
**‘JUST LIVING TOGETHER’: AN ANALYSIS OF RIGHTS AND OBLIGATIONS OF
WOMEN IN COHABITATION WHEN SUCH RELATIONSHIPS BREAK DOWN: A
CASE STUDY OF MUFAKOSE AND MARIMBA SUBURBS IN HARARE,
ZIMBABWE**

By

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Abstract

This research investigates the discrimination that growing numbers of women who cohabit with male partners in Zimbabwe face in relation to breaches of their property rights upon the dissolution of such unions when the courts leave them with little or nothing at all. This occurs primarily because Zimbabwe does not recognise cohabitation (or ‘just living together’) as a legal form of marriage. The writer is a lawyer working in the area of legal reform in the Ministry of Justice and Parliamentary Affairs who is ideally and strategically placed to lobby for the recognition and protection of the rights of such women as Zimbabwe engages in the process of harmonising its laws with the human rights provisions contained in its progressive 2013 Constitution and various international human rights instruments to which Zimbabwe is a party. She engaged several approaches within the overarching grounded women’s law approach to gain a deep understanding of the lived realities of cohabiting women in the context of their multifaceted relationships between themselves and the law and society, her main objective being to expose the inadequacies of Zimbabwe’s current legal framework.

Unstructured in-depth interviews and group discussions with her 51 respondents (including cohabiting women and men from medium and low income communities and representatives from the legal, governmental, non-governmental and religious communities) proved the most appropriate data collection methods for this largely qualitative research. Her major findings revealed that as a result of the absence of any clear law on which our courts should be able to rely in order to resolve these types of property disputes fairly, women cohabitants are discriminated against on grounds of their marital status (i.e., merely because their informal relationships do not fall within any of Zimbabwe’s legally recognised and protected relationships of marriage) in contravention of their Constitutional rights. She advocates test case Constitutional litigation (1) to declare that women in cohabitation unions need to be just as well protected under the law as any everyone else in Zimbabwe and (2) to define what is meant by discrimination on the basis of marital status as this would help in determining the contemporary scope and meaning of marital status discrimination in the country’s new Constitutional dispensation. The writer also advocates for a wider interpretation that would not only protect people from discrimination because they are married or unmarried, but would also protect people who are in non-marital relationships.

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Declaration

I, Letticia Fadzai Moyo, certify that this is my original work; it is an honest and true effort of my personal research. I certify that the work has not been presented anywhere else before for any other thesis.

Signed

Date

This dissertation was submitted for examination with my approval as the University Supervisor

Signed

Date

Professor J.E. Stewart

Director of Southern and Eastern African Regional Centre for Women’s Law, University of Zimbabwe

Signed

Date

Dedication

I dedicate this work to my beloved family for their unwavering support throughout this entire journey. May the Lord, God shower you with abundant blessings.

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List of abbreviations and acronyms

CEDAW	Convention on the Elimination of all forms of Discrimination Against Women (1979)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MJLPA	Ministry of Justice, Legal and Parliamentary Affairs
SADC	Southern African Development Community
SEARCWL	Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe
UDHR	Universal Declaration on Human Rights
ZWLA	Zimbabwe Women Lawyers Association

List of international instruments and recommendations

Convention on the Elimination of all forms of Discrimination Against Women, 1979
(CEDAW)

Committee on the Elimination of Discrimination against Women, General Recommendation
No. 21: Equality in marriage and family relations HR1/GEN11.REV 7(1994)

International Covenant on Civil and Political Rights (ICCPR)

International Covenant on Economic, Social and Cultural Rights (ICESCR)

African Charter of Human and Peoples' Rights, 1981 (the Banjul Charter)

Protocol to the African Charter of Human and Peoples' Rights on the Rights of Women in
Africa, 2003 (the Women's Protocol) (the Maputo Protocol)

SADC Declaration on Gender

Universal Declaration on Human Rights

Human Rights Committee General Comment 19, Protection of the Family, Rights to
Marriage and Equality of Spouses, HR1/GEN1.Rev 2. (1990)

Human Rights Committee, General Comment 28. Equality of Rights between men and
women (article 3). UN Doc CCPR/.C/21/Rev1/Add 10 (200).

List of statutes

Ethiopia

Ethiopian Revised Family Code, 2000

Malawi

Malawi Constitution, 1994

Zimbabwe

Constitution of Zimbabwe Amendment Act, No.20 of 2013

Customary Marriages Act, Chapter 5:07

Matrimonial Causes Act, Chapter 5:13

List of cases

Chapeyama v Matende and Another 2000 (2) ZLR 356 (S)

Chivise v Dimbwi HH-4-04 (unreported)

Feremba v Matika HH-33-07 (unreported)

Karambakuwa v Mabaya SC-158-87 (unreported)

Katekwe v Muchabaiwa SC-87-84 (unreported)

Mashingaidze v Mugembe HH-3-99 (unreported)

Matibiri v Kumire 2000 (1) ZLR 495 (H)

Mtuda v Ndudzo 2000 (1) ZLR 718 (H)

Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs CCZ-12-15
(unreported)

Usayi v Usayi SC-49-03 (unreported)

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Executive summary

‘Just living together’ or cohabitation in Zimbabwe is a non-legislated area in Zimbabwe. Cohabitation is neither recognized as a form of marriage in Zimbabwe nor is there a specific law that protects the rights of persons in such unions, yet it is increasing and has become common. There is a lack of an adequate legal framework on how the courts should distribute property for persons in cohabitation. The silence of the law has affected women as they tend to lose out on the sharing of property. Our courts have therefore resorted to general law principles such as tacit universal partnership, unjust enrichment and joint property to resolve property disputes of persons in cohabitation unions. These principles are difficult for women to prove in court which usually results in their being taken advantage of. The writer was motivated to do this study during the Second Semester’s Family Law and Social Realities course during the Masters in Women’s Law Programme at the Southern and Eastern African Regional Centre for Women’s Law at the University of Zimbabwe (SEARCWL). She realized that in the area of family, marriage has been discussed a lot neglecting other forms of family that have emerged in recent years.

The writer, a lawyer in the Ministry of Justice and Parliamentary Affairs, who has worked for the Department of Constitutional and Parliamentary Affairs for several years, is strategically positioned to influence the alignment of marriages laws to the Zimbabwe Constitution as well as a total reform of such laws. The methodological framework was informed by understanding how women are discriminated against upon termination when their property rights are not protected. To investigate the lived realities of women in cohabitation relationships, she started by interviewing women using the women’s law approach which explores the connections between law and gender which are sometimes hidden and identified the bias involved, her main objective being to expose the inadequacies of the current legal framework. She also employed the grounded approach where she engaged with empirical knowledge and the data she managed to collect on women’s lived experiences on law and sharing of property disputes upon the dissolution of cohabitation unions. As the writer incorporated her findings into the legal framework, it became apparent that the Zimbabwean legal framework is inadequate as it exposes women in cohabitation unions to discrimination as their property rights are violated upon the dissolution of such unions. The sex and gender analysis also assisted the writer to hear the masculine voice and understand how men view cohabitation and investigate how they would like the law to regulate such unions, especially

when it comes to the distribution of property upon separation. Both men and women suffer because of this uncertainty, but women suffer more. In order to obtain data the writer used less structured in-depth interviews.

As she first went into the research field, the writer adopted an uncomplicated definition of cohabitation which simply means ‘a man and a woman who just stay together as husband and wife without following the customary rites or civil procedures.’ Determining whether civil procedures had been followed or not was quite simple, but controversies emerged when she tried to define cohabitation under custom and what customary rites ought to be performed for a marriage to be said to have been formed. In other words, debate surrounded situations in which a cohabitation union remained such because the expected customary formalities had not been performed to the expected level or standard. As a result of her research, she discovered that there is a need to probe further and research the actual numbers and types of cohabitation unions including such unions which are called ‘small house relationships’ where a married man has a family with another woman without observing any civil or customary formalities and ‘Ben ten relationships’ where older rich women cohabit with younger men who want to benefit financially from these women. These relationships sometimes overlapped and intermingled with cohabitation relationships creating a complex web. This led her to ask, ‘What really constitutes cohabitation and what are the elements of cohabitation?’ ‘Does cohabitation mean the day-to-day physical staying together of two adult persons of the opposite sex or can it be on an *ad hoc* basis?’ ‘Should there be permanence of some sort?’ She discovered that there are different categories of cohabitation which need to be interrogated further.

Her major findings revealed that there is no clear law that can be used by our courts to distribute the property of persons in cohabitation when such unions break down. There is no statute law currently in place to determine how their property should be divided and as a result, there is confusion on the part of the judiciary. It therefore proves to be undeniably difficult to distribute the property of persons in cohabitation unions because usually women lack evidence to prove their contribution. Most of the informants thought that a cohabitation union would become a ‘common law marriage’ after the parties have stayed together for a certain period of time. On the contrary our legal framework does not have such a presumption. There are family level meetings that are held to decide important issues such as the distribution of property, maintenance and custody of children. It is paradoxical that

women who cohabit with their partners find themselves being discriminated against when Zimbabwe has one of the best and most modern constitutions that, in terms of section 56, prohibits discrimination on the basis of marital status. Surely it is high time we consider the scope and meaning of discrimination on the basis of marital status in Zimbabwe. Does section 56 imply that the Matrimonial Causes Act should apply to all marriages and unions that exist in Zimbabwe? Having done this research and in the light of decided cases on cohabitation, it looks as though we should recognize cohabitation and protect the property rights of women in such unions, but obviously there are problems that must be anticipated in trying to implement this. A variety of attitudes towards cohabitation is apparently going to persist but policy makers should pay close attention to the voices of the increasing numbers of people who undoubtedly regard cohabitation as an acceptable form of family relationship. There is a possibility of cultural and religious objections and resistance which will disrupt implementation. Nevertheless cohabitation is a lived reality and should be addressed. The fact that countless women in such *de facto* unions suffer violations of their property rights under the law as it currently stands amounts to discrimination. Zimbabwe is a party to many international conventions that protect women from discrimination and Zimbabwe should honour its international obligations.

Test case litigation should be launched to protect women who cohabit in the same way as the Constitutional challenge of *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs* CCZ-12-15 (unreported) protected children against child marriages. That case emphasised the paramount provisions of the Constitution that provide that all persons are equal before the law and have the right to equal protection and benefit of the law, every person has a right not to be treated in an unfairly discriminatory manner on grounds of marital status and that every person has the right to access the courts or some other tribunal or forum established by law for the resolution of any dispute. In other words, legal precedent should be put in place that declares that women in cohabitation unions need to be protected by the law just like everyone else in Zimbabwe. Test case litigation to define what is meant by discrimination on the basis of marital status would also help in determining the contemporary scope and meaning of marital status discrimination in the new Constitutional dispensation. The writer advocates a wider interpretation that would not only protect people from discrimination because they are married or unmarried, but would also protect people because they are in non-marital relationships.

CHAPTER ONE

1.0 INTRODUCTION AND ANALYSIS OF THE PROBLEM

1.1 Introduction

Cohabitation is neither recognized as a form of marriage in Zimbabwe nor is there a specific law that protects the rights of persons in such unions, yet it is increasing and has become common. This has been fuelled by a number of push factors which include economic hardships that make it socially difficult for most people to formalize marriages. Women become vulnerable especially upon the dissolution of the union because there is no specific law that protects their property rights. Cohabitation unions are not regarded as marriages under the law and as a result all the matrimonial laws including the Matrimonial Causes Act cannot be used to determine the distribution of assets that such parties may have accumulated during the subsistence of their relationship. Our courts have therefore resorted to general law principles which govern tacit universal partnership, unjust enrichment and joint property to resolve property disputes of persons in cohabitation unions. These principles are difficult for women to prove in court which usually results in their being taken advantage of. There are gender inequalities in cohabitation as men and women approach this relationship from unequal social positions with unequal levels of bargaining power.

Therefore there is a need to recognize cohabitation in order to safeguard the property rights and interests of women in such unions. Although a lot has been written about cohabitation both in Zimbabwe and other jurisdictions, the law in Zimbabwe has not specifically addressed this problem. With the coming into being of the new Constitution, something can be done to protect the property rights of women in cohabitation unions. If other countries have come up with laws that have tried to help women in cohabitation, Zimbabwe can also come up with laws that specifically work for us without necessarily copying other jurisdictions.

With the economic difficulties currently being experienced in Zimbabwe, most people are finding it difficult to pay *lobola* (bride wealth) which is culturally the first step towards any marriage in Zimbabwe. Socially, *lobola* is treated as the fundamental determining feature for a valid marriage. In actual fact, it has been granted so much controlling power that most

women have been socialized to think that to earn social acceptance and respect, *lobola* should be paid for you.

1.2 Statement of the problem

Several people who have been in cohabitation unions have approached the courts to have their property disputes resolved when their unions broke down. Decided cases on the sharing of property have reflected that customary law *per se* is inapplicable. Our courts have therefore relied on judicial innovation in order to provide a just and equitable distribution of such assets. Inevitable legal uncertainties arising from such innovation have resulted in the discrimination of women as they are the ones who tend to lose out more than men when cohabitation unions break down.

1.3 Objectives of the study

- To investigate the concerns of women in cohabitation relationships in relation to the distribution of assets at separation.
- To explore whether women in cohabitation relationships understand the legal implications of such relationships, especially with regard to the distribution of assets when relationships breakdown.
- To understand how women in cohabitation unions are vulnerable compared to men.
- To investigate the gender inequalities in cohabitation and devise legal and non-legal strategies to protect the rights of women in such unions.
- To explore possible recommendations and options on how to address the gender inequalities suffered by women in cohabitation unions at dissolution.

1.4 Research assumptions and questions

Table 1 sets out the research assumptions and questions around which the study revolved.

Table 1: Research assumptions and questions

RESEARCH ASSUMPTIONS	RESEARCH QUESTIONS
1. The legal framework in Zimbabwe does not adequately protect women in cohabitation relationships in relation to the distribution of assets at separation.	1. Does the legal framework in Zimbabwe inadequately protect women in cohabitation relationships in relation to the distribution of assets at separation?
2. The laws that are used by our courts to distribute jointly acquired property of persons in cohabitation are discriminatory to women because judges have too much discretionary power in determining such cases.	2. Is it the case that the laws that are used by our courts to distribute jointly acquired property of persons in cohabitation are discriminatory to women because judges have too much discretionary power in determining such cases?
3. It is difficult to distribute property equitably when cohabitation unions break down.	3. Is it difficult to distribute property equitably when cohabitation unions break down?
4. There is a need to address the gender inequalities in cohabitation relationships so as to protect women in such unions.	4. Is there a need to address the gender inequalities in cohabitation relationships so as to protect women in such unions?
5. Some women in cohabitation do not understand the legal implications of such unions especially when their relationships break down.	5. Do some women in cohabitation fail to understand the legal implications of such unions especially when their relationships break down?
6. Some women in cohabitation unions resort to both legal and non-legal measures when relationships are terminated by separation.	6. Do some women in cohabitation unions resort to both legal and non-legal measures when relationships are terminated by separation?
7. Persons in cohabitation do not have a legal duty to maintain each other, yet in reality they do so.	7. Is it the case that persons in cohabitation do not have a legal duty to maintain each other, yet in reality they do so?
8. The failure to protect the rights of women in cohabitation relationships infringes a number of their Constitutionally guaranteed rights like the right to protect the family unit, right to be protected from non-discrimination on the basis of and marital status or sex, and right to dignity.	8. Is it the case that the failure to protect the rights of women in cohabitation relationships infringes a number of their Constitutionally guaranteed rights like the right to protect the family unit, right to be protected from non-discrimination on the basis of and marital status or sex, and right to dignity?
9. There is a need for legal and policy reforms to protect women in cohabitation unions.	9. Is there a need for legal and policy reforms to protect women in cohabitation unions?

1.5 Delimitations of the study

My research is focused on cohabitation in relation to sharing of property when the union breakdown. Cohabitation issues range from rights of children, maintenance and inheritance. Geographically, my study was also limited to Mufakose high density suburb and Marimba medium density suburb of Harare, Zimbabwe's capital, which are just located next to each other. I decided to choose a high density and medium density to make a comparison and find out if cohabitation is a class issue.

CHAPTER TWO

2.0 COHABITATION IN ZIMBABWE

2.1 Introduction

Many women in Zimbabwe are subordinated and discriminated against even in ‘marriages’ where *lobola* (bride wealth) has not been paid. Women in cohabitation unions face multiple exclusions as discrimination against them is many-sided. These unions are not legally recognized and women in such unions are regarded as inferior. Family, society and the courts cannot protect them so they have nothing to on which to fall back. To comprehend fully the situation of a woman in cohabitation especially the discrimination she faces upon dissolution of the union in terms of distribution of assets acquired during the union, there is a need to investigate the historical background of cohabitation. There is also a need to understand whether cohabitation has always been part of our lifestyle or whether it has been necessitated by the changing lifestyles and patterns of our modern society.

2.2 Historical background to cohabitation

The law has not traditionally looked positively upon persons who decide to live together without performing the rites of matrimony. Religion has also constantly disapproved of people living together outside marriage and has overtly referred to cohabitation as living in sin. It is important to note that historically the law and religion were linked. Parker (1990), as quoted by Diduck (2006), argues that a historical perspective may help to move the debate away from a traditional comparison of marriage and cohabitation to the issue of what is meant by marriage in the first place. He questions whether there was ever historically or is even now a clear demarcation between marriage and cohabitation. In Zimbabwe there is no legal definition for the term cohabitation.

Cohabitation in Zimbabwe is believed to have been introduced by colonization and urban expansion which had the effects of separating husbands from their wives as men left the rural areas in search of work (Muzvidziwa, 2002). Commonly in Zimbabwe and elsewhere in Africa, the practice of cohabitation was linked to the process of urbanization and weakening of institutional controls (Chavhunduka, 1979). As Banda (2005) correctly puts it, in Africa the reality of the situation is that few women and an equally small number of sons-in-law would contemplate marriage without the payment of bride wealth for fear of attracting an ill

omen against themselves and their children. Nevertheless as revealed by this study, there is increasing evidence showing marriage variants existing in modern Africa which weaken the conception of the universality of patriarchal marriage in Africa (Muzvidziwa, 2002). As noted by Suda (1996), cohabitation and other new experimental substitutes to traditional marriage are now widespread in urban African families. While it is difficult to gauge the precise predominance of cohabitation relationships in Zimbabwe, the practice is certainly now common. National surveys such as the Zimbabwe Demographic and Health Survey 2010-11 pointed out that 2.8% of women and 0.7% of men aged 15-49 in Harare are currently living together with a partner as though they were married giving a total percentage of 3.5 %. This study has also revealed that 5.1% of women in Harare have one co-wife and 0.9% of women have two or more co-wives, giving a total of 6%. On the other hand 8.9% of women do not know whether their spouses have other wives besides them. This becomes interesting because in this category there is a possibility that their spouses might be having unofficial wives. This is an indication that polygamy whether formal or informal still remains a common practice. However cohabitation may be gradually replacing polygamy as polygamous unions are becoming less official in nature. My research revealed that some men may sometimes have multiple ‘unofficial wives’ in the form of civil marriage wives, cohabitating partners and unregistered customary law wives at the same time. Our national census unfortunately does not enumerate cohabiting unions as a distinct marital status in the class ‘living together’. As a result most cohabitants are likely to be categorized as ‘never married’ or ‘married’ which probably misrepresent the whole picture as this does not reflect the reality on the ground.

2.3 Grounded definition of cohabitation – ‘Kuchaya mapoto/Ukhuhlalisana’

Cohabitation has been described by a number of academic researchers as a union of two adults of the opposite or same sex who live together as husband and wife in an intimate and devoted relationship but are not married to each other either under civil law or customary law (Hunter, 2004; Townsend *et al.*, 2006). Mokomane (2013) defines cohabitation as a substitute to marriage, a transitory phase before marriage and an option to being single. Cohabitation can also be described as one in which the parties live together as husband and wife without the formal ties of a marriage. Under our customary law, such unions are not valid but it is worth noting that living together without customary formalities having been performed has become a new custom that is being shaped to respond to the new circumstances such as

urbanization. As argued by Channock (1989), a new form of marriage has been developed that is neither customary nor legal. It thus becomes important to consider the living customary law.

A cohabitation relationship creates indirect affirmation that an inferred marriage contract exists. It raises the presupposition that the parties have established a marriage. The major drawback of a cohabitation relationship is that it does not provide structural fortification of either party upon dissolution of the relationship and most women tend to lose out more than men for they economically depend on men for support. The more dominant or protected cohabitant may gain as the weaker loses out. Male partners are often the least dependant in financial terms as they generally receive the higher pay, more secure jobs with pension rights and are most likely to be the house owner (Barlow *et al.*, 2005). Surveys have revealed that women sometimes poor, but not always, may prefer to be the mistress of a rich man than the wife of a poor man (Harrell-Bond, 1975).

As I went into the field I adopted an uncomplicated definition of cohabitation which simply means ‘a man and a woman who just stay together as husband and wife without following the customary rites or civil procedures.’ Determining whether civil procedures had been followed or not was quite simple, but controversies emerged when we tried to define cohabitation under custom and what customary rites ought to be performed for a marriage to be said to have been formed. In other words, debate surrounded situations in which a cohabitation union remained such because the expected customary formalities had not been performed to the expected level or standard.

Although *lobola* is seen as the basis of customary marriage it is still sometimes difficult to ascertain that a customary marriage has indeed come into being. This is because different groups have different requirements about its delivery (Banda, 2005). It was interesting to note that people held different cultural definitions of cohabitation and this applied even to the Magistrates’ Court where this has created problems even for the judiciary. At the Magistrates’ Court one female magistrate I interviewed said they do not go to such extent to determine the percentage of *lobola* that has been paid, as long as something has been paid no matter how little, an unregistered customary marriage exists. Unfortunately I did not manage to interview a traditional chief who are custodians of customary law.

As I began my study, I thought it was very easy to define cohabitation and I also thought my own definition would generally apply to everyone. But I was stunned when some of my respondents started talking about the requirement under customary law that a certain percentage of *lobola* should be paid for a customary marriage to have been formed. The distinction between cohabitation and a marriage under customary law is blurred. I had to ask myself: What is real *lobola*? What percentage of *lobola* needs to be delivered before one can say there is a proper marriage under customary law? Where do we start and where do we end? It can sometimes be difficult to say whether a marriage under customary has indeed occurred (Banda, 2005). If the strict application of custom is followed, a great number of purported unregistered customary unions, when interrogated further, turn out to be cohabitation unions. For example, one elderly respondent (about 70 years old) told her daughter's story. She had fallen pregnant, eloped with her boyfriend and ended up in a cohabitation union. The respondent narrated as follows:

'Mwanasikana wangu akatizira asi varume vake vakangobvisa tsvakiraikuno chete. Iyi imari yekungotizivisa sebarekerki kuti mwana wenyu ndisu tinaye asi rora hariasati rabviswa.mari iyio haimiririre roora inongratidza kuti vakwash vane chido chekuroora mumazuva anoteerea kana mari ichinge yawanikwa.rustambo inobviswa kurakidza kuti musikana abvuma bonde pese murume wake anoridira huye haazofi akapa mumwe murume bonde nekuti hupombwe. Mukadzi anobatwa achipomba anopiwa mutongo wakaoma pamwe nekurambwa zvinova zvinonyadzisa iye nemhuri yake. Danga rinoripwa kubudikudza ne mombe uye ndiro rinopa baba masimba pamusoro pevana vavo.

(Meaning: 'My daughter eloped and her "husband's" family only paid *'tsvakiraikuno'*, i.e., a token to show intention to marry. This is usually paid when two people are already staying together as husband and wife but no *lobola* has been paid, whether the woman is pregnant or not. Under our custom this token does not signify marriage. More money like the *'rutsambo'* which is the initial payment associated with the girl's sexual rights whose payment conferred on the husband 'exclusive sexual rights' over his wife and this is also why adultery with a married woman was and is still punishable by payment of a cow. In the modern era, it is still the first part of *lobola* which is usually a gift in cash and kind and now consists of garments, kitchenware and foodstuffs. For a marriage to be valid the husband must also pay what is termed in *Shona* as *'danga'* which is the more significant payment of the *lobola* in the form of cattle and this was linked with rights over children born to the woman. This particular payment conferred child ownership on the father. It is important to note that nowadays people are demanding cash.'))

She continued:

'Mazuvano nekuda kwekuti zvinhu zvakaoma vanhu vakungobhadhara iyo tsvakiraikuno vanhu votogarisana hupenyu hwese matambudziko anowanzoya kana mumwe afa. Asi munhu akabvisa tsvakiraikuno anenge achitotamba hukwasha, mukadziwo achitotambawo huroroora. Kare zvaisaita mukwasha abvisa tsvaikrikuno ainzi haasati azivikanwa mumusha.'

(Meaning: 'Nowadays because of economic hardships people just pay that token and spend the rest of their lives staying together as husband and wife. problems only emerge when such a union is breaking down or when one partner dies. Currently people who have paid this token are viewed as husband and wife and they are allowed to play their roles as son/daughter-in-law, respectively. In pre-colonial times this would not happen as custom was so strict and would not allow such. Under *Shona* custom they say they have no relationship with the prospective son-in-law because he has not formally established a relationship with his in-laws since no *lobola* negotiations have been initiated.')

Although the payment of *lobola* process cannot be uniform as it varies from one place to another in Zimbabwe, the majority of people agreed that the token of intention to marry remained a token that showed that plans to formalize the cohabitation union in the future are positive. Unless some more steps are taken towards the starting of substantial *lobola* negotiations, it remains a promise to marry which can be equated to an engagement. The argument of levels and stages of the customary rites that must be performed are to a greater extent varied from place to place. As noted by Banda (2005), across Africa people have different expectations, some expect the entire bride wealth payment to be made before the 'transfer' of the woman to her new marital family can take place; others see it as a generational obligation to be given over time.

As a result of my research, I discovered that there was also a need to investigate other types of cohabitation unions involving 'small house relationships' where a married man has a family with another woman without observing any civil or customary formalities and 'Ben ten relationships' where older rich women cohabit with younger men who benefit financially from these women. Such relationships overlapped and intertwined with cohabitation unions and created a web of complexity and uncertainty. This led me to ask myself: What really constitutes cohabitation and what are the elements of cohabitation? Does cohabitation mean the day-to-day physical staying together of two adult persons of the opposite sex or can it be

on an *ad hoc* basis? Should there be some permanence of some sort? I discovered that there are different categories of cohabitation which need to be interrogated further.

2.4 Categories of cohabitation and challenges posed: Informal polygamous relationships

This brings us to the categories of cohabitation I have devised for the purpose of this dissertation which has allowed me to interrogate this phenomenon of cohabitation in greater depth.

(a) Proper cohabitation partnership

This is when two adults masquerade as husband and wife and live together socially as a proper family. They also do so openly so that they are recognized by society as husband and wife although no cultural or customary rites have been fulfilled and they have not gone through the procedure of a civil marriage. Under this category it is also possible to find that one of the partners may be in an existing civil marriage but has failed to nullify it for reasonable and justified reasons, one of them being that most people cannot afford to go through divorce proceedings because they may be complex and expensive.

This category poses its own problems which are not as complicated as those encountered with the following categories. The following categories constitute what is commonly known as the 'small house phenomenon'. This takes place where:

(b) The man has an existing civil marriage and one or several women purporting to be wives

(c) The man has an existing customary marriage with proper customary rites performed and one or several women claiming to be wives but no customary rites were performed

The above mentioned categories pose the greatest challenges since it is not really easy to establish whether they meet the requirements of cohabitation because most of these relationships are kept in secret and the parties are not willing to disclose that they are in cohabitation. Although all the elements of cohabitation can be fulfilled in these unions such

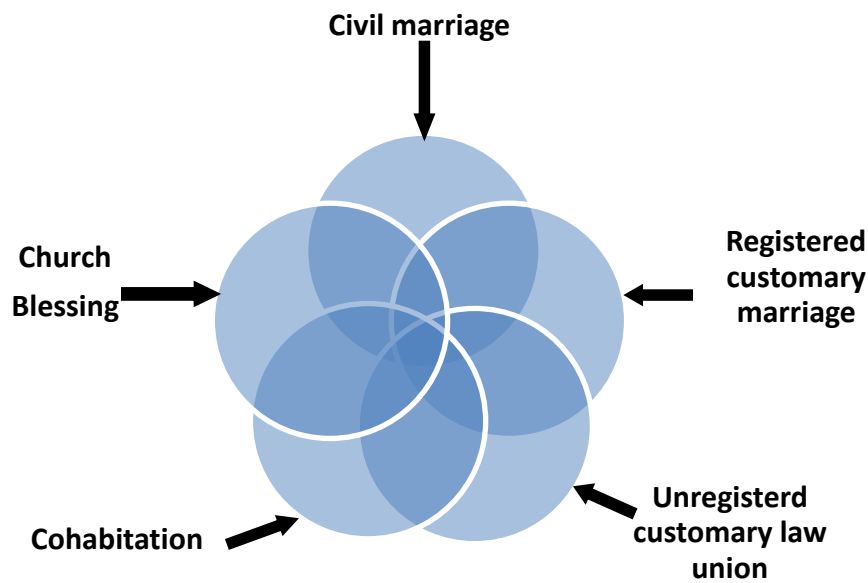
as sharing financial responsibility, maintaining each other and giving birth to children, the element of staying together may be not satisfied as the man is seen hopping from one woman to another including the woman in the 'main house' caring for all the women involved. In such extra unions property may be acquired and be deliberately registered excluding the woman in the 'main house' who is probably holding on to a marriage certificate thinking she has a better right than the rest of the other women. There is a need to interrogate these relationships further in order to establish whether these types of unions that are mushrooming in our society can also be categorized as cohabitation. If we cannot call them such then what should we call them and how can we address and protect the rights of the women entwined in this web. Cohabitation may therefore be steadily replacing polygyny in an informal way. At the end of the day, one can argue that the rights of the women in civil marriages are threatened.

If we give priority to the woman in a civil marriage, are we not unfairly discriminating against the other women involved on the basis of marital status which is prohibited by section 56 of the Constitution? If it is discrimination, then one can ask what is the point of getting married and having it registered anyway if the rights are so fluid and can just be tampered with in the name of non discrimination on the basis on marital status? Section 56 of the Constitution prohibits unfair discrimination on the basis of marital status. My own understanding is that no one should be discriminated against on the basis that they are in a civil union, a customary union, a cohabitation union or are single. But what do we really mean when we say 'unfair discrimination' and how do we determine this fairness? So there might be a need for interpretation of this provision by the Constitutional Court through test case litigation.

Discrimination on the basis of sex also comes into play because it is usually women who are disadvantaged in cohabitation relationships. Thus, failure to protect women cohabitants amounts to discrimination on the basis of marital status as well as sex. The right to have one's dignity respected and protected in terms of section 51 of the Constitution is also violated because the failure to recognize cohabitation is tantamount to the failure to respect and protect the fundamental life choices made by those cohabitants who have chosen to live under

such arrangements.¹ The diagram in Figure 1 depicts the complexities of variations of informal polygamous unions women find themselves in under the legal plural system that exists in Zimbabwe.

Figure 1: A diagram depicting the complexities of variations of informal polygamous unions



The complexity created by informal polygamous unions becomes discriminatory of the women involved when the man has to divide his resources between his official and unofficial partners. There is the great risk that the man will financially prefer the ‘small house’ or cohabitant partner over the ‘main house’. It is apparent that not all men manage to distribute the available resources equally and fairly between their multiple partners. More problems are created when one of the relationships breaks down and there is the sharing of property involved. The woman in the civil marriage is not able to claim her share from that of the cohabitant wife considering that she has been disadvantaged by the extra marital affair when her share was now being divided amongst unofficial wives. Although in principle men are not supposed to marry different women under the two marriage regimes, over and over again most men marry different women under different marriage systems, generating pandemonium and uncertainty. As argued by Banda (2005), this state of affairs creates legal ambiguities

¹ The above categorization was extracted from my policy brief written in the Family Law and Social Realities course in the last Semester of the Masters in Women’s Law Programme, 2015-16. This gave me the inspiration to use the grounded approach of this dissertation to further interrogate the discrimination suffered by women in cohabitation unions when such unions break down.

which leave women vulnerable to falling through the cracks in Zimbabwe's plural legal system where they find themselves left out in the cold and without legal protection.

2.5 Who cohabits and why? The contemporary push and pull factors

My study has revealed that there are a plethora of reasons that causes cohabitation ranging from social, economic and misconceptions that the law in Zimbabwe protects marriages by repute. Most women are being pushed into cohabitation due to financial constraints whilst others are being pulled by the benefits that come with such a living arrangement. Most of the young people who find themselves in such unions are doing so because of misbehaviour and early sexual activity. The younger generation is susceptible to pressure from friends and so they usually end up in forced marriages or child marriages as they are sent away by their parents for coming home late or sleeping out. My study also revealed that for financial security, some women are choosing to cohabit with men whom they know have a wife. Most of my respondents made regular reference to the economic hardships currently being experienced in Zimbabwe. A combination of these economic hardships together with the commercialization of *lobola* has caused most men to opt for cohabitation rather than marriage because they are unable to pay *lobola*. There are also some people who are not employed and because of this they choose cohabitation which does not require the payment of *lobola*.

The tradition has been distorted from being a metaphorical transfer of small items to a more profit-making and cash driven project. Unemployment is seen as one of the major factors that will continue to increase the levels of cohabitation as the total cost of getting married in Zimbabwe are unaffordable. Many unemployed or lowly paid young men have difficulty in meeting the costs associated with marriage (Mokomane, 2013). One middle aged woman at Mhishi Shopping Centre who works in Connect Hair Salon and lives in a cohabitation union, explained:

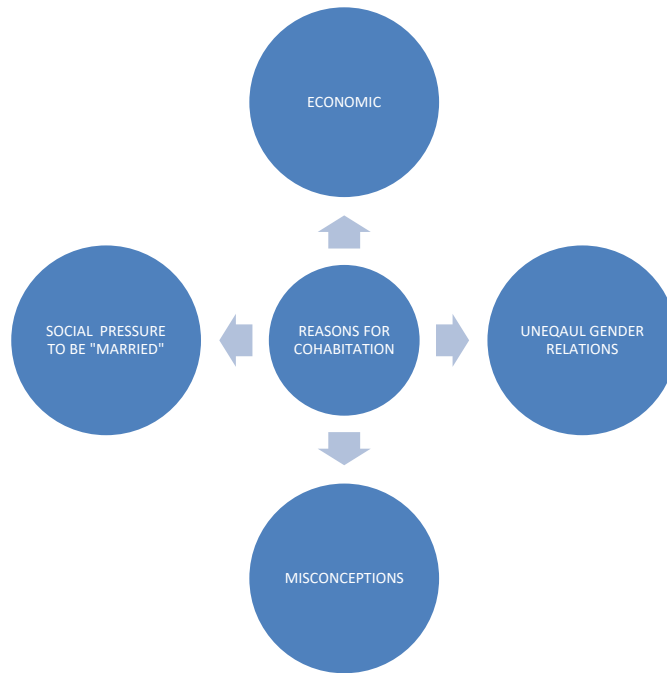
'Asingade kuroorwa mushe ndiani, hakuna mari chete mazunao yekuti varume vabvise roora. Mari kana yawanika murume wangu achanobvisa.'

(Meaning: 'It is everyone's wish to be properly married but there is no money to pay *lobola* because of economic hardships currently being faced. When funds permit my "husband" will formalize our union in the future.')

This simply means that when funds become available the union will be transformed into a proper marriage. So in other words cohabitation becomes a temporary arrangement which

forms part of the process to getting married properly. When funds permit, cohabiting partners have the intention of formalizing their union. Figure 2 shows a diagram which illustrates the various reasons for cohabitation that may or may not be related and which intersect to push or pull women into cohabitation relationships.

Figure 2: A diagram depicting the various reasons why people cohabit



The research also revealed that people move through cohabitation to marriage and it is viewed as a natural progression to marriage. Manting (1994), Carmichael (1995) and Smock (2000) also describe cohabitation as the last and temporary phase before marriage. Couples begin cohabitation with varying degrees of intentionality about marital future (Manning and Smock, 2005, in Rhoades, 2002). This view, as argued by Wiesrma (1983) as cited in Prinz (1995), implies that cohabitation is a transitional stage that is either terminated or transformed into legal marriage. I also discovered that most women are choosing to be in cohabitation because of financial dependence on men. At Mhishi Shopping Centre I interviewed one woman who was cohabitating and she observed:

‘Mazuvaano kutotenda wachaya mapoto nekuti unenge wawana anokuchengeta nevana vako. Ndakaknga ndakambororwa ndikarambwa ndaita vana vangu vaviri, saka ndakatoona kuti kuchaya mapoto kuri nane nekuti hapana murume angade kuroora mukadzianevanavakekare.’

(Meaning: ‘Nowadays a woman who comes out of a failed marriage, especially with children, is lucky to find someone to cohabit with because most men are not interested in marrying such women.’)

Therefore single mothers and those women who have gone through failed marriages find it better to cohabit because society sees them as ‘damaged goods’. Researcher, Harsky (1995), has noted that premarital cohabitation is particularly likely before second a marriage which is also termed post-marital cohabitation. One elderly man in his fifties at Samuriwo Shopping Centre perceived cohabitation in a negative light when he commented:

‘Kuchaya mapoto kunobvumirwa kune vanhu vakamboroorwa zvikaramba kana mvana kwete mhandara.’

(Meaning: ‘Cohabitation can only be accepted to those who had failed marriages and single mothers and not to virgins.’)

Some erroneously believe that the law protects cohabitation and that they are legally married after they have stayed together for a specified period of time. Most people thought that a cohabitation union was a ‘marriage’, that all marriages were equal and that one marriage cannot supersede another.

On the other hand, I also discovered the positives of cohabitation that attract some women to live in such arrangements. Some women choose to cohabit in a bid to avoid male dominance and women’s subordination that comes with marriage. One respondent noted that cohabitation is another way of emancipating women from the shackles of marriage, thereby showing that some people choose to cohabit because they are no legal consequences attached to such an arrangement. When the relationship breaks down, each party may just decide to move away and start a new life. There is no serious commitment that is expected from such a union hence it is a flexible arrangement. Some people especially the educated and the affluent choose to cohabit in order to save money. Thus cohabitation is a class issue which some people choose, whilst others are pushed into cohabitation because of economic hardships that prevent them from complying with all the requirements of *lobola*.

2.6 Perceptions on cohabitation

Cohabitation in Zimbabwe has both positive and negative aspects. As I did my research, my respondents echoed different sentiments about it and it can be concluded that the negative perceptions that used to exist are now being blended together with positive attitudes.

'*Kuchaya mapoto*' is the *Shona* term that is used to describe cohabitation. This term literally means 'beating up pots' but it also has some negative connotation which implies that the woman is just cooking for a man who has not formally married her, in other words, she is doing demeaning work for him as compared to that done by a woman who is properly married. The underlying meaning here is that the woman is being taken advantage of. '*Ukhuhlalisana*' is the *Ndebele* term that refers to cohabitation unions. This also has some negative undertones in that it simply means that the couple is 'just staying together', when, culturally, it is not proper for a man and woman to stay together without properly marrying each other. In other words, this is a private arrangement only recognized between the two parties involved. Such an agreement is not considered African because people marry for the good of their families. Marriage is not simply a private arrangement, it is a family affair and is necessary in order to gain social acceptance. That is why Banda (2005) describes *lobola* as the transfer of cattle or livestock and/or money by a prospective bridegroom or his family to the family of the woman which he intends to take as his wife, thus making marriage a family concern.

Some negative perceptions held by my respondents clearly illustrated how patriarchy and male dominance has influenced how our society depicts and objectifies women. They show how a woman as the 'other' is socialized to believe that *lobola* must be paid for her. Some also thought that cohabitation promotes prostitution and that men should marry and respect their wives. One 65 year old woman became quite emotional during the interview when she said:

'Roora ngaribviswe, kana zvakadaro vana vacho ngavachingoita mahure zvavo ka, kuchaya mapoto humbwa.'

(Meaning: '*Lobola* must be paid or else everyone becomes a prostitute, those who cohabit behave like dogs.')

However there were some respondents who had positive perceptions about cohabitation. One Law Officer who is the Gender Focal Person in the Ministry of Justice, Legal and Parliamentary Affairs said:

'Cohabitation is a hazardous feature that *lobola* is now anachronistic. Because of the resistance to change, it becomes so difficult to stand on the pedestal and shout that *lobola* is archaic. Cohabitation is a sign of its obsolescence. *Lobola*

is contributing to disempowerment, commercialization and the commodifying of women and interventions are necessary.’

Cohabitation is therefore seen by others as a move towards the emancipation of women as it liberates them from the shackles of *lobola* and male dominance. In the end, cohabitation remains the only flexible union in which a person can enjoy companionship without having to live up to the high expectations of in-laws. If the parties decide to end the union, they can just end it by themselves without involving the courts which is a very expensive and cumbersome process. Marital bliss is not guaranteed by the formalization or registration of marriages, and some people who cohabit are happier than those in registered marriages who may suffer from abuse.

The question whether someone is married or not is becoming irrelevant to everyday practice. Many of the respondents felt that they were already viewed as married couples especially when children are involved. This is so because both parties play daughter or son-in-law roles with each other’s respective families. The research also revealed that the younger age group predominantly held tolerant and liberal approaches to cohabitation whilst older groups remain less accepting of cohabitation. One woman aged about 30 years whom I interviewed at OK Mufakose Shopping Centre said:

‘Vabereki vedu havatombozwise kuti kuroorwa kwakunetsa.kuchaya mapoto ndokwakuroorwa kwacho uye utori nerombo ukawana wekuchaya mapoto naye. Kuchaya mapoto kutori nane pane kuti vabereki vagare nevana vavo kana vamitiswa.’

(Meaning: ‘Our parents do not understand that it has become so difficult to get married of late. Cohabitation union is now the “marriage” that we know and you are lucky if find someone to cohabit with. Cohabitation is a better option instead of parents taking in their children when they become pregnant.)

However it must be noted that the *Mudzuru and Another v Minister of Justice, Legal and Parliamentary Affairs* CCZ-12-15 (unreported) indicated otherwise when it emphasized that the circumstance of a girl falling pregnant does not disentitle her from the enjoyment of the rights of a child enshrined in the Constitution. The court also highlighted that a girl does not become an adult and therefore eligible for marriage simply because she has become pregnant; in other words, a girl remains a child regardless of her having fallen pregnant. It was noted with concern that this is a major driving factor behind child marriages: that girls below the

age of majority are being coerced or unduly influenced to get married by parents or guardians simply because they have fallen pregnant.

During the research I also came across religious interpretations and opinions on cohabitation. A proper understanding of gender requires not only the interrogation of cultural frameworks but also the impact of religion which sometimes interacts with culture to produce its own cultural hybrid (Davison as quoted by Banda, 2005). One of my respondents was a female pastor in one of the many Pentecostal churches which are springing up and rapidly spreading throughout Zimbabwe and she provided me with a Christian perspective on cohabitation. She defined cohabitation as:

‘Staying together as husband and wife without God’s blessing.’

She observed that the church puts more emphasis on God’s blessing than the marriage certificate. *Lobola* is a component but it is not supposed to be exploitative. She highlighted the Christian process of getting married which comprises three stages which include courtship, honouring the parties’ parents and the blessing of God. Children honour their parents through seeking their approval for marriage and having parental blessing through paying *lobola*. Isaac and Rebecca’s story in the Bible illustrates how important it is for the man to seek the woman’s consent, her parents’ consent and the blessing of God. Rebecca was also given her parent’s blessing before she left, she just did not disappear or elope with Isaac. Therefore in church one cannot just start a family without the necessary parental blessing or guardian’s approval, thus cohabitation in church is not accepted. This is a clear indication that by their very nature, religions are based on doctrinal beliefs grounded in faith, that they are hard to challenge and indeed merely challenging them may be construed as a betrayal of faith (Bruse, 2003, in Banda, 2005). In Genesis, God gave Eve to Adam as his wife, so God is the ultimate giver of wives and pronounces a blessing on them to be fruitful and multiply, which is the ultimate purpose of marriage. At church even if you pay *lobola* you are not considered to be properly married. *Lobola* is just a step involved towards marriage.

God cannot bring down the blessing by Himself, He has representatives on earth. So people exchange vows before an ordained man of God who will pronounce God’s blessing. The church’s emphasis is not so much on the celebrations surrounding the wedding ceremony but rather on people who cannot afford grand celebrations. They can simply appear before the

man or woman of God in the presence of parents and witnesses in a church service or the pastoral office and the marriage ceremony can be conducted. They also take it upon themselves to fulfil the legal aspect of signing of marriage certificates because they agree with laws of the State on civil marriages which do not promote polygamy. They do not encourage their followers to tie the knot in courts because that process lacks the crucial component of God's blessing on the marriage. If their followers decide to do so, they do not condemn them but encourage them to come before the man of God who will pronounce the blessing of God upon their marriage and that they have a valid marriage. According to McRae (1997), couples with strong religious beliefs are more likely to marry than cohabit.

2.7 Cohabitation: The legal framework in Zimbabwe

As mentioned earlier, the legal framework in Zimbabwe does not cover cohabitation unions and therefore general law principles are followed to distribute the property of parties in such unions. The law in Zimbabwe is silent on cohabitation as our legal system does not acknowledge marriage by repute, also known as common law marriages. There are some African states like Malawi, Ethiopia and Tanzania, however, which do acknowledge common law marriages. For example, article 97(1) of the Ethiopian revised Family Code, 2000 provides that when there is no marriage certificate, evidence that a marriage existed will be recognized by a court of law. Where a man and woman consider themselves and live as spouses and they are regarded and viewed as such by their family and community, a marriage is held to exist. Tanzania also works on the same supposition to the effect that if a couple has stayed together for two or more years, regards themselves as married and are held to be so by their family community, then a *de facto* union is held to exist. Section 22(2) of the 1994 Malawi Constitution also protects marriages by repute. They also have a Cohabitation and Marriage Act that clearly provides for cohabitation unions. The Malawian courts have interpreted this provision to mean that the duration of cohabitation should be five years or more. Although this could be a positive move to assist women in such unions, some men have managed to circumvent the operation of this provision by leaving a relationship a few months just before the stipulated two or five year period.

In Zimbabwe these presumptions do not operate which means that a woman is then considered to be in a cohabitation union and is left vulnerable to desertion without any recourse at law either customarily or statutory (Banda, 2005). She has what is termed an

irregular, *de facto* union or an unrecognized union which is described as one which has ‘received none of the possible forms of legal sanction’ (Mair, 1969). Women in such cohabitation unions are therefore left in a precarious position despite having a modern and comprehensive Constitution that was passed in 2013. The fundamental provision of our Constitution that provides some hope for women in cohabitation unions is section 56 which provides for equality of all persons before the law, equal protection and benefit of the law and protection against discrimination. Discrimination on the basis of marital status is totally outlawed by the supreme law of the land. However, while the legislature provides the Matrimonial Causes Act to determine how to distribute the property of persons married under the civil law and registered customary law unions, it fails to provide a clear and satisfactory law that determines how the property of women in unregistered law unions and cohabitation unions should be distributed and this is tantamount to discrimination of such women on the basis of their marital status.

There is a definite need to interrogate further what section 56 of the Constitution means by discrimination on the basis of marital status. In most jurisdictions, as argued by Joslin (2015), the term is narrowly defined (or through court interpretation) to limit meaning to being single, married or divorced excluding non-marital cohabiting relationships. There are however some jurisdictions that apply marital status discrimination more broadly. The Victorian Equal Opportunity and Human Rights Commission and the Ontario Human Rights Commission define marital status as the status of being married, single, widowed, divorced or separated and this includes the status of living with a person in a conjugal relationship out of marriage or in a *de facto* relationship (cohabitation unions).²

In this new Constitutional dispensation in Zimbabwe, it may be important to seek clarity on the contemporary meaning of discrimination on the basis on marital status. It seems that the time is right for a Constitutional challenge or test case litigation to define what is meant by discrimination on the basis of marital status in Zimbabwe. Do we take a narrow definition or do we apply it more broadly as is the case with other progressive jurisdictions? If we take a wider interpretation it might be possible for someone to challenge the Customary Marriages Act as well as the Matrimonial Causes Act which have the effect of discriminating against

² Victorian Human Equal Opportunity and Human Rights Commission-www.gov.au/index.php/types-of-discrimination/marital-status and Ontario Human Rights Commission www.ohrc.on.ca/en/code-grounds/family-marital-status.

some women because of their marital status. Does it mean that the Matrimonial Causes Act now applies to all marriages and unions that exist in Zimbabwe? There is a need to revisit the issue of discrimination on the basis of marital status in order to protect diverse family forms. The decision to form a family including a non-marital family or cohabitation families is one that is of Constitutional importance. I would urge a wider interpretation be adopted that would not only protect people from discrimination because they are married or unmarried, but would also protect people because they are in non-marital relationships.

The state should therefore take reasonable legislative and other measures to achieve equality of all and protect or advance classes of people who have been disadvantaged by unfair discrimination. It is important to note that while Zimbabwe is more on compliant on paper, it should direct more effort at implementing these paper rights. Further section 69(3) of the Constitution provides for a fair hearing and that every person has a right to approach the courts for the resolution of any dispute. This implies that there should be a clear law that our courts rely on to solve property disputes of women in cohabitation. It is not in the letter and the spirit of the Constitution to leave such disputes to the unlimited discretion of judicial officers where their personal views play a significant role in determining such matters.

Whilst women are now making direct contributions to the joint household through activities such as gardening, vending and cross-border trading, home-making still remains the responsibility of both married women and women in cohabitation relationships. Giving value to this indirect contribution has posed difficulties for judicial officers because there is no set down standard of determining its value. To a certain extent, this is because some judges continuously deny the fact that housekeeping ranks equally with monetary contributions to the joint household. Both article 13(h) of the Women's Protocol and paragraph 32 of CEDAW General Comment No. 21 enjoin states to take measures aimed at recognizing the economic value of the work of the women in the home. Wiersma (1983), as quoted by Banda (2005), notes that a husband is enabled to earn economically because of his wife's sacrifice and that the free homemaking activity is the most important positive feature of the marriage and in fairness, it should be shared equally between the parties.

It is important to note that equality can only be attained when our judicial officers are trained to be gender sensitive and start regarding unpaid house work done by women as being as valuable as men's work outside the home. Lawyers as legal centralists take the law as the

starting point in which they see property as following title and that anything outside this parameter is irrelevant and of no interest to them.

Zimbabwe is also mandated under its national objectives (section 25) to protect the family. Since it is debatable what a family is, our Constitution never attempted to define it. This has made room for modern interpretations of the term family which acknowledge that families can come in different shapes, sizes and forms and that regardless of these aspects, 'the family' must be afforded all the protections that are put in place for the family, be it at the national or international legal level. This is a positive move that will create hope for women in cohabitation families because such families are also protected by the Constitution. Section 25 as read with section 80(3) of the Constitution creates an obligation on the state to come up with laws that will address the previous discrimination suffered by women in the field of family law.

Because there is no express legal provision to guide judicial officers on how to decide cases of sharing of property for cohabitation partners, the bulk of the cases that have managed to find their way to the courts on appeal were decided on the basis of judicial precedent. It is therefore important to take a look at a few reported cases on cohabitation and the sharing of property in our superior courts. The case of *Chivise v Dimbwi* HH-4-04 (unreported) is a clear illustration of just how difficult the judiciary finds this task. The learned judge who presided over the civil appeal in this case went on at length to describe how to distribute the property of persons in cohabitation and which law is applicable. There seems to be no established position that has materialized from the many judgments that have delivered. The learned judge also explained the uncertainties to be found in the law in this field which can only be resolved through legislative (parliamentary) legal reform. This is a clear indication that the law in this area is not satisfactory at all as it leaves women who are usually the weaker party in such unions exposed to discrimination and unequal distribution of the acquired property.

There is no known principle of tacit universal partnership under customary law. The general position that emerges from decided cases on unregistered customary law unions and cohabitation such as *Mtuda v Ndudzo* 2000 (1) ZLR 718 (H), *Matibiri v Kumire* 2000 (1) ZLR 495 (H), *Chapeyama v Matende and Another* 2000 (2) ZLR 356 (S) and *Mashingaidze v Mugembe* HH-3-99 (unreported) reflects that customary law *per se* is not applicable as it leads to an injustice between the parties.

It should be recognised that all the general common law principles (including unjust enrichment, universal partnership and joint ownership) which have been resorted to by the courts through judicial innovation have all been aimed at providing a just and equitable distribution of such property to ensure that women in such unions do not just walk away empty handed. Therefore the development of the law towards continuing to recognize the property rights of women in such unions should be encouraged and regarded as conforming to the national objective that provides that the state must endeavour to protect and foster the institution of the family, including cohabitation families. Based on the *Mudzuru* case (above), the courts accept that a person can found a family without necessarily getting married to the father or mother of the child with whom she lives in a household.

It is almost impossible to draw the line between an incomplete or irregular unregistered customary law marriage and a cohabitation relationship. Our courts have been vexed with trying to come up with a line between these two types of unions. Cohabiting partners just like unregistered customary law unions cannot divorce because the parties are deemed to have never been married legally and these unions are invalid. Just as a cohabitant may use the general common law principles of tacit universal partnership, unjust enrichment or joint property to obtain the equitable distribution of assets upon the dissolution of their relationship, so spouses in unregistered customary law unions employ the same remedies. Judicial officers have therefore used the decided cases on unregistered customary law unions to determine how the property of cohabiters may be distributed. Each of the common law principles that have been recommended and used to achieve equality have necessary fundamentals that have to be proved if alleged. It is the agreed position at law that whatever legal vehicle is used to try and achieve equity between parties, some legal principles must be pleaded. A recognized cause of action must be pleaded. The courts now emphasize the importance of adequately proving of these principles. It is insufficient simply to mention that a woman stayed for a number of years in a union or relationship in order to establish the case for women in cohabitation or, similarly, for a man if he is in a 'Ben Ten' relationship with an older richer woman. As emphasised *Feremba v Matika* HH-33-07 (unreported) although the judicial officers would want to treat cohabitation unions as marriages, such a view is currently not supported by the law.

2.8 Cohabitation versus Marriage and New Models of Family: The international law perspective

While marriage and cohabitation and the relationship between them have swiftly and perhaps necessarily changed, marriage alone remains the keystone of family law. Cohabitation is often ignored and when recognized, it is treated in a piecemeal and *ad hoc* fashion (Barlow *et al.*, 2005). A marriage certificate gives partners substantial and automatic legal benefits which unmarried cohabitants do not possess (Barlow *et al.*, 2005). While cohabitation has all the headaches of marriage; ironically, it usually comes with none of its benefits. So the questions that must be addressed are: ‘What must be done with the gender inequalities that come with cohabitation?’ ‘Should we consider cohabitation unions as marriages or should the principles of equality and non-discrimination form the basis of operations of both cohabitation unions and marriages?’ It is important to ascertain the debates surrounding these two concepts under the international law to which Zimbabwe adheres. Appendix 1 identifies certain specific elements of international human rights instruments which protect the rights of women in cohabitation unions.

Families come in different shapes, sizes and forms and it is a good thing that international law recognizes and protects the numerous diversities of family including cohabitation families. Soft law that generally gives an official interpretation of the international instruments such as the International Convention on Cultural and Political Rights (ICCPR) and the Convention on the Elimination of Discrimination Against Women (CEDAW) through comments and general recommendations have extensively dealt with the rights of persons in cohabitation, emphasising that the protections afforded to the family in these international conventions equally apply to women in cohabitation relationships.

CEDAW General Recommendation No. 21 on Equality in Marriage and Family Relations has also expansively discussed the new forms of family that have emerged in this modern era. It clearly recognizes that the form and concept of the family is not the same as it varies from place to place. In whichever form the family portrays itself, in whatever legal or customary law system, it is of paramount importance that women in such units are treated with equality and have equal access to justice just like everyone else. This clearly shows the urgent need for Zimbabwe to come up with a law so that women in cohabitation unions are treated with equality. And also when their unions breakdown, the law should ensure that their property

disputes are solved in a satisfactory manner in our courts. Generally cohabitation unions in Zimbabwe are not afforded legal protection at all. Zimbabwe should therefore ensure that women in such unions have equal status with men both in family life and in the sharing of property when such unions break down. The General Comment also observes that ‘a stable family is one which is based on principles of equality, justice and individual fulfilment.’ International law on marriage and the family therefore oblige Zimbabwe to give adequate and clear protection to women in cohabitation relationships since the current legal framework is silent thereby resulting in discrimination of such women when their unions breakdown.

Generally a *de facto* union is not given legal protection at all as is the case in Zimbabwe. This could explain why the Committee also emphasizes that women in such relationships should have their equality of status with men both in family life and in the sharing of income and assets protected by law. The Comment adds that where division of property is largely based on financial contribution, as is the case with cohabitation unions, other contributions such as raising children for the elderly, relatives and discharging household duties are diminished. Often such contributions of non-financial contributions and should be accorded the same weight. In Zimbabwe, property accumulated during a cohabitation union is not treated by the law in the same way as property acquired during a marriage. This flies in the face of equality and non-discrimination of family members advocated by CEDAW. When such relationships come to an end, it is usually the woman who receives a significantly lower share than her partner. Property laws that discriminate against women who cohabit like this should be invalidated.

In dividing property, human rights standards command courts to divide it equally. Article 7(d) of the Women’s Protocol provides that in the case separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property acquired during the union. Working with a rule that says ‘receive what you have paid for’ negates a woman’s contribution to her family for all she able to show is some clothes and a few pots and pans. Furthermore when women are formally employed their income is usually used to buy consumables which leave them with nothing to show how their property contributed towards their acquisition, consequently diminishing their capacity to claim protection.

The Human Rights General Comment 19 on article 23 of the ICCPR acknowledges that there are various forms of family which include cohabitation relationships. It acknowledges the fact that the family is the natural and fundamental group unit of society that must be protected by the both the state and society. Although it is not easy to give a standard definition of the family as it comes in different forms from state to state, unmarried couples or cohabiting families and their children must be protected. States are also mandated to adopt legislative, administrative and other measures to protect the family in all its different varieties.

The right to found a family implies, in principle, the possibility to procreate and live together and that is cohabitation. The Constitution in Zimbabwe provides that any person who turns 18 has a right to found a family and goes further to say the family unit must be protected. In the same vein, a person may choose to found a family without necessarily getting married and following the rites of a civil or customary marriage. This is supported by the *Mudzuru* case (above), which clearly decides that founding a family does not necessarily mean getting married. The court held that it was absurd to attach the right to found a family on marriage as there is nothing to bar persons who have attained the age of 18 and are desirous of founding a family to enter into an agreement to live together as husband and wife, making it clear that entering into marriage is by definition one of the methods but not the only method of founding a family. So it can be argued that although the Constitution does not define what a family is (implying that it accepts that it may take many different forms), it does require that the family unit, whatever form it takes, must be protected.

While the current laws in Zimbabwe protect the nuclear family which is premised on marriage, they openly neglect other forms of family, such cohabitation families and single mothers. The law has clearly made provision for how the property of those with registered marriages should be distributed whilst it is silent on cohabitation families. Zimbabwe now has a duty to remedy this omission and protect all forms of family without neglecting others. Failure by the state to take such legislative measures to protect the rights of persons in cohabitation unions when it is under a duty to act according to international law and its own Constitution (as interpreted by its own Constitutional Court), denies women in such unions the right to equal protection of the law.

The Human Rights Committee also authored General Comment No. 28 on article 3 on the Equality of Rights between Men and Women. Article 26 also provides for the right to

equality before the law and freedom from discrimination in the field of family law especially those in cohabitation who are continuously being discriminated against due to unclear legal provisions on how their property should be shared when such unions breakdown. Zimbabwe should review its legislation and practices and take all measures necessary to eliminate discrimination against women in all fields. State responsibility is incurred when its conduct or omission consists of a breach of its international obligations (Chirwa, 2004).

As already mentioned, a number of international conventions emphasize the principles of the equality of everyone before the law and that everyone is entitled to the equal protection of the law. Any person whose rights and freedoms are violated must have an effective remedy determined by a competent tribunal. International treaties establish mechanisms for the enforcement of remedies in the event of violations for human rights. Failure to make such provision would render the whole human rights discourse futile. States are therefore enjoined to develop forms of judicial remedy for human rights violations where they are lacking. In the face of the international law provision that all persons are equal before the law and are entitled without any discrimination to equal protection before the law, Zimbabwe has clearly failed women in cohabitation unions by failing to provide them with a legislative framework that determines how their property should be distributed upon dissolution of their unions. Women in cohabitation unions have not been guaranteed equal protection before the law like other women with a different marital status. It means that Zimbabwe's law itself has failed to afford women in cohabitation a remedy before a competent tribunal to determine property disputes when cohabitation unions break down. It simply means that the laws themselves have as a whole discriminated against women in cohabitation unions. Both men and women in cohabitation are being discriminated against on the basis of their marital status and this is verified by the silence of the law to their plight when it comes to the equal distribution of their jointly acquired property at the dissolution of their unions.

CHAPTER THREE

3.0 RESEARCH METHODOLOGY

3.1 My expedition: Exploring the cohabitation phenomenon

3.1.1 *The women's law approach*

To investigate the lived realities of woman in cohabitation relationships, to understand how they want their rights protected under law, to appreciate why women decide to cohabit and whether they understand the legal consequences of such unions, I started by interviewing women using the women's law approach. Figure 3 shows photographs of me conducting my field research. As noted by Stewart (1990), the purpose of this approach is to explore the connections between law and gender (which are sometimes hidden) in order to identify the bias involved. My main objective was to expose the inadequacies of the current legal framework so I used the women's law approach to investigate women's legal position in the context of sharing of property when cohabitation unions break down. Key arguments by Dahl (1987) are that men and women lead different paths in life and are affected by laws differently. She further argues that the law is one sided and that it is the male norm which we find in the law, hence the need to take women's lives or a grounded approach as the starting point in our understanding of laws and the different impact that they have on women as compared to men.

Figure 3: Showing two photographs of the researcher conducting interviews at Mhishi and Samuriwo Shopping Centres on 5 November 2015



When I conducted my research, it was not easy to identify the women in cohabitation. As a result I ended up going to open places, consulting people in market places to get a general idea of how people in Mufakose perceive cohabitation. From there I hoped I would bump into people who would admit that they are in it. As I did my research I wore two hats, one as a lawyer and the other as a student doing a Masters in Women's Law. Some people would then confess that they are in cohabitation as they started seeking legal counsel. Most of my informants would narrate cohabitation stories of other people but as I carried on with my interviews, they would start to open up and begin narrating their own stories. Usually I would initiate dialogue with one person and frequently ended up having group interviews because many people would join in. It happened this way because my topic involved a lot of topical and sensitive issues that usually stirred up hot debate among people for example, *lobola*, and related issues.

3.1.2 The grounded approach

I also employed the grounded approach where I engaged with empirical knowledge and the data I managed to collect on women's lived experiences on the law and sharing of property disputes upon dissolution of cohabitation unions. The constant interaction with my assumptions and data led me in new directions and to new sources of data. The 'dung beetle' iterative process assisted me as I filtered and evaluated my data to establish what I would collect next. There were some emerging issues as well, as from time to time there were some gaps in my data that I needed to follow up on in subsequent interviews. For instance, I had to visit one of the Housing Co-operative Schemes in Marimba Park to find out how residential stands were being registered as I had discovered in my research that some women in cohabitation unions were opting to register their properties in the 'husband's' name instead of protecting and safeguarding their own property rights.

Because of the equality between women and men, anyone is free to purchase and register a residential stand in his or her name regardless of their marital status. The chairperson of one of the co-operative housing schemes I interviewed said they did not regard a marriage certificate as a prerequisite for the registering of property because some people are married under customary law and some people who are single may have the resources to purchase a residential stand. He also emphasized that even those who cohabit are not barred from registering their property in the names of both male and female partners. Women who wished to register residential stands in their own names were free to do so. The chairman also

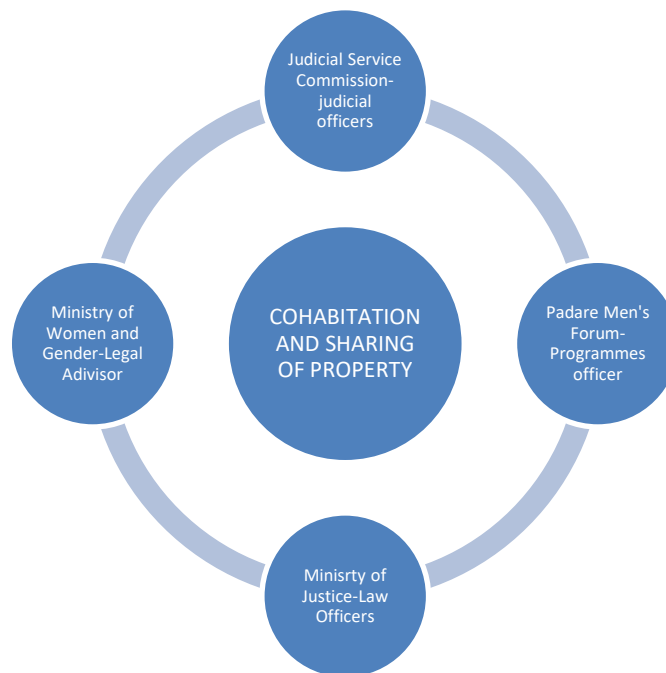
emphasised that because of our African culture they had come across some women who had opted out and insisted on registering the property in the name of their ‘husbands’, thereby totally foregoing their own interests in the property. This a clear indication that although certain legal requirements have changed and practices have become gender neutral, there are still other cultural restrains that continue to discourage women from safeguarding their property rights. This is an example of how the grounded theory approach assisted me in analysing the law and its concepts through the medium of women’s and men’s lived realities (Bentzon *et al.*, 1998).

As I incorporated my findings into the legal framework, it became apparent that the Zimbabwean legal framework is inadequate in that it exposes women in cohabitation unions to discrimination as their property rights are violated at dissolution of such unions. My findings helped me to devise proposals for law reform in the family law arena especially the property rights of women in cohabitation. As a result, the combination of the women’s law and grounded theory approaches became useful tools in helping me to understand and improve the position of women and law in society (Dahl, 1987).

3.1.3 The actors and structures approach

When using the actors and structures approach I interviewed officials from the Judicial Commission, the Ministry of Women, Gender and Community Development as well as the Ministry of Justice, Legal and Parliamentary Affairs who administer the marriage laws and who are also responsible for the alignment process. The actors and structures approach proved useful in obtaining a dynamic and processual understanding of gender and legal change in the context of societies where state law interplays with other normative orders (Bentzon *et al.*, 1998: 100). When I interviewed officials in the Ministry of Justice, I had an advantage because I work in the Ministry. So it was trouble-free seeking and obtaining approval to interview officers from the Department of Policy who administer the marriage laws. Although I received a quick response from the Judicial Service Commission, I was denied access to the High Court judges and was restricted access to the Magistrate’s Court. To understand how the High Court adjudicates on such cases I resorted to case law authority. Most of the magistrates were also my colleagues so to book for appointments was also uncomplicated. Figure 4 shows the organizations and the officials I interacted with as I collected data.

Fig 4 Diagram showing the structures and their actors engaged in the study



Using this approach, I started by looking at women’s experiences from the interviews I held with them and discovered that the Judicial Service Commission and judicial officers had an impact on how property disputes over the distribution of property between partners in cohabitation unions are handled. Most of the women held the assumption that the courts tend to favour men when it comes to the sharing of property cases because most judicial officers fail to take into account their indirect contribution. As a result of this most women usually walk out with less or even nothing when a cohabitation union breaks down.

The actors and structures approach then helped me to understand why most judicial officers tend to apply and enforce the law more rather than explore the realities on the ground. This is attributed to the fact that most judicial officers are trained to use the legal centralist approach which fails to take into account the relationship between the law and the lived experiences of women in cohabitation unions. The legal centralism approach, which remains the dominant tradition among academic lawyers, starts with the stand point that state law or state recognized and enforced law is the most important normative order and that all other norms creating and enforcing social fields, institutions and mechanisms are either illegal, insignificant or irrelevant (Bentzon *et al.*, 1998). This then revealed to me that the background of the legal training and other personal biases play a significant role in how

judicial officers determine the distribution of property cases of those who were in cohabitation unions. Judicial officers are therefore not neutral entities; they are influenced by their gender and cultural profiles. As noted by Banda (2005) the whole system is a lottery depending on which judge you appear before. The judicial officers come from a broad spectrum of society thus establishing a multi-ethnic and cross cultural judiciary where everybody has their own intrinsic prejudices. As argued by Bentzon *et al.* (1998), strategic human action may be directed at maintaining or changing structures or finding ways to exploit opportunities within social, administrative or legal structures.

The following comments from one female magistrate I interviewed clearly illustrate how her gender and personal views come into play when making decisions:

‘As a female magistrate, a mother, a sister and a woman who understands the plight of women, when I decide on sharing of property cases, I make sure that there is no woman who walks away empty handed.’

3.1.4 The sex and gender analysis approach

To explore how women in cohabitation unions are more vulnerable than men and also to understand how cohabitation impacts on men and women differently and who is more affected I interrogated this issue with both sexes and made some comparisons. The sex and gender analysis also assisted me to get the masculine voice and understand how men view cohabitation and investigate how they would want the law to regulate such unions, especially when it comes to the distribution of property at separation.

3.1.5 The human rights approach

As I interviewed my respondents I also extended my analysis to explore whether there are any human rights that are being infringed by the non-regulation of cohabitation unions in Zimbabwe, especially when it comes to dividing the assets of the parties when they break down. Most of the officials I interviewed interrogated the possibility of using the right to equality and non-discrimination provisions of the Constitution to protect the rights of women in cohabitation relationships.

3.2 Research design

3.2.1 Population and sample

A population can be defined as including all the people or items one wishes to understand. Because there is rarely enough time or money to gather information from everyone in the population, a researcher has to work with a sample of the population. This research was therefore done in Mufakose high density suburb (one of the oldest suburbs in Harare) and the more recently established New Marimba Park medium density suburb just adjacent to Mufakose. Mufakose is situated to the west of Harare's city centre and is densely populated whilst Marimba Park is sparsely populated. While Mufakose has a high rate of unemployment, New Marimba Park is a high income suburb with less unemployment. This research was mainly done around Mhishi, Samuriwo, and Magandanga and around OK Mufakose areas and New Marimba Park.

Table 2 shows the groups and numbers of people interviewed for this research and an explanation of the research methods are discussed in the following paragraphs.

Table 2: Showing the groups and numbers of respondents interviewed

Respondents	Female	Male	Total
Group 1 OK Mufakose Shopping Centre	5		5
Group 2 OK Mufakose Shopping Centre		6	6
Group 3 OK Mufakose Shopping Centre	3		3
Group 4 Savemore Shopping Centre	5	3	8
Group 5 Magandanda Market	4	3	7
Group 6 Samuriwo Shopping Centre	5		5
Group 7 Samuriwo Shopping Centre	3	2	5
Individuals	3		3
Chairman, Herbert Chitepo Housing Co-operative		1	1
Padare Men's Forum		1	1
Ministry of Justice, Department of Constitutional and Parliamentary Affairs - Law Officers	1	1	2
Ministry of Justice, Policy and Legal Research Department, Law Officer	1		1
Ministry of Women and Gender and Community Development, Legal Adviser	1		1
Church leader - River of Life Ministries	1		1
Total	32	19	51

3.2.2 Research instruments

3.2.2.1 Individual interviews/ Group discussions

In order to obtain data I had to use less structured in-depth interviews. This method was useful because I was able to capture both verbal and non-verbal data. The body language of interviewees also helped me to assess whether a respondent was comfortable or not with the interview. As I went on with my interviews I discovered a lot of enthusiasm because my topic would usually stir up hot debate. When I conducted an individual interview, it would somehow become converted into an unplanned group interview or discussion because the area I was researching on would draw more people into the interview and they would then give me their various views. These group interviews were not planned but would just happen which meant that I had to manage the discussion and keep the interview focused and on track. Usually people would go on and on which was an advantage for me to capture raw emotions. This helped me investigate issues in-depth for this method allowed me to probe more, encouraging them to explain their responses further.

The interview method yielded rich data, details and new insights. Respondents answered questions in as much detail as they wanted. More valid information about respondents' attitudes, values and opinions were obtained as people tried to explain and contextualize issues. The informal atmosphere encouraged most of my respondents to open up and be honest because people have both negative and positive attitudes towards cohabitation. People are afraid of the stigma that is associated with cohabitation. This approach was flexible as it assisted me to adjust my questions and direct the way the interviews were flowing.

3.2.2.2 Secondary data document analysis/archival records

I used this approach to look at other research done both in Zimbabwe and neighbouring countries to assess how others have dealt with the complex situation of cohabitation. I also used this approach to peruse some files at the civil Magistrates' Court and this assisted me to access the inaccessible litigants who previously attended the courts with property disputes in cohabitation unions. This assisted me to get the information from the people I would not have practically managed to interview. Using this method I discovered that much contention surrounded property that was of little value such as small pieces of furniture. If the property exceeds the monetary jurisdiction of the Magistrates Court (which is \$10,000) or immovable property is involved, then the case is referred to the High Court.

3.3 Conclusion

In this chapter I explained how the methodology revealed the whole journey I undertook throughout my research. It clearly illustrates how I used the grounded theory and the women's law approaches, among others, which unearthed the discrimination being faced by women in cohabitation unions at the point when they have been dissolved and their property rights are being determined. These approaches assisted me to collect data from women concerning their lived realities and experiences on the law, customs, practices and procedures without necessarily asking them the difficult question, 'Are you in a cohabitation union?' This ideally leads to the next chapter which covers the research's findings, their presentation and discussions about them.

CHAPTER FOUR

4.0 DATA PRESENTATION AND DISCUSSION

4.1 Introduction

This chapter is intended to give an outline of my research findings and my interpretation of them. It will discuss the findings related to each assumption. None of my assumptions were challenged indicating that there is a real gap in the legal framework in relation to cohabitation relationships and the protection of property rights of women in such unions upon their dissolution. For a long time the legislature has turned a blind eye to this area of family law and it is high time to start to reflect upon the realities of modern life on the ground.

4.2 Inadequacy of the legal framework

I found out that there is no clear law that can be used by our courts to distribute the property of persons in cohabitation when such unions break down. This is noted by Stewart *et al.* (1990) where she rightly observes that where parties cohabit without entering into some form of marriage, the law treats them as strangers and thus they acquire no rights or obligations against each other, and this is still the case today. When magistrates are deciding how to distribute property in such cases, each party leaves with what they brought to the union. All the assets that are jointly acquired are shared equally as long as one can prove their contribution to their acquisition. There is no statute law currently in place to determine how their property should be divided. There is confusion on the part of the judiciary and this is excusable and understandable because there is no settled position under the law as to how to deal with such cases.

4.3 Excessive judicial discretionary power in deciding sharing of property in cases of persons who cohabit

In the field I discovered that when women fail to tender evidence of their contribution to property acquired during the period of cohabitation (because they are in the habit of not keeping such records), they are usually at a disadvantage because judicial officers then consider their indirect contribution through the unpaid house work that they perform. Most respondents said that even when people cohabit women contribute towards the upkeep of the family and when they buy property they usually do not keep proof of their acquisition. They enter into such unions hoping that one day they will be formalized and their break-up is the

last thing they expect. Most of the time, their contribution is estimated to be minimal by magistrates because housework is not accorded the value that it is truly worth. Unpaid care work or housework is usually undermined because there are no set down principles on how to determine its value. This is left entirely to judicial officers to determine. It is the same legal training received by both lawyers and judicial officers that often make them view property as having to follow title, so that the person in whose name a property is registered (which most of the time is the man) is considered the rightful owner of the property and that is considered the end of the matter (Banda, 2005). This narrow legalistic perception is reinforced by their socialization, which tells them that it is the women's role to look after the family home and by doing this women are just doing what they are supposed or expected to do.

The case of *Usayi v Usayi* SC-49-03 (unreported) discusses the difficulties faced by judicial officers in determining the value of indirect contribution. The court said:

'How can one compute in financial terms the contribution of a wife and mother who devotedly executes her duties as wife, mother, counsellor, domestic worker, house keeper, day and night for her husband and children? How can one place an economic value on the love, consideration and attention to detail that she puts into all the everyday and often boring duties of attending and keeping a household running efficiently and a husband and children happy? How can one measure in monetary terms the establishment of a home and therein an atmosphere from which both husband and children can function to the best of their ability? In the light of these many and various duties how can one say as is often remarked, "Throughout the marriage or the cohabitation union she was a housewife, she never worked."?'

It is exactly because no monetary value can be placed on the performance of these wifely duties that Ncube (1998: 178) supports the above assertion and argues that our courts should follow a fair approach to the re-allocation of property at dissolution. He says judicial officers should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife and that 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 attainment of matrimonial assets or joint property. The court further said:

'Thus the evaluation process should not seek to establish how much a housekeeper is worth in contrast with, for example, a university lecturer, nor should the process seek to determine the value of a wife's cooking, washing

and rearing of children as compared to, say, a government minister's work. The proper approach would be to presume that in the majority of marriages or cohabitation unions, the spouses or partners take up equal, though unlike, duties which are evenly valuable to the wellbeing of the family. In that role a woman enabled the man to engage in the academic pursuit which places him in a position to improve the family's standard of living. It is her contribution on the domestic front which frees the man to work outside the home. Because of her hard work, the home and family remains together and such a contribution cannot be underestimated.'

4.4 Difficulty in distributing property equitably

The research evidence proved undeniably that it is difficult to distribute the property of persons in cohabitation unions because women usually lack the evidence which proves their contribution. While the relationship between partners is working, they may appear to be living together as husband and wife in a normal family set-up; when a problem arises, however, that is when you hear that the parties were not married but were cohabiting.

The customary law that operates in our everyday life also complicates the issue of how the property of cohabiting persons is to be distributed even though their union is not recognized under customary law. For example, customary law says that all the kitchen utensils, the stove and the bed belongs to the woman, and this is why men leave these pieces of property with the women with whom they cohabited when these unions break down. Here we see customary law principles and tenets being employed in resolving disputes of this nature. Such an approach has resulted in discrimination against women who cohabit considering that they also making financial contributions to the joint household through their entrepreneurial activities.

One woman I interviewed actually said she was contributing towards instalments for a residential stand which is registered in her husband's name. Stewart *et al.* (1990) accurately observes that although in theory women have equal rights in property with their male counterparts, they are often the losers in disputes over property as they have voluntarily assigned their rights to males or failed to secure adequate protection for themselves. This often occurs where the wife contributes to the purchasing of building materials or to the running of the matrimonial home but permits the home to be registered in the name of her husband (Stewart *et al.*, 1990).

The sharing of property is also made difficult as men do not acknowledge that women also contribute towards the upkeep of the household. When I interviewed the Programmes Officer at Padare Men's Forum he said that as an organization they always try to help men understand that even though culturally household work was considered to have no value, things have changed and that this indirect contribution to the home has value. All work should be valued and be given its proper worth. The men they deal with from those in civil marriages, customary marriages, unregistered customary marriages as well as those who are in cohabitation unions.

The Magistrates' courts are also being called upon to consider how to distribute rural homes and rural assets upon the dissolution of unions between cohabiting parties. One female magistrate I interviewed at the civil courts said judicial officers usually assume that when parties issue a civil summons, general law principles must automatically apply to the cases before them. When the property involves rural assets like cows, they should be considered and divided equitably. A problem arises when trying to place a value on traditional rural homesteads since they are constructed using traditional methods on communal land and are considered to have no financial value. But nowadays people are buying land in communal areas to construct rural homesteads. If parties agree on the value of the rural homestead it is easier for judicial officers to compensate women for their contribution. If the man is gainfully employed, for instance, as a soldier or policeman, a garnishee order can be granted to ensure that the woman is compensated for her contribution towards the construction of the rural home and the purchase of cattle.

It is also easy for the judicial officers to share cattle between the parties if they provide a stock record book. Some people even invest in the resettlement areas of the country where they construct large mansions and invest heavily in livestock. Some have farms where they rear livestock together. If all these assets have been acquired during the subsistence of a cohabitation union and both parties have been contributing to their acquisition, then the courts have an obligation to share the property between them equitably.

4.5 Gender inequalities in cohabitation unions

I found that there is even greater male dominance over women where no *lobola* has been paid. Women in such unions agree to everything their partners demand hoping that some

form of formalization will take place in the future. Women in such unions live in constant fear of being left, so they submit to their male partners even more than they should in order to prevent this from happening. Some women even purchase property and put it into their male partners' name to prove their commitment to the relationship and to prevent them from leaving them for someone else. There are a lot of power dynamics and power struggles that exist within such unions. One woman in cohabitation revealed her predicament by saying:

'Ndotya ini kumuchalenger nekuti ndiri kuda kuti andiroore, saka ndofaniria kutoita munhu kwaye, pamwe nerimwe zuva achazondobvisa mari kuvabereki vangu.'

(Meaning: 'I am afraid to challenge him before he pays *lobola* for me because I am hoping that one day he will formalize the union, therefore I cannot afford to be controlling.')

Therefore it becomes very difficult for some women in cohabitation to keep documentation proving that they have contributed to the acquisition of property or to take steps to ensure that houses or residential stands are registered in both names. Most men were not comfortable with women having property registered in their name alone, and accused women who tried to do so were wanted to be in control of or were not committed to the relationship. Most women who already owned property in their own name ended up registering it in the name of their partners, thereby totally failing to safeguard or forsaking their own interests. Most women said that they did not have the power to force men to formalize their unions. Goldblat (2003) argues that men and women approach intimate relationships from different social positions and with different measures of bargaining power. Gender inequality and patriarchy removes power from women to set the terms of the relationship. Women depend on men because of their unequal position in society as, unlike men, women do not access resources and income on an equal footing, especially when they are burdened by motherhood. As a result some women choose to stay in abusive cohabitation unions even when their partners have made it abundantly clear that they do not ever intend to formalize their union.

The Programmes Officer at Padare Men's Forum advocated for the empowerment of all women, including those who cohabit, so that they will become economically independent and know how to safeguard their property rights and interests. Women should concentrate on economic empowerment rather than housework which will ultimately not be accorded its real value. This will liberate women from the shackles of the gender inequalities that exist in both

marriage and cohabitation unions. Women should strive for financial security and make sure that they seek and maintain documentation that serves as proof that they also contributed towards the acquisition of assets during the cohabitation relationship.

4.6 Misconstrued legal implications of cohabitation

Most of the respondents did not know that there are legal steps pertaining to the sharing of property that could be taken after the dissolution of a cohabitation relationship. Some women thought cohabitation was equivalent to all other types of marriages. Most of the informants thought that a cohabitation union would become a ‘common law marriage’ after the parties have stayed together for a certain period of time. On the contrary, our legal framework does not have such a presumption. Upon the breakdown of such a union cohabiting partners have none of the guidance or protection of matrimonial divorce law (Walsh and Geddes, 2010). My research revealed that cohabiting couples have little guidance as to their legal rights in such areas such as property ownership and the sharing of property upon the dissolution of such unions. Most of the people who start cohabiting do so when they are young and they are not aware of the legal consequences of such relationships.

Some thought that there was no recourse at all upon separation, whilst others thought that matrimonial laws which apply to marriages also apply to cohabitation unions. This is a clear indication that the uncertainties of the law have caused confusion for both the general population and judicial officers. It is not clear how cohabitation unions should be treated under the law nor how their property should be shared upon their dissolution. One elderly woman I interviewed said:

‘Kana zvekuchaya mapoto zvapera chero ukaenda kumatare edzimhosva hapana chaunobatsirwa nacho nekuti vanongokuvhunza chitupa chemuchato.’

(Meaning: ‘When such unions break down you will not get any help from the courts because they always ask for the marriage certificate.’)

One woman who eventually admitted that she is living in a cohabitation union towards the end of my interview, said:

‘Takagarisana nemurume wangu kwemakore mashanu uye tinongogarisira zvakakanaka sezvinongoita vakaroorana.saka ndofunga kuti tofanira

kungochengetedzwa nemutemo sevamwe kana taakurambana kunyanya pakugoverwa kwemidziyo.'

(Meaning: 'We have been living together for the past five years. Our relationship is stable just like a marriage, and therefore it should be afforded the same protection under the law when we separate. The usual principles that apply to the division of property for married couples must also apply to our union in case we decide to go our separate ways.')

My findings reflect that this misconception is widespread and has discouraged women from taking steps to formalize their unions as they believe that their rights are protected under our legal framework. This is not the true position.

4.7 Legal and non-legal measures to resolve property disputes

WLSA Research (1994) has revealed that women's problems are to a large extent resolved at the administrative level, at the lower court level or in out-of-court arrangements. Therefore it becomes necessary to understand that the norms and expectations which inform the position of women and gender relationships are generated at the intersection between general law, customary law and people's customs and practices. This meant that in the field I had to interrogate the alternative dispute resolution mechanisms women resort to when their cohabitation unions break down. Therefore I had to explore the women's experiences with and in the law, in its pluralities and beyond the borders of legal centralism.

My study revealed that when cohabitation unions break down, usually such disputes are resolved at the family level. There are family level meetings that are held to decide on important issues such as the distribution of property, maintenance and custody of children. When it comes to the sharing of property, people usually say that you take what belongs to you, but it all depends on the people involved. In most instances, family meetings usually resolve such issues and most of the time women are sent away with nothing. This is the disadvantage of family level settlements. Most people use informal measures and there seems to be a legal knowledge gap.

Some respondents said they decided to deal with the issues simply with their partners, others said they just moved out and started a new life. This is a clear indication that there are semi-autonomous social fields that exert more power than the legal order over women's lives and disputes arising from the cohabitation. Of the 51 respondents I interacted with almost 50% of

them were not aware that they can approach the courts and have their disputes resolved. However, there were also a significant number of people who approach the courts. I discovered this when I perused files on the sharing of property at the Magistrates' Court and one magistrate confirmed that such cases contribute to the bulk of the many cases that they deal with everyday.

Most of my respondents, including some who were cohabiting partners, said they rarely discuss what will happen if they do decide to separate. Others said discussing such an issue was not necessary because there are practically no assets of any great value. They said they did not have much to share because they only had pots, pans, and blankets. As a result when a break up comes it becomes expensive to approach the courts to divide such insignificant and valueless property and therefore disputes are concluded at the family level. Usually it is the women who are vulnerable and they tend to fail to obtain a fair share of the accumulated property and sometimes they walk away with nothing at all.

4.8 Maintenance during and after the cohabitation unions break down

I discovered that people in cohabitation do in fact maintain each other even though they are not legally required to do so. They maintain each other and contribute to each other's upkeep because as far as they are concerned they are husband and wife. When such unions break down, parties cannot claim maintenance except for the children born into their relationship. Ex-cohabiting couples cannot claim maintenance for themselves after they have separated. Some of my respondents were mistaken in thinking that the right to claim maintenance depends on how long a couple had been together. I put this down to people tending to assume that the law will reflect what they see as being socially logical and morally sensible.

Contrary to this legal position, it is interesting to note that in the case of *Karambakuwa v Mabaya* SC-158-87 (unreported), a man who had cohabited for seven years with his 'wife' was ordered by the Supreme Court to maintain her after the union had broken down. Their relationship was found to be a customary union because the judge reasoned that the conduct of the 'husband' and his people unmistakably pointed to the customary acceptance of the union as one between husband and wife. The judge held that the question of *lobola* must be completely disregarded in determining whether the two parties had a relationship that amounted to a customary union for the purpose of maintenance as their union had all the

features of a customary union between husband and wife. The court came to the conclusion that the 'husband' could not be regarded as a mere 'seducer' as he argued because the 'wife' was accepted as a daughter-in-law according to custom. The possibility that the union was a concubinage, commonly known as '*kuchaya mapoto*', was found to be so remote in the circumstances that the 'husband's' argument was totally disregarded. Ncube (1995) argues that the judge erred in determining that their union was a customary union because *lobola* remains a requirement of a customary law union. Therefore making a husband pay maintenance for a wife for whom he had never paid *lobola* had no legal basis. With due respect, I admire a judge who could come up with such a progressive judgment in the 1980's.

I commend the judge for using the women's law approach that takes women as the starting point. The approach he used considered the lived realities of women where we expect that all lawyers are legal centralists who always take the law as the beginning and end of a problem and solution. Legal centralists argue that the law should be the law of the state, uniform for all persons, exclusive of any other law and administered by a single set of institutions (Griffith, 1986, as quoted by Bentzon *et al.*, 1998). It is baffling to imagine that our law confines people to only two types of marriage and fails to recognize that there are other types of marriages and family forms that fall within the continuum such as cohabitation unions. The reality of the situation is that most women find themselves in cohabitation unions and my research revealed that they are being accepted by their 'husband's' families as though a customary law union has been established. More often than not, when such unions break down most men begin to argue that there was no customary marriage when in fact they were indeed conducting themselves in a way that suggested that a customary marriage had been observed. One female respondent explained it by saying:

'The woman will be playing all the daughter-in-law duties and roles at family gatherings and funerals as if *lobola* has been paid.'

An analysis of the research findings indicate that the law is behind the people. When lawyers take the law as a starting point it leads to discrimination of women because the law is a male-dominated norm.

4.9 Failure to acknowledge cohabitation: An infringement of Constitutionally guaranteed rights

Most respondents kept on referring to equality and non-discrimination. Of the 28 women I interviewed, 21 of them did not understand why some marriages were given priority by recognizing them at law whilst failing to recognize cohabitation when it comprises the bulk of marriages that exist in Zimbabwe. Most of the women regarded cohabitation unions as marriages, regardless of whether or not *lobola* had been paid or registration had taken place and they were of the view that failure to acknowledge such unions is tantamount to discrimination because of marital status. Section 56 of the Constitution of Zimbabwe outlaws discrimination on the basis of marital status. The fact that women's property rights in such *de facto* unions are not protected under the law is tantamount to discrimination. Section 25 of the Constitution protects the family unit without specifying and defining what 'a family' means. It provides that the state and all its institutions and agencies of government at every level must protect and foster the institution of the family.

This provides us with a window of opportunity which allows for legal concepts of family to evolve to fit the social realities of Zimbabwean women. There is room to expand the definition of family. There is a lot of stereotypical thinking about cohabitation and it is time to improve the legal framework to cover all types of marriage because of the economic conditions we are in. Although people would like to formalize their unions, they lack the capacity to do so. One law officer who is also the Gender Focal Person for the Department of Constitutional and Parliamentary Affairs in the Ministry of Justice said:

'Existing laws need to be amended and get rid of any discriminating tendencies. Marriage laws must be aligned with the Constitution because it outlaws discrimination on the basis of marital status. Women's rights are protected without reference to marriage types or status. Laws on sharing of property at divorce or separation should be underpinned with values of equality, fairness and non-discrimination.'

All forms of discrimination against women have been outlawed by section 80 of the Constitution which provides that all laws, customs, traditions and cultural practices that infringe the rights of women conferred in the Constitution are void to the extent of their infringement. This legal change is in line with the goals of social justice at the centre of

international human rights standards requiring Zimbabwe to take legislative measures including Constitutional provisions to address past discrimination.

4.10 Should the law intervene: Legal and policy reform?

There is always a link between social reality and the law. The important question that needs to be answered if there is going to be law reform to address the rights of persons in cohabitation is: 'How are we going to achieve this?' This is quite a complex socio-legal question quite apart from the technicalities involved because it immediately brings into focus a wider moral and political question about what the law is for and what it should do (Banda, 2005). Law makers should respond to developments and find a way of regulating cohabitation by considering what kind of legal framework would best suit family realities (Legal Assistance Centre, 2010). Several questions are posed by Krause (2008) such as, 'How should the law define the legal position of cohabiting couples?', 'What level of marital-like rights and obligations should be imposed on or granted to them and in the absence of documentation, how may it be proved competently?' The law in Zimbabwe is silent on issues concerning cohabitation. Zimbabwean law does not categorically state anywhere that cohabitation unions are acceptable or unacceptable. It becomes a problem when people fail to access adequate justice before the courts when everyone has a right to access justice and a right to a fair trial. The Zimbabwean law has completely ignored the fact that an increasing number of men and women are now cohabiting or living together without getting married. This contrasts with other countries in Africa where specific legal rights are given to such couples (Rae, 1986). The reality that more people are cohabiting and that more are anticipated to do so in the future is itself a legitimate ground for law reform.

One magistrate I interviewed at the civil court explained how women in cohabitation are discriminated against because of lack of a clear law to guide judicial officers on deciding property disputes of persons in cohabitation union. It would be proper to have a separate law or to consider cohabitation unions in the marriage harmonization process. Whatever is done will go a long way in addressing the difficulties we are facing as magistrates, rather than pretending that people are not cohabiting when in actual fact the bulk of cases the Magistrates' Court deals with consists of sharing of property of persons in cohabitation unions. It appears such people are not adequately protected by the law. It would be proper to have a separate law regulating these unions.

It was interesting to note that most women unanimously agreed that the law should not protect ‘small house relationships’ because this will disadvantage women who are properly married and have even registered their marriages. Most women were not comfortable with the issue of informal multiple wives mushrooming through the ‘small house’ phenomenon in Zimbabwe. As such, most women advocated for the protection of property rights of women in cohabitation but without being attached to third persons, i.e., small house network. Those in small house relationships cannot be afforded equal protection under the law because they are disadvantaging some other women who are holders of marriage certificates. One middle-aged woman expressed her discontentment by saying:

‘Ini handingafare kana pakaita mutemo unochengetedza masmall house nekuti zvinodzvanyirira mudzimai ane muchato, masmall houses akungotambirwa mazuvano asi patori nemudzimai ane muchato.’

(Meaning: ‘I am not comfortable with the law protecting the “small house” women because protecting them will disadvantage the official wife with the marriage certificate. Those women with registered marriages are being disadvantaged whilst holding on to their certificates. It’s like nowadays people are embracing small houses.’)

Women’s groups in Zimbabwe have for a long time been lobbying for marriage law reforms. Zimbabwe Women Lawyers Association (ZWLA) and Women in Law in Southern Africa (WLSA) are some of the organizations that were involved. In 2004 the Ministry of Justice, Legal and Parliamentary Affairs released a white paper with several amendments to the marriage laws. To understand what had stalled the harmonization process and interrogate whether cohabitations unions were being considered in the process, I visited the concerned Ministry. I enquired whether there were any plans in the pipeline to continue or resuscitate the process of the harmonization of the marriage laws in Zimbabwe. Since Zimbabwe has a pluralistic marriage system, one can choose between cohabiting (or be forced to cohabit due to reasons beyond one’s control), an unregistered customary law union, registered customary marriage or a registered civil marriage. This has created many battles and as the Ministry of Justice, Legal and Parliamentary Affairs administers the Marriage Acts it should be seen to be doing something on the ground to address these battles.

One law officer I interviewed from the Department of Policy and Legal Research that is specifically mandated with law reform of the statutes assigned to the Ministry said the process just died a natural death. The fact that the marriage laws must be aligned to the Constitution

has created some possibility that some of the battles will be addressed. She emphasized the fact that the process must be started all over again because it came to an end with the previous Minister of Justice, the Honourable Mr Chinamasa, who earlier desired to engage with other ministers before the whole process could begin. But she also advised that the Ministry of Justice had received some proposals about children and women from the Ministry of Women, Gender and Community Development. To confirm this I had to make a follow-up with the legal advisor of the said Ministry in a telephonic interview and they said the Ministry had drafted a white paper through WLSA. She also hoped that some of the problems associated with the plurality of marriages would be addressed if their proposals are considered. I also asked her whether there were any plans to carry out consultative workshops to investigate whether women in cohabitation are protected and what should be done to adequately protect them under the law, especially concerning the sharing of property. She said that would be a good idea which can be looked into at a later stage after we have managed to resuscitate the program. This would assist us in arriving at proper legislation that would safeguard the rights of both men and women who are involved in cohabitation unions such as was done in other African countries like Kenya, South Africa, Malawi and Uganda. This is important because cohabitation unions come up with a lot of gender inequalities, especially when such unions break down. Other jurisdictions have come up with partnership agreements whilst others have afforded automatic protection to women who have stayed for a stipulated period of time men such as six months, two or ten years depending on jurisdiction.

It is also important to note that the idea of law reform was met with mixed feelings. Those who perceived cohabitation in the negative obviously did not concur with legal interventions. They insisted on people following the law and following God's principles; for instance, when asked about the legal reforms, one middle-aged female pastor said that reforming the law could be a good idea but before we amend the law, it would take some awareness programmes to educate women on the different types of marriages and the consequences that flow from them. It would be important to improve public information and education about the true legal position to enable individuals to make informed choices. It seems this issue has been overtaken by contemporary issues such as child marriages in that these issues are given serious consideration. Activist work is determined by funding and contemporary issues and this has created a legal gap in terms of information dissemination on types of marriages we have in Zimbabwe and the consequences they bear. There is a need for us to take a step further and educate and give women proper information. As argued by Banda (2005), are we

not better off concentrating on improving women's socio-economic rights with the main aim being to improve their agency and turn them from being dependant to independent people? Women in cohabitation for longer periods can be superseded by other women who can just arrive on the scene and enter into a certified marriage with their partner. And there is no place for cohabiting women to go and protect their rights. The pastor emphasized that this is the main reason why the church does not acknowledge such unions as they lack the necessary protection especially for women and why, the pastor said, we cannot run away from the principles of God. This is exacerbated by the fact that our law is silent even on longer periods of cohabitation. The problem is deeply rooted in customary marriages that recognize polygamy. As a result, the law can never provide for solutions since the law has limitations and this is where we need to use alternative measures and strategies.

CHAPTER FIVE

5.0 ASSESSMENT OF THE EMERGING ISSUES

5.1 *Lobola controversy: Who is saying what?*

Most of my respondents ended up discussing the payment of *lobola* and how some think it is causing gender inequalities between men and women in that the giving of *lobola* is meant to transfer the labour value of the woman from her family or origin to her husband's family. This would also entitle the man to exclusive sexual rights and this also means that children born out of the marriage form part of the father's family (Banda, 2005). The payment of *lobola* is done to bind the two families of the bride and the groom together. *Lobola* has its foundation in the patriarchal institution. The radical feminists suggest that patriarchy is oppressive and should be done away with. According to Marie (1994), radical feminists argue that it is the patriarchal system that oppresses women, it is a system characterized by power, dominance, hierarchy and competition. The system cannot be reformed but can only be ripped out root and branch. African feminists argue it is not necessary to uproot patriarchy but we need to negotiate with patriarchy so that it is not oppressive to women.

Of the 15 men I interviewed, 12 men said they did not understand why they should pay *lobola* whilst women do not pay. They said they cannot afford *lobola* because it has been commercialized and most men feel that it amounts to discrimination against men. They said they wanted it scrapped because it is leading to cohabitation unions that do not offer legal protection for women. This move could be difficult to implement because there are possibilities of both cultural and religious resistance. It is noted by Banda (1993) as quoted in Banda (2005), that the colonial authorities in Southern Rhodesia, now Zimbabwe, made several attempts to limit bride wealth but eventually gave up in 1962 due to the resistance offered by the people in Zimbabwe. Some men thought this is a positive move that can be targeted at liberating women from the shackles of *lobola* and male domination. Many of them said they had no problem with having their daughters marry without charging *lobola*. In regard to this issue I noticed generation differences; the older generations require *lobola* to be paid whilst the young modern generation want *lobola* scrapped.

The *Katekwe v Muchabaiwa* SC-87-84 (unreported) case declared *lobola* is no longer a legal requirement for marriage, but the Customary Marriages Act still has a provision that

mandates that judicial officers request for the payment of *lobola* before a marriage is registered. According to section 12 of the Marriages Act, Africans who want to register their marriage as a civil marriage in terms of the Marriage Act, must first obtain a certificate from the Magistrates Court stating that the parents or the guardian of the woman have agreed to the marriage and must give details of the marriage consideration, the consideration paid, its value, any outstanding consideration and the terms of payment agreed upon consideration. The effect of this provision is to import the concept of marriage consideration into civil a marriage between Africans as a legal requirement. This provision has however been rendered obsolete and has fallen into disuse. Any person can virtually walk into the Magistrates' Court and register a civil marriage without necessarily having to prove that *lobola* has been paid.

This requirement has subsequently fallen out of practice with time. Although *lobola* is no longer a legal requirement, it has been granted such a social controlling force and significance that it makes it very hard for people to attempt to register marriages without having it paid. Those people who have gained the courage to register their marriage in court without *lobola* having been paid are looked down upon socially and considered to be only in a relationship of cohabitation, not marriage. So, even though *lobola* is no longer recognized as being part of the marriage contract, the practice of paying *lobola* remains contentious and people continue to pay it (Banda, 2005). In actual fact socially, *lobola* is treated as the fundamental determining feature for a valid marriage as one of the female respondents in the study said:

'Kungochatiswa pasina chadyiwa hakuite.'

(Meaning: 'Just having a marriage without grand celebration is out of tune.')

In simpler terms, this means people cherish the ceremony more than the certificate. A proper marriage should be accompanied by a luxurious feast. The whole business of marriage has been converted into a business enterprise where the service providers in the 'wedding' industry make huge amounts of profit.

Women had mixed reactions. Some said they no longer want it whilst others said that they cannot be married for free when they are going to be working and bearing children. It is said that the majority of women favour having *lobola* paid for them, because it shows a man's commitment and love and also because *lobola* is said to act as a guarantee against desertion

by the husband who stands to lose his investment should he abandon the marital home (Banda, 2005). Of the 28 women I interviewed, 10 women said removing *lobola* would promote prostitution. This again was a sensitive issue that was prone to such hot debate that some of my respondents would become too emotional. One Mrs. Maja even went as far as saying that ‘people who cohabit are prostitutes and they behave like dogs.’ This is also a clear illustration of how women sometimes become gate keepers of cultural practices. Some women I interviewed said these days women are even offering to assist their husbands to pay *lobola* since men can no longer afford to pay it on their own, but the men in response to this move said they will not accept assistance of this kind. He also talked of the ‘Ben ten relationships’ where older women take advantage of younger men and choose to cohabit because the older woman wants sex and the younger man wants financial security. We need to define cohabitation as a marriage of convenience, entered into by both men and women who seek various benefits such as social security, financial gain and sexual pleasure. There is a need to define the meaning of convenience before we lump all forms of cohabitation unions into one group. These issues are circumstantial and we need to zoom in on the degree of convenience. ‘Ben ten’ relationships, just like the ‘small house’ phenomenon, are social ills that point to the need to re-evaluate marriage.

5.2 Nexus between cohabitation child marriages and forced marriages

When I started my research I thought people in cohabitation are adults (majors who are over 18 years old) who are not forced to enter into such unions but do so of their own volition. But when I interviewed the Projects Director at Padare Men’s Forum he said their statistics revealed that the majority of the men they interacted with in their counselling sessions alleged that they are not interested in formalizing marriages or registering marriages because they would have entered into such marriages by force and sometimes to girls below the age of 18. Some men I interviewed complained that parents are pushing their children into marriage when they are not ready for it. Most men are left without an option and at the end of the day they cohabit. Most men find it difficult to formalize these forced type of marriages and therefore lack the zeal and willingness to formalize the marriages. Threats of legal action especially where the sexual relationships involve minors forces or pushes men into cohabitation or child marriages.

5.3 Serial cohabitation

My research revealed that young people who are jobless and are now resorting to serial cohabiting with older women who can take care of their economic needs. Some of the young men I managed to interview said men do this as a means of survival and these women rarely demand that they formalize the marriage or perform the cultural rites. So many men without financial resources to marry now prefer a life of this kind as it comes without any attachments. Most of the women also cautioned that in trying to come up with a law that protects the property right of cohabiters, we should be wary of serial cohabiters because some men and women have resorted to serial cohabiting as a means of accumulating properties.

Of the 19 men I interviewed, 9 of them alleged that men are entering into cohabitation because of economic hardships, and have resorted to serial cohabitation. Because of difficulties in life, they are not even in a position to buy furniture together, they just manage to buy a few pieces of furniture like beds, utensils and blankets and when such relationships sour, they just leave everything behind and move on to the next woman, starting the cycle all over again.

‘Vapfana vechidiki vazhinji takutoraramiswa nezvimama zvine mari kuti tirarame.pazvinoperra ndongotsvaga chimwe chimother.’

(Meaning: ‘Most young like us are jobless and are now resorting to serial cohabiting with older women who can take care of their economic needs. When such unions break down, most men are choosing to just move to the next woman.’)

5.4 Different ideas surrounding the civil marriage certificate

For women, the marriage certificate implies protection for them if and when the relationship breaks down. But 8 of the 19 men that I interviewed were against having a civil marriage certificate because they perceived that it empowered women more than men. Most men thought they would not benefit in any way from having their marriage registered. Instead they viewed it as a document that takes away their patriarchal benefits that come with marriage. One man said:

‘Mukadzi akangochata chete haachateere,kana kukudza murume.’

(Meaning: ‘Once a woman has a marriage certificate, they become stubborn and stop submitting.’)

Men have more privileges than women and a marriage takes away some of these privileges so women should concentrate on obtaining a marriage certificate. Most men would prefer cohabitation to safeguard these privileges. They would prefer to stay in a relationship without the legal conditions that come with a marriage certificate and therefore deliberately delay the formalization of their so-called marriages.

5.5 Conclusion

This chapter was an overview of the unexpected findings I came across but contributed much to my research. The above issues directly contribute to the gender inequalities that exist in cohabitation unions. The next chapter discusses the various possible interventions and recommendations, both short and long term, that can be implemented to try and protect the property rights of women in cohabitation upon dissolution of the relationship.

CHAPTER SIX

6.0 DISCUSSION OF INTERVENTIONS AND CONCLUSION

6.1 Introduction

Should marriage be the benchmark for defining cohabitation or should the law approach different forms of family in a more open-minded way by asking what function they serve in society? Should marriage be the starting point or should the law take a more open-minded approach to different forms of family forming its foundation on the fundamental principles of our Constitution on equality of all persons and non-discrimination? Marriage and cohabitation create similar emotional contributions, dependences and complex issues of finance and property (Sinclare, 1996). Therefore the legislature should devise ways and means to create laws and other supporting measures that will protect all women and not ones that afford some protection for married women yet discriminate against those in cohabitation unions. Dahl (1987), for instance, suggests a three-pronged feminist approach to the law in which (1) we conduct a critical analysis of existing law, (2) identify areas of strong and weak legal support and judicial voids and (3) then suggest areas of reform. Law reform can bring immediate improvements to women's position in society which is the main purpose of women's law. Dahl (1987) further suggests that to apply a feminist perspective to legal rules means that one perceives legal rules in the light of both women's experiences and interests. An alternative approach would be to move away from using matrimonial law as the yardstick for cohabitation. It would be unrealistic and unfair to discriminate against women who are the weaker partner in a cohabitation relationship on the basis that she should either have insisted on marriage or should have withdrawn from it if all circumstances had pointed to failure to formalize the union.

6.2 Identifiable gaps in relation to policy, practice, theory and laws

Since there is no law concerning cohabitation unions in Zimbabwe, there is a need to come up with a law that works well for both women and men who cohabit together. The approach currently being used lacks clarity, consistency and relies heavily on judicial discretion. This further contributes to the discrimination of women in cohabitation unions. And yet it was also surprising to find from the study that even though the law allows women to register land in their own names (such as residential stands they acquire through housing cooperatives), some women in cohabitation unions are reluctant to do so and instead opt to register land in the

husband's name. The women said that if you want to safeguard your property rights, the men take it as a threat and threaten to leave you accusing you of not being committed to the relationship. Last but not least, customary law demands that *lobola* be paid, but in reality people are no longer able to afford it and are turning to cohabitation. The question I constantly asked myself was, 'How do we resolve the *lobola* controversy?' 'Is it not high time that we revisit the *lobola* phenomenon and see whether it is still in keeping with and reflective of today's reality?'

6.3 Discussion of interventions

6.3.1 Test case litigation

I acknowledge that my research has touched on very controversial and sensitive issues. But a solution needs to be found to deal with this complex problem. For now I would say, a Constitutional challenge, like that of the *Mudzuru* case (above) on child marriages, should be launched focusing on the fundamental provisions of the Constitution that provide that all persons are equal before the law and have the right to the equal protection and benefit of the law and that every person has a right not to be treated in an unfair and discriminatory manner because of their marital status. The fact that every person has the right to access the courts or some other tribunal or forum established by law for the resolution of any dispute means that women can seek from the Constitutional Court a declaration to the effect that women in cohabitation unions need to be just as well protected by the law as everyone else in Zimbabwe. Therefore, it may be important to seek clarity on the contemporary meaning of discrimination on the basis of marital status. As explained earlier, it is probably high time for a Constitutional challenge or test case litigation to define what is meant by discrimination on the basis of marital status in Zimbabwe. I would advocate for a wider interpretation that would not only protect people from discrimination because they are married or unmarried, but would also protect people because they are in non-marital relationships. Ignoring the fact that women in cohabitation unions are being discriminated against will only expose them to further discrimination.

6.3.2 Legal reform: Alignment of legislation to the Constitution

Since Zimbabwe adopted its new Constitution in Zimbabwe in 2013, the Ministry of Justice, Legal and Parliamentary Affairs should have has been in the process of aligning and harmonising the country's current laws, including its laws marriage laws, with the

fundamental rights principles contained in the Constitution. It is our hope that the concerned Ministry will be able to resuscitate the harmonization process of the marriage laws that started many years ago. It is also anticipated that the Ministry together with other interested stakeholders will be able to extend this process to cohabitation unions that have been neglected by the legal framework for a long time and also manage to address the gender inequalities that exist in such unions. My study has revealed that cohabitation unions have proved to be an alternative to the traditional form of marriage. Although some magistrates seem to have found ways to distribute property equitably when cohabitation relationships end, there remains a problem on how the law should protect the rights of cohabitants. Whether the legislature provides for cohabitation contracts or automatic protection for cohabiting partners after staying together for a certain period remains a gap that needs to be filled by further research. It is important that a deeper interrogation into this kind of family arrangement on the ground to see how best the law can intervene.

6.4 Conclusion

The primary objective of this study was to reveal how the property rights of women in cohabitation unions are being infringed by failure to provide the necessary legal provisions within our legal framework in Zimbabwe. It has become apparent that the law in this field of family law remains unsatisfactory and an opportunity to call upon the legislature to intervene is presented by the increasing number of such disputes coming before our courts. Having done this research and in the light of decided cases on cohabitation, it looks as though we have to recognize cohabitation and protect the property rights of women in such unions, but obviously there are problems that must be anticipated in trying to make this a reality. As I started my research, I thought this problem could be solved by harmonizing our marriage laws during the alignment process. But as I went on with the research, I discovered that polygyny is a phenomenon that will not be easy to outlaw. With the 'small house' saga going viral and also contributing to a number of cohabitation unions, it seems like most men will never readily subscribe to monogamy. This outstanding fact will pose a challenge for the legal drafters as well. Just as was with case with child marriages in Zimbabwe, this situation calls for a Constitutional challenge.

Mixed opinions and attitudes towards cohabitation are likely to persist but policy makers should pay attention to the voices of the increasing number of people who view cohabitation

as an acceptable type of family. This new form of family has developed as people respond creatively to the challenges of everyday living in contexts where some of the older cultural and institutional constraints have lost their bite (Carling, 2002). Therefore the laws in Zimbabwe should be seen to address these enduring lived realities of the people and run parallel with modernity.

In recognizing cohabitation at law, there are potential conflicts that could arise as some would argue that law reform is not really the way forward. Others would advocate for legal literacy which includes advocacy and dissemination about the laws on marriage so that public information and education is improved. This will enable people to make informed decisions. Recognizing cohabitation brings its own challenges and these include the following. There is the possibility of cultural and religious objections and resistance which will disrupt implementation. Nevertheless the fact is cohabitation is a lived reality and must be addressed. Protecting the rights of women in cohabitation has the potential of threatening the rights of women in formal marriages. However this cannot sufficient justification to warrant the continued denial of rights and protection of many people who are living within this family arrangement. People should be afforded rights to make choices through the provision and protection of different options. Suggesting cohabitation or partnership contracts, on the other hand, is not realistic in Zimbabwe considering that some of the people who cohabit are poor and illiterate and have little knowledge of the law. Requiring such persons to regularize their cohabitation will be cumbersome and impractical bearing in mind that they are already failing to formalize their current relationships because of financial constraints and their lack of appreciation of the laws on marriage. Also, recognition of cohabitation should be safeguarded against abuse by some women who might become serial cohabitants just to obtain property and assets from different men.³

³ Extracted from the policy brief I wrote in the Family and Social Realities Course of the Second Semester of the Masters of Women's Law Programme, 2015-16.

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Appendix

Appendix 1: International human rights components that protect the rights of women in cohabitation unions

Human right element	International human rights instrument
<p>Women and men are equal before the law and have the right to equal protection and benefit of the law.</p> <p>Equal protection of the law and effective protection against discrimination.</p>	<p>UDHR, articles 7,10 ACHPR, articles 2, 7 Women’s Protocol, article 8 ICCPR, articles 2(3) and 26 ICESR, articles 2 and 3 CEDAW, article 2</p>
<p>States to provide for appropriate remedies to women whose rights contained in the Women’s Protocol have been infringed</p>	<p>Women’s Protocol, article 25</p>
<p>Effective remedy by the national tribunals for acts violating fundamental rights in the Constitution</p>	<p>UDHR, article 8</p>
<p>States condemning discrimination against women in all its forms</p>	<p>UDHR, article 2 CEDAW, article 2 Women’s Protocol, article 2(1)</p>
<p>State parties to eliminate discrimination against women regarding marriage and family relations</p>	<p>CEDAW, article 16(1) Women’s Protocol, article 6(c)</p>
<p>States to adopt measures to ensure that women and men enjoy equal rights in marriage and be regarded as equal partners in marriage and in the equitable distribution of property at separation</p>	<p>SADC Protocol on Gender, article 8(3)(b) Women’s Protocol, article 7(d) ICCPR, article 23</p>
<p>States to protect the family unit</p>	<p>African Charter, article 18(3) ICCPR, article 23</p>
<p>Protection and promotion of rights of women in polygamous unions</p>	<p>Women’s Protocol, article 6(c)</p>