

AN INTERROGATION OF THE LAW RELATING TO COHABITATION IN ZIMBABWE AND THE NEED FOR LAW REFORM¹

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ABSTRACT

This article specifically interrogates the extent to which the continued lack of recognition of cohabitation relationships under Zimbabwean law has resulted in disproportionate gendered impacts on women involved in such relationships. Yet in all fairness and to a large extent, a cohabitation relationship performs the same function as that of a legally recognised marriage. It argues that the non-recognition is discriminatory and violates section 56(1) of the Constitution of Zimbabwe. The article builds a case on the need for law reform of marriage laws in Zimbabwe that takes into account international best practice.

Key words: Cohabitation, property, marriage, equality, non-discrimination

INTRODUCTION

There is no legal definition of cohabitation in Zimbabwe nor are there specific laws governing such relationships. A contextual definition of the term has been adopted for purposes of this article. Cohabitation is whereby “two adults live together in a relationship resembling a marriage in some key respects, without being married” either under civil or customary law⁴. The family is traditionally created by virtue

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⁴ Hubbard et al, *A Family Affair :The Status of Cohabitation in Namibia and Recommendations for Law Reform* (2010) Hubbard et al (Legal Assistance Centre)

of a marriage acknowledged through a ceremony of payment of lobola (bride wealth) or exchange of marriage vows in a court of law or at church. For a cohabitation relationship to exist; there neither would have been any payment of lobola nor marriage in court. Consequently in the eyes of the law the couple is viewed as merely cohabiting; more like two unrelated people sharing a house. Traditionally under Shona customary law, this is widely known as “kuchaya mapoto” or “kutizira”.⁵ Public policy therefore seems to militate against such relationships⁶ with the law offering limited protection to cohabiters during the subsistence of the relationship as well as at its dissolution. Yet in all fairness and to a large extent, a cohabitation relationship performs the same function as that of a legally recognised marriage.

2. BACKGROUND

Zimbabwe is a democratic society⁷ which is founded on respect for values and principles which include the recognition of equality of all human beings as well as non-discrimination.⁸ Hence all persons have a right to equal protection and benefit of the law⁹ and the right not to be treated in an unfairly discriminatory manner on the basis of their social status.¹⁰ It is against this background that one notes the need for legal recognition of cohabitation relationships in Zimbabwe. Whilst the subject remains contentious especially regarding whether non-recognition of cohabitation “is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”¹¹ or whether it is in the interests of public morality¹², it is submitted that an approach taken in *Karambakuwa v Mabaya*¹³ is more encompassing vis-à-vis the rights and situation of cohabitants in Zimbabwe.

From an international perspective, there has been in some jurisdictions acceptance and legal recognition of family forms that are different

⁵ Literally translated to “beating of pots” or “eloping”

⁶ Chirawu Slyvia, *Family Law in Zimbabwe Student Notes* (unpublished, 2016) pg 47

⁷ section 1 of the Constitution of Zimbabwe, 2013

⁸ section 3(1)(f) & section 56 (1)

⁹ section 56(1)

¹⁰ section 56(3)

¹¹ section 86(2)

¹² section 86(2)(b)

¹³ An unreported Supreme Court case no. 158/89 where a cohabitation relationship was given legal recognition

from marriage. One of the most progressive jurisdictions which recognise cohabitation is Norway which provides a framework of laws protecting such relationships. Tanzania also recognises cohabitation. It is an inarguable fact that cohabitation has become more normative and has attained significant similarity to marriages when viewed from legal and economic perspectives. This calls for law reform which will enable the de jure status to adjust and/or conform to social realities on the ground as emphasized in *Zimnat Insurance Company Limited v Chawanda*¹⁴ where it was stated that law in a developing country cannot afford to remain static but must be dynamic and accommodating to change. Law must adapt itself to fluid socio-economic norms and values as well as evolving views of justice. A key question has been what has been the basis for arguing in favour of or against the recognition of cohabitation as a marriage worthy of legal recognition?

1. ARGUMENTS ADVANCED FOR AND AGAINST THE LEGAL RECOGNITION OF COHABITATION RELATIONSHIPS

1.1. The Argument in Favour of Recognition of Cohabitation Relationships

The legal recognition of cohabitation relationships has been an area of heated debate with various scholars advocating for the protection of vulnerable partners of such relations while others strongly argue against such protection. H.R Hahlo¹⁵ states that "the fundamental objection to placing a common-law marriage on the same or nearly the same legal footing as a legal marriage is that as long as marriage is retained as a legal institution couples who do not choose to avail themselves of it but prefer to 'shack up' make a deliberate choice. This has been largely referred to as autonomy of the individual, freedom of choice. In other words, it is not the right of lawmakers to dictate to persons (who have chosen not to marry) that consequences flowing from marriage will attach to their relationship. A person who chooses not to marry therefore cannot claim spousal benefits.

The only justification Hahlo gives for recognition of cohabitation relationships is compassion for the woman who is usually the one who pays for attaching to a cohabitation union the consequences of a legal marriage. Research however, reveals that not all cohabitation

¹⁴ 1990 (2) ZLR 143(S)

¹⁵ *The South African Law of Husband and Wife* 5th edition (1985)

relationships are by choice for example some cannot afford to pay the traditional bride price, some live together as a prelude to marriage, often while they are saving for the expenses attendant upon marriage. Some are precluded by family reasons such as forbidden interracial or interreligious marriages. Alternatively some parties who genuinely want to marry cannot obtain a divorce from their existing spouse¹⁶ thus the choice argument seems misplaced.

Another argument advanced against legal recognition of cohabitation relationships is that, the marriage institution loses its sanctity and significance as recognition of such relationships protects persons who undermine the very essence of the marriage institution. This is evidenced by the existence of “mistress-patron” affairs. This seems to be a public policy consideration based on preventing immorality. However D. Singh¹⁷ distinguishes between a cohabitant and a mistress. A female cohabitant is defined as one who is in a relationship and cohabits in the same household as a male partner whilst the “mistress-patron” relationship carries clear connotations of a deliberate variation of the monogamous ideal because the mistress appears to coexist with her lover’s spouse “in a form of quasi-polygamy, which activity undermines the conventional marriage.”¹⁸ Permanent and stable relationships or partnerships should therefore be distinguished from those of intermittent character.

J.D. Sinclair¹⁹ states that;

...a better argument for intervention is that the only thing that distinguishes marriage from cohabitation is a piece of paper that testifies to its existence. An undeniable similarity exists between a recognised marriage and a cohabitation relationship. The nature of the human relationship is ubiquitously identical, children are often the result, and women are notoriously left financially at risk when the relationship fails...Marriage and cohabitation create similar emotional involvements, dependencies and complex issues of finance and property.

¹⁶ Johnson v Johnson [1982] 12 Fam Law 116 cited in D Bloy *Family Law* (1995) pg 162

¹⁷ Divya Singh “Cohabitation relationships revisited: Is it not time for acceptance? (1996) Volume 29, Issue 3, Comparative and International Law Journal of Southern Africa

¹⁸ *ibid*

¹⁹ *The Law of Marriage*, Vol.1, 1996

In essence cohabitants face the same practical problems as their married counterparts with whom any children should live and encounter property and financial matters and possibly some element of domestic violence or molestation.²⁰ To that end cohabitants need legal protection.

Sinclair notes two attitudinal perspectives to the legal protection of cohabitation, one restrictive and the other realistic. On one hand the question asked is whether cohabitation per se deserves special protection by the law? On the other hand is the pertinent question based on reality, that is, whether the victims of breakdown of intimate relationships deserve special legal protection? The answer to the latter is in the affirmative. One should not look so much as to whether on face value cohabitation deserves legal protection but at the victims of the breakdown of the relationship.

1.2. Challenges Associated with Non-recognition of Cohabitation Relationships

The current family laws perpetuate discrimination and stigmatization of cohabitants as legal status and benefits resulting from marriage are the sole privilege of married couples. It can be argued that this tramples upon the rights firmly entrenched in the Zimbabwean Constitution namely the right to equal benefit and protection of the law and the right to non-discrimination. Non-intervention in the context of cohabitation manifests a choice to allow substantial suffering to continue unalleviated²¹. The economically weaker partner is always at the mercy of the stronger partner.

The law becomes retrogressive as it fails to fulfil its purpose of adjusting to social changes in the lives of society. Thus it has been said that by assuming that families always arise out of marriage and using marriage as its point of departure, the law lags behind social change.²² Hence the criticisms which have been levelled against the contemporary analysis of the family in Africa are premised on its tendency to define the family in terms of marriage²³ with many African law systems rarely making any provision for the rights of women who

²⁰ D. Bloy *Family Law* (1995)

²¹ Sinclair *supra*

²² Amstrong. A et al, *Uncovering Reality: Excavating Women's Rights in African Family Law*, WLSA

²³ *ibid* pg 57

are not formally married²⁴ yet the concept of a family is not cast in stone but covers a wide range of relationships which include cohabitation relationships.

2. THE LEGAL STATUS OF COHABITATION RELATIONSHIPS IN ZIMBABWE: A BRIEF OVERVIEW OF THE DOMESTIC LEGAL FRAMEWORK

2.1. Introduction

According to Hahlo (*supra*), a cohabitation relationship is neither a legal marriage nor does it ripen into one by the lapse of time. Consequently, a cohabitation relationship generally lacks a clearly determined legal status and there are no specific laws which are suited to govern this type of relationship. Resultantly cohabitants suffer certain vulnerabilities. To ascertain the legal standing of cohabitation relationships in Zimbabwe, in this paper a cohabitation relationship is contrasted with marriage. The main argument here is that; if only a piece of paper distinguishes marriage from cohabitation, is the lack of such paper by cohabitants enough justification to deny them the legal benefits and protection enjoyed by spouses in a marriage? To reach an informed conclusion, specific legal aspects that affect cohabitants in Zimbabwe are explored with the key aim of revealing the vulnerabilities that cohabitants encounter in each different aspect discussed.

2.2. Cohabitation and the Law in Zimbabwe

Due to its colonial history, Zimbabwe has a dualist legal system whereby general law (comprised of received laws and statutory law) operates side by side with customary law.²⁵ Coupled with other influences from all over the world emanating from globalization, this has brought about a legal pluralist environment. Ultimately this has meant that common law, customary law and people's customs and practices²⁶ have been accepted as applicable sources of law.²⁷ There exists a potential conflict of laws applicable to a particular situation regarding whether it is general law or customary law that should apply. Traditionally a choice of law criterion has been adopted to determine the applicable system

²⁴ Ibid

²⁵ Section 192 of Constitution

²⁶ As long as they are positive cultural norms

²⁷ S. Chirawu, G.Murungu et al, *Challenging the Status Quo-Gender, HIV/AIDS and the Law in Zimbabwe: A Rights-based Approach*, (2007) WLSA

of law. However the 2013 Zimbabwean Constitution has had the effect of overriding some customary law choices which perpetuated gender inequality as they tended to be discriminatory against certain groups of people particularly women as based on gender.

Section 3 of the Customary Law and Local Courts Act²⁸ provides guidelines on the law to be applied in a given situation. Unless the justice of the case otherwise requires, customary law applies in any civil case where the parties have expressly agreed that it should apply; or regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. In all other cases, the general law of Zimbabwe is applicable. Surrounding circumstances in relation to a case include the mode of life of the parties; the subject matter of the case; the understanding by the parties of the provisions of customary law or the general law of Zimbabwe and the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe.

In *Mabaudi v Mhora*²⁹ it was stated that customary law cannot be applied to a cohabitation union. The parties in *casu* did not have a customary union, which is the only recognized type of union under customary law. The court held that general law could not be applied as there was no cause of action pleaded based on general law and none seemed to be applicable to the particulars of claim set out. It follows that the applicable law to a cohabitation relationship is general law but a party must specifically plead a recognized cause of action such as mounting an action based on tacit universal partnership or unjust enrichment.

Despite its growing contribution to the family setup, there is no clear legal framework governing cohabitation in Zimbabwe. The complete framework of legislation governing family law is not designed to cater for cohabitants but “spouses” and to a limited extent unregistered customary law unions which have always been distinguished by the payment of *lobola* or bride-wealth. The distinction between an unregistered customary law union and cohabitation seems to have fallen away as the payment of *lobola* no longer is an essential element

²⁸ [Chapter 7:05]

²⁹ (HH) unreported case no 60/11

under customary law as enunciated in *Katekwe v Muchabaiwa*³⁰ and *Karambakhwa v Mabaya* (*supra*).

Whilst there are mechanisms in place that can be invoked by cohabiting couples³¹, the current laws are not designed to cater for cohabitants as they are inadequate to most cohabiting situations. These mechanisms do not automatically apply but rather have to be specifically pleaded and proven. Cohabitants therefore remain vulnerable as they do not have a clearly determined legal status. As a result, the personal and proprietary consequences of cohabitation remain unclear in several legal scenarios that include (i) claims for adultery damages; (ii) sharing of property; (iii) intestate succession rights, and (iv) maintenance during the subsistence of the cohabitation and after its dissolution, to mention but a few.

Case law exposes the vulnerability of cohabitants. In a fairly recent case, *Nyamukusa v Maswera*³² where an applicant sought distribution of property acquired during her cohabitation relationship with the defendant and customary union thereafter; the court clearly distinguished the entitlements of a cohabitant to that of a spouse of a registered marriage, the latter being in a better and more advantaged position than the former;

She seems to be mistaking her entitlements to those of a wife under a registered marriage as provided for in terms of the Matrimonial Causes Act [Chapter 5:13]. She seems to forget that her claim is based on tacit universal partnership and/or unjust enrichment.

Therefore the law as it stands provides no assistance to cohabitants, especially women who are unable to assert their proprietary rights and are then left with only what their partner chooses to give them.

2.2.1. *Relevant Constitutional and Legislative Provisions*

As indicated earlier, in Zimbabwe there is no piece of legislation that specifically governs cohabitation relationships. The basic Statutes or Acts that provide for family protection by the State only recognise formal marriages and give rights to spouses within a formal marriage

³⁰ 1984(2)ZLR112(S)

³¹ such as mounting an action based on tacit universal partnership or unjust enrichment

³² (HH) unreported case no 35/16 of 14 December 2015

to the exclusion of cohabitants. The spouse-centred pieces of legislation that have provisions governing family relations in Zimbabwe to the exclusion of cohabitants include (i) Administration of Estates Act [*Chapter 6:01*], (ii) Civil Evidence Act [*Chapter 8:01*], (iii) Criminal Procedure and Evidence Act [*Chapter 9:07*], (iv) Customary Marriages Act [*Chapter 5:07*], (iii) Deceased Estates Succession Act [*Chapter 6:02*], (iv) Maintenance Act [*Chapter 5:09*] and (v) the Matrimonial Causes Act [*Chapter 5:13*]. Further to that, the types of marriages recognized in Zimbabwe are (i) the civil marriage contracted in terms of the Marriage Act [*Chapter 5:11*] which is monogamous; (ii) the registered customary law marriage in terms of the Customary Marriages Act [*Chapter 5:07*] which is potentially polygamous; and, (iii) to a limited extent an unregistered customary law union which is valid only for purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of children born of such marriage.³³

THE CONSTITUTION OF ZIMBABWE, 2013

Section 56(3) of the Constitution of Zimbabwe, 2013 provides that every person has the right not to be treated in an unfairly discriminatory manner on such grounds as include social status. It is submitted that non recognition in the context of cohabitation deprives cohabitants of the right to non-discrimination and the right to equal benefit and protection of the law as per section 56(1) of the Constitution. Every person must be given equal moral worth and systematic inequality and disadvantage must be eradicated by actively promoting substantive equality.

Section 46(c) of the Zimbabwean Constitution further states that a court, tribunal, forum or body must take into account international law and all treaties and conventions in which Zimbabwe is a party. Zimbabwe is a signatory to treaties which include the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (Maputo Protocol), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognise the fundamental rights to equality and non-discrimination and further recognise different family forms. Section 326(2) of the Constitution

³³ Section 3(5) of the Customary Marriages Act [*Chapter 5:07*]

of Zimbabwe also provides that when interpreting legislation, courts and tribunals must adopt reasonable interpretation of legislation which is consistent with customary international law applicable to Zimbabwe. Thus the judiciary has a key role to play in protecting the family in line with customary international law.

2.2.2. *Statutory Provisions that Relate to Specific Areas of Marriage Law*

1. Property Distribution

There are no special rules governing property distribution between cohabitants upon breakdown of the relationship³⁴. Whilst distribution of property upon divorce in marriage is governed by the Matrimonial Causes Act³⁵, which addresses the mischief of injustice in distribution of property upon divorce by providing equitable principles, the Act does not apply to cohabitants³⁶. A good example is section 7(4) (g) of the Act³⁷ which requires courts to place divorcing spouses and children in the position they would have been in had a normal marriage relationship continued between them. Section 7(4) (e) also recognises the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties, which provisions do not apply to cohabitants.

Since a cohabitant cannot invoke the protective and adjustable measures available to spouses; he or she is vulnerable when the relationship ends. In a situation whereby property accrued during the existence of the relationship is registered in the name of one partner, that partner in whose name the property is registered is the sole owner. The common practice has been for the aggrieved cohabitant to seek remedy through proving their contribution in the cohabitation relationship. This is achieved through establishing the existence of a tacit universal partnership or alternatively claiming unjust enrichment against the unjustly enriched partner so as to achieve a fair distribution

³⁴ The principles of sharing matrimonial property upon divorce namely "his", "hers" and "theirs" as put out in *Takapfuma v Takapfuma 1994(2)ZLR103* may not apply to a cohabitation relationship

³⁵ [Chapter 5:13]

³⁶ Section 2 of the Act defines "marriage" to include a marriage solemnized in terms of the Customary Marriages Act [Chapter 5:07]

³⁷ Matrimonial Causes Act [Chapter 5:13]

of property. However recourse to these legal solutions is not automatic as outlined in statutory law. Rather one has to locate remedies within the law of contract and the general law of property.

1.1. Tacit Universal Partnership

This is an alternative remedy available to a cohabitant based on the Roman Dutch law of partnership, the *societas unversorum quat ex quaestu veniunt*³⁸ where parties agree that all they may acquire during the existence of the partnership from every kind of commercial undertaking; shall be partnership property³⁹. This specifically means that as partners entered into a universal partnership, through their conduct and joint endeavour, they jointly acquired and now own property under discussion for their joint use and benefit.

The principle of tacit universal partnership was discussed at length in the case of *Masimbe v Mungofa*.⁴⁰ Referring to *D v Wet N.O.*⁴¹ and *Ally v Dinath*⁴² the court held that there is no obstacle to a woman who has lived with a man, as man and wife for a long time bringing this type of action, namely the tacit universal partnership. However, the cohabitant alleging the existence of such partnership has to fulfil certain requirements before property can be equitably distributed between the parties. In *Nyamukusa v Maswera* (supra) the court reiterated the requirements for a tacit universal partnership spelt out in *Mtuda v Ndudzo*⁴³ as follows:

- a) Each of the partners must bring something into the partnership or must bind himself or herself to bring something into it, whether money or labour or skill;
- b) The business to be carried out should be for the joint benefit of the parties;
- c) The object of the business should be to make a profit; and
- d) The agreement should be a legitimate one.

In addition, the intention of the parties to operate as a partnership is also an important consideration. All these requirements must be met prior to the finding of a relationship as a tacit universal partnership.

³⁸ A Latin expression literally translated to mean, "dazzled as they come from the income of a society for all"

³⁹ *Butters v Mncora* 2014(3)All SA 259 (SCA)

⁴⁰ HH-96-94

⁴¹ 1953(1) SA 612

⁴² 1984(2)SA 451(TPD)

⁴³ 2001(1) ZLR 710 (H)@p176 F-G

Sinclair⁴⁴ points out the problems associated with the use of this legal concept. Proving existence of a tacit universal partnership is difficult since reliance is on an implied contract. Cohabitants seldom enter into written agreements, making it difficult to prove the terms and conditions of the implied partnership. This is more so when one considers that in these cases oral evidence is largely used. The situation is different if there is a contract present whose details and contents are spelt out with clarity in terms of frameworks used for the sharing of property and regulation of affairs. Unfortunately, most partners who cohabit seldom enter into written universal partnerships. The majority of cohabitants find themselves in a predicament when the relationship ends as they are left without anything of note.

1.1. *Unjust Enrichment Action*

This is the other alternative route available to a cohabitant who wants to claim equitable distribution of property upon breakdown of a relationship in the courts of law. The requirements for an action for unjust enrichment were laid out in *Industrial Equity v Walker*⁴⁵. This concept entails that the plaintiff has to prove contribution which if not shared equally will leave the defendant unjustly enriched at the plaintiff's expense as stated in *Nyamukusa v Maswera*⁴⁶. The requisites to be met are;

- a) The defendant must be enriched;
- b) The plaintiff must have been impoverished by the enrichment of the defendant;
- c) The enrichment must be unjustified;
- d) The enrichment must not come within the scope of one of the classical enrichment actions;
- e) There must be no positive rule of law which refuses an action to the impoverished person.

This was successfully applied for in *Goncalves v Rodrigues*.⁴⁷ The court stated that it is a generic conception of the composite event which gives rise to a claim for restitution. In *casu* after concluding that all requisites had been proved to its satisfaction, the court ordered the defendant to pay the plaintiff an amount equivalent to fifty-per centum

⁴⁴ supra

⁴⁵ 1996(1) ZLR 269(H)

⁴⁶ HH-35-16

⁴⁷ (HH) unreported case no 197/03 of 7 January 2002 & 11 February 2004

of present nature of the immovable property or in default of doing so the property would be sold to the best advantage and the net proceeds divided equally between the parties.

Although these equitable doctrines work in favour of vulnerable cohabitants, at most all they do is merely alleviate the situation of cohabitants. In the majority of cases, cohabitants still suffer vulnerabilities that emanate from the stringent requisites which are often difficult to prove and inevitably lead to inequitable distribution of assets. Family law consequences ought to flow automatically from a cohabitation relationship that is stable and permanent, founded by two parties with the intention to found a family.

1.1. Maintenance

Maintenance has been defined as payment of money or material support that a person may be ordered by a court to pay so as to provide support of his or her dependants⁴⁸. Whilst partners to a civil marriage in terms of the Civil Marriages Act⁴⁹ and Customary Marriages Act⁵⁰ can claim maintenance from their spouses by virtue of a fully recognised legal marriage in which either party is obliged to maintain the other, this does not apply to cohabitants. There is no reciprocal duty of support between cohabitants during the relationship or after its termination by death or otherwise⁵¹. The Maintenance Act⁵² at most acknowledges maintenance of spouses under customary law that is those in unregistered customary law unions to the exclusion of cohabitants. Section 6(3) states that husbands and wives under customary law are primarily responsible for each other's maintenance. Since cohabitation is unknown under customary law, the legal entitlement is not extended to cohabitants. Cohabitants may only claim maintenance from their partners for their children but not for themselves. This is so because maintenance laws do not distinguish in as far as the maintenance of children is concerned.

It is argued however that if need is the determinant factor in awarding maintenance then it should not be a challenge to use the same

⁴⁸ J. Win & L.O. Veneklasen t al, *Family Laws Customs and Practices in Zimbabwe* pg 99

⁴⁹. [Chapter 5:11]

⁵⁰. [Chapter 5:07]

⁵¹ Sinclair supra

⁵² [Chapter 5:09]

approach for cohabitation relationships. This is because cohabitation relationships are normally dependency-producing ones and as such logic demands that maintenance be awarded to the partner who is in more need of such maintenance once it is established that the cohabitation union was akin to marriage. Whilst the law does not provide for such, the factual reality is that there is indeed reciprocal maintenance between cohabitants who live as husband and wife during the existence of the relationship which must not terminate with the dissolution of the relationship.

1.1.1. Opportunities for Change

The case of *Karambakuhwa v Mabaya (supra)* has provided a window of hope for law reform vis-à-vis maintenance for former cohabitants. In *casu* the parties had cohabited in a union which was neither registered in terms of status nor had lobola or roora (bridewealth) been paid to the woman's family. The woman's claim for maintenance was countered by the husband based on the assertion that he was not legally liable to maintain her as he was a mere 'seducer'. It was alleged that since he had not paid nor promised to pay any roora for the woman cohabitant, he was a mere seducer and therefore he was not legally liable to maintain her.

The court referred to the *Katekwe versus Muchabaiwa* case⁵³ and stated that it is settled law that the question of roora is no longer an essential element of marriage under customary law.⁵⁴ The question of roora was completely disregarded in determining whether the respondent's relationship with the appellant amounted to a customary union for purposes of the Maintenance Act. The adduced evidence pointed to the fact that the respondent had been accepted as a daughter-in law according to custom. Further to that, the union between the appellant and the respondent, viewed as that expected of a "husband and wife," was characterized by reasonable stability similar to many registered marriages. By looking at the functional similarity between marriage and cohabitation, the court thus discarded the allegedly cast in stone approach which makes registration the only determinant factor in establishing a marriage relationship.

⁵³ *supra*

⁵⁴ The court in *Hosho v Hassisi (HH)* unreported judgement no. 491/15 took a different view stating that lobola remains the most cogent and valued proof and indication of a customary union.

1.2. Insurance Claims and other Claims for Loss of Support

There being no reciprocal duty of support between cohabitants, it follows therefore that a cohabitant cannot make a claim for damages for loss of support after the death of his or her partner. If a cohabitant who is the bread winner and sole provider dies, the surviving partner cannot claim damages for loss of support due to him or her against the third party who has unlawfully caused the death of the breadwinner. This position governing cohabitation relationships is however different from that which previously has been adopted for unregistered customary law unions, the most popular example being the case of *Chawanda v Zimnat Limited* (supra) where it was stated that one can successfully institute a claim for loss of support arising from the unlawful killing of their breadwinner to whom they were married in terms of an unregistered customary law union.

In the absence of any significant uniform approach to the determination of cases emanating from cohabitants and those in unregistered customary law unions, dependent cohabitants have therefore continued to suffer untold hardships as they are often left unsupported financially when their partners who are principal breadwinners substantially contributing to their welfare die or neglect to maintain them during the existence of the relationship.

1.3. Evidence and Marital Privilege for Cohabitants

Marital privilege which protects communications between spouses from being divulged in a court of law does not extend to cohabitants since the privilege attaches to a legally recognised marital union. A cohabitant is therefore a compellable witness and can be compelled by a court of law to testify against his or her partner. Being called as a witness for or against a partner in both civil and criminal proceedings is socially undesirable as it disturbs harmony between the parties and is harsh on the partner compelled to give evidence. Yet the confidences exchanged between cohabitants are equally as intimate and confidential as that of a married couple⁵⁵ entitling such to the same protection as that of a husband and wife.

Of particular relevance to this aspect is the Civil Evidence Act [Chapter 8:01]. Section 6 of the Act addresses competence and compellability of witnesses in civil matters. Subsection 3 of Section 6 states that no

⁵⁵ Bromley supra

person shall be compelled to disclose any communication, whether oral or in writing, made by him to his spouse or made to him by his spouse during their marriage. This applies whether or not the marriage has been subsequently terminated by death or dissolved or annulled by order of a court⁵⁶. Such privilege however may not extend to cohabitants as they are not encompassed in the definition of a spouse in the Act.

Under Section 247 of the Criminal Procedure and Evidence (C.P. & E) Act [Chapter 9:07] or Criminal Code, the wife or husband of an accused person is not compellable to give evidence against his or her spouse (unless the crime is a grievous offence which in itself undermines the marriage institution). These include rape; aggravated indecent assault; sexual intercourse or performing an indecent act with a young person; sexual intercourse within a prohibited degree of relationship; kidnapping or unlawful detention of a child; bigamy and perjury. The wife or husband of an accused person is a competent witness, but is not compellable, to give evidence for the prosecution without the consent of the accused person where such person is prosecuted for an offence against the separate property of the wife or husband of the accused person⁵⁷. All these provisions seem to exclude cohabitants. This means that if a cohabitation relationship breaks down, a bitter and vindictive partner may break confidences and broadcast information imparted and received on the shared understanding that it would not go further. Familial harmony is thus undermined and trampled upon.

1.4. Intestate Succession and Matters to do with Inheritance

Cohabitants do not have automatic intestate succession rights. Unlike spouses within a formal marriage, cohabitants can only benefit from the estate of a deceased partner through testate succession. Laws of intestate succession do not encompass cohabitants. Hence if a partner dies without a valid will, there is no legal protection if the property in question is not registered in both the name of the deceased partner and/or the surviving partner. Absence of a valid will in favour of the surviving spouse therefore has dire consequences for the surviving partner because if a partner dies without a valid will there is no protection offered by the law.

⁵⁶ section (6)4

⁵⁷ section 247(3)

1.5. Entitlements in Respect of the Matrimonial Home

Unlike a spouse, a cohabitant holds no statutory right to occupy the quasi-matrimonial home, but is entitled to remain in it only as an owner or licensee. Section 3A of the *Deceased Estates Succession Act [Chapter 6:02]* provides that inheritance of the matrimonial home and household effects is vested in the surviving spouse. A cohabitant who is not the owner or lessee of the property has no special right to occupy the common home. This arises from the fact that for a cohabitant to then acquire the house; he or she must prove contribution or joint ownership. Difficulties in proving this exposes the surviving cohabitant not only to being evicted but also to property grabbing by relatives of a deceased partner.

1.6. Adultery

Adultery occurs when sexual intercourse is engaged in by two people whereby one of the parties or both are married to someone else at the time the act of sexual intercourse took place. Consequently, adultery damages are intended to compensate an innocent spouse for the injury inflicted upon him or her by the defendant who has had sexual relations with his or her spouse and also for the loss of consortium the plaintiff may have suffered by reason of the withdrawal of the comfort, society, love, companionship and assistance his or her spouse was providing⁵⁸. In *Njodzi v Matione*⁵⁹ it was held that adultery is an injury occasioned to the innocent spouse because of the adulterous relationship. In that regard, the injured spouse can recover damages for loss of a spouse's consortium as well as any patrimonial loss suffered and also personal injury or *contumelia* suffered by them, inclusive of loss of comfort, society and services.

Adultery has been discussed at length in the context of registered marriages as well as unregistered customary law unions but not in the context of cohabitation. In *Mukono v Gwenzi*⁶⁰, it was held that a woman married in accordance with custom and whose marriage is registered under the Customary Marriages Act [Chapter 5:07] cannot claim damages against a woman who has committed adultery with her spouse. This is so because the customary marriage under the said

⁵⁸ Ncube W, (1989) *Family Law in Zimbabwe* pg54 para3

⁵⁹ (HH) unreported case no.37/16

⁶⁰ 1991(1) ZLR 119

Act is potentially polygamous whereas a marriage under the Marriage Act⁶¹ is monogamous. In *Carmichael v Moyo*⁶² it was held that a husband in an unregistered customary law union has a legal right to sue in a court administering customary law for adultery committed with his spouse.

These personal consequences of marriage do not attach to cohabitation relationships. A cohabitant cannot institute an action for adultery damages against a third party who has engaged in sexual intercourse with his or her partner. This would seem to suggest that in the absence of a legally recognised marriage, no wrong is done since cohabitants are deemed to be free to engage in sexual relations with other parties without any consequence which obviously is not always the case. It is argued however that once a cohabitation relationship is established, the justice of the case would demand that in the event that one of the cohabiting partners is unfaithful and has sexual intercourse with a third party, the innocent partner must be awarded damages for the wrong done. This is because except for lack of registration, for all intents and purposes a cohabitation relationship is akin to marriage. One can actually compare the situation to the consequences that arise when parties breach a verbal or written contract with similar terms.

3. MARRIAGE UNDER THE INTERNATIONAL LEGAL FRAMEWORK

3.1. *The Recognition of Cohabitation as an Emerging Family Form*

It has always been one of the key arguments by researchers on the family, the most popular being Engels,⁶³ that from time immemorial the family as a social unit has been in a continuously evolving state. A popular adage that has consequently emerged is that “*the family is*

⁶¹ [Chapter 5:11]

⁶² 1994 (2) ZLR 176

⁶³ Engels in “Origins of the Family, Private Property & the State” Available at: <https://readingfromtheleft.com/PDF/EngelsOrigin.pdf> last accessed 08/30/2018

in a state of continuity and change."⁶⁴ Engels⁶⁵ cites from Lewis H. Morgan's 1877 book,⁶⁶ where he states;

...when the fact is accepted that the family has passed through four successive forms, and is now in a fifth, the question at once arises whether this form can be permanent in the future. The only answer that can be given is that it must advance as society advances, and change as society changes, even as it has done in the past. It is the creation of the social system, and will reflect its culture. As the monogamian family has improved greatly since the commencement of civilisation, and very sensibly in modern times, it is at least supposable that it is capable of still further improvement until the equality of the sexes is attained. Should the monogamian family in the distant future fail to answer the requirements of society it is impossible to predict the nature of its successor.

It has been the case that in other jurisdictions of the world especially Scandinavian countries (as discussed later in this article), cohabitation has been recognized as an emerging form of a marriage relationship despite its lack of some of the formalities currently viewed as essential for its validity e.g. registration.

3.2. Identifying the Cohabitation Relationship as Constituting a Family Social Unit

P.M. Bromley⁶⁷ defines a family as a basic social unit constituted by at least two people whose relationship may fall into one of three categories. The first one being husband and wife or "two persons living together in a manner similar to spouses." The current laws however are stagnant and seem not to embrace the fact that a cohabitation relationship is an undeniable family form. The argument here is that cognisance must be taken of this unique social phenomenon as deserving of legal protection similar to the conventional marriage.

⁶⁴ Since Welshman Ncube's 1997 publication entitled, "*Continuity and Change: The Family in Zimbabwe*" under the WILSA flagship, many other publications on the evolving nature of the family have emerged and flooded the internet.

⁶⁵ Ibid; See page 85

⁶⁶ L.H. Morgan, *Ancient Society, or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization*, 1877 available at: <http://www.gutenberg.org/files/45950/45950-h/45950-h.htm> or <https://www.marxists.org/reference/archive/morgan-lewis/ancient-society/index.htm> [last accessed 10 September, 2018]

⁶⁷ P.M. Bromley and N.V. Lowe, *Bromley's Family Law* 8th edition, 1992, pg 3

Following on that a key question arises, which is whether either registration of a marriage or intention to found a family is the yardstick of determining the validity of such relationships? If it is established that the manner in which parties to a cohabitation relationship lived together and that their intention thereof was to found a family, is it justifiable to deny the parties legal recognition and protection? It is hereby argued that cohabitants ought to be legally protected if it is established that they fit into the description of a family unit.

3.2.1. Taking a Human Rights-based Approach to Recognizing Cohabitation Relationships as Family Units

A rights based approach to development has been described as “a conceptual framework for the process of human development normatively based on international human rights standards and operationally directed to promoting and protecting human rights”⁶⁸ It integrates the norms, standards and principles of the international human rights into the plans, policies and processes of development. The rights based approach does not describe situations simply in terms of human needs, or development requirements but further looks at the society’s obligations to respond to inalienable rights of individuals⁶⁹. People are thus empowered to demand justice as a right and it gives a moral basis from which to claim international assistance where needed.⁷⁰

Human rights are rights that accrue to a person simply by virtue of being human and are independent of any acts of law⁷¹. A salient human right is protection from discrimination and it is hereby argued that non recognition of cohabitation as a family form indeed discriminates between married and unmarried couples and amounts to unfair discrimination. Taking an approach that is human rights based effectively demands the establishment of a scheme that recognises everyone’s equal rights and judges the behaviour of every person on the basis of how people realise or violate those rights. It is more than an individual process but a collective system which calls for state intervention and cooperation of government with corporations and

⁶⁸ Available at <http://hrbaportal.org/faq/what-is-a-human-rights-based-approach>, Accessed 24 April 2018

⁶⁹ Available at <http://www.icva.ch/doc00000664.html>> Accessed 17 April 2018

⁷⁰ *ibid*

⁷¹ S.Chirawu, G.Murungu et al, *Challenging the Status Quo-Gender, HIV/AIDS and the Law in Zimbabwe: A Rights-based Approach*, (2007) WLSA

individuals to redress this discrimination especially since cohabitation and marriage serve the same function and is becoming increasingly normative. State institutions cannot continue to ignore this social phenomenon.

In order to grasp the extent to which the family has evolved and continues to do so in a manner that is increasingly accommodative of cohabitation relationships, it becomes important to undertake a brief analysis of relevant provisions that accommodate cohabitation under the various international human rights conventions to which Zimbabwe is party.

1. International Covenant on Civil and Political Rights (ICCPR) (1966)

Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. In paragraph 2 of its *General Comment No. 19 on Article 23 of the ICCPR (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*⁷² the UN Human Rights Committee takes note of the fact that the concept of family may differ in some respects from state to state or region to region within a state and thus it is impossible to give the concept a standard definition. The committee goes further to take note of various forms of family which include unmarried couples and their children. The Human Rights Committee takes the same stance in paragraph 27 of its General Comment No. 28 of 2000 on Article 3 on "*Equality of rights between men and women*"⁷³

2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1981)

Stating that "*state parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations...*";⁷⁴ 'Article 16.1 of the CEDAW contains both a general call for equal rights and responsibilities of

⁷² available at: <http://www.refworld.org/docid/45139bd74.html> [last accessed 31 August, 2018]

⁷³ available at: <http://www.refworld.org/pdfid/45139c9b4.pdf> [last accessed 31 August, 2018]

⁷⁴ See Article 16 of the CEDAW available at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [last accessed 08/31/2018]

*spouses and a right to equality in property relations in particular,*⁷⁵ By necessary implication, it would follow that non-recognition of cohabitation relationships perpetuates discrimination against women in matters relating to marriage and family relations. In most instances the woman will be a housewife or earns a small wage whilst the man will be gainfully employed naturally placing the woman at an economic disadvantage when the relationship terminates.

3. The Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa (Maputo Protocol) (2005)

Despite the inarguable fact that Africa as a continent has its fair share of unregistered customary marriages some of which are nothing more than cohabitation relationships, it is to be noted that under the Maputo Protocol a hard line stance is taken against unregistered unions whereby Article 6 on Marriage in paragraph (d) states that, “...*every marriage shall be recorded in writing and registered in accordance with national laws, in order to be legally recognised.*” There thus exists a gap between the de jure and de facto status of marriages and what is recognized as a family on the continent inclusive of Zimbabwe which requires urgent redress.

4. The African Charter on Human And Peoples’ Rights (ACHPR) (1981)

Article 2 of the ACHPR provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. It can be argued that the phrase “other status” encompasses cohabitants. One of the rights and freedoms guaranteed in the Charter is in Article 3 which provides that every individual is entitled to equal protection of the law. It therefore means that failure to offer legal protection to cohabitation relationships perpetuates unjustified inequality between formally married and cohabiting couples.

⁷⁵ See A. Hellum and H.S. Aasen in “*Women’s Human Rights: CEDAW in International, Regional and National Law- A Study of Human Rights Convention*” (2000) at page 282

The Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC)

Both the CRC and the ACRWC recognize the family as the fundamental basis of society and also the natural environment for the growth and well-being of all its members particularly children which must be afforded the protection and assistance necessary for the full assumption of its responsibilities within the community.⁷⁶ Reference is made to “a family environment”⁷⁷ which must be conducive for the child to grow up in an atmosphere of happiness, love and understanding. The term has been defined to mean different family structures arising from various cultural patterns and emerging familial relationships⁷⁸ and this seems to encompass cohabitation relationships.

5. A COMPARATIVE ANALYSIS OF ZIMBABWE AND OTHER JURISDICTIONS: THE CASE OF AFRICA AND SCANDINAVIA

5.1. Introduction

Despite the general lack of protection for cohabitation relationships across the world inclusive of Zimbabwe there exists exceptional jurisdictions within which provisions have been put in place to eliminate the inherent insecurity of cohabitation relationships. This has been achieved by giving legal recognition and protection to cohabitants through acknowledging cohabitation relationships as a new family form different from marriage. Examples used in this article are South Africa, a country with a legal system similar in many aspects to Zimbabwe; Tanzania, an African country which has pro-cohabitation laws and Norway, a Scandinavian country which has the best practices insofar as it gives considerable rights to cohabitants.

5.2. South Africa

South Africa like Zimbabwe has no specific legislation which governs cohabitation relationships. It is characterized by rigid family structures centred on marriage. In *Volks No v Robinson and others*⁷⁹ the court had occasion to mention that it could legitimately distinguish between married and unmarried people and could accord benefits to married

⁷⁶ see Preamble to CRC and Article 18 of the ACRWC

⁷⁷ see Article 20 and Preamble to CRC and Article 18 ACRWC

⁷⁸ UN Committee on the Rights of the Child, “Fortieth session: Day of General Discussion, Children without Parental Care”, CRC/C/153, 17 March 2006

⁷⁹ 2005 (5) BCLR 446 (CC)

persons which it does not accord to unmarried persons⁸⁰. However, certain statutes in South Africa recognise cohabitants which will be discussed below. South African courts like Zimbabwe have extended protection to cohabitants who can prove the existence of universal partnership.⁸¹ South African courts have further recognized contracts entered into by and between cohabitants as enforceable. Further to that, the Draft Domestic Partnership Bill of 2008 which has not been adopted as law to date would alleviate most of the problems cohabitants in South Africa encounter due to their non-recognition by the current South African marriages legal regime.

5.2.1. Statutory Recognition

Similar to the position in Zimbabwe, cohabitation in South Africa is recognised under the South African Domestic Violence Act of 1998. A domestic relationship is defined to include persons who are of ...or the opposite sex who live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.⁸² The law thus provides maximum protection to victims of domestic violence. The Medical Schemes Act 131 of 1998 defines a dependant to include a 'partner.' Consequently, either partner in a cohabitation relationship may name the other as a beneficiary in a life-insurance policy. The nomination will, however, have to be clear because a clause in an insurance policy that confers benefits on members of the insured's 'family' may cause problems.⁸³ The South African Compensation for Occupational Diseases Act, 1997 also states that a surviving domestic partner may claim for compensation if their partner died as a result of injuries received during the course of work, provided that, at the time of the employee's death they were living as 'husband and wife.'

5.2.2. Cohabitation Contracts

South African courts have in the past recognised cohabitation contracts. These are contracts similar to an ante nuptial contract that regulates obligations during the subsistence of the relationship

⁸⁰ for example duty of support, cohabitation and fidelity

⁸¹ *Ally v Dinath* supra , *Butters v Mncora* supra looks at indirect financial contributions

⁸² Section 1 (vii)(b) of the Act

⁸³ <http://divorceattorneycapetown.co.za/living-together-law-cohabitation-common-law-marriage-laws-of-cohabitation-common-law-marriage/> Accessed 23 March 2018

and patrimonial consequences of termination. Whilst some have argued that they are contrary to public policy⁸⁴, the argument proffered in this article is in support of taking an accommodating approach that does not view such contracts that create families as being contrary to public policy. The position of a cohabitation relationship in society is not likely to encourage people to cohabit who would not do so anyway and if two people do intend to live together, it is better that the law gives cohabitants a framework within which they should give some thought to their financial and other arrangements if the union should break down.⁸⁵

In *Steyn v Hasse*⁸⁶ it was held that in South Africa cohabitation is a common phenomenon and widely accepted but cohabitants generally do not have the same rights as partners in a marriage or civil union. It was said that although no reciprocal duty of support arises by operation of law in the case of unmarried cohabitants, it does not preclude such duty from being regulated by agreement. This follows that if one partner refuses to follow the agreement; the other partner can approach a court for assistance. In most cases, a court will enforce the agreement provided the agreement is not illegal, against the morals of society or contrary to public policy.⁸⁷ For example in Zimbabwe a court would not be able to enforce an agreement between two persons of the same sex purporting to be cohabiting because the relationship contravenes Constitutional provisions and is void ab initio.

5.2.3. South Africa's Domestic Partnerships Bill of 2008

The 2008 Domestic Partnership Bill is an elaborate piece of draft legislation which seeks to provide cohabitants with an option to register their relationship as a domestic partnership and attaining similar rights and responsibilities as those obtaining within a marriage union. The draft bill provides for the legal recognition of domestic partnerships and the enforcement of the legal consequences of domestic partnerships. The mischief sought to be addressed is that there is no legal recognition or protection for opposite-sex couples in permanent partnerships. Everyone is equal before the law and has the right to

⁸⁴ Hahlo *supra*

⁸⁵ Bromley P.M. et al *supra*

⁸⁶ A93/2013

⁸⁷ <http://divorceattorneycapetown.co.za/living-together-law-cohabitation-common-law-marriage-laws-of-cohabitation-common-law-marriage/> accessed 23 March 2018

equal protection and benefit of the law. Rights of equality and dignity of the partners in domestic partnerships therefore must be upheld and family law must be reformed to comply with the applicable provisions of the Bill of Rights.

1. Requirements to be Met under the Draft Bill

Clause 4 of the draft bill outlines qualifications that have to be satisfied for one to be recognized as a cohabitant which includes the need;

- To be a partner in one registered domestic partnership at any given time.
- For one of the prospective partners to be a South African citizen.
- Not to be formally married.
- Not to be within prohibited degrees of relationship to marry on the basis of consanguinity or affinity.⁸⁸
- To be aged 18 years or older.⁸⁹

Once the registration process is complete, the registrar issues to the partners a certificate which becomes *prima facie* proof of the existence of a registered domestic partnership between the partners and, where applicable, a certified copy of the registered domestic partnership agreement is attached thereto.⁹⁰

2. Partners' Duties and Entitlements under the 2008 SA Domestic Partnerships Bill

Various duties and entitlements flow from a domestic partnership or cohabitation relationship as provided for under the Draft 2008 Bill namely;

(a) Duty of support

Clause 9 of the draft Bill provides for the duty of support. Partners owe each other a duty of support in accordance with their respective financial means and needs. It is defined in clause 1 as the responsibility of each registered domestic partner to provide for the other partner's basic living expenses while the registered partnership still exists. Maintenance after termination is provided for in clause 18 and maintenance after death in clause 19.

⁸⁸ clause 4(5)

⁸⁹ clause 6

⁹⁰ clause 6(6)

(b) Right of occupation of family home

Clause 11 on the right of occupation of family home states that both registered domestic partners are entitled to occupy the family home during the existence of the registered domestic partnership, irrespective of which of the registered partners owns or rents the property. The registered partner who owns or rents the family home may not evict the other registered partner from the family home during the existence of the registered domestic partnership. Further to that clause 20 equates a spouse's entitlements under the Intestate Succession Act to a registered domestic partner.

(c) Division of property

Clause 22 governs property division upon termination of a registered domestic partnership. A partner may apply to court for an order to divide their joint property or separate property, as the court may deem fit. A court must order the division of property in a manner it regards as just and equitable considering relevant factors which are outlined in the Bill. In dividing property, the court considers direct or indirect contributions made by a partner to the maintenance or increase of the separate property or part of the separate property of the other registered domestic partner during the existence of the registered domestic partnership.

(d) Unregistered Domestic Partnerships

In the 2008 draft Bill unregistered domestic partners are provided for under Chapter 4. A partner may apply upon termination of the partnership for an order for maintenance, intestate succession or a property division order⁹¹ within two years from the date of termination of the unregistered partnership.⁹² The court first looks at several factors which include the length of the relationship, degree of financial dependence or interdependence, and any arrangements for financial support between the unregistered domestic partners; the reputation and public aspects of the relationship, the degree of mutual commitment to a shared life and the relationship status of the unregistered domestic partners with third parties.

Despite providing expansive protection to cohabitants, the draft Bill has its own shortcomings. It has been argued that the bill is flawed in that it wrongfully presumes that upon termination of the relationship

⁹¹ clause 26 of the Bill

⁹² clause 33 of the Bill

individuals will have the knowledge and resources to engage with the courts to seek protection.⁹³ Further to that the Bill has taken too long prior to becoming operational since it can only enter into operation when a date is fixed by the president of South Africa through proclamation in the Gazette.⁹⁴ This is still to occur.

5.1. *anzania*

5.1.1. *Statutory Recognition of Cohabitation*

The Tanzanian law unlike Zimbabwe has an explicit provision which seems to address the insecurity of cohabitants by providing better protection for cohabitants' rights. Section 160 (1) of The Law of Marriage Act Chapter 29 speaks of a rebuttable assumption which arises when a man and a woman have lived together for two years that they are married. In a situation where this presumption is rebutted in a court of competent jurisdiction, section 160(2) provides for the woman to apply for maintenance for herself and children, if any. In brief, the court is clothed with jurisdiction to make an order or orders for maintenance and upon application made therefore either by the woman or the man, to grant such other reliefs including custody of children, as it has jurisdiction under the Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may deem fit. The requirements to be met for the presumption to apply are such that the plaintiff has to prove that though not officiated, the relationship was in the eyes of the community a lawful marriage and the two had lived together as husband and wife. In *John Kirakwe v Iddi Siko*⁹⁵ it was held that to constitute a presumption of marriage three elements are necessary; firstly, the parties should have cohabited for over two years, secondly, the parties should have acquired the reputation of husband and wife and thirdly, there was no formal marriage ceremony between the said couples. In *Martine v Christopher*⁹⁶ it was held that there is a firm distinction between a formal marriage solemnized through some form of a ceremony and the rebuttable presumption of marriage under

⁹³ De Vos, P. Still out in the Cold? The Domestic Partnerships Bill and the (Non)protection of Marginalised Woman, in Sloth-Nielsen J. and Z. Du Toit, (eds) *Trials & Tribulations, Trends and Triumphs: Developments in International, African and South African Child and Family Law*, 2008

⁹⁴ Clause 36 of the Bill

⁹⁵ [1989] TLR 215

⁹⁶ Civil Appeal No.68 of 2003

section 160(1) of the Act. Thus the appellant's ground of appeal based on the fact that the court a quo distributed matrimonial assets before declaring that the marriage had irretrievably broken down was misplaced there being no marriage to dissolve. However, since the parties had cohabited for 10 years without any form of marriage ceremony, the presumption of being duly married was rebuttable but the respondent in *casu* was entitled to the same reliefs as any other woman upon dissolution of a formal marriage pursuant to what section 160(2) of the Law of Marriage Act Provides.

5.2. Norway

Norway has been described as an interesting example of the institutionalization of modern cohabitation as the country has gone full circle with regard to the regulation of cohabitation.⁹⁷ Although there is no specific Act which regulates all the affairs of cohabiting couples in Norway, cohabiting couples enjoy considerable recognition in many aspects such that it has been said that cohabitation in Norway has been recognised in law in ways that blur the differences between cohabitation and marriage. This is discussed in detail below and particular reference is made to legislation which recognises and protects the rights of cohabiting couples.

5.2.1. Property Matters

The Norwegian Household Community Act of 1991 which applies also to two or more unmarried adults who live together in a household for at least two years, confers upon such persons a certain right to take over residence or household goods when the cohabitation ends due to the death of a member of the household or for any other reason. The distribution of the joint residence and household goods of cohabiting couples is operational when a household community ceases to exist. A partner can therefore have a right to purchase the common residence and household goods at a market value upon termination of the household⁹⁸. It has been said that this inheritance right cannot be restricted by a will or an inheritance agreement⁹⁹.

⁹⁷ Syltevik, L.V. "Cohabitation from illegal to institutionalized practice: the case study of Norway 1972-2010" in 2015, Vol. 20, Issue 4, *The History of the Family*, 515-529

⁹⁸ Sverdrup, *National Report on Informal Relationships: Norway (2015)* available online at <http://www.ceflonline.net/wp-content/uploads/Norway-Property> [last accessed 10 Sept, 2018]

⁹⁹ *ibid*

Cohabitants can also establish co-ownership¹⁰⁰ upon termination of a cohabitation relationship. This applies where it has not been agreed upon as to who is deemed the owner of particular items of property. If such co-ownership is proved, partners own an equal part unless facts of the case justify a different fraction of ownership. Co-ownership limits the exclusive right of a cohabitant to dispose an item co-owned and creditors may not dispose of the item as well. An unjust enrichment action can also be mounted upon termination of the relationship in exceptional circumstances.

5.2.2. *Inheritance*

The inheritance laws in Norway are favourable as they recognize the right of a cohabitant to benefit from an estate under intestate succession. The Norwegian Inheritance Act, 2009¹⁰¹ confers to unmarried cohabitants who have had; had or are expecting to have children, a right to either inherit approximately 40,000 Euros or to postpone the settlement and keep part of the deceased's estate undivided. By allowing a surviving cohabitant to inherit or retain the undivided portion of the estate in certain circumstances, the law is adaptive to change and steps in to protect the economically vulnerable cohabitant.

The Inheritance Act defines cohabitation as two people who live together in a marriage-like relationship and are above the age of eighteen years as long as they are not married or registered partners or cohabiting with others. The yardstick is evidently not registration but determination of whether a certain relationship is "marriage like". This is indeed a progressive piece of legislation. The two persons must permanently reside together but shorter periods of separation may not disqualify a person the right to inherit. However, certain persons are excluded from the definition of cohabitation that is two persons that are so closely related that they cannot marry.

5.2.3. *Adoption*

The Norwegian Adoption Act, 2014 provides that married and cohabiting couples have equal rights in as far as adoption is concerned. Section 5 of the Act states that a person who is married or is a cohabitant may only adopt jointly with his or her spouse or cohabitant, unless the spouse or cohabitant is insane, mentally retarded or is

¹⁰⁰ In accordance with the Norwegian Co-ownership Act

¹⁰¹ section 28(b) and (c)

missing. Section 5(a) defines the term “cohabitants” to mean two persons who live together in a stable, marriage-like relationship. Cohabitants can also adopt from each other but consent has to be given first by the partner concerned.¹⁰² The effect of adoption is that the adopted child retains the same legal status in relation to both cohabitants as if he or she were their joint child.¹⁰³

5.2.4. Similarities with Zimbabwe

However despite the legal recognition of cohabitants in Norway, similar to the situation in Zimbabwe is the fact that cohabitants do not owe each other a legal duty of maintenance. There is no recognised legal duty which the law confers on cohabiting partners to maintain each other. However an agreement by the partners may stipulate issues of maintenance. The absence of symbolic aspects of marriage that include the ritual, public declaration and wedding which are very important social markers of the marriage relationship distinguish cohabitation relationships from marriage.¹⁰⁴

6. CONCLUSION

6.1. Introduction

A brief analysis of the jurisdictions discussed clearly shows that cohabitation relationships can be legally protected. An analysis of the progressive South African and Tanzanian legal frameworks has confirmed that “the African marriage covers a wider range of flexible relationships, performing various social functions, which reflect their specific socio-economic conditions.”¹⁰⁵ Family law thus cannot be confined only to registered marriage relationships. The yardstick ought to be intention and not registration. Stable, intimate, dependence-producing relationships are worthy of the protection of the law. Lessons can thus be learnt from the progressive laws of Tanzania and Norway.

6.2. A Summary of the Zimbabwean Situation and Suggested Solutions

The position of cohabitation relationships as currently obtaining in Zimbabwe is highly unsatisfactory and needs redress as a family is not

¹⁰² Section 5(b) provided they are not of the same sex and the child originates from a foreign state which disallows such adoption

¹⁰³ Section 13

¹⁰⁴ Syltevik supra

¹⁰⁵ Armstrong et al supra pg 55

created only through registration. The current family law in Zimbabwe unfairly discriminates between formally married partners and cohabitants by excluding the latter from protection guaranteed by these statutes. This is despite the fact that there exists a functional similarity between marriage and cohabitation with only a piece of paper distinguishing the two. Women are the most affected group as in most cases they are unable to assert their proprietary rights. Modern state intervention in family laws is critical to curb perpetuation of economic vulnerability of cohabitants. Whilst there is no single solution which completely addresses the situation of cohabitants in Zimbabwe, various reforms can be adopted as drawn from the international human rights framework and the very progressive grounding within Zimbabwe's 2013 Constitution. Suggested below are some of the recommended solutions;

1. Law Reform

The role of law is threefold namely: to provide mechanisms and rules for adjusting the relationship between family members; to provide protection for individuals from possible harms suffered within the family and lastly to support the maintenance of family relationships¹⁰⁶. Thus reform is vital in the context of cohabitation for law to fulfil its purpose as law does not exist in a vacuum. Its effectiveness is judged by its ability to fulfil these roles. There is need for home grown solutions which fully address the vulnerability of cohabitants in Zimbabwe because "*...if the law is to be a living force, it must be dynamic and accommodating to change.*"¹⁰⁷

A comparative analysis of Zimbabwe to the selected jurisdictions has shown that cohabitation relationships can be protected by the state. South Africa's draft bill on domestic partnerships is a comprehensive document which seems to address all aspects which need reform in as far as cohabitation relationships are concerned. Zimbabwe would do well to adopt the approach taken in the very progressive jurisdictions of South Africa, Tanzania and Norway.

2. Cohabitation Contracts

Another best practice which Zimbabwe can emulate from South Africa is the use of cohabitation contracts. The courts can give recognition

¹⁰⁶ Eekelaar, Family Law and Social Policy, 2nd ed (1984)

¹⁰⁷ as per Gubbay CJ in *Zimnat v Chawanda* (supra)

to and enforce cohabitation contracts entered into by cohabitants for lawful ends. These contracts will provide a mechanism for the sharing of property and regulation of other legal aspects of the cohabitation relationships. A cohabitation contract can encompass aspects such as ownership and occupation of the common home, ownership of household goods while the relationship lasts and after its termination, each party's obligation to contribute to household and living expenses, and the ongoing duty of support.¹⁰⁸

3. Use of Judicial Discretion

Another solution lies with the judiciary through its use of wide discretionary powers. Instead of looking at whether a registered marriage exists, a court may look at the function the relationship serves to fulfil. The intention of the parties in entering the relationship and their conduct may be helpful in this regard. Sinclair describes it as "flexibility through the extension of discretionary judicial powers."¹⁰⁹ Such an approach goes further than identifying if the formalities of a valid marriage have been met. The judicial process therefore has a vital role to play in moulding and developing the process of social change to meet the expectations of people in developing countries as stated in *Zimnat v Chawanda* (supra).

4. Legislative Intervention

The legislature may intervene by promulgating a law that legally recognises cohabitation relationships and provides legal entitlements to the partners during the existence of the relationship and upon its dissolution. Cohabitants will be able to rely on statute for redress of their family law based legal concerns. The statute may also provide for the registration of cohabitation relationships.

¹⁰⁸ Sinclair supra

¹⁰⁹ ibid