



**LETTICIA FADZAI MOYO-REG NO.R027466C**

**“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**

**SUPERVISED BY PROFESSOR JULIE STEWART**

**Submitted in partial fulfillment for the Masters’ Degree in Women’s Law Southern and  
Eastern Regional Center for Women’s Law, University of Zimbabwe**

**2016**

**DECLARATION**

I **Leticia .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 Center for Women’s Law, University of Zimbabwe

**Date** ..... **Signed** .....

## **ABSTRACT**

“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 lacks 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 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 them being taken advantage of. The writer was motivated to do this study from the Second Semester’s Family Law and Social Realities course during the Masters in Women’s Law programme 2015 -16 .She realized that in the area of family, marriage has been discussed a lot neglecting other forms of family that have emerged. The writer being a lawyer in the Ministry of Justice and Parliamentary Affairs and having worked for the department of Constitutional and Parliamentary Affairs for several years is strategically positioned to influence the alignment of marriages laws to the constitution as well as total reform of such laws. The methodological framework was informed by understanding how women are discriminated upon termination when their property rights are not protected. To investigate the lived realities of woman in cohabitation relationships, she started by interviewing women using the women’s law approach which explore the connections between law and gender and which are sometimes hidden and identify 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 dissolution of cohabitation unions are resolved. As she incorporated her findings into the legal framework, it became apparent that the Zimbabwean legal framework is inadequate and it exposes women in cohabitation unions to discrimination as their property rights are violated at dissolution of such unions. The sex and gender analysis also assisted her to get the masculinity voice and understand how men view cohabitation and investigate how they would want the law to regulate such unions especially when it comes to distribution of property at separation. Both men and women suffer because of this uncertainty but women suffer more. In order obtain data the writer had to use less structured in-depth

interviews. Her major findings revealed that certainly 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. It becomes a paradox when women in cohabitation are being discriminated when Zimbabwe has one of the best and modern constitutions that prohibit discrimination on the basis of marital status under section 56. Maybe 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 other decided cases on cohabitation, it looks like 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 operationalise this. Variety of attitudes towards cohabitation is apparently going to persist but policy makers should not fail to pay attention to the voice of increasing number of women who find themselves in cohabitation families. The fact that women in such de facto unions have their property rights not protected under law is tantamount to discrimination. Zimbabwe is a party to many international conventions that protect women from discrimination and Zimbabwe should honor its international obligations. A constitutional challenge as was with the *Mudzuru and another v Ministry of Justice Legal and Parliamentary Affairs* CC12/15 case on child marriages, highlighting 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 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, will declare that women in cohabitation unions need to be protected as well under 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 this new constitutional era. The writer 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.

## **DEDICATION**

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

## **AKNOWLEDGMENTS**

To **SEARCWL**, thank you for providing financial assistance.

Professor Julie .Stewart, thank you for your academic support and guidance and encouragement through the duration of the course

## **LIST OF ACRONYMS**

CEDAW-Convention on the Elimination of Discrimination against Women

ICCPR-International Covenant on Civil and Political Rights

ICESCR-International covenant on economic, social and cultural rights

MJLPA-Ministry of Justice of Legal and Parliamentary Affairs

SADC-Southern African Development Community

UDHR-Universal Declaration on Human Rights

ZWLA-Zimbabwe Women Lawyers Association

## **TABLE OF STATUTES**

Constitution of Zimbabwe Amendment (No.20)2013

Customary Marriages Act Chapter 5:07

Matrimonial Causes Act Chapter 5:13

## **TABLE OF CASES**

Chapeyama v Matende and another ZLR 356

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Feremba v Matika HH/04

Karambakuwa v Mabaya SC158/87

Katekwe vs Muchabaiwa SC 87/84).

Mashingaidze v Mugembe HH 3/99

Matibiri v Kumire 2001 ZLR 495 (H)

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

Mudzuru and another v Minister of Justice Legal and Parliamentary Affairs CCZ12/15

Usayi v Usayi SC 49/03

## **STATUTES FROM OTHER JURISDICTIONS**

Malawi Constitution, 1994

Ethiopian Revised Family Code 2000

## **INTERNATIONAL INSTRUMENTS AND RECOMMENDATIONS**

Convention on the Elimination of Discrimination against Women

International Covenant on Civil and Political Rights

International covenant on economic, social and cultural rights

Maputo protocol

SADC Declaration on Gender

Universal Declaration on Human Rights

Committee on the Elimination of Discrimination against Women, General recommendation no21: equality in marriage and family relations HR1/GEN11.REV 7(1994)

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)

## **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 lacks 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 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 them being taken advantage of. The writer was motivated to do this study from the Second Semester’s Family Law and Social Realities course during the Masters in Women’s Law programme .She realized that in the area of family, marriage has been discussed a lot neglecting other forms of family that have emerged.

The writer being a lawyer in the Ministry of Justice and Parliamentary Affairs and having worked for the department of Constitutional and Parliamentary Affairs for several years is strategically positioned to influence the alignment of marriages laws to the constitution as well as total reform of such laws. The methodological framework was informed by understanding how women are discriminated upon termination when their property rights are not protected. To investigate the lived realities of woman in cohabitation relationships, she started by interviewing women using the women’s law approach which explore the connections between law and gender and which are sometimes hidden and identify 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 dissolution of cohabitation unions. As the writer incorporated her findings into the legal framework, it became apparent that the Zimbabwean legal framework is inadequate and it exposes women in cohabitation unions to discrimination as their property rights are violated at dissolution of such unions. The sex and gender analysis also assisted the writer to get the masculinity voice and understand how men view cohabitation and investigate how they would want the law to regulate such unions especially when it comes to distribution of property at separation. Both men and

women suffer because of this uncertainty but women suffer more. In order obtain data the writer used less structured in-depth interviews.

As the writer went to the field the writer had 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”. Following civil procedures did not create much debate 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 it has been formed or run the risk of being a cohabitation union because the expected customary formalities have not been performed to standard or to an expected level or point. As a result of her research, she discovered that there is need to probe further and research on the actual numbers of cohabitation unions such unions involved as ‘*small house relationships*’ where a married man has a family with another woman without observing any civil or customary formalities and the “*Ben ten relationships*” where older rich women are cohabiting with younger men who want to benefit financially from these women. All this was entwined with the cohabitation relationships such it created a web of complexities. This led her to ask what really constitutes cohabitation and what are the elements of cohabitation? Does cohabitation mean 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? She discovered that there are different categories of cohabitation which need to be interrogated further.

Her major findings revealed that certainly 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 put in place to determine how their property should be divided. There is confusion on the part of the judiciary. Undeniably it proved to be difficult to distribute 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 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 on important issues such distribution of property, maintenance and custody of children. It becomes a paradox when women in cohabitation are being discriminated when Zimbabwe has one of the

best and modern constitutions that prohibit discrimination on the basis of marital status under section 56. Maybe 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 other decided cases on cohabitation, it looks like 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 operationalise this. Variety of attitudes towards cohabitation is apparently going to persist but policy makers should not fail to pay no attention to the voice of increasing number of people which undoubtedly regard of the population which views cohabitation as one of society's repertoire of acceptable family types. There is a possibility of cultural and religious objections and resistance which will disrupt implementation. Never the less cohabitation is a lived reality and should be addressed. The fact that women in such de facto unions have their property rights not protected under law is tantamount to discrimination. Zimbabwe is a party to many international conventions that protect women from discrimination and Zimbabwe should honor its international obligations.

A constitutional challenge as was with the *Mudzuru and another v Ministry of Justice Legal and Parliamentary Affairs* CC12/15 case on child marriages, highlighting 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 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, will declare that women in cohabitation unions need to be protected as well under 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 era. The writer 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.

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## **CHAPTER I:**

### **1.0. INTRODUCTION AND THE PROBLEM ANALYSIS**

#### **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 at dissolution of the union because there is no specific law that protects their property rights. Cohabitation unions are not regarded as marriages under law and as a result the all the matrimonial laws including the Matrimonial Causes Act cannot be used for 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 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 them being taken advantage of. There are gender inequalities in cohabitation as men and women approach this relationship from unequal social position with unequal levels of bargaining power. Therefore there in 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 in 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, likewise 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 which is culturally the first stage to commence 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 were in cohabitation unions have approached the courts to have their property disputes resolved when their unions broke down. From already decided cases on sharing of property, it has reflected that customary law per se is in applicable. Our courts have therefore relied on judicial innovation in order to provide a just and equitable distribution of such asserts. The legal uncertainties 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 distribution of assets at separation.
- To explore whether women in cohabitation relationships understand the legal implications of such relationships especially with regards to 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. Assumptions and research Questions

Table 1: Assumptions and research questions

ASSUMPTIONS	RESEARCH QUESTIONS
1.The legal framework in Zimbabwe does not adequately protect women in cohabitation relationships in relation to distribution of assets at separation	1. Does the legal framework in Zimbabwe inadequately protect women in cohabitation relationships in relation to 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. Are 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 need to address the gender inequalities in cohabitation relationships so as to protect women in such unions	4. Is there 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 are maintaining each other.	7. Do persons in cohabitation not have a legal duty to maintain each other yet in reality they are maintaining each other?
8. 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 failure to protect the rights of women in cohabitation relationships and infringement of 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 need for legal and policy reforms to protect women in cohabitation unions.	9. Is there 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 suburb 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 2:**

### **2.0. COHABITATION IN ZIMBABWE**

#### **2.1. Introduction**

Many women in Zimbabwe are subordinated and discriminated against even in “marriages” where lobola has not been paid. Women in cohabitation unions face multiple exclusions as their discrimination is double edged. These unions are not legally recognized and with that in mind, women in such unions have been perceived to be inferior. Family, society and the courts cannot protect them so they have nowhere to fall back on. 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 need to investigate the historical background of cohabitation. There is also need to understand whether cohabitation has always been part of our lifestyle or it has been necessitated by the changing lifestyles and patterns.

#### **2.2. Historical background to cohabitation**

The law has not traditionally looked positively upon persons who decide to live together without performing the matrimony rites. Religion has also constantly disapproved 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, S, 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 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 the institutional controls, Chavhunduka, (1979). As Banda ,(20050 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 an ill omen befalling them and 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. The 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 if 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 wife, cohabitation partner and an unregistered customary law wife 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 illustrated by a diversity 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. A cohabitation can also be described as one in which the parties live together as husband and wife without 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 have 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 to the field I had 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”. Following civil procedures did not create much debate 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 it has been formed or run the risk of being a cohabitation union because the expected customary formalities have not been performed to standard or to an expected level or point. 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 definition 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 is blurred, what is real lobola? , what percentage amounts to proper marriage?,where do we start and where do we end? It can sometimes be difficult to say that a marriage has indeed occurred, Banda, (2005).If we go by the strict application of the custom, then a greater percentage of the purported unregistered customary unions, when interrogated further, turned out to be cohabitation unions. One elderly respondent aged around seventy years told her daughter's story as she got pregnant and eloped to her boyfriend and ended up in a cohabitation union. She said

*“Mwanasikana wangu akatizira asi varume vake vakangobvisa tsvakiraikuno chete.Iyi imari yekungotizivisa sebarekerki kuti mwana wenyu ndisu tinaye asi rroro hariasati rabviswa.mari iyio haimiririre roora inongratidza kuti vakwash vane chido chekurooroa 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: Her 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 “rustambo” which is the initial payment associated with the girls sexual rights which 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 a 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, kitchen ware 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 further said:

*“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 husbands 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 the husband is they are allowed to play their roles as son/daughter in law respectively. In pre colonial times this would not happen and as custom was so strict and would not allow such. In Shona they say there have no relationship with the prospective son in law because he has not formally established a relationship with his in-laws since no the 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 “transfer” of the women 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 is need to probe further and research on the actual numbers of cohabitation unions such unions involved as ‘*small house relationships*’ where a married man has a family with another woman without observing any civil or customary formalities and the “*Ben ten relationships*” where older rich women are cohabiting with younger men who want to benefit financially from these women. All this was entwined with the

cohabitation relationships such it created a web of complexities. This led me to ask what really constitutes cohabitation and what are the elements of cohabitation? Does cohabitation mean 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 categories of cohabitation I have devised for the purpose of this dissertation so that I interrogate this cohabitation phenomenon deeper.

##### a) Proper cohabitation partnership

This is when two adults masquerade as husband and wife and as a proper family socially. 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 did not go 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 and they have failed to nullify the civil marriage due to a plethora of reasons which could be reasonable and justified. One of the reasons is that most people cannot afford to go through the divorce proceedings because it is complex and expensive. This category poses its own problems which are not as complicated as of the following categories .The following categories constitutes what is commonly known as the “small house phenomenon”. This takes place where:

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

(c) The man has an existing customary marriage with proper customary rites performed + 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.

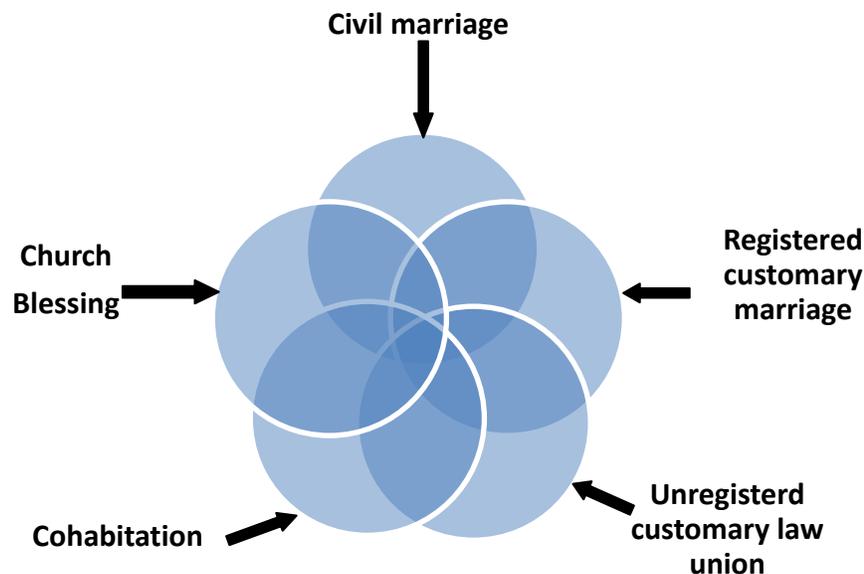
Although all the elements of cohabitation can be fulfilled in these unions such as sharing financial responsibility, maintaining each other and giving birth to children, the element of staying together may be not satisfied as the man is seen hopping from one woman to the other including the woman in 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 need to interrogate 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 intertwined 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 the need of getting married is and have the marriage registered anyway if the rights are so fluid and can just be tempered 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. In my own understanding it means that no one should be discriminated on the basis that they have a civil union, customary union, are in cohabitation or they are single. But do what we really mean when we say unfair discrimination and how do we determine this fairness. So there might be 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 women who are usually disadvantaged in cohabitation relationships. Thus failure to protect women cohabitants amounts to discrimination on basis of marital status as well as sex .The right to have dignity respected and protected afforded in the Constitution under section 51 is also violated because failure to recognize cohabitation is tantamount to failure to respect and protect fundamental life choices made bysome cohabitants who desire to be in such living arrangements.<sup>1</sup>The diagram below indicates

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<sup>1</sup> The above categorization was extracted from my policy brief written in the Family Law and Social Realities course of last Semester done during the Masters’ in Women’s Law Programme, 2015-16. This gave me insight to further

the types of unions women find themselves in as result of legal pluralism that exists in Zimbabwe.



**Figure 1: Complexities of informal polygamous unions**

The complexity created by informal polygamous unions becomes discriminatory to the women involved when the man has to divide his resources between his official and unofficial partners. There are high chances of the man abandoning the “main house” financially preferring the “small house” or cohabitant partner. It appears not all men manage to distribute the available resources equally and fairly between the multiple partners. More problems are created when one of the relationships breaks down and there is sharing of property involved. The woman with 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

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interrogate the discrimination suffered by women in cohabitation unions when such unions break down using a grounded approach in this dissertation.

state of affairs creates legal ambiguities which leave women vulnerable to falling through the cracks of the plural legal system and are left out in the cold 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 misbehavior and engaging in sexual activities earlier in life. The younger generation is susceptible to pressure from friends that usually 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 some women are choosing to cohabit with a man they are aware that he has another wife just for financial security. A common view that came from most of my respondents was that of economic hardships currently being experienced in Zimbabwe. A combination of the economic hardships together with the commercialization of lobola has caused most men to be unable to pay up lobola and thus most people are opting for cohabitation. Some people who are not employed and because of unemployment are just choosing to live together without paying lobola.

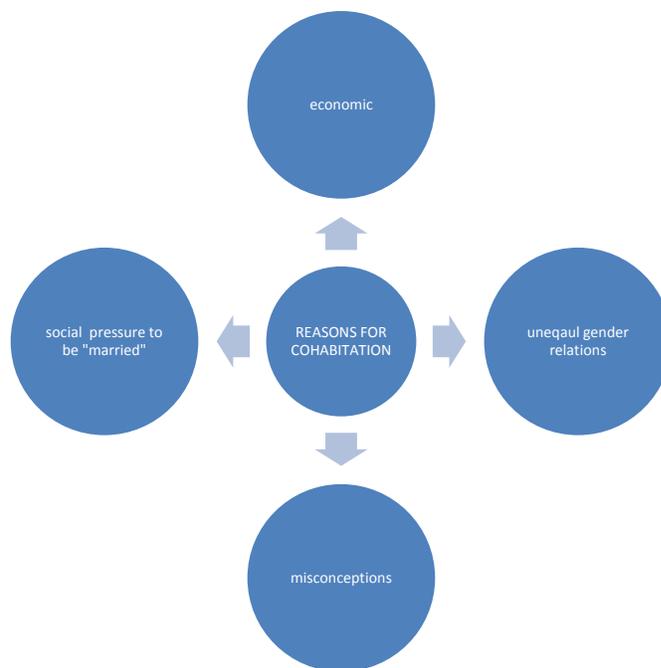
The tradition has been distorted from being a metaphorical transfer of small items to a more profit-making and cash driven project. Unemployment is seen as one of the major factors that will continue to increase the levels of cohabitation as the total costs of getting married in Zimbabwe are unaffordable. 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 Center who works in Connect Hair Saloon and is also in a cohabitation union had to say

*“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 an intention of formalizing their union. The figure below illustrates the various reasons for cohabitation that sometimes, are related and intersect to push or pull some women into cohabitation relationships.

**Figure 2: Reasons of cohabitation**



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, one woman in cohabitation I interviewed at Mhishi Shopping Center said:

*“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”. As researched by Harsky (1995), premarital cohabitation is particularly likely before second a marriage which is also termed marital post marital cohabitation. One elderly man in his fifties at Samuriwo Shopping Center was perceived cohabitation in a negative way as he said:

*“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 inaccurately believe that law already protects cohabitation and that they are legally married after they have stayed together for a specified period. Most people thought cohabitation union was a “marriage” all marriages were equal and no other marriage must 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 shackles of marriage thereby highlighting that some

people choose to cohabit because there 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 its flexibility. Some people especially the educated and the affluent may choose to cohabit in order to save expenses. Thus cohabitation becomes a class issue as others choose to be in whilst others are pushed into cohabitation because of economic hardships that hinder them meeting all the lobola requirements.

## **2.6. Perceptions on cohabitation:**

Cohabitation in Zimbabwe has both a positive and negative outlook. As I did my research, my respondents echoed different sentiments 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 literally means “*beating up pots*” but its meaning holds some negative connotations which imply that a woman is just cooking for a man who has not formally married her, therefore doing demeaned work compared to that of a woman who is properly married. In simple terms this means the woman is being taken advantage of.” *Ukhuhlalisana*” is the Ndebele term that depicts cohabitation unions. This also has some negative implications that 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. This simply means this is an arrangement only recognized between the two parties involved and this is described as being not African because people marry for the good of their families. Marriage cannot be an individual arrangement but should be a family matter 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 affair.

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 elderly woman aged 65 became emotional during the interview 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 hazarding feature that lobola is now anachronistic. Because of the resistant 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 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 where you get to enjoy companionship without a lot expected from you by in- laws .If parties decide to end, they can just end it by themselves without involving the courts which was a very expensive and cumbersome process. Marital bliss is not guaranteed by formalization or registration of marriages, some people in cohabitation are happier than those in registered marriages who can undergo abuse in such relationship.

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 in 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 around thirty I interviewed at OK Mufakose Shopping Center 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”*

*“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 you 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 Ministry of Justice, Legal and Parliamentary Affairs* CCZ12/15 indicated otherwise when it emphasized that the circumstance of a girl getting 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 because she has become pregnant, a girl remains a child regardless of pregnancy. It was noted with concern that this is a major driver of child marriages as girls below the age of majority being coerced or unduly influenced to get married by parents or guardians because they got pregnant.

As I did my 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 respondent who is a female Pastor in one of the Pentecostal churches rapidly increasing around Zimbabwe provided me with a Christianity perspective on cohabitation. She defined cohabitation as:

*“Staying together as husband and wife without God’s blessing”*

She observed that the church does not put much emphasis on the marriage certificate but on God’s blessing .Lobola is a component but it is not supposed to be exploitative. She highlighted the Christian process of getting married which comprises of three stages which include courtship, honoring our parents and blessing of God. Children honor 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 it is important for the man to seek the woman’s consent, parents

consent and the blessing of God .Rebecca was also given parental blessing before she left, she just did not disappear or eloped. Therefore in church one cannot just start a family without parental blessing or guardian's approval, thus mere cohabitation in the church is not accepted? This is a clear indication that by their very nature, religions are based on doctrinal beliefs grounded in faith, these doctrinal beliefs are therefore hard to challenge and indeed to challenge them in itself is construed as a betrayal of faith, Bruse (2003) in Banda (2005).In Genesis God gave Adam Eve as a wife, so God is the ultimate giver of wives and pronounced a blessing now be fruitful and multiply, this is the ultimate epitome of marriage. At church even if you pay lobola you are not considered as properly married. Lobola is just a step involved towards marriage.

God cannot bring down the blessing by himself, but he has representatives on earth. So people exchange vows before ordained man of God who will pronounce the blessing of the God. The church's emphasis is not also on celebrations but people who cannot afford grand celebrations, they can just appear before the man or woman of God in the presence of parents and witnesses in the church service or the pastoral office and a marriage can be concluded. They also take it upon themselves to fulfill 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 a crucial component of God blessing 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 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 highlighted earlier, the legal framework in Zimbabwe does not cover cohabitation unions therefore general law principles are used to share property of the people in such unions. The law in Zimbabwe is silent on cohabitation our legal system does not acknowledge marriage by repute which can also be termed common law marriages. Other African States like Malawi, Ethiopia and Tanzania acknowledge common law marriages. The Ethiopian revised Family Code 2000

article 97(1) provides that when there is no marriage certificate, evidence that a marriage existed will be recognized in 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 therefore exists. Tanzania also works on the same supposition that if a couple have stayed together for two or more years, regard themselves as married and are held by their family community as such, then de facto union exists. The 1994 Malawi constitution under section 22(2) 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 staying together should be five years or more. Although this could a positive move to assist women in such unions, some men have managed to equivocate this provision by moving out of the relationship a few months just before the stipulated two or five year period.

In Zimbabwe these presumptions do not operate, 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, a 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 and the legislature by providing a law on how property of persons married under the civil law and the registered customary law unions through the Matrimonial Causes Act and failing to provide a clear and satisfactory law that determines a how the property of women in unregistered law unions and cohabitation unions should be distributed is tantamount to discrimination of such women on the basis of their marital status.

Definitely there is need to interrogate further what section 56 of the Constitution mean 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 where the meaning is limited 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 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).<sup>2</sup> In this new constitutional dispensation in Zimbabwe, it may be important to seek clarity on the contemporary meaning of discrimination on the basis of marital status. 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. Do we take a narrow definition or do we apply it more broadly as 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 has an effect of discriminating 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 need to revisit the marital status discrimination in order to protect diverse family forms. The decision to form a family including non marital family or cohabitation families is one that is of constitutional importance. I would urge 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.

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 Zimbabwe is more on paper complaint but further efforts should be concentrated on the implementation side. Further the Constitution under Section 69 (3): 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 law that our courts rely on to solve property disputes of women in cohabitation. It is not in the letter and the spirit of

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<sup>2</sup> Victorian Human Equal Opportunity and Human Rights Commission-[www.gov.au/index.php/types of discrimination/marital status](http://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](http://www.ohrc.on.ca/en/code-grounds/family-marital-status)

the constitution to leave such disputes to the unlimited discretion of judicial officers where personal views play a significant role in determining such matters. Whilst women are now making direct contributions through activities such as gardening, vending and cross border trading, home-making remains the responsibility of both married women and women in cohabitation relationships. Giving value to 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 repudiate the fact that domestic contribution is at par with monetary contribution. The Women's Protocol under Article 13 (h) and CEDAW General Comment 21, paragraph 32 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 the wife's sacrifice and 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 at par with men's work outside the home. Lawyers as legal centralist take the law a starting point there they see property as following title, anything outside this parameter is not of interest to them.

Zimbabwe is also mandated under its national objectives under Section 25 to protect the family. Since defining concept of the family is not possible as it is debatable, our constitution never attempted to define it. This gives room for modern interpretations of the term family which acknowledges that families come in different shapes and sizes and whatever form the family exhibits itself in it must be afforded all the protections that are put in place for the family, be it in national laws or international law. This is a positive move that will create hope for women in cohabitation families because such families are also protected in the constitution. This provision read in relation to section 80(3) of the same constitution creates an obligation on the state to come up with laws that will address the previous discrimination that women 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 on a few reported cases on cohabitation and sharing of property in our superior courts. The case of *Chivise v Dimbwi* HH4/04 is a clear illustration on how the judiciary finds it difficult to deal with case of such nature the learned judge who presided over the civil appeal went at length to describe how to distribute the property of persons in cohabitation and which law is applicable. There is no established position that has materialized from a range of judgments that have been passed. The learned judge also elaborated the uncertainties that are portrayed by the law in this field which can only be addressed by legislature through reform the family law area. 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 ZLR 356 and *Mashingaidze vs Mugemba* HH 3/99 reflects that customary law per se is not applicable as it will lead to an injustice between the parties. All the general principles including unjust enrichment, universal partnership and joint ownership have been resorted to by the courts through judicial innovation and are all aimed to provide just and equitable distribution of such property and try and ensure that women in such unions do not just walk away empty handed. Therefore the development of the law towards recognizing 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 endeavor to protect and foster the institution of the family, cohabitation families forming part of the family unit as well. As highlighted by the *Mudzuru case* highlighted above a person can found a family without necessarily getting married to the father or mother of the child with whom she lives with as one 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 demarcation 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 principles such as tacit universal partnership, unjust enrichment or joint property to obtain equitable distribution of assets at dissolution of the relationship, 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 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 on the proving of these principles, just mentioning that a woman stayed for a number of years in a union or relationship cannot establish a case for women in cohabitation or arguably for a man if he is a “Ben Ten”. As highlighted in *Feremba v Matika* HH-33-07 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 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 question that must be addressed is what must be done with the gender inequalities that come with cohabitation? Should we consider cohabitation unions as marriages or the equality principle and non discrimination principles must form the basis of operations in both cohabitation unions and marriages. It is important to ascertain the debates surrounding these two concepts under the International law that Zimbabwe is a party to.

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 give 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, highlighting that the protections afforded to the family in these international conventions equally apply to women in cohabitation relationships.

The CEDAW General Recommendation number 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 are treated with equality and have equal access to justice just like everyone else. This clearly illustrates how Zimbabwe is burdened to come up with a law so that women in cohabitation unions are treated with equality .And also the law should ensure that their property disputes when their unions breakdown 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 goes further to elaborate that *“a stable family is one which is based on principles of equality, justice and individual fulfillment.”* International law on marriage and the family therefore obligates 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 de facto union is not given legal protection at all as is in our case in Zimbabwe .the committee also emphasize that women in such relationships should have their equally of status with men both in family life and in sharing of income and asserts protected by law. Where division of property is emphasized on financial contribution as with the case of cohabitation

unions, other contribution such as raising children for the elderly, relatives and discharging household duties are diminished the comment goes on. Often such contributions of non-financial contributions should be accorded the same weight. In Zimbabwe, property accumulated during a cohabitation union is not treated at law on the same basis as property acquired during marriage. This flies in the face of equality and non discrimination of family members advocated by CEDAW .When such relationships end, it is usually the woman who receives a significantly lower share than her partner. Property laws that discriminate women in cohabitation like this should be invalidated.

In dividing property, human rights standards command courts to divide it equally. The women's protocol article 7 (d) provides in the case separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of joint property acquired from the union. Working with a rule that says "receive what you have paid for" negates a woman family contribution 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 make women have nothing to show as their property that they contributed towards their acquisition, consequently diminishing their entitlements.

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 the society that must be protected by the both the state and the society. It is not easy to give a standard definition of the family as it comes in different forms from state to state but emphasize on the need to protect unmarried couples or cohabiting families and their children. States are also mandated to adopt legislative, administrative and other measures to protect the family in its varieties. The right to found a family implies, in principle the possibility to procreate and live together that is cohabitation. Just as 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 necessary getting married and follow rites of a civil or customary marriage. Founding a family as highlighted in *Mudzuru and another v Minister of Justice Legal and Parliamentary Affairs* CC12/15 does not mean getting married. The court

highlighted 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 to found 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. As the provided by the constitution, a family unit must be protected but it does go further to define what a family since there is no stated definition of it as it comes in different forms. The legal framework in Zimbabwe however indeed went further to come up with laws that protect the nuclear family that is premised on marriage and neglecting the other forms of family such cohabitation families and single mothers. The law has clearly provided on how the property of those with registered marriages should be distributed whilst on the other hand on the law has chosen to be silent on cohabitation families. This gives a burden on Zimbabwe to 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, denies women in such unions the right to equal protection of the law.

The Human rights committee also came out with general comment number 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 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 there is a conduct consists of a breach of an international obligation of the conduct consists of breach of an international obligation of the state Chirwa, (2004).

As highlighted above a number of International Conventions emphasize on the equality of everyone before the law and that everyone is entitled to equal protection of the law. Any person whose rights and freedoms are violated must have an effective remedy and such remedy must be determined by a competent tribunal, it is trite that when International Treaties provide for human right they also provide for an enforcement mechanism that put emphasis on remedial action where rights have been contravened. Otherwise the whole human rights discourse would be

futile. States are therefore enjoined to develop avenues for judicial remedy at moments of violation. When international law provides that all persons are equal before the law and entitled without any discrimination to equal protection before the law, it therefore indicates that Zimbabwe has failed women in cohabitation unions by failing to provide 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 any other women with different marital status. It means that the 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 law itself has discriminated against women in cohabitation unions instead of it to prohibit any discrimination of any kind and guarantee every person equal protection before the law. Both men and women in cohabitation are being discriminated on the basis of marital status and this is buttressed by the silence of the law on their plight when it comes to equal distribution of jointly acquired property at dissolution.

## CHAPTER 3:

### 3.0. RESEARCH MEHODOLOGY

#### 3.1. My expedition: Exploring the cohabitation phenomenon



**Figure 3: Conducting interviews at Mhishi and Samuriwo Shopping Centers: 5.November 2015**

To investigate the lived realities of woman in cohabitation relationships and understand how they want their rights protected under law and also to understand why women get into cohabitation and whether they understand the legal consequences of such unions, I started by interviewing women. As noted by Stewart, (1990), the purpose of women’s law approach is to explore the connections between law and gender and which are sometimes hidden and identify the bias involved, my main objective was to expose the inadequacies of the current legal framework. I therefore used the women’s law approach to investigate the 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. 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 on markets 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 was wearing two caps one as lawyer and as a student doing a Master's Women's Law. So 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 went along with my interviews, they would start to open up and begin narrating their own stories. Usually I would initiate a dialogue with one person and frequently ended up having group interviews because many people would join in. It was like that because my topic involved a lot of topical and sensitive issues that usually stirred up hot debate among people for example, lobola issues.

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 law and sharing of property disputes upon dissolution of cohabitation unions. The constant interaction with my assumptions and data led me to new directions and 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 some gaps in my data that I needed to follow up on subsequent interviews. For instance I had to visit one of the Housing Cooperative Scheme 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" name instead of protecting and safeguarding their property rights. Because of equality between women and men; anyone is free to purchase and register a residential stand in his or her name regardless of marital status. The chairperson of one of the housing cooperative schemes I interviewed said they do not regard a marriage certificate as a prerequisite of registering property because other people are married under customary law and some people who are single may have the resources to purchase residential stands. He also emphasized that even those who are in cohabitation are not barred to register their property in both their names. Women who wish to register residential stands in their names are free to do so. The chairman also accentuated that

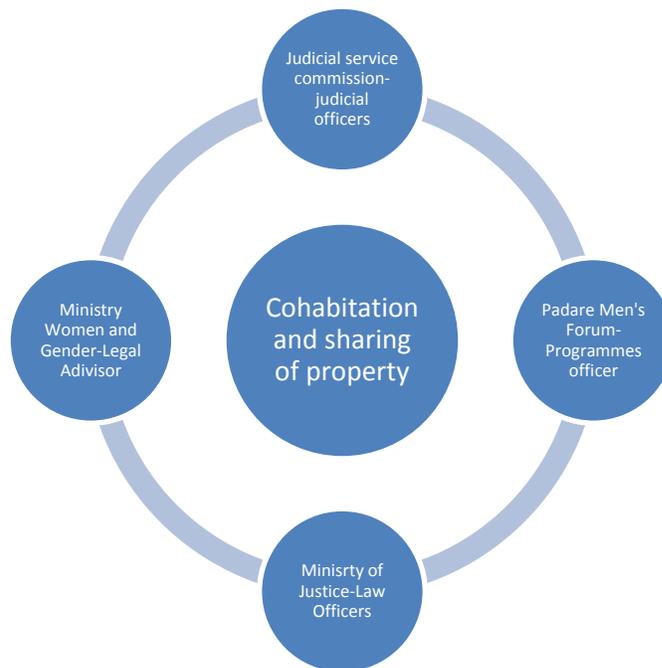
because of our African culture they have come across some women who opt out and insist on the registration of their husband's name totally foregoing their own interests in the property. This a clear indication that the laws have changed and practices have become gender neutral and it seems they are ahead of the people and the lived realities as there other cultural restrains that still discourage women from safeguarding their property rights. The grounded theory therefore assisted me to analyze 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 and 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 women's law approach and grounded theory became a useful tool for me to understand and improve the position of women and law in society, Dahl, (1987).

To obtain the actor perspective I interviewed officials from the Judicial Commission, Ministry of Women Gender and Community Development as well 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 analysis was 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 the officials in the Ministry of Justice, I was at a vantage point because I work in the Ministry. So to seek approval to interview officers from the Department of Policy that administers marriage laws, it was trouble-free. Although I received a quick response from the Judicial Service Commission, I was denied access to the high court judges and was restricted to the magistrate's court .To understand how the high court adjudicate on such cases I then resorted to case law authority. Most of the magistrates were also my colleagues so to book for appointments was also uncomplicated. When I interviewed the officials in the Ministry of Justice, I was at a vantage point because I work in the Ministry. So to seek approval to interview officers from the

Department of Policy that administers marriage laws, it was trouble-free. The figure below shows the organizations and the officials I interacted with as I collected data.

**Figure 4: Various Actors and Structures engaged with in the study**



Using the actors and structures approach ,I started by looking at women’s experiences from the interviews I held with women and discovered that the Judicial Service Commission and judicial officers had an impact on how property disputes in as far as distribution of property for partners in cohabitation unions. Most of the women held an assumption that the courts tend to favor men when it comes to 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 assisted me to understand why most judicial officers tend to use the law more rather than exploring the reality 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 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 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 sharing 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 lottery depending on which judge you appear before. The judicial officers come from a broad spectrum 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. One female magistrate interviewed clearly illustrates how her gender and personal views come into play when making decisions, she said

*“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”*

To explore how women in cohabitation unions are vulnerable than men and also understand how cohabitations impacts on men and women differently and who is affected more between them, I interrogated this issue with both sexes and made some comparisons. The sex and gender analysis also assisted me to get the masculinity voice and understand how men view cohabitation and investigate how they would want the law to regulate such unions especially when it comes to distribution of property at separation. As I interviewed my respondents I also extended my analysis to explore whether there are any human rights that are being infringed by non regulation of cohabitation unions in Zimbabwe especially when it comes to dividing assets of parties in such unions when they break down. Most of the officials I interviewed interrogated the possibility of using the right to equality and non discrimination provisions in 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, and New Marimba Park medium density just adjacent to Mufakose .Mufakose is situated to the west of the Harare city center and positioned in the north of Bulawayo road. It is densely populated whilst Marimba is sparsely populated. There is a high rate of unemployment as it is one of the oldest suburbs in Harare compare to New Marimba Park which is a high income suburb. This research was mainly done around Mhishi, Samuriwo, and Magandanga and around Ok Mufakose areas and New Marimba Park.

**Table 2 : Number of Respondents interviewed**

<b>Respondents</b>	<b>Female</b>	<b>Male</b>	<b>Total</b>
<b>Group 1 OK Mufakose Shopping Center</b>	<b>5</b>		<b>5</b>
<b>Group 2 OK Mufakose Shopping Center</b>		<b>6</b>	<b>6</b>
<b>Group 3 OK Mufakose Shopping Center</b>	<b>3</b>		<b>3</b>
<b>Group 4 Savemore Shopping Center</b>	<b>5</b>	<b>3</b>	<b>8</b>
<b>Group 5 Magandanda Market</b>	<b>4</b>	<b>3</b>	<b>7</b>

<b>Group 6 Samuriwo Shopping Center</b>	<b>5</b>		<b>5</b>
<b>Group 7 Samuriwo Shopping Center</b>	<b>3</b>	<b>2</b>	<b>5</b>
<b>Individuals</b>	<b>3</b>		<b>3</b>
<b>Chairman,Herbert Chitepo housing co-operative</b>		<b>1</b>	<b>1</b>
<b>Padare men’s forum</b>		<b>1</b>	<b>1</b>
<b>Ministry of Justice, department of Constitutional and Parliamentary affairs-Law Officers</b>	<b>1</b>	<b>1</b>	<b>2</b>
<b>Ministry of Justice, Policy and legal research Department, Law Officer</b>	<b>1</b>		<b>1</b>
<b>Ministry of Women and Gender and Community Development ,Legal Advisor</b>	<b>1</b>		<b>1</b>
<b>Church leader-Rivers of life Ministries</b>	<b>1</b>		<b>1</b>
<b>Total</b>	<b>32</b>	<b>19</b>	<b>51</b>

## **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 the verbal and non-verbal data. Body language would also inform me to assess whether a respondent was comfortable or not comfortable with the interview. As I went on with my interviews I discovered a lot of enthusiasm because my topic would usually stir up hot debates. When I conducted an individual interview, somehow it was converted into an unplanned group interview or discussion because the area I was researching on would attract more people to debate and give a variety of views. Interviews would usually start with one person and ended up having more people joining thereby converting the individual interview into a group interview or discussion. These group interviews were not planned but would just happen meaning 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 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 researches done both in Zimbabwe and neighboring 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. From these sharing of property cases I discovered that most of the properties that will be contentious are of little value like small pieces of furniture and if the property exceeds the monetary jurisdiction of the magistrates court which is \$10 000 or there is immovable property involved then, the case is referred to the high court.

### **3.3. Conclusion**

The methodology highlighted the whole journey I embarked on my research. It clearly illustrates how I used the Grounded theory and the Women's law approach unearths the discrimination being faced by women in cohabitation unions at dissolution where their property rights are being undermined. This assisted me to collect data on women's lived realities and experiences on law customs practices and procedures without necessarily asking the difficult question-“are you in a cohabitation union”. This will therefore lead to the following Chapter of data presentation and discussion of findings.

## **CHAPTER 4:**

### **4.0. DATA PRESENTATION AND DISCUSSION**

#### **4.1. Introduction**

This Chapter is intended to give an outline of my research findings and interpret them. The chapter will discuss findings as per each assumptions all my assumptions were not 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 at dissolution of the relationship. 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 the realities of modern life on the ground.

#### **4.2. Inadequacy of the legal framework in Zimbabwe**

I found out that certainly 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 clearly 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. At the magistrates' court when they are deciding on sharing of property cases, each party moves away 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. There is no statute law put 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 law on how to deal with such cases.

### **4.3. Excessive Judicial Discretionary Power in deciding sharing of property cases of persons in cohabitation**

In the field I discovered that when women fail to tender evidence towards their contribution because they are in the habit of not keeping receipts to prove contribution, they are usually at a disadvantage because judicial officers then consider their indirect contribution through unpaid house work. Most respondents said even when people are in cohabitation women contribute towards the upkeep of the family and even buy properties, they usually do not keep the proof. They get into such unions hoping that one day the union will be formalized and a break up is least anticipated. Most of the time, their share is minimal because housework is not given the value that it is 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 for the judicial officer to determine. It is the same legal training of both lawyers and judicial officers that often make them to view property as following title, so that the person in whose name the property is registered, which at most instance the man, is the rightful owner of the property and that is the end of the matter, Banda (2005). This narrow legalism is shatter proofed by their socialization, whereby they see it as women's role to look after the family home and in doing this women are just doing what they are supposed to do.

The case of *Usayi v Usayi* SC 49/03 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, counselor, domestic worker, house keeper, day and night and nurse 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. Ncube, (1998), 178 supports the above assertion when he argues that our courts should follow a fair approach that sets out when formulating a legal approach to the re-allocation of property at

dissolution; judicial officers should not attempt to attach a monetary value to the intangible and unquantifiable domestic contributions of a housewife. Ncube (1998) further avers 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 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**

Undeniably it proved to be difficult to distribute property of persons in cohabitation unions because usually women lack evidence to prove their contribution. People stay together as husband and wife in a normal family setup but when a problem arises that is when you hear that there was no marriage but parties were cohabiting. Customary law that operates in our everyday life also complicates how property of persons be distributed although such a union is not recognized under customary law. The customary law says all the kitchen utensils, the stove and the bed belongs to the woman, which is why men leave these properties with women when cohabitation unions break down. Here we see customary law principles and tenets being employed in solving disputes of such nature. This has resulted in discrimination of women in cohabitation considering that women are also making financial contributions in the home through some entrepreneurial activities. One woman I interviewed actually said she is contributing towards installments for a residential stand which is registered in her husband’s name. This is rightly captured by Stewart et al, (1990) 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 the building material or running the matrimonial home but permits the home to be registered in the name of the husband Stewart et al, (1990).

Sharing of property is also made difficult as men do not acknowledge that women are also contributing towards the upkeep of the household. When I interviewed the programmes officer at Padare Men's Forum he said as an organization they always engage men to make them understand that even though culturally household work had no value, things have changed and this indirect contribution has value. All work should be valued and be given its worth. The men they engage in range from those in civil marriages customary marriages, unregistered customary marriages to those who are in cohabitation.

The rural home and assets in the rural homestead are also being considered for sharing of property at the magistrates' court. One female magistrate I interviewed at the civil court said as judicial officers usually assume that when parties issue summons, automatically general law principles must apply. However when a party raises issues of rural assets like cows, such assets should be considered and divided equitably. The problem only comes in putting value on a rural homestead since such houses are constructed on communal land which has no financial value. But these days people are now buying land in communal areas to construct rural homesteads .If parties agree on the value of the rural homestead it becomes easy for the judicial officers to compensate the woman their contribution. If the man is gainfully employed for instance as a soldier or policemen, a garnishee order can be granted to ensure that the woman is compensated for her contribution towards the construction of the rural home and purchase of cattle. It is also easy for the judicial officers to share the cattle if the parties just provide a stock record book. Other people are even investing in resettlement areas and construct big houses and invest in stocks. Some also have farms and where they rear livestock together, thus all these assets if they have been acquired during the subsistence of the cohabitation union and both parties have been contributing to their acquisition the courts have an obligation to share them equitably.

#### 4.5. Gender inequalities in cohabitation unions

I found that male dominance over women even in a scenario where no lobola has been paid is more. Women in such unions agree to everything the husband demands 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 over submit to their husbands just to avoid being left. Some women even purchase properties in the husband's name to prove that they are committed to the relationship and will not leave them for someone else. There are a lot of power dynamics and power struggles that exists within such unions. One woman in cohabitation had 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 so difficult for some women in cohabitation to keep some documentation of properties they have also contribute towards their acquisition and also to ensure that houses or residential stands are registered in both names. Most men were not comfortable in women having properties registered in their sole names, women who tried to do so were accused of wanting to be in control or were not committed to the relationship. Most women ended up registering properties they have solely acquired in the name of the men, totally failing to safeguard or forsaking their own interests. Most women said they do not have power to force men to formalize our marriages .Goldblat (2003) argues that men and women approach intimate relationships from different social position with different measures of bargaining power. Gender inequality and patriarchy makes women to lack the power to set the terms of the relationship. Women depend on men because of the unequal position of women in society as they do not access resources and income on an equal footing just like men when they are burdened by motherhood. As a result some women choose to stay in an abusive cohabitation union even when

the man has indisputably demonstrated that he is not going to formalize their union even in the future.

The programmes officer at Padare Men's Forum advocated for the empowerment of women in cohabitation and other women in general women that they should aim for self empowerment that will enable them to become economically independent and know how to safeguard their property rights and interests. Women should concentrate on economic empowerment than housework which will not be given its real value at the end. This will liberate women from the shackles of gender inequalities that exist in both marriage and cohabitation unions. Women should strive for financial security and emphasize on basic 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 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 parties have stayed together for a certain period of time. On the contrary our legal framework does not have such a presumption. On 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 sharing of property at dissolution of such unions. Most of the people who get in cohabitation unions do so at a younger age and are not aware of the legal consequences of such relationships.

Others thought that there was no recourse at all upon separation whilst some thought that matrimonial laws which apply to marriages also apply to cohabitation unions. This is clear

indication that the uncertainties of the law have caused confusion for both the judicial officers and the general population. It is not clear how cohabitation unions should be treated under the law and how their property should be shared upon dissolution of such a union. One elderly woman I interviewed said:

*“Kana zvekuchaya mapoto zvapera chero ukaenda kumatare edzimhosva hapana chaunobatsirwa nacho nekuti vanongokuvhunza chitupa chemuchato”*

*“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 tinongogarisa zvakanaka sezvinongoita vakaroorana.saka ndofunga kuti tofanira kungochengetedzwa nemutemo sevamwe kana taakurambana kunyanya pakugoverwa kwemidziyo”.*

*“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 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 that this misconception is widely accepted and this resulted in other women lacking the zeal to formalize their unions as they believed that their rights are also protected under our legal framework, which in actual fact 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 the norms and expectations which inform the position of women and gender relationships are generated in the intersection between general law, customary law and peoples customs and practices. So in the field I had to interrogate alternative dispute resolution

mechanisms women resort to when the cohabitation union breaks down. Therefore I had to explore the women's experiences with the law 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 a family level. There are family level meetings that are held to decide on important issues such distribution of property, maintenance and custody of children. When it comes to sharing of property, usually people say you take what belongs to you but it depends with people. In most instances, family meetings usually resolve such issues and most of the times 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 people just decide to deal with issues amongst themselves, other respondents said they just move out and start a new life. This is a clear indication that there are semi autonomous social fields that exert more power on women's lives and disputes arising from the cohabitation more than the legal order. 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 sharing of property at the magistrates' court and one magistrate confirmed that such cases contribute to the bulk of many cases that they deal with everyday.

Most of my respondents including some who were cohabiting partners said they rarely discuss what will happen at separation. Others said discussing about it was not necessary at times because there are practically no assets of great value. There is really nothing to divide because there only are pots, pans, and blankets. As a result when a break up comes it becomes expensive to approach the courts to divide such insignificant property without value and therefore disputes are concluded at the family level. Usually it is the women who are vulnerable and they tend to fail 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 indeed people in cohabitation maintain each other 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 save for children that were born out of the relationship. Ex- cohabiting couples cannot claim for maintenance post separation. Some of my respondents were mistaken to think that the right to claim maintenance depends on how long a couple had been together. As people tend to assume that the law will reflect what they see as socially logical and morally sensible.

On the contrary to the legal position, it interesting to note that in the case of *Karambakuwa vs Mabaya* SC158/87, 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 customary acceptance of the union as one between husband and wife. The judge argued 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 a 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 this the "husband's" argument was totally disregarded. Ncube, (1995) then 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 husband pay maintenance for a wife he had never paid lobola for had no legal basis. With due respect, I acknowledge the 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 a starting point and everything else ends with law. The legal centralists argue that the law should be the law of the state, uniform for all persons, exclusive of other law and administered by a single set of institutions, Griffith, 1986 as quoted by Bentzon et al (1998). It becomes baffling to imagine that our law confines people into only two marriage genres failing to recognize that there are other types of a marriages and family forms that fall in-between 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 in their “husband’s” families as if a customary law union has been established. More often than not, when such unions breakdown most men begin to argue that there was no customary marriage when in fact were conducting themselves in a way that suggests as customary marriage has been conducted. 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 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 women 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 lobola being paid or registration and failing to acknowledge such unions is tantamount to discrimination because of marital status. The constitution of Zimbabwe under section 56 outlaws discrimination on the basis of marital status. The fact that women in such de facto unions have their property rights not protected under law is tantamount to discrimination.

The Constitution under Section 25 protects the family unit without specifying and defining what 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 and an alley of hope in that it allows for legal concepts of family to evolve to fit the social realities. There is room to expand the definition of family. There is a lot of stereotypical thinking about cohabitation. There is need to improve the legal framework to cover all types of marriage because of the economic condition we are in, people would desire to formalize their unions but lack the capacity. 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 the constitution under 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 center 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, 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 Center, (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. It neither unequivocally states that cohabitation unions are acceptable nor does it provide that they are not permitted, that is why people are involved in such arrangements .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 highlighted how women in cohabitation are discriminated 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, than pretending as if people are not cohabiting when in actual fact the bulk number 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 houses phenomenon” in Zimbabwe.As such, most women advocated for protection of property rights of women in cohabitation but

without attached to third persons i.e. small house network. Those in small house relationships cannot be afforded equal protection under 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 disadvantage 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 Ministry of Justice Legal and Parliamentary Affairs released a white paper with several amendments to marriage laws. To understand what had stalled the harmonization process and interrogate whether cohabitations unions were 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 harmonization of marriages in Zimbabwe. Since in Zimbabwe has a pluralistic marriage system, one can choose to cohabit or find herself in cohabitation due to reasons not of one’s making or choose unregistered customary law union ,registered customary marriage or to be in 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 statues assigned to the Ministry said they process just died a natural death but the fact that the marriages laws must be aligned to the constitution, then there is some hope that some of the battles will be addressed .She emphasized the fact the process must be started all over again because it died with the previous Minister of Justice

Honorable Chinamasa who earlier desired to engage with other ministers before the whole process would 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 through a telephonic interview who 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 addresses 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 law especially at sharing of property. She said that would be a good idea which can be looked at a later stage after we have managed to resuscitate the program. This would assist us to come up with proper legislation that would safe guard 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 ideas. Those who perceived cohabitation in the negative obviously did not concur with legal interventions. They insisted on people following the law and following Gods principles for instance one middle aged female Pastor when asked about the legal reforms said reforming the law could be a good idea but before we amend the law, it takes some awareness programmes to educate women on the different types of marriages and the consequences that follow. It would be important to improve on 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 such that these issues are given serious considerations. 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 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 of increasing their agency and turning them from being dependant to independent people? Women in cohabitation for longer periods can be superseded by other women who can just come become manipulative enough and obtain a marriage. And there is no where such women can go and have their rights protected. 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 as result, this becomes is clear indication that 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 the customary marriages that recognize polygamy. As a result, the law can never provide for solutions the law has limitations and this is where we need to use other alternative measures and strategies.

## CHAPTER 5

### 5.0. ASSESSMENT OF THE EMERGING ISSUES

#### 5.1. Lobola controversy: *who is saying what?*

Most of my respondents would end up discussing about the payment of lobola and how some think it is causing gender inequalities between men and women 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 it whilst women don't 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 off or gazzeted 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 the 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 modern generations want lobola scrapped.

The *Katekwe v Muchabaiwa* SC 87/ 84 declared lobola is no longer a legal requirement for marriage, but the Customary Marriages Act still has a provision that mandates the judicial officers to request for the payment of lobola before a marriage is registered, According to Marriages Act section 12,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 have been rendered obsolete and have fallen into disuse. Any person can virtually walk in 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 not a legal requirement anymore it has been granted such social controlling force and significance that it makes it so hard for people to attempt to register marriages without having it paid. Those people who have gained such courage to register in court without lobola having been paid are socially looked down upon and considered as being in cohabitation. Even when lobola is not recognized as part of the marriage contract, the practice of paying lobola remains tenacious and people continue to pay, 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 immeasurable 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 favor 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 hot debate such that some of my respondents would become too emotional. One Mrs. Maja had to say “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, but the men in response to this move said they will not accept such kind of assistance. He also talked of the “*Ben ten relationships*” where older women take advantage of younger men and cohabit because the older woman t wants sex and the younger man wants financial security. We need to define cohabitation as a marriage of convenience, both men and women who get into cohabitation have some benefits out of it, some seek social security or financial gain whilst some seek sexual pleasures. There is need to define the convenience before we lump all cohabitations in one group. These issues are circumstantial and we need to zoom on the degree of convenience. The “*Ben ten relationships*” just like the ‘small house saga’ are social ills that are pointing to the need relook at marriage.

## **5.2. Nexus between cohabitation child marriages and forced marriages**

When I started my research I thought people in cohabitation are majors are not forced to enter into such unions but do so upon 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 counseling sessions alleged that they are not interested in formalizing marriages or registering marriages because they would have entered in 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 marriage. 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 involves 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 said that they 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 such kind of life as it comes without any attachment. 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 getting 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 relationships sour, they just leave everything behind and move on with 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 has implied terms of the protection when the relationship breaks down. But 8 of the 19 men that I interviewed were against having the civil marriage certificate because they perceived it as empowering women more than men. Most men thought they would not benefit anything by having the 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 emphasize on the need to obtain the marriage certificate. Most men would prefer cohabitation to safeguard these privileges. They would to stay without legal attachments that come with the marriage certificate and would delay the formalization of the marriages by intent.

#### **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 contributes 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 6**

### **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 or Constitution on equality of all persons and non discrimination. Marriage and cohabitation create similar emotional contributions, dependences and complex issues of finance and property, Sinclair, (1996), therefore the legislature should devise a way of protecting both women and not that discriminate against the woman in a cohabitation union whilst affording some legal protection for the married woman. Dahl (1987) for instance suggested a three pronged feminist perspective to law where we do a critical analysis of existing law, identify areas of strong legal support, weak legal support and judicial voids and then suggest areas of reform. Law reform can bring immediate improvements to the 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 move away from using matrimonial law as the yardstick for cohabitation. It would be unrealistic and unfair to discriminate against the weaker partner to a cohabitation relationship on the basis that she should either have insisted on marriage or withdrawn from the relationship if all circumstances pointed to failure to formalize the union.

#### **6.2. Identifiable gaps in relation to policy, practice, theory, laws**

There is no clear law therefore there is need to come up with a law that works well in Zimbabwe. The approach currently being used lacks clarity, consistency and it heavily relies to judicial

discretion .This further contribute to the discrimination of women in cohabitation unions. It was also interesting to find out from the study that even though the law is now allowing women to register land in their own names such as residential stands they acquire through housing cooperatives, some women in cohabitation unions themselves are reluctant and instead opt to register in the husband's name. The women said if you want to safeguard your property rights the men will 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 affording it and opting out for cohabitation. The question is 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 tandem with today's reality?

### **6.3. Discussion of interventions**

#### **6.3.1. Test case litigation**

I acknowledge that my research has bordered 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 as was with the *Mudzuru and another v Ministry of Justice Legal and Parliamentary Affairs CC12/15* case cited above on child marriages, highlighting 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 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, will declare that women in cohabitation unions need to be protected as well under the law just like everyone else in Zimbabwe. 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. As highlighted earlier it is probably high time for 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 that woman in cohabitation unions are being discriminated against will further expose and discriminate women in such unions.

### **6.3.2. Legal reform: Alignment of legislation to the Constitution**

Since we adopted the new Constitution in Zimbabwe in 2013, the alignment process has been an on -going process. The Ministry of Justice Legal And Parliamentary Affairs which administers the marriage laws is mandated with tackling the alignment issues of such laws. It is our hope that the concerned Ministry will be able to resuscitate the harmonization process of the marriage laws that started many years back. It is also anticipated that the Ministry together with other interested stakeholders will be to extend this process to cohabitation unions that have been neglected by the legal framework for a long time and manage also to address the gender inequalities that exists in unions. My study has revealed that cohabitation unions have proved 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 of 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 of such disputes in our courts. Having done this research and in the light of other decided cases on cohabitation, it looks like 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 operationalise this. As I started my research, I thought this problem could be solved with 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 cohabitations unions, it seems like most men are never going to subscribe to monogamy so easily. This noticeable fact will pose a challenge for the legal drafters as well. Just as was with case of child marriages in Zimbabwe, it called for a constitutional challenge.

Variety of attitudes towards cohabitation is apparently going to persist but policy makers should not fail to pay no attention to the voice of increasing number of people which undoubtedly regard of the population which views cohabitation as one of society's repertoire of acceptable family types. This new form of family has developed as people respond creativity 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 the 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 comes along with side effects such as the following. There is a possibility of cultural and religious objections and resistance which will disrupt implementation. Never the less cohabitation is a lived reality and should be addressed. Protecting the rights of women in cohabitation has a potential of threatening the rights of women in formal marriages. However this cannot be sufficient enough to warrant denial of rights and protection of many people who are living within this family arrangement. People should be afforded rights to make choices through 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. Mandating such

persons to regularize their cohabitation will be cumbersome and impractical bearing in mind that they are already failing to formalize their relationships because of financial constraints and lack of an appreciation of the laws on marriage. Recognition of cohabitation should be safeguarded against abuse by some women who might become serial cohabitants just to obtain properties and assets from different men.<sup>3</sup>

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

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## APPENDICES

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

Human right element	International convention
<ul style="list-style-type: none"> <li>❖ Women and men are equal before the law and have the right to equal protection and benefit of the law.</li> <li>❖ Equal protection of the law and effective protection against discrimination.</li> </ul>	UDHR article 7,10 ACHPR article 2, 7 women's protocol 8 ICCPR article 2(3) and article 26 ICESR article 2 and 3 CEDAW article 2
<ul style="list-style-type: none"> <li>❖ States to provide for appropriate remedies to women whose rights contained in the protocol have been infringed</li> </ul>	Maputo protocol article 25
<ul style="list-style-type: none"> <li>❖ Effective remedy by the national tribunals for acts violating fundamental rights in the constitution</li> </ul>	UDHR article 8
<ul style="list-style-type: none"> <li>❖ States condemning discrimination against women in all its forms</li> </ul>	UDHR article 2 CEDAW article 2 Maputo protocol article 2(1)
<ul style="list-style-type: none"> <li>❖ State parties to eliminate Discrimination against women regarding marriage and family relations</li> </ul>	CEDAW article 16(1) Maputo protocol Article 6 (c):
<ul style="list-style-type: none"> <li>❖ States to adopt measures to ensure that women and men enjoy equal rights in marriage and regarded as equal partners in marriage and equitable distribution of property at separation</li> </ul>	SADC protocol on gender, Art 8(3)(b) Women's Protocol article 7 (d) ICCPR article 23 of the
<ul style="list-style-type: none"> <li>❖ States to protection of the family unit</li> </ul>	African Charter article 18(3) ICCPR article 23 of the
<ul style="list-style-type: none"> <li>❖ Protection and promotion of rights of women in polygamous unions</li> </ul>	Maputo protocol Article 6 (c)