother to keep any records of their contributions. This is because a marriage relationship is complicated by the emotional side to it, unlike a purely business partnership and while the family is still a happy, going concern many see it as permanent relationship.

⁶ *Muswere v Makanza* HH16-2005 at p.4

There is also the class of women who are purely homemakers. These were described by Ethel Tawse-Jolie who was the sole female member of the Southern Rhodesia Legislature at the time of passing the Married Persons Property Act 1 of 1929:

‘The woman when she marries gives up the opportunity of earning a livelihood but the man does not. He acquires a housekeeper as well as a partner and he still retains the power to earn his own livelihood; whereas the woman by the mere fact of her marriage, as a rule deprives herself of that liberty’ (Zimbabwe government, undated).

Women interviewed by Ncube (1986) understood marriage to be a partnership, to which each of the spouses contributed through earned income or through work done. One woman said:

‘I think that my domestic work was as important as his work. After all, he had asked me to leave my job, so it is only fair that I should have been recognized as co-owner of the property acquired during the marriage’ (Ncube, 1986: 154).

Decision making: Who has the casting vote?

In the *Makanza* case Dr Makanza sold the home and subsequently invited his wife who was employed in Mutare to join him in Nyanga in his rural home. It is apparent that he did not consider his wife’s participation in the decision to sell the house to be crucial. He was also making indirect decisions about her continued employment without involving her in such decision making. This runs through all the cases referred to and is in line with Lord Wilberforce’s holding in the *Ainsworth* matter. He said:

‘For to hold that the wife acquires on marriage a right valid against third parties to remain in the house where she lives with her husband would not only fly in the face of reality of the marriage relationship which requires the spouses to live together, as they can agree, wherever circumstances may prescribe, *but would create impossible difficulties for those dealing with the property of a married man. It would mean that the concurrence of a wife would be necessary in all dealings.* (See page 494H) (my emphasis)

This decision is in keeping with the man’s perceived role as head of the family and decision maker, an area in which the wife is excluded even if her own rights are at stake. Lacking property means that women are often reduced to powerless dependants who have no economic leverage upon which they can start to build a power base.

Household production as an economic activity

Ncube (1986) notes that the concept of domestic work is elusive and uncertain, depending on the context in which it is used. At different levels it can cover the hard labour of housework and childcare, the more managerial, decorative and supportive functions of some middle class housewives through to the purely ornamental and sexual services of the old mistress style. In the Zimbabwean context, however, the concept of domestic work is often used to include the physically demanding role of cultivator. It is common for some women to spend part of the year in the rural area and then join the husband in town where he is in paid employment. Additionally this woman takes on the roles of child caring and housekeeping. These women involved in agriculture are clearly involved in the production sector as they produce the family’s food needs as well as some crops for sale. For this class of women, their entitlement to a share in the control and ownership of matrimonial property is founded not only on their contributions through domestic work.

There is also the class of woman whose role is domestic work purely in the urban area. Her work includes preparing and cooking food, washing utensils used, doing laundry for the whole family, ironing of clothes, cleaning the house, the yard, bathing and feeding of children, shopping, assisting the children with homework and so on. The purpose of this work is to reproduce the family by reproducing labour power and the children. In this role women are not recognized, are invisible and marginalized in the mainstream capitalist mode of production. They are not compensated at all and in a system of separation of property, the law's attitude is that: 'the right of the deserted wife is purely personal between husband and wife and incapable of binding third parties'. This is in keeping with the privatization of domestic labour and its exclusion from social production. Noteworthy, however, is women's increasing presence in the formal labour force and in the informal sector due to economic hardships and how this is challenging the concept of the man as breadwinner. In some cases women actually bring in more income than their husbands.

A third class of women engaged in domestic work is that of the employed women who are in full time employment but still go back home to play the housewife role; cleaning, cooking, ironing and feeding the husband and children. In most instances the husband does not assist and takes out leisure time whilst the wife works. This applies across classes to include women working as teachers, nurses, lawyers, accountants, general factory workers and so on. These women contribute both directly and indirectly to the acquisition of the immovable property. Depending on the level of contribution by way of salaries, the professional women are in a better bargaining position than their lowly paid counterparts. Their legal position with respect to immovable property during the subsistence of a marriage is however not very different where the husband is the sole owner as in the case of the *Makanzas*.

Valuing women's indirect contributions

The Matrimonial Causes Act in section 7(3)(e) provides that the direct and indirect contributions of each of the spouses to the family, including contributions made by looking after the home, caring for the family and other domestic duties, should be considered in the reallocation of property. The practice of the courts in exercising their discretion in reallocating property at divorce tells a lot about how women's indirect contributions are generally undervalued and the difficulties courts face in placing a value on this work. Before this law the court had held that a wife who had made direct financial contributions to the improvement of the matrimonial home as well as taking on the subsistence needs of the family had no claim to a share of that home.⁷

One difficulty is presented when one tries to place a monetary value on domestic work that produces use value rather than exchange value and in Zimbabwe domestic work is grossly undervalued. The correct approach is to note that in most marriages spouses take up different duties which are equally beneficial to the family. In the case of *Muchada v Muchada* HC-H-346-86 the court awarded a 50 per cent share of the matrimonial home to the wife who had taken care of the children and improved the matrimonial home with the financial assistance of her husband who was abroad studying. On the extreme end are cases such as *Masocha V Masocha* HC-H-183-87 where the court refused to award a half share of the proceeds of the sale of a house on the basis of the disparity in salaries and totally overlooked the wife's indirect contributions. The correct approach should be as stated by Gray:

'A just and realistic evaluation of her efforts depends instead upon the avoidance of the absolute terms of cash value in preference for the relative approach of differential equality between financial and non-financial contributions to the acquisition of matrimonial assets.'⁸

⁷ *Chiromo v Katsidzira* 1981 ZLR 87.

Protecting the woman's interests at divorce

The Matrimonial Causes Act is interested in safeguarding the woman's interests in the matrimonial property as courts are directed to consider all the circumstances of the case in reallocating property and these include some very gendered grounds in addition to the one considered above. Some of these are the income and earning capacity and financial resources of the parties, financial needs and obligations, standard of living, age, physical and mental condition of the spouses and children and duration of the marriage. In practice, however, courts do not always pass gender equitable judgments and this could be partly because of the attitudes of some court officers who are not gender sensitive. The provisions in the law provide a basis on which to challenge any unsatisfactory determinations.

Protecting the woman's interests upon death of the spouse

The Deceased Estates Succession Act provides that in the event of death of one of the spouses in a civil marriage, the surviving spouse shall inherit the matrimonial home and household goods and effects. This is in fact preemptory and ensures a roof over the widow's head.

Consequently, the woman's position and rights are better protected upon divorce or death of a spouse than during the subsistence of the marriage. It has been shown how the context has changed and how the law has responded to the changed context in respect of divorce and inheritance. This started from the feudal era in England when the husband owned and controlled all of the wife's property, to date when local legislation and regional and international commitments fly in the face of the law practised in Zimbabwe with respect to the rights of a civil marriage wife to the matrimonial home registered in the sole name of her husband.

Conclusion: Ensuring gender equality; A roof over her head

The law in Zimbabwe in respect of the rights of a civil marriage wife under family law to the matrimonial home registered in the sole name of her husband is a far cry from the ideal position proposed under CEDAW and other international and regional instruments. As illustrated above the rights of a woman married in terms of civil marriage are inadequately protected by the law that provides for separation of property.

The shortcoming with this provision is that it is advocating for separation of property which in reality disadvantages women, whose lived reality is that they do not have the same opportunities as men to own property. Women and men are not equally free to work or stay at home, to own property individually or jointly and to acquire assets. It also does not correspond with the reality of how spouses deal with property by making internal arrangements dividing roles and responsibilities and this is largely influenced by social constructions about what each party should do. Men are expected to be the head of the household, the provider, breadwinner and decision maker. The socio-economic context has however largely changed this. In conclusion the law applies with great unfairness to married women.

At the moment, the law protects the interests of rich husbands whose intention is to retain their accumulated property at the expense and exclusion of their wives. It fails to take into account the economic realities of married life by not recognizing the role of the wife as a homemaker in the acquisition and preservation of the matrimonial home and the internal division of labour within the family.

⁸ See Gray (1976:56).

There is a conflict between the provisions relating to division of property at divorce and death and what happens during the subsistence of a marriage with the wife emerging worse off during the subsistence of a marriage in respect of her rights to the matrimonial home.

The law needs to be reformed to ensure women have equal decision making with their husbands in relation to the ownership, acquisition, management, administration, enjoyment and disposition of property. The City of Harare has started implementing a policy where they do not sell their houses on a rent to buy basis where the lease is in the husband's sole name, without first getting the wife's consent. The options for reform in an attempt to meet the criticisms of the present law are as follows:

- (i) a community of property regime;
- (ii) a special proprietary regime relating solely to the family home, which of course is often the only family asset of any significant value.

Community of property

By virtue of the marriage, the spouses' property is subjected to joint ownership. This would be based on the status of marriage rather than the woman's contributions to the acquisition of property. With respect to the extent of the property affected, this would cover all the property owned by either spouse at the time of marriage as covering only property acquired during the subsistence of marriage, gives effect to the contribution theory which has been shown to be problematic. This community of property regime would exclude the husband's marital power and provide for joint decision making. This would ensure equal sharing for women but would not have the husband as decision maker on the property.

Special rules for matrimonial home

The law could recognize a special regime relating only to the matrimonial home. This could be either a restraint on dealings or joint ownership. A restraint on dealings would prevent the husband from mortgaging or even selling the house over his wife's head.

Joint ownership is, in a way, community of property limited to the matrimonial home. The Scottish Law Commission in 1973 advocated for this and commented:

'It would reflect the realities of family life, in which husband and wife regard the home as 'theirs' without considering the legal title or principles of trust law. It would apply during the subsistence of the marriage and would give security of ownership to the spouse who is now considered by law as having no proprietary interest in the home. It would recognize that each spouse contributes to the marriage and to the family and that the joint efforts of both make possible the purchase and maintenance of the home. It would eliminate the uncertainties of litigation in which ownership rights are established by proof of financial contribution'(Scottish Law Commission, 1984).

The bottom line is that whatever route is taken, the law must ensure a roof over the woman's head during the subsistence of the marriage by providing for her protection to be in line with the statutory protection on death or divorce.

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