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**LACK OF LEGAL FRAMEWORK ON COHABITATION
UNIONS IN KENYA AND THE IMPACT ON THE SOCIO-
ECONOMIC RIGHTS OF WOMEN****DR. NANCY BARAZA**Senior Lecturer, Department of Public Law,
School of Law, University of Nairobi**Abstract**

Unmarried heterosexual cohabitation is rapidly increasing in Kenya and a significant number of children are now born to unmarried cohabiting parents. Parties in cohabitation unions also undertake investments that lead to accumulation of property. This is not just an important change in the way people live in present day Kenya; it is also a political and theoretical marker. Some commentators see cohabitation as evidence of selfish individualism and the breakdown of the age-respected traditional family central to which is marriage, while others see it as just a less institutionalised way in which people express commitment and build their families. Politically, 'stable' families are seen as crucial and families borne out of cohabitation unions are frowned upon. At present the law in Kenya retains important distinctions in the way it treats cohabiting and married families and this can have deleterious effects on the human rights of the vulnerable partners on cohabitation breakdown or death of a partner. Using findings from a research carried out in the Kibera slums of Nairobi in the Kenyan capital and existing literature, the author examines the extent to which cohabitation phenomenon exists. The author then explores why people in Kenya cohabit rather than marry, what the nature of their commitment is to one another and note the impact of legal marginalisation on the socio-economic rights of the vulnerable parties in cohabiting unions who in most cases are women. The main purpose of this paper is to propose possible legal protections that Kenya should adopt in order to protect parties in non-marital family unions.

KEY WORDS: legal, socio-economic, marriage, family, marginalization, non-marital vulnerable, relationships, human rights.

1.0 INTRODUCTION

Poverty and inequality are deeply entrenched in Kenya, with the country being one of the most unequal countries in the world. The most affected sections of society include women who are in cohabitation unions and whom the family law in Kenya does not recognise. To eradicate poverty and inequality, enhance the achievement of social justice, fast-track human development, as well as to entrench participatory democracy and a culture of justification in governance, Kenya has, for the first time, entrenched justiciable socio-economic rights (SERs) in its 2010 Constitution.¹ Socio-economic rights of women in cohabitation families in Kenya are guaranteed under the constitution, yet they are violated due to lack of legal framework to regulate the relationships. Lack of legislation reinforces the vulnerability of women who have been marginalised by the law and the patriarchal social structure.

Children continue to be born in cohabitation unions and parties in these unions also undertake investments that lead to accumulation of property. This is not just an important change in the way people live in present day Kenya; it is also a political and theoretical marker. Some commentators see cohabitation as evidence of selfish individualism and the breakdown of the age-respected traditional family central to which is marriage, while others see it as just a less institutionalised way in which people express commitment and build their families.² Politically, 'stable' families are seen as crucial and families borne out of cohabitation unions are frowned upon. At present the law in Kenya retains important distinctions in the way it treats cohabiting and married families and this can have deleterious effects on the socio-economic rights of the weaker parties in such unions who are mostly women. This is in contradiction to the Constitution which guarantees equality, non-discrimination and socio-economic rights to all.

The primary reason for the vulnerability of cohabitants is, however, the fact that their status is lacks legislative protection and is currently governed by a "patchwork of laws that [do] not express a coherent set of family law rules".³ These rules are also predominantly based on liberal conceptions of choice and individualism, which have the propensity to entrench patterns of inequality and disadvantage.⁴ While the liberal conception of choice is deeply embedded in our law, current trends indicate the need to question and transform this underlying paradigm.⁵ The family law regime should be developed to serve as a tool for transforming the lives of female cohabitants. While the legal system alone cannot foster all of the necessary social change, it should play an integral part in responding to the experiences of cohabiting women and in contributing to the change that needs to occur.⁶

Using findings from a research carried out in the Kibera slums of Nairobi in the Kenyan capital and existing literature, the author examines why people in Kenya cohabit rather than marry, what the nature of their commitment is to one another and the impact of lack of legal regulation on the socio-economic rights of women cohabitantes. In the light of this evidence, the author then evaluates suitable options for legal reform.

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¹ Nicholas Wasonga Orago, Poverty, inequality and socio-economic rights: A theoretical framework for the realisation of socio-economic rights in the 2010 Kenyan Constitution. A thesis submitted in fulfillment of the requirements for the degree Doctor of Law in the Faculty of Law of the University of the Western Cape, South Africa, 2013 p iv.

² Anne Barlow, Simon Duncan, Grace James, Alison Park, Cohabitation, Marriage and the Law Social Change and Legal Reform in the 21st Century. Available at <https://www.bloomsburyprofessional.com/uk/cohabitation-marriage-and-the-law-9781841134338/>

³ Tarryn Bannister, The implications of a relational feminist interpretation of socio-economic rights for cohabiting partners. Dissertation presented in fulfillment of the requirements for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University, 2016 p 17.

⁴ Ibid

⁵ Ibid

⁶ Ibid

1.1 BACKGROUND

Inequality is highly entrenched in Kenya, with poverty and inequality forming a vicious cycle, ensuring that poor and marginalised families and groups are unable to break away from their dire situations. The World Bank's World Development Indicators 2011 indicates that, inequality in Kenya is so high that in the African region it only compares favourably with that in South Africa, a country that had suffered many years of apartheid.⁷ Beyond gender discrimination, further discrimination occurs for those women, who have no legal status or recognition in public law as a result of their informality.⁸ While this inequality is attributable to different causes, discrimination in the family sphere continues to serve as a central foundation of women's social and economic disadvantage. This imbalance is evinced by the fact that women continue to bear the socio-economic burdens of divorce and family dissolution disproportionately. Women as a group are also more vulnerable to destitution, homelessness, and violence.⁹ Poverty and status discrimination also reinforce one another with respect to women. Women are more likely to be poor than men, largely as a result of discrimination against them.¹⁰

Historic inequalities, persistent gender stereotypes, low levels of property ownership and inequality of access to education and employment, all combine to the effect that women are poorer than men in their community. In its turn, women's relative poverty plays an integral role in perpetuating discrimination and inequality in almost all areas of life, from access to healthcare to participation in civic and public life.¹¹ Lack of a law to recognise and protect cohabitation unions in Kenya has, for years, led the courts relying on the English common law principle of presumption of marriage after a reasonable period of cohabitation to find relief for parties in distress. However, this is not sufficient and the continued discrimination deprives most women in such relationships their socio and economic rights.

While all family relationships need to be regulated to protect the socio-economic needs of its members, research has revealed that cohabiting women remain particularly vulnerable. A major factor underlying cohabitants' socio-economic disadvantage is the fact that these relationships have traditionally been perceived and regulated through a discriminatory lens.¹² Family law has obliterated the existence of cohabitations, leaving the courts to invoke the common law principle of presumption of marriage and case law to find for vulnerable women which such relationships end or male parties die.¹³ Studies carried out by the Federation of women lawyers in Kenya (FIDA-Kenya) show that the majority of cases involving cohabitantes before the courts have involved women who have been left without any form of financial support for their children by their cohabiting partners, or have been stripped of any property acquired jointly with their deceased cohabiting partners by relatives of the deceased who claim their kin was never married to the women.¹⁴ Established a legal regime that enforces, enables the realisation of socio-economic rights within the private sphere is thus closely related to addressing systemic patterns of gender inequality in Kenya.

⁷ See The World Bank Poverty Reduction and Economic Management Unit Africa Region Report 'Kenya poverty and inequality assessment: Executive summary and synthesis report' (June 2008) 3 accessed 1 March 2014. In A compendium on economic and social rights cases under the Constitution of Kenya, 2010. THE EAST AFRICAN CENTRE FOR HUMAN RIGHTS p 4.

⁸ Tarryn Bannister, The implications of a relational feminist interpretation of socio-economic rights for cohabiting partners. Dissertation presented in fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University, 2016, p 17

⁹ Ibid

¹⁰ Patterns of Discrimination and Inequality, http://www.equalrightstrust.org/ertdocumentbank/Kenya_Part_2_Patterns.pdf P 37

¹¹ Ibid

¹² Tarryn Bannister (n. 9 above) p

¹³ Wanjiru Joan Veronicah, Reforms Needed on Property Laws on Cohabitation. LLB thesis, Strathmore University Law School, 2017 p 1.

¹⁴ Pauline Musangi, (n 2 above)

Happily for Kenya, the Constitution entrenches tools for the amelioration of the dire poverty, inequality and socio-economic marginalisation and enhancement of social justice and the egalitarian transformation.¹⁵ In Kenya economic and social rights are entrenched in the Bill of Rights. The importance of these rights in enhancing the realisation of the egalitarian transformation of the Kenyan society was aptly captured by the High Court of Kenya in the case of John Kabui Mwai and Others v The Attorney General and 2 others as follows:¹⁶

In our view, the inclusion of economic, social and cultural rights in the Constitution is aimed at advancing the socioeconomic needs of the people of Kenya, including those who are poor, in order to uplift their human dignity. The protection of these rights is an indication of the fact that, the Constitution's transformative agenda looks beyond merely guaranteeing abstract equality. There is a commitment to transform Kenya from a society based on socio-economic deprivation to one based on equal and equitable distribution of resources. This is borne out by Articles 6(3) and 10(2)(b). The realisation of socio-economic rights means the realisation of the conditions of the poor and less advantaged and the beginning of a generation that is free from socio-economic need.

However, as noted by Louise Arbour, the realisation of economic and social rights is inherently a political undertaking, involving negotiation, disagreement, trade-offs and compromise. But political processes do not serve all equally.¹⁷ Equality requires, among other things, that the most disadvantaged be empowered to participate meaningfully both in political and legal processes, unshackling them from the benevolence and whim of the powerful, and enabling them to control their own destinies."¹⁸ Some countries, including Kenya have in place constitutions that address inequalities and entrench socio-economic rights as a means towards this goal.

2.0 SOCIO-ECONOMIC RIGHTS IN KENYA

2.1 The Constitution

The following articles of the constitution of Kenya 2010 enshrine SERs: 21(2), 27 43, 28 53(1)(a) and (b) and they encapsulate the major SERs that have been captured by the constitutions of countries that have entrenched SERs.¹⁹ Article 21 deals with the implementation of rights and fundamental freedoms and sub-article 2 requires the State to 'take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under article 43'.²⁰ Article 43 is entitled "Economic and social rights" and it provides in article 43(1) that 'Every person has the right – a) to the highest attainable standard of health, which includes the right to healthcare services, including reproductive health; b) to accessible and adequate housing, and to reasonable standards of sanitation; c) to be free from hunger, and to have adequate food of acceptable quality; d) to clean and safe water in adequate quantities; e) to social security; and, f) to education".²¹

The Constitution of Kenya expressly protects the right to family life or the right to marry.²² It mirrors article 16 of the Universal Declaration of Human Rights (UDHR) and several other international instruments.²³ Article

¹⁵ The East African Centre for Human Rights. A compendium on economic and social rights cases under the Constitution of Kenya, 2010. p 4.

¹⁶ John Kabui Mwai & 3 Others v Kenya National Examination Council & 2 Others, High Court of Kenya at Nairobi, Petition No. 15 of 2011, 6. In A compendium on economic and social rights cases under the Constitution of Kenya, 2010. THE EAST AFRICAN CENTRE FOR HUMAN RIGHTS p 4.

¹⁷ Louise Arbour, UN High Commissioner for Human Rights, Lafontaine-Baldwin speech, 2005

¹⁸ Ibid

¹⁹ Andrew Barney Khakula, Theory and Practice of Social and Economic Rights in Kenya. Thesis Submitted in accordance with the requirements for the degree of MASTER OF LAWS, University of South Africa 2015 p 7.

²⁰ Ibid

²¹ Ibid

²² See Article 45 of the Constitution of Kenya

16 enshrines the family as "the natural and fundamental group unit of society." Article 16 directly associates the right to marry with the right to "found a family."²⁴ Article 16 of the UDHR is replicated in several other international conventions.²⁵

On the other hand, Article 2(1) states that it is the Constitution is the supreme law of the Republic, while section 19(1) describes the Bill of Rights as an integral part of Kenya's democratic state and the framework for social, economic and cultural policies. Article 19(2) goes on to state that the purpose of recognising and protecting human rights, and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Article 21 (1) states that it is the duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. Article 21(4) requires that State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. The State is therefore under a positive duty to promote a family law regime based on the Individual rights and fundamental freedoms protected in the Bill of Rights.²⁶

The constitution of Kenya stipulates that all State organs and all public officers have the duty to address the needs of vulnerable groups within society including women.... The Constitution specifically provides that the rights in the Bill of Rights apply to all law and that they bind the "legislature, the executive, the judiciary and all organs of state".²⁷ Article 20 of the Constitution further states that the Bill of Rights applies to all law and binds all State Organs and all persons. The Constitution's commitment to founding a society based on "human dignity, equity, social justice inclusiveness, equality, human rights, non-discrimination and protection of the marginalised therefore extends to private relations. Article 20 (4) states that when interpreting the Bill of Rights, courts, tribunals or other authorities shall promote the values that underpin an open and democratic society based on human dignity, equality and freedom. Article 20 (4) (b) goes on to state that when interpreting the Bill of Rights, the court shall promote the spirit and objects of the Bill of Rights. legislation or developing the common law or customary law, courts must "promote the spirit, purport and objects of the Bill of Rights".

This progressive instruction reveals that all law, including the common law, is subject to the Constitution. Moreover, under Kenya's Constitution, no exercise of power – whether public or private – is immune from constitutional scrutiny, in light of the progressive rights and values protected within our Constitution.²⁸ The provisions of the Constitution justify transcending the public/private law divide and analysing the potential implications of socio-economic rights within the area of family law.²⁹

²³ UDHR Article 16 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

²⁴ Ingar Brueggemann and Karen Newman, *Health and Human Rights* Vol. 3 No. 2

²⁵ The International Covenant on Economic, Social and Cultural Rights at Article 10 States: (1) the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. Article 17 of the International Covenant on Civil and Political Rights states that: (1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks. Article 23: (1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. [...], while Article 16 of the Convention on the Rights of the Child states that : (1) No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, nor to unlawful attacks on his or her honour and reputation.

²⁶ Ingar Brueggemann and Karen Newman

²⁷ Ibid(n 20 above) p 17.

²⁸ Tarryn Banniste, *The implications of a relational feminist interpretation of socio-economic rights for cohabiting partners* Dissertation presented in fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University, 2016 p 17.

²⁹ Ibid

Notwithstanding this positive intention, the Kenyan law recognises various forms of family regimes which it protects and holds marriage as the legitimate mode of family formation.³⁰ This has resulted in the marginalisation and violation of the socio-economic rights of families resulting from unmarried cohabitations.³¹

2.2 International human rights law

SERs have also been recognised by a number of international and regional human rights documents in the world. The Universal Declaration of Human Rights document (UDHR)³² recognises the importance and centrality of SERs in the protection, promotion and realisation of human rights in the world. The African Charter on Human and Peoples Rights (ACHPR)³³ in its preamble recognises that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African People.³⁴ The Charter further takes cognisance of the fact that CPRs cannot be dissociated from SERs in their conception as well as universality and satisfaction of SERs is a guarantee for the enjoyment of CPRs.³⁵ In a nutshell, the drafters of the ACHPR argue that all the generations of rights have to be accessed and enjoyed in their entirety by all in a just, equitable and egalitarian society.³⁶ The ICESCR³⁷ expressly recognises SERs and underscores the importance of these rights in realising the fundamental objective of the UDHR, that is; free human beings enjoying freedom from fear and want. The Covenant reiterates that this ideal can only be achieved if conditions are created to enable everyone to enjoy their economic, social and cultural rights, as well as their CPRs³⁸

Kenya in general, has a strong record of ratifying major international and regional human rights instruments. It is a party to six of the seven core UN HRs treaties, with the exception being the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.³⁹ Additionally, Kenya is a party to five regional HRs treaties.⁴⁰ Article 2(6)⁴¹ of the Constitution of Kenya 2010 changed the Republic of Kenya from a dualist State to a monist State⁴² meaning that any international or regional treaty that has been ratified by Kenya automatically applies in the national plane. Kenya does not have to enact local

³⁰ Ibid

³¹ See section 6 of the Marriage Act, 2014.

³² Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

³³ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

³⁴ See Paragraph 3 of the Preamble.

³⁵ See Paragraph 8 of the Preamble.

³⁶ Andrew Barney Khakula, *Theory and Practice of Social and Economic Rights in Kenya*. Thesis Submitted in accordance with the requirements for the degree of MASTER OF LAWS, University of South Africa 2015 p 7.

³⁷ International Covenant on Economic, Social and Cultural Rights (note 13 above)

³⁸ Ibid

³⁹ Towards Equality And Anti-Discrimination, An Overview of International and Domestic Law on AntiDiscrimination in Kenya Kenya National Human Rights Commission report page 1 available at <http://www.khrc.or.ke> accessed on 20/03/14

⁴⁰ These are; OAU Convention Governing Specific Aspects of Refugee Problems in Africa, African Charter on Human and Peoples Rights, OAU DOC CAB/LEG/67/3, rev 5, 27 June 1981, African Charter on the Rights and Welfare of the Child adopted in July 1990, entered into force on 29th November 1999, OAU DOC CAB /LEG 153 / REV 2, Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights OAU DOC OAU /LEG /EXP/AFCHPR/PROT (III), Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa adopted by the second ordinary session of the Assembly of the Union in Maputo on the 11th of July 2003 available at <http://www.au.int/en/treaties> accessed on 20/03/14

⁴¹ Article 2 (5) & (6) provides that 'The general rules of international law shall form part of the law of Kenya and Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution'

⁴² F Viljoen *International human rights law in Africa* (2012) 522; M Killander & H Adjolohoun 'Introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 3 11. Dualism envisages the complete separation of national and international legal systems, and that for rules of international law to apply in the national legal system, they must be transformed, through domestication, and thus apply as part of domestic national law and not as international law. Monism, on the other hand, envisages international law and national law as part of one legal system, and that international law is directly incorporated into the national legal system without any difficulty in its application as international law within the domestic legal system. Cited in Orago W.N *The 2010 Kenyan Constitution and the hierarchical place of international law in the Kenyan domestic legal system: A comparative perspective* (2013) 13 *African Human Rights Law Journal* 416.

legislation to operationalise an international treaty locally.⁴³ This therefore means that all SERs contained in the ACHPR and ICESCR are directly enforceable in Kenya.⁴⁴

2.3 The Marriage Act, 2014

The recently enacted Marriage Act 2014 protects the institution of marriage as the only form of family formation. The Act, at section 2 merely defines cohabitation, with no other substantial support for it in the entire law. This is attributed to the incoherence created by the legislature when it mutilated the KLRC 2007 draft without harmonizing what their intention was.⁴⁵ Contrary to the spirit of the Constitution which is inclusionary and pragmatic, the current Marriage Act outlaws cohabitation families although they have been in existence since time immemorial and they are, in fact on the increase.⁴⁶

Section 2 of the Marriage Act only defines cohabitation without giving any substantive recognition to it. Registration is also a prerequisite requirement of a valid marriage, yet any union not recognised under section 6 of the Act is not registrable, thus excluding cohabitation unions. Section 11(c) of the Act also renders void marriage in which at the making of the union either party is incompetent to marry by reason of a subsisting marriage. Most cohabiting couples, especially the men, happen to be already married to other wives, thus rendering subsequent cohabitations null and void. These two sections expressly outlaw cohabitation.⁴⁷ None of the four systems of marriage recognise cohabitation, and therefore render no protection for women in such union. Under customary law, for example, “no length of cohabitation is considered to amount to marriage or give rise to inheritance rights between the partners or their issue”.⁴⁸

What are the implications of failure by the legislator to recognize and protect cohabiting unions? Law sets the background distributions of power and the default rules against which people define their social relations, whether through force, coercion, bargaining, exchange, duty, reliance, or gift. Law works by imposition of rules and punishments, but also importantly by constructing authoritative images of social relations.⁴⁹ Richard Lempert rightly argues that

Law matters...because it is a resource...It is a source of support that people may draw on in the same way they draw on other resources in their environment such as savings accounts, accumulated human capital, and the availability of others to help them achieve their goals. Law may be an intangible resource, as when one invokes the law’s authority to order another’s behaviour, or a tangible one, as when one calls the police to achieve the same end.⁵⁰

Awareness or existence of what the law says is just or unjust, justified or unjustified, influences all interactions between people, ultimately shaping their identities as well as their goals. Lack of the law to protect parties in cohabitation unions deprives them of this benefit of the law.⁵¹

⁴³ 1 Ibid 419.

⁴⁴ Ibid

⁴⁵ Pauline Musangi, (n 10 above)

⁴⁶ Winifred Kamau, Law, Pluralism and the Family In Kenya: Beyond Bifurcation of Formal Law and Custom. Oxford University Press, 2009). <https://academic.oup.com/lawfam/article-abstract/23/2/133/928964/Law-Pluralism-and-the-Family-In-Kenya-Beyond>

⁴⁷ Ibid

⁴⁸* Zitha Mokomane, Cohabitation in Botswana: An Alternative or a Prelude to Marriage? African Population Studies Vol.20 n° 1/Etude de la population africaine vol. 20 n° 1

⁴⁹ Catherine Albiston, Feminist in Relation. Wisconsin Women’s Law Journal, Vol. 17:1 p 2.

⁵⁰ Richard Lempert, A Resource Theory of the Criminal Law: Exploring When it Matters, in How Does Law Matter? 227, 236 (Bryant G. Garth & Austin Sara eds., 1998). In C. Albiston, Feminist in Relation. Wisconsin Wone’s Law Journal, Vol. 17:1 p 2.

⁵¹ Ibid

3.0 SOCIO-ECONOMIC IMPLICATIONS OF DEATH OF PARTNER OR TERMINATION OF COHABITATION RELATIONSHIP

Interpersonal power dynamics intersect with communal relations, while a lack of knowledge of the law and insufficient access to legal services compounds vulnerability. Consequently, a significant number of women living in domestic partnerships often mistakenly believe that their relationship is regulated by law.⁵²39 In addition, women who are married under customary law, but who fail to fulfill certain prescribed formalities mistakenly believe they are officially married. Many of these women only find out their true legal position once it is too late.⁴⁰ The legal gaps confronting cohabitants are patently unjust when compared to how marriage offers socio-economic benefits, such as the right to inherit, spousal benefits and tax advantages.⁵³

The failure to recognise cohabitation unions entrenches the subordination and material insecurity experienced by a significant number of Kenyan women.⁵⁴ This subordination is anchored in the legal history of Kenya. Law historically reinforced gender inequality through legal rules that validated social injustices leading to the marginalisation of women. Further, the legal system was an obstacle to changes required to remove inequality in rules, procedures and institutions.⁵⁵ Kameri-Mbote argues that this was achieved firstly, through legal rules and principles, in the statute books legitimating the subordination of women to men; secondly women's subordination was occasioned by the structure and administration of laws and thirdly, gender inequality was ingrained by the patriarchal ordering of society, under which political, economic, legal and social standards are either set by or fixed in the interests of men.⁵⁶ This state of affairs is pronounced in the private sphere of family.⁵⁷

It needs to be emphasised, however, that not all cohabiting women are powerless and that not all unmarried women wish to be married. Moreover, there are a number of complex intersecting factors that have contributed to the decline in marriage in Kenya.⁵³ As noted by ***, Remaining in a cohabitation union may however, represent the most feasible option amongst a limited range of choices. A significant number of cohabiting women interviewed for this study indeed prefer to be married, but lack the power to determine the official form of their relationship. Most survive at the mercy of their male cohabiting partners, who in most cases abandon them at their will. Further, the social realities of poverty, unemployment and gender inequality play a significant role in shaping these relationship choices.⁵⁸

This study argues that Kenya's legal approach of focusing on the form of a family relationship, preferring marriage to non-marital family formations, undermines the constitutional commitment to establish a society based on non-sexism and non-discrimination and respect for fundamental human rights. In order to protect and fulfill the socio-economic rights of women in society, the underlying gendered dynamics shaping their choices and their access to resources must be more effectively recognised and addressed.

4.0 A RELATIONAL FEMINISM AS THEORETICAL FRAMEWORK

Realisations of the socio-economic rights of disadvantaged women call for a transformative approach, not just to constitutional interpretation but to family law as well.⁵⁹ This Article adopts a relational feminist framework. Relational feminist is an analytical tool to reveal hidden contradiction – how law appears to act upon an

⁵² Tarryn Bannister, The implications of a relational feminist interpretation of socio-economic rights for cohabiting partners Dissertation presented in fulfilment of the requirements for the degree of Doctor of Laws in the Faculty of Law at Stellenbosch University, 2016 p 17.

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Patricia Kameri-Mbote, Constitutions as Pathways to Gender Equality in Plural Legal Contexts. Oslo Law Review 01/2018, Volume 5, p 3.

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Achieving Women's Economic & Social Rights, Strategies and Lessons from Experience. Association for Women's Rights in Development p 4.

external social world, even as it is part of that world. Feminists such as West are skeptical about liberal legal theory which is viewed as “essentially and irretrievably masculine” in its model,⁶⁰ relational feminists see Law as having particular capacity to create social reality by creating rights, defining relationships, and interpreting the meaning of social events.⁶¹ It is transformative in nature. The need for a transformative approach to family law is emphasised by the fact that the family unit plays an integral psychological role in shaping peoples’ identities, values and decisions.⁶² The importance of the family unit is emphasised by the fact that many people gain access to the objects of socio-economic rights privately, “within and by way of relationships”.⁶³

Family law scholars have accordingly recognised the constitutive power of the family, accentuating how family law rules play a political role in entrenching inequalities on numerous grounds.⁶⁴ Significant scholarship therefore exists on the manner in which the family law regime perpetuates discrimination on the grounds of gender, race, sexual orientation, class, religion and culture.⁶⁵ While it may be easy to recognise the constitutive nature of the family for young children, Jennifer Nedelsky highlights that in reality relational interdependence extends throughout our entire lives.⁶⁶

A relational feminist perspective accordingly recognises the significance of relations that shape people’s capacity for love, creativity and independence, as well as their choices and our capacity to access resources.⁶⁷ These private dynamics inevitably intersect with broader social patterns, resulting in constructs of rights offering varying privileges to differently situated groups.⁶⁸ This relational reality reveals that rights are not stable givens, but that they shift as relationships change.⁶⁹ As a result, private and public relationships give rise to intersecting forms of vulnerability and disadvantage. In order to protect the fundamental human rights of each person, the regulation of both public and private power needs to be sensitive to existing relational inequality and disadvantage.⁷⁰

5.0 PROBLEMS UPON DEATH OR TERMINATION OF RELATIONSHIP

Many cohabiting couples face severe problems when the relationship ends or one of the partners dies. The majority of the women stated that they would have liked to get married but were constrained by men’s lack of desire to do so, while others were unable due to the high cost of marriages, whether civil or customary. Most women face financial disadvantages because of lack of legal entitlement to property, even though it could have been jointly acquired with their male partners. Most did not understand their status vis-à-vis the law. Indeed, asked if they know of any law that protects them, the majority thought they were legally protected because they thought they were married, while others did not know, thus exposing their ignorance about the implications of their relationship and the law generally. This is supported by studies undertaken on his subject. Kamau, for instance, acknowledges the dire situation of women by stating that:

[Cohabiting] women often end up in a precarious position in relation to property that the couple acquires during the subsistence of their relationship. Usually, the woman in such a relationship is either a housewife or earns a small wage outside the home, while the man will earn more because of

⁶⁰ See West, 1988, 2 p 10

⁶¹ Catherine Albiston, *Feminist in Relation*. Wisconsin Women’s Law Journal, Vol. 17:1 p 4.

⁶² Tarryn Bannister, *The implications of a relational feminist interpretation of socio-economic rights for cohabiting partners* Dissertation presented in fulfillment of the requirements for the degree of Doctor of Laws, Faculty of Law at Stellenbosch University, 2016 p 17.

⁶³ Ibid

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Ibid

the relatively better employment opportunities for men in the formal sector. ... As a result, whatever property of value is acquired during their friendship will be in his name. Since the law does not recognise such a relationship as giving rise to duties of support between them, or as implying joint ownership of property they acquire, women are left without support or property should the friendship terminate. ... as a general rule, women who cohabit with men without being married to them have no legal protection.⁷¹

In other cases, women face a lot of hostility from the families who disown them and proceed to grab all the property for themselves. They claim that there was no marriage between the surviving women and 'their son' and hence she is not entitled to any property. The remaining partner may struggle to raise children alone, which is common.

In other cases, due to the fluidity of the relationship, men end up marrying other women, thus making the abandoned ones feeling they wasted their time. In other cases, it is easy for the women to get kicked out of the house or agree to abide by onerous set conditions to avoid being kicked out. When this happens, it is hard to figure out who gets what property since no laws cover this situation. The women's dilemma is worsened by the fact that the woman's parents may not support her and her children when her boyfriend or live-in partner kicks her out of their home. Wekesa (not his real name) a male participant in this study had this to say:

cohabitation is not good because in the event that one of us dies, you might the deceased's relatives become very violent and selfish. For example, if I die and my relatives are selfish, they can come and take everything in this house and by so doing denying the children I have with her any inheritance. All on the basis of the fact that I had not married her (45 year old cohabiting man, rural area), Cohabitation has one major disadvantage.

Another male participant, Oduor (not his real name) observed as follows:

I am currently living with this woman and we do our things together, such as buying things jointly and paying the rent and utilities together. We support the children together. But if I die, the major problem that may arise is that my parents and other relatives will come rushing and grab everything without any regard as to whether she contributed to any of the properties or not. They believe that the woman never had anything and all these properties are ours."

These sentiments are supported by literature by Karani who notes that unless such women can prove that the survivor evolved from a mere cohabitee to a dependant under section 29 of the Law of Succession Act, then they are not eligible to inherit from their deceased partner⁷² Although unmarried individuals can leave their property to cohabitation partners or anyone else they choose in their wills, few Kenyans write wills, thus leaving their surviving partners to meet the demands of the law of intestacy. In Kenya, the Laws of intestacy look first to the decedent's lawful spouse, and then to the closest blood relatives such as children, parents and siblings. If there are no close relatives, the probate court will look further afield to locate the nearest blood relative. If no relatives can be found, the decedent's estate passes to the state.⁷³ There is legally no room for surviving cohabiting partners.

In an effort to find for cohabitant widows, the Law of Succession Act was amended to introduce a new form of marriage referred to as a 'marriage for the purposes of succession'.⁷⁴ This law is inconsistent with the new

⁷¹ Ibid

⁷² Winifred Kamau, *Law, Pluralism and the Family In Kenya: Beyond Bifurcation of Formal Law and Custom*. Oxford University Press, 2009).

⁷³ Laws of intestacy

⁷⁴ See Law of Section 3(5) of the Law of Succession Act, Cap 160 of the Laws of Kenya.

constitution 2010. Women who therefore are living as companions of married men should expect nothing at when their companion is deceased, unless he was in a marriage that was potentially polygamous.⁷⁵

6.0 HOW THE ENGLISH DOCTRINE OF COMMON LAW PRESUMPTION OF MARRIAGE HAS BEEN USED IN KENYA

Kenyan courts have traditionally sought reliance on this English common law principle of presumption of marriage as a vehicle through which cohabitation unions may be legitimised as amounting to a marriage.⁷⁶ The presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.⁷⁷ Common law marriage is a relationship which is not solemnised in a ceremonial manner, but requires the following:

positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations.⁷⁸

Although the courts have in the past invoked the doctrine of common-law presumption of marriage to grant relief to couples who can establish that their relationship meets the criteria, the process of such proof is long and tedious and unknown to majority of women in this relationship. The four elements of common law marriage historically have been a combination of capacity to enter into a marital contract, present agreement to be married, cohabitation for which no specific length of time is required, and the parties holding themselves out as husband and wife so that they have a reputation as being married in the community.⁷⁹ The doctrine of common law presumption of marriage is applicable in Kenya by virtue of the Judicature Act. Section 3 (1) of the Judicature Act identifies common law as a source of law in Kenya. It allows for the application of the common law of England and the doctrines of equity in so far as they are suitable to the conditions of Kenya and its inhabitants.⁸⁰ In so doing the court declares that for all intents and purposes, the cohabitation union is a marriage.⁸¹

Using this doctrine has been a result of the law treating unmarried cohabitating couples in the same manner as unrelated people sharing living quarters, such as housemates or friends who might share an apartment to save on expenses.⁸² Living together does not establish a legal connection between the two people and does not give either party any right of inheritance – or any responsibility for the other's debts or other legal obligations. An exception to this arises in the recognition of common law marriage.⁸³

In *Hotensia Wanjiku Yawe v. Public Trustee*⁸⁴ the Court of Appeal for Eastern Africa (as it then was) recognised and approved the presumption of marriage, in a situation where the deceased had declared to another that the appellant (Yawe) was his wife by general repute....the court held that long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence can rebut such presumption.⁸⁵ Justice Wambuzi in this case held that:

⁷⁵ Harry Stephen Arunda is undergoing Advocates Training Programm at the Kenya School of Law.

⁷⁶ Winifred Kamau (n. 76 above) p 6.

⁷⁷ Ibid

⁷⁸ Black's Law Dictionary 277 (6th ed. 1990)

⁷⁹ Cynthia Grant Bowman, A Feminist Proposal to Bring Back Common Law Marriage, 75 Or. L. Rev. 709, 712-713 (1996).

⁸⁰ Janet Kabeberi-Macharia and Celestine Nyamu, Marriage by Affidavit: Developing Alternative Laws on Cohabitation in Kenya. The Zimbabwe Law Review 1997 Volume 14 above p 48.

⁸¹ Ibid p 49

⁸² Ibid

⁸³ Cindy Hill, Cohabitants: Inheritance laws. <http://info.legalzoom.com/cohabitants-inheritance-laws-23429.html>

⁸⁴ Ibid

⁸⁵ *Hotensia Wanjiku Yawe v. Public Trustee* the Court of Appeal for Eastern Africa

the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.⁸⁶

The court also held that the presumption of marriage may be applied to customary marriages. In this case, the court applied the presumption of marriage to cohabitation relationships even where the requirements for customary marriage have not been met. In *Adongo v. Adongo*,⁸⁷ the court applied the presumption of marriage in order to hold that a woman in a cohabitation relationship was married to the deceased and as such was a wife for purposes of the Act, thereby enabling the woman to have a share of the deceased's estate.

The Court of Appeal in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another*⁸⁸ held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held that:

Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.

The courts have continued to invoke the doctrine of common-law marriage after the enactment of the Marriage Act, 2014. In the recent case of *KO and JO vs. JO*,⁸⁹ High court Judge Majanja resorted to the earlier court decision in *Beth Nyandwa Kimani vrs Joyce Nyakinywa Kimani & others*,⁹⁰ and concurred as follows:

For it matters not whether statutory or customary marriage requirements are strictly proved in marriage. The Court must go further and consider whether, on the facts and circumstances available on record, the principles of presumption of marriage was applicable in the appellant's favour.

The matter however does not end there. A Court of law in such a situation must endeavor to consider whether the prevailing circumstances of the case when taken into consideration can be a basis of presuming a marriage under the common law doctrine of **presumption of marriage**. In this position I take refuge in the Court of Appeal decision in.

7.0 CONCLUSION

Inequality in the family continues to serve as a central cause of women's poverty. While all intimate relationships need to be regulated to protect the rights of its members, cohabiting women are particularly vulnerable to destitution and homelessness upon the dissolution of their relationship. Given the constitutional commitment to non-sexism and justiciable socio-economic rights, the state is constitutionally required to examine how the family law regime can be transformed to structure more equitable socio-economic relations between cohabiting men and women. This obligation is emphasised by the fact that all areas of law are subject to the Bill of Rights, as well as the constitutional duty on the state to "respect, protect and promote" the rights in the Bill of Rights. Recognition of women in cohabitation unions through amending the Marriage Act will go a long way in protection their socio-economic rights and implementing the Constitution.

⁸⁶ Ibid

⁸⁷ *Adongo v. Adongo*

⁸⁸ *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR

⁸⁹ High Court Civil Appeal no. 82 of 2017

⁹⁰ *Beth Nyandwa Kimani vrs Joyce Nyakinywa Kimani & others* (2006) eKLR

8.0 RECOMMENDATIONS

One of the most acceptable options for reforms in the Marriage Act 2014 is that the State revisits the provisions in the 2007 Kenya Law Reform Draft Marriage Act which read: "Where it is proved that a man and woman having capacity to marry have lived together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married."

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