

**FEMINIST JUDGMENTS: INTERROGATING ZIMBABWEAN JUDGMENTS USING  
ANTI-ESSENTIALIST FEMINIST LEGAL THEORY**

By

RUMBIDZAI MATAMBA

BA, LLB (RHODES UNIVERSITY)

A dissertation submitted in partial fulfilment of the degree  
MASTER OF LAWS IN APPROVED COURSES AND A MINOR DISSERTATION

In the Faculty of Law, University of Cape Town



Under the supervision of

**PAMELA-JANE SCHWIKKARD**

Professor of Law

University of Cape Town

DECEMBER 2023

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

## Table of Contents

ACKNOWLEDGEMENTS .....	3
ABSTRACT.....	4
INTRODUCTION .....	5
A BRIEF OVERVIEW OF FEMINIST LEGAL THEORY .....	7
The equality stage .....	10
The difference stage .....	11
The diversity stage .....	13
FEMINIST LEGAL THEORY IN ZIMBABWE.....	16
METHODOLOGY .....	28
FEMINIST JUDGMENTS .....	32
EXERCISING THE RIGHT TO TERMINATION OF PREGNANCY IN ZIMBABWE WITHIN THE AMBIT OF THE APPLICABLE LAWS .....	32
CUSTODY AND GUARDIANSHIP RIGHTS UPON SEPARATION OF UNMARRIED PARENTS.....	45
MATRIMONIAL PROPERTY RIGHTS UPON DISSOLUTION OF MARRIAGE IN ZIMBABWE .....	53
THE VALUE OF ANTI-ESSENTIALIST FEMINIST LEGAL THEORY IN OUR COURTS .....	63
CONCLUSION.....	67
BIBLIOGRAPHY .....	69

## ACKNOWLEDGEMENTS

I am grateful for the opportunities that have come my way and led me to pursuing this degree. Thank you to my mother and the rest of my family for their support. I would like to acknowledge the work of trailblazing feminist disruptors across the globe (a lot of whom have been cited throughout this thesis) who have come before me and who have laid the foundation for this type of work. I would also like to thank Koliwe Majama and Chenai Chair whose financial assistance and support made pursuing this degree possible.

Special mention goes to Professor Kelley Moulton in the Centre for Criminology who introduced me to my supervisor, Professor PJ Schwikkard. To my supervisor, PJ, thank you for your guidance, your expertise, your grace, and, most importantly, your patience during the last two years. I came to you with an ambitious and wide research topic, and you guided me through this more structured and nuanced research. Thank you for your words of encouragement and for pouring into my cup when it was running empty. This work would not have been possible without you.

Finally, to my mainini Khanyi who passed away shortly before I was meant to complete this degree: “I wrapped this grief around me and wrote this with your wishes in my heart. I did it solely because I promised you that I would.” In my next life, you will be my sister again.

## ABSTRACT

In 2004, the first feminist judgments project was launched by a group of Canadian lawyers and scholars. This group, calling themselves the Women's Court of Canada, produced six rewritten opinions of the Canadian Supreme Court interpreting the Canadian Charter of Rights and Freedoms from a feminist perspective. This style of rewriting original court opinions from a feminist perspective sparked the feminist judgments movement and has been taken up by feminist lawyers and scholars across the globe; in England, Ireland, Australia, the United States, India, New Zealand, South Africa, and Mexico, rewriting significant cases on an array of topics including criminal law, family law, international law, and constitutional law. In each of these projects, feminist scholars and lawyers apply their chosen strands of feminist legal theory to already decided cases to show the practical utility of feminist legal theory to a set of existing facts and laws.

Loosely following on this model of rewriting existing judgments from a feminist perspective, this thesis offers commentary on how three Zimbabwean appeal judgments, selected from a reading and review of some of the most prominent cases in the last 20 years, could have been decided differently from an anti-essentialist feminist perspective. The three cases cover the following topics: matrimonial property rights, child custody rights and abortion rights. This commentary is offered as part of the exercise by feminist scholars around the world to put feminist legal theory into practice and to discuss the difference these differently decided judgments would have on women in Zimbabwe, the affected parties in each of the selected cases, and the Zimbabwean society at large.

Beginning with a discussion on the development of feminist legal theory in courts, mainly starting in the United States before trickling down to other parts of the world, the thesis focuses on how the three selected judgments, retaining the same facts and legal principles they have been previously decided on, would be altered or bolstered using an anti-essentialist feminist legal theory interpretation. This commentary is followed by a concluding section commenting on the value of feminist legal theory to the Zimbabwean judicial system.

## INTRODUCTION

Legal positivism avers that law is neutral and objective and can be relied upon to produce the right answers.<sup>1</sup> However, the track record of the application of the law in cases involving women and the disproportionate effects that some judgments have on women forces one to stop and question: ‘the right answers according to who’?

What happens in court is not neutral or isolated, judges have their own personal ideologies and are not insulated from the ideas circulating in our larger society.<sup>2</sup> And the impact of court judgments extends beyond the parties involved in the litigation. Some judgments become precedent in future cases and constitutional litigation sometimes leads to the change in or amendment of our laws.

The functionality of the legal system, for example, who has access to the courts, who can afford good legal counsel, who is aware of the law, is all determined by our social structures which include patriarchy, capitalism, and racism. This is because the law does not occur in a vacuum. It occurs alongside, and is influenced by, social structures. Multiple social structures intersect in different ways but have a disproportionately negative effect on women, a concept which will be explored and illustrated throughout this thesis.<sup>3</sup> The law and what happens in our courts is therefore, not neutral – precedent affects later decisions in lower courts, social ideologies and ideas influence decisions, and both negative and positive decisions reverberate inside and outside the court.<sup>4</sup>

While the law remains a site of injustice in some instances and is a hostile tool for some women, it cannot be ignored because it is an integral part of democratic society alongside the rule

---

<sup>1</sup> M Thornton ‘Postscript: Feminist Legal Theory in the 21st Century’ (2020) 9 (3) *Laws* at 16.

<sup>2</sup> C Blouws and PD Gqola ‘Courts designed for women should not gag them’ *New Frame* 1 December 2021 at <https://www.newframe.com/courts-designed-for-women-should-not-gag-them/>, accessed 24 November 2022.

<sup>3</sup> Other factors that make it more difficult for women to gain access to justice include illiteracy, trafficking, armed conflict, status as an asylum seeker, internal displacement, statelessness, migration, being a female head of household, widowhood, living with HIV, deprivation of liberty, criminalization of prostitution, geographical remoteness and stigmatization of women fighting for their rights, see United Nations Committee on the Elimination of Discrimination against Women ‘The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) General recommendation No. 33 on women’s access to justice’ United Nations 3 August 2015 at <https://digitallibrary.un.org/record/807253?ln=en#record-files-collapse-header>, accessed 1 November 2023.

<sup>4</sup> Blouws and Gqola op cit note 2.

of law and social contract theory. Many legal feminist scholars have concluded that gender bias constitutes a pervasive feature of our law and is not isolated to instances of abuse of law or discriminatory laws. These scholars have sought to change this by identifying women's legal challenges, particularly where a gender bias is obvious, and offering feminist solutions to these legal challenges.<sup>5</sup> The law is both responsive and resistant to feminist approaches and perspectives and it is useful as a tool for feminists because of its ability to regulate access to rights, benefits and resources, social inclusion and marginalization, and its power to define an 'authoritative reality'.<sup>6</sup>

This work seeks to contribute to the existing work on identifying the instances in which laws may be used to directly or indirectly discriminate against women or instances where a feminist perspective is useful when deciding a case by offering anti-essentialist feminist commentary on selected Zimbabwean judgments and by discussing how an anti-essentialist feminist judge would decide the selected cases.<sup>7</sup> The first section of this work traces the development of feminist legal theory and reviews the theoretical literature on feminist legal theory. The second section addresses the methodological underpinning of this thesis, setting out how and why the cases under discussion have been selected. Section three focuses on the selected judgments and discusses how they would be altered or bolstered using anti-essentialist feminist legal theory, followed by a concluding section which comments on the value of feminist legal theory to the Zimbabwean judicial system.

---

<sup>5</sup> See, for example, C Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 (2) *Politikon: South African Journal of Political Studies* at 217.

<sup>6</sup> *Ibid* at 220.

<sup>7</sup> For other feminist judgment projects, please see the following works: S Cowan, C Kennedy and V Munro (eds) *Scottish feminist judgments : (re)creating law from the outside in* (2019); J McCandless, M Enright and A O'Donoghue 'Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity in Northern/Irish Courts' (2016) Policy Briefing Paper No. 17 *LSE Law*; and LL Berger, KM Stanchi, and BJ Crawford *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016).

## A BRIEF OVERVIEW OF FEMINIST LEGAL THEORY

At the conception of the modern state as we know it today, women were relegated to a subordinate status: they were denied the right to make decisions, the right to vote and the right to participate economically.<sup>8</sup> When the social contract theory was formulated to replace monarchical power with democratic policies, it empowered men through the forging of political fraternities bonded together through shared masculinity.<sup>9</sup> It has been argued that men became agents in the political sphere because of their role as ‘heads of the family’ – as fathers and husbands. Men’s role as heads of patriarchal families allowed them to extend this authority to the public sphere under political structures.<sup>10</sup> After this, the law became a vehicle for gender discrimination by creating and maintaining male dominance through outright discriminatory laws, misapplied or ignored laws and neutral-appearing laws with adverse effects against women because of their socio-economic status.<sup>11</sup>

Feminist legal theory emerged as a corollary of second wave feminism with the critique of knowledge as its central tenet.<sup>12</sup> Feminist legal theory engages with legal concepts, legal ideology, legal practice and other areas of substantive legal doctrine, the law being the central site of engagement and analysis.<sup>13</sup> Feminist legal theory has two major components: it explores and critiques the theoretical issues underlying the interaction between law and gender and it applies a feminist analysis and perspective to concrete areas of law.<sup>14</sup> However, the ‘legal’ in feminist legal theory does not limit feminist legal theory to a purely legal analysis void of any social, economic or political engagement and enquiry.<sup>15</sup> Instead, similar to other forms of feminist theory and practice, feminist legal theory is interdisciplinary in its methods and approaches.<sup>16</sup>

---

<sup>8</sup> P Scully “Should we give up on the State? Feminist theory, African gender history and transitional justice” (2010) 9 (2) *African Journal on Conflict Resolution* 29 at 31. See also S Qureshi ‘Research Methodology in Law and Its Application to Women’s Human Rights Law’ (2015) 22 (2) *Journal of Political Studies* 629 at 636.

<sup>9</sup> P Scully “Should we give up on the State? Feminist theory, African gender history and transitional justice” (2010) 9 (2) *African Journal on Conflict Resolution* 29 at 31.

<sup>10</sup> *Ibid.*

<sup>11</sup> See A Armstrong (ed) *Women and Law in Southern Africa* (1987) at vi.

<sup>12</sup> Thornton op cit note 1 at 16.

<sup>13</sup> VE Munro & M Davies *The Ashgate Research Companion to Feminist Legal Theory* (2016) at 1.

<sup>14</sup> KD Weisberg (ed) *Feminist Legal Theory Foundations* (1993) at 3.

<sup>15</sup> Albertyn op cit note 5 at 217.

<sup>16</sup> *Ibid.*

Despite the form that it takes, for example whether artistic or academic, feminist thought is concerned with the modalities of power which have produced and continue to produce a gendered social existence.<sup>17</sup> These modalities of power include capitalism, patriarchy, race and hierarchies which are interwoven into the fabric of our social and economic systems.<sup>18</sup> Feminist legal theorists are united in the primary belief that society is patriarchal - designed and dominated by men for the benefit of men.<sup>19</sup> Patriarchy affects all aspects of society, both public and private, and all feminist jurisprudence analyses and critiques women's position in patriarchal society and suggests alternative equal societies.<sup>20</sup>

Patriarchy, the system by which men are viewed and presented as the leaders and women and children their subordinates, filters into all aspects of our lives.<sup>21</sup> It determines how people live in public and in private, it determines our health and wealth outcomes, it has a bearing on whose loan gets approved, who gets hired, how they are hired, and where they are hired. Patriarchy sometimes informs some public policy outcomes such as health rights and funding and employment laws and regulations. However, the concept of patriarchy is a societal construct. Professor Pumla Dineo Gqola explains that, to work, patriarchy relies on symbolic arrangements as though they are natural, automatic and inevitable.<sup>22</sup> Therefore, it is imperative that feminist work, not only illustrate how patriarchy works, but strategizes against it and works to dismantle it.<sup>23</sup> This is one of the premises of feminist legal work and feminist scholarship in general.

At the beginning of feminist legal theory, feminist legal scholars questioned how claims to legal universality and neutrality, averred by legal positivism, could be valued if the voices of over 50% of the population, i.e., women, are missing from judgments, the legislature or the judiciary.<sup>24</sup> This critique of knowledge systems and the context they are created in is one of the identifying

---

<sup>17</sup> Albertyn op cit note 5 at 218. See also DC Byrne & Z Imma 'Why 'Southern Feminisms'?'(2019) 33 (3) *Agenda* 2 at 4 and B Somekh and C Lewin *Research Methods in the Social Sciences* (2004) at 68.

<sup>18</sup> JM Modiri 'The colour of law, power and knowledge: Introducing critical race theory in post-Apartheid South Africa' (2012) 28 *SAJHR* 405 at 406.

<sup>19</sup> Albertyn op cit note 5 at 218.

<sup>20</sup> *Ibid.*

<sup>21</sup> CP Christ 'A new definition of patriarchy: control of women's sexuality, private property, and war' (2016) 23 *Feminist Theology* 214 at 214.

<sup>22</sup> PD Gqola *Female Fear Factory* (2021) at 13.

<sup>23</sup> *Ibid.*

<sup>24</sup> Thornton op cit note 1 at 16.

elements of feminist scholarship. Feminist scholarship has certain identifying characteristics which do not make an exhaustive list, but serve as possible markers of feminist thought.

The first identifying characteristic of feminist scholarship is the emphasis on women's experiences.<sup>25</sup> This is sometimes referred to as the 'woman question' whereby feminist legal scholars question the shortage of women's presence and women's experiences in multiple sectors and industries such as the legislature, theology or the economy. Feminist scholarship recognizes that there is a gap in knowledge produced by women and information relating to women's experiences and have, therefore, made it a priority to highlight women's experiences and voices in their work.<sup>26</sup> The centering of women's experience has been useful in identifying harms and gaps that had not been recognized by courts or legislatures or have been minimized because there was never any thought to the consequences for women.<sup>27</sup>

Another characteristic of feminist scholarship is that it uncovers male bias in rules, norms and standards that are typically portrayed as neutral or objective.<sup>28</sup> Alice Armstrong, in the introduction to '*Women and Law in Southern Africa*' identifies women's legal problems and where they stem from.<sup>29</sup> She states that while some laws are *prima facie* discriminatory, other laws appearing neutral may adversely affect women because of women's economic or social circumstances.<sup>30</sup> Some laws may also be discriminatory because of what they leave out, for example, maternity leave legislation that does not require employers to pay women during the period of their leave.<sup>31</sup> The uncovering of male bias under feminist scholarship can be both deconstructive, whereby it exposes underlying bias, or reconstructive whereby it constructs methods of inclusion for the marginalized.<sup>32</sup>

Feminist scholarship also engages with the dilemma of difference.<sup>33</sup> Scholars have noted that taking gender into account sometimes leads to the stigmatization of the group on grounds of

---

<sup>25</sup> M Chamallas *Introduction to Feminist Legal Theory* 2 ed (2003) at 7.

<sup>26</sup> Chamallas op cit note 25 at 7.

<sup>27</sup> Chamallas op cit note 25 at 10.

<sup>28</sup> Chamallas op cit note 25 at 8. See also B Somekh and C Lewin *Research Methods in the Social Sciences* (2004) at 66.

<sup>29</sup> A Armstrong (ed) *Women and Law in Southern Africa* (1987) at vi.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> Chamallas op cit note 25 at 8.

<sup>33</sup> Chamallas op cit note 25 at 10.

difference or inferiority, reinforcing gender difference.<sup>34</sup> The dilemma of difference means recognizing that neither ignoring nor highlighting gender will necessarily translate into progress for women and this is an issue that feminist scholarship often grapples with.<sup>35</sup>

Feminist scholarship also looks at the patterns of male domination and offers solutions to limit the reproduction of these patterns.<sup>36</sup> This has involved unpacking the concept of choice and investigating the circumstances under which women commonly make choices.<sup>37</sup>

Feminist legal theory has developed in stages which have been characterized by different strands of feminist thought and different sites of contestation over laws and legal practices which facilitated women's inequality. There have been three prominent stages in the development of feminism that consequently informed feminist legal thought.<sup>38</sup> The first is the equality stage of the 1970s which has its roots in liberal thought and is sometimes referred to as liberal feminist legal theory.<sup>39</sup> The second stage was introduced in the 1980s by 'difference theorists' who engaged with the concept of differences between men and women and argued that recognizing this gender difference did not mean accepting it as unalterable.<sup>40</sup> The third stage, from the 1990s onwards, was the diversity stage whereby feminists started arguing that there isn't a homogeneous women's experience, but rather that the lived experiences of women are different depending on a range of factors such as race, social and economic class, ethnicity, physical disability, and sexual orientation.<sup>41</sup> The three stages are discussed in more detail below.

### The equality stage

The equality stage of the 1970s saw feminist legal scholars advocating for privacy, formal equality in the economic sector and within the family structure, and the legal regulation of sexual conduct.<sup>42</sup> During this stage, feminist legal scholars advocated for equal access to jobs and

---

<sup>34</sup> Chamallas op cit note 25 at 10.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Chamallas op cit note 25 at 17.

<sup>40</sup> Chamallas op cit note 25 at 18.

<sup>41</sup> Chamallas op cit note 25 at 20.

<sup>42</sup> Chamallas op cit note 25 at 10. See also B Somekh and C Lewin *Research Methods in the Social Sciences* (2004) at 67.

education and were successful in a few aspects of attaining formal equality. A prominent example during this stage was securing the presumption of the best interests of the child during divorce proceedings. This presumption required the courts to look at the best interests of the child in child custody cases and not merely the financial security of a parent in determining who gets custody of the child.<sup>43</sup> Feminists during this stage also advocated for individual autonomy and choice and for these freedoms to be applied equally between men and women.<sup>44</sup>

While equality informs the very basic argument that feminists seek to make - that there should be equal treatment and non-bias on the grounds of gender or sexuality - it has been the most criticized strand of feminist thought. This stage was heavily criticized because formal equality did not improve the reality of most women and another criticism was that the early focus on gender identities was misplaced.<sup>45</sup> Dominance theorists also criticized liberal feminism for legitimizing the status quo through its advocacy for concepts such as privacy, objectivity and individual rights which do not increase women's power, but rather push for these concepts within the biased frameworks that they already exist in.<sup>46</sup> Consequently, equality feminists have sometimes been called assimilationists for assimilating the status quo through their advocacy.<sup>47</sup> Another criticism levelled against equality advocates is that individual autonomy on its own advances women's rights formally and not substantially. This is because formal equality merely compares the treatment of women against the treatment of men without looking at other factors such as the disadvantages suffered by women, the distribution of power and without addressing inequality more substantively.<sup>48</sup>

### The difference stage

In the 1980s, feminists began focusing on the economic consequences of patriarchy and the gendered differences between men and women which patriarchy set as justification for economic practices the world over.<sup>49</sup> These feminists were referred to as 'difference theorists'

---

<sup>43</sup> Chamallas op cit note 25 at 33.

<sup>44</sup> Chamallas op cit note 25 at 17.

<sup>45</sup> Chamallas op cit note 25 at 27.

<sup>46</sup> Chamallas op cit note 25 at 28.

<sup>47</sup> Ibid.

<sup>48</sup> R Graycar & J Morgan 'Feminist legal theory and understanding of equity: One step forward or two steps back' (2005) 28 *Thomas Jefferson Law Review* 399 at 409.

<sup>49</sup> Chamallas op cit note 25 at 39.

because they engaged with the concept of differences between men and women and argued that recognizing this gender difference did not mean accepting it as an unchangeable fact.<sup>50</sup> They discussed the feminization of poverty, the gender gap in public spaces, for example in politics, the glass ceiling, the gender pay gap, etc. which distinguished men and women in ways that had a detrimental effect on the economic subsistence of women.<sup>51</sup> Difference theorists located foundations of gender difference in cultural attitudes, ideology, socialization or organizational structures.<sup>52</sup> They also theorized that because of the biological and socially constructed differences between men and women, identical treatment of each group could not produce meaningful equality because men and women were on unequal foundational footing.<sup>53</sup>

Much of the work in the 1980s sought to explain that the inclusion of women into male-dominated spaces was not the exclusive meaning of equality.<sup>54</sup> One of the most prominent feminist legal theorists during this period was Catharine MacKinnon who argued that the legal system was against women's interests and was designed to further male dominance.<sup>55</sup> She also argued that what passes as the objective view is the view held by the dominant group which is readily accepted as the truth as opposed to a point-of-viewlessness as has been argued.<sup>56</sup> MacKinnon's feminist critique of objectivity marked a departure from the tenets of liberal feminism during the equality stage, which had insisted that the law be neutral and worked to minimize sexual differences rather than highlight them.<sup>57</sup> MacKinnon also introduced the dominance approach to equal protection within the realm of constitutional law.<sup>58</sup> The dominance approach challenged the reliance on differences within the equal protection doctrine. The equal protection doctrine held that like people should be treated alike and this allowed differential treatment on the basis of sex.<sup>59</sup> This is because the requirement that 'likes be treated alike' implied that only people of a similar standing had the right to demand equal treatment and women were different from men in certain specific aspects

---

<sup>50</sup> Chamallas op cit note 25 at 39. See also B Somekh and C Lewin *Research Methods in the Social Sciences* (2004) at 68.

<sup>51</sup> Ibid.

<sup>52</sup> Chamallas op cit note 25 at 40.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Chamallas op cit note 25 at 45.

<sup>56</sup> Chamallas op cit note 25 at 48.

<sup>57</sup> Chamallas op cit note 25 at 49.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

such as sexual reproduction.<sup>60</sup> MacKinnon's dominance approach argued that courts should be more concerned with the prevalence of domination not the existence of difference because the existence of dominance is what perpetuates the subordination of women, not the existence of real or perceived differences between men and women.<sup>61</sup> The dominance approach decenters men's needs and experiences as the standard by which the treatment of women is judged.<sup>62</sup> The dominance theory was criticized, however, because of its emphasis on the victimization of women and left little room for women to describe how they had exercised their autonomy in shaping their lives.<sup>63</sup>

Where MacKinnon's dominance approach fell short is where cultural feminism picked up during the difference stage. Cultural feminism argued that women were nurturers with a penchant for preserving relationships and being empathetic.<sup>64</sup> Cultural feminism also emphasized attachment.<sup>65</sup> This is the 19th century stereotypical view of women as naturally emotional, domestic and nurturing and this was one of the criticisms against cultural feminism.<sup>66</sup> However, it was popular within the field of alternative dispute resolution as it was emerging because of its emphasis on settling disputes amicably in order to preserve relationships.<sup>67</sup> These principles, although not gendered, make up the underlying principles of alternative dispute resolution and are still in use to date. This is one example of how feminist legal theory has contributed to the legal system.

### The diversity stage

Prior to the 1990s, most feminist legal scholarship was concerned with the differences between men and women and how those differences necessitated more inclusive standards.<sup>68</sup> In doing this comparative exercise, feminist scholars tended to overplay the differences between men and

---

<sup>60</sup> Chamallas op cit note 25 at 49.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

<sup>63</sup> Chamallas op cit note 25 at 52-53.

<sup>64</sup> Chamallas op cit note 25 at 57.

<sup>65</sup> Chamallas op cit note 25 at 59.

<sup>66</sup> Chamallas op cit note 25 at 60.

<sup>67</sup> Chamallas op cit note 25 at 58.

<sup>68</sup> Chamallas op cit note 25 at 77.

women while downplaying the differences between women.<sup>69</sup> Since the 1990s, feminists have worked towards correcting these overgeneralizations by highlighting the differences between women associated with race, ethnicity, sexual orientation, and socioeconomic class.<sup>70</sup> Black feminists and other feminists of colour argued that the movement was saturated by white women and their needs, while the needs of other women were not on their agenda. They cited the fight for abortion rights as an example: while white feminist legal theorists were preoccupied with abortion rights, the involuntary sterilization of minority women in America by the state was not on the agenda.<sup>71</sup>

‘Essentialism’ is a term which captures the idea that there is ‘a common, underlying attribute or experience shared by all women’ independent of any aspects of their lives such as race, social class or sexual orientation.<sup>72</sup> Katharine Bartlett describes two forms of gender essentialism: false universalism and gender imperialism.<sup>73</sup> False universalism is the use of an unexpressed norm of the most privileged group of women, in this case white, middle-class and heterosexual, in a way that obscures nonprivileged groups of women.<sup>74</sup> Gender imperialism places more weight on gender oppression and underplays the impact of oppression based on other factors such as race, class or sexual orientation.<sup>75</sup> Anti-essentialism, then, refers to the rejection of essentialism and a commitment to the inclusion of all women without any qualifications.<sup>76</sup>

The rise of anti-essentialist thought during the 1990s was referred to as the diversity stage. Prominent scholars of this stage included American advocate Kimberle Crenshaw who pointed out the discrimination faced by black women and other women of colour which was often overlooked in the mainstream feminist movement.<sup>77</sup> Feminist scholars pointed out several techniques which led to the exclusion of black women and other women of colour from mainstream feminist discourse including the use of dichotomous and exclusive categories in the description of women

---

<sup>69</sup> Chamallas op cit note 25 at 77.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Chamallas op cit note 25 at 78.

<sup>73</sup> Chamallas op cit note 25 at 79.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Chamallas op cit note 25 at 80. See also TB Johnson “Waves of Feminism and the Media” (2017) 32 *University of Kentucky Lewis Honors College Capstone Collection* 1 at 9.

e.g. ‘women’ and ‘minorities’ when black women occupied both categories simultaneously.<sup>78</sup> Crenshaw further highlighted how while black women could sometimes experience discrimination faced by white women, they also experienced discrimination exclusive to them.<sup>79</sup> Women of colour sometimes had to choose between sex discrimination or race discrimination in the cases they brought before American courts and this had the disadvantage of excluding important facts if they did not fit into the chosen discrimination brought before court.<sup>80</sup> This was when Crenshaw introduced the theory of intersectionality, a theory recognizing the interlocking nature of the two systems of oppression black and other women of colour faced - gender and race.<sup>81</sup>

Anti-essentialist feminist legal theory is the chosen strand that this thesis focuses on and uses in its interrogation of selected judgments because it seeks to challenge oppression from its multiple origins. Anti-essentialism is the best theoretical underpinning for work which is aimed at social change because it challenges homogeneity which limits reform and social reorganization.<sup>82</sup> The law is already associated with rigidity and anti-essentialism is an important tool in challenging this rigidity because it challenges the way race, gender, class and other categories have been used as a vehicle for oppression.<sup>83</sup>

## Conclusion

There are several strands of feminist thought and, consequently, feminist legal theory. Feminist legal theory has developed and evolved through the stages discussed above and within these three stages, several other strands of feminist thought have cropped up to either challenge or supplement these three stages. And while each strand might criticize the other in some respect, they are all outward facing in that they are not consumed in intra-feminist politics, but focus on the rehabilitation and progress of their societies.<sup>84</sup> The arguments within each strand of thought might be different and their agendas might differ, but they have the same foundation - the “woman

---

<sup>78</sup> Chamallas op cit note 25 at 80.

<sup>79</sup> Chamallas op cit note 23 at 81.

<sup>80</sup> Chamallas op cit note 25 at 82.

<sup>81</sup> Ibid.

<sup>82</sup> J Wong ‘The anti-essentialism v. essentialism debate in feminist legal theory: The debate and beyond’(1999) 5 *William & Mary Journal of Race, Gender, and Social Justice*.

<sup>83</sup> Modiri op cit note 18 at 417.

<sup>84</sup> S Setlaelo ‘African feminism and its project of decolonisation’ (2021) at <https://thoughtleader.co.za/african-feminism-and-its-project-of-decolonisation/> (accessed 18 September 2021).

question”.<sup>85</sup> Therefore, while each stage indicates a particular mobilization strategy, a particular theoretical base or a certain agenda, the ‘woman question’ makes up the foundation of each strand and the development and use of feminist legal theory by women in Africa illustrates this point clearly.

### FEMINIST LEGAL THEORY IN ZIMBABWE

Feminist legal theory emerged in Africa in the late 1960s alongside feminist thought.<sup>86</sup> This was a period characterized by radical intellectual political philosophies as African countries were fighting for independence from colonial powers through movement building and the critique of class based systems.<sup>87</sup> African feminists have defined feminist thought as ‘a woman-centred radical political philosophy, which has emerged through critical reflection on the ways in which oppressive regimes of gender and sexuality facilitate the exploitation of African women.’<sup>88</sup>

This paper looks at feminist legal theory in southern Africa in general and more specifically it is an exercise on the practical application of anti-essentialist feminist legal theory in Zimbabwe, by piecing together historical research on the development of the law and women’s engagement with the law. A useful starting point when looking at feminist legal theory in southern Africa and women’s interaction with the law is through the history of colonialism and the evolution of family law in both Zimbabwe and, partly, in southern Africa as a whole.

Southern African countries share a common history in that they were all subject to colonial rule, most of them by the British and others by Portugal, France and Germany. Schmidt posits that the arrival of the colonizers in Zimbabwe and surrounding areas such as Zambia and Malawi (then Rhodesia) offered different ways of living for people living on the margins of society and that women took advantage of this opportunity by fleeing from polygamy and forced marriage to mission stations, mining compounds, European farms, and developing urban areas.<sup>89</sup> These options ultimately undermined the authority of African patriarchs such as chiefs, headmen, fathers and male guardians. People living on the margins of society were observed by the colonizers as human

---

<sup>85</sup> Ibid.

<sup>86</sup> A Mama ‘African feminist thought’ 2019 *Oxford Research Encyclopedia of African History* 1 at 2.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> E Schmidt ‘Negotiated spaces and contested terrain: men, women, and the law in colonial Zimbabwe, 1890–1939’ (2007) 16 *Journal of Southern African Studies* 622 at 622-623.

pawns transferred as payment of a debt, captives of war, and dissatisfied co-wives, and young women and girls forced to marry against their will or pledged to marriage.<sup>90</sup> European missionaries and the colonial state allowed and encouraged this movement and, to some extent emancipation, because they considered customs such as child-pledging for marriage, forced marriage and polygamy to be repugnant and immoral.<sup>91</sup> The phrase ‘repugnant to natural justice and morality’ was defined by the Chief Justice of Rhodesia to mean customs which were abhorrent to the British or were immoral by their standards.<sup>92</sup>

It is important to note, at this point, that family law is the branch of law which regulates aspects of everyday life and it has the potential to transform the socio-economic realities of women.<sup>93</sup> Family law usually regulates marriage, divorce, inheritance and reproduction and this makes it particularly important for women because it affects their interaction with men, their interaction with their immediate societies and their economic and political livelihoods.<sup>94</sup> Family law also has a big influence on the legal status of women because women’s legal status has traditionally been based on their status in the home.<sup>95</sup> Often the best way to determine whether women are actually emancipated by the law is through observing whether they are empowered to make their own reproductive choices, whether they have equal inheritance rights, whether they have custody rights, and whether they are not discriminated against by divorce laws.<sup>96</sup> When women are disadvantaged under family law or family law is not a site of justice or emancipation for them, this affects their socio-economic status and, consequently, their everyday lives.<sup>97</sup>

During the first few decades of colonial rule in Zimbabwe, between 1890-1920, regulations under family law such as legislation outlawing child marriages, forced marriages and setting limitations on bride wealth was passed.<sup>98</sup>

---

<sup>90</sup> E Schmidt ‘Negotiated spaces and contested terrain: men, women, and the law in colonial Zimbabwe, 1890–1939’ (2007) 16 *Journal of Southern African Studies* 622 at 622-623.

<sup>91</sup> Ibid.

<sup>92</sup> F Banda ‘Women, law and human rights in Southern Africa’ (2006) 32 *Journal of Southern African Studies* 13 at 13.

<sup>93</sup> P Mcgee Crotty ‘Family law in sub-Saharan Africa’ (2009) 30 *Journal of Women, Politics & Policy* 341 at 341 - 342.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Schmidt op cit note 89 at 623.

In 1901, the Native Marriages Ordinance of 1901, was passed and it prohibited the practice of child pledging and set a requirement that a woman's consent be obtained before a marriage could take place; in 1912 an amendment to this Ordinance made child pledging criminally punishable; and a further amendment in 1917 criminalized marriages with girls who were underage resulting in punishment in the form of a fine or imprisonment.<sup>99</sup> These laws were enforced by requiring all African marriages to be solemnized before a registering officer and requiring that all African marriages be registered, failure of which attracted a fine.<sup>100</sup> Schmidt postulates that these laws served the economic (agricultural and mining) interests of the colonizers by destabilizing indigenous social, political and economic structures.<sup>101</sup> However, in as much as these laws offered some level of emancipation for women and girls, women still required the consent of their guardians to marry or the consent of the administrator of Southern Rhodesia making them minors under male tutelage and under the state.<sup>102</sup>

It can be argued that women in Zimbabwe were more emancipated under customary law prior to its codification and the passing of the laws above because under Shona customary law for example, a woman could elope (*kutizira*) where a male guardian did not consent to her marriage and this was an acceptable form of marriage.<sup>103</sup> The colonial state rigidly maintained that the consent of a male guardian was required for marriage and forbade eloping.<sup>104</sup> However, shortages in male labour and the post-war recession of the early 1920s forced the colonial state to reassess its position and promote the African chiefs, headmen and other male elders they had initially undermined.<sup>105</sup>

These patriarchs became central to the colonial state's administrative system and they helped with maintaining law and order.<sup>106</sup> The collaboration between African patriarchs and the colonial state during this time extended to controlling the movement and sexuality of the African women that the laws enacted by the colonial state had initially emancipated.<sup>107</sup>

---

<sup>99</sup> Schmidt op cit note 89 at 628.

<sup>100</sup> Schmidt op cit note 89 at 629.

<sup>101</sup> Schmidt op cit note 89 at 623.

<sup>102</sup> Schmidt op cit note 89 at 630.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Schmidt op cit note 89 at 623-624.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

The colonial powers' indirect rule allowed African patriarchs some power in the area of personal or family law, but this function was limited because the colonial powers still had to adjudicate on personal or family law matters whenever disputes arose.<sup>108</sup> In order for the colonial powers to hear and decide on personal and family law disputes, they needed to have some understanding of the customary or 'native' law which was, at that point, not recorded in the form of statute or precedent.<sup>109</sup> Consequently, colonial state officials consulted notable African patriarchs such as chiefs, headmen and male elders for their 'legal' opinion on customary family laws which would fit the colonial state agenda of appeasing the African patriarchs with more power within their social structures which had been waning because of the arrival of the colonizers.<sup>110</sup> Bolstered power ensured that the African patriarchs would continue to collaborate with the colonial state and ensure a steady supply of labour for the colonial state.<sup>111</sup> What followed was the creation of rules *vis a vis* customary law. Fluid practices became hard and fast rules and African patriarchs saw this as an opportunity to double down on the power they had initially lost and as a way to create new rules to further reinforce their power.<sup>112</sup> While custom had been both malleable and sensitive to mitigating circumstances, 'customary' law as defined by colonial powers was not.<sup>113</sup> Where women tried to protest these interpretations of customs and traditions in colonial courts, state officials dismissed them because they based their assessments on the interpretations provided by influential male patriarchs.<sup>114</sup>

In addition to these masculinist interpretations, male colonial officers also held discriminatory views against women.<sup>115</sup> Male colonial officers introduced the Victorian concepts of gendered divisions in economics, education, politics and in families and imposed them on African women.<sup>116</sup> African women were resultantly not included in the interpretation of customary laws and norms which led to them receiving limited rights and the conclusion that customary law

---

<sup>108</sup> Banda op cit note 92.

<sup>109</sup> Ibid.

<sup>110</sup> Schmidt op cit note 89 at 624.

<sup>111</sup> Ibid.

<sup>112</sup> Schmidt op cit note 89 at 626.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Banda op cit note 92 at 14.

<sup>116</sup> Mcgee Crotty op cit note 93.

was gendered.<sup>117</sup> The decisions of colonial courts also gave African men a new, legal proprietorial sense of control over women.<sup>118</sup>

### Feminist legal theory in postcolonial Zimbabwe

Most postcolonial legal systems, including the Zimbabwean legal system, are plural legal systems. Plural legal systems are legal arrangements whereby two or more systems of law co-exist.<sup>119</sup> These can be statutory systems where law is codified in legislation passed by parliament and can be accessed via written statutory documents existing side by side with customary law which may be unwritten and based on oral tradition, or religious law which may also be codified and written. Plural legal systems in postcolonial African countries often recognize statute law passed on from the colonizing state which address certain specific aspects of the law such as labour laws or criminal litigation procedure laws, a single constitutional doctrine which often entrenches civil and political rights and freedoms, customary law as another branch of the law recognized and regulated by the state, and, sometimes, religious law.<sup>120</sup> In some ways, postcolonial systems of law have not been a tool for the emancipation of African women because they are rooted in colonial systems, misinterpreted and customary law, suppressive religious laws, and poorly implemented constitutional laws. An argument can also be made that implementing women centred laws, while a good initiative by legislators including women legislators, has sometimes been a tick box exercise and the lack of implementation of these laws provides some evidence for this argument.<sup>121</sup>

Zimbabwe is a constitutional democracy with the constitutional document entrenching several fundamental freedoms and rights to be enjoyed by and for the benefit of all, including women, such as the right to equality and non-discrimination.<sup>122</sup> The Constitution is the ‘supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency’.<sup>123</sup> Harmful practices which are inconsistent with the constitution have largely been criminalized by law, but they sometimes continue in practice. In practice, forced

---

<sup>117</sup> Banda op cit note 92 at 14.

<sup>118</sup> Mcgee Crotty op cit note 93.

<sup>119</sup> G Swenson ‘Legal Pluralism in Theory and Practice’ (2018) 20 *International Studies Review* 438 at 438.

<sup>120</sup> Banda op cit note 92 at 14.

<sup>121</sup> Albertyn op cit note 5.

<sup>122</sup> Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>123</sup> Section 2 of the Constitution of Zimbabwe.

virginity testing, female genital mutilation and child marriages have continued with very little consequence.<sup>124</sup> These practices are especially rampant in religious sects in Zimbabwe.<sup>125</sup> In 2020, 34% of girls were married before the age of 18 and young girls as young as 14 years old have died whilst giving birth.<sup>126</sup>

Zimbabwe has also adopted national legislation and policies which address matters specific to women and prohibits discrimination against women such as the Maintenance Act 5 of 1951, the Customary Marriages Act 23 of 1950, the Births and Deaths Registrations Act 11 of 196, and policies setting out the national strategy on gender-based violence, for example. Most recently, in 2022, Zimbabwe also passed the Marriages Act 1 of 2022 which has been lauded as a fundamental step in achieving women's rights because it contains provisions which speak to the regulation of marriages, the division of matrimonial property and provides for the rights of parties in civil partnerships, amongst other provisions, although its efficacy remains to be seen. While legislation targeted at issues affecting women has been enacted and amended, the implementation of the legislation is poor and there is often no way to track and measure the implementation of these laws outside their application and use in litigation. This is another reason why feminist legal theory is an important tool in engaging and challenging already enacted laws and policies for the betterment of women. It is worth noting that even within the Zimbabwean legal and regulatory landscape, laws and policies enacted in the areas of domestic violence against women; abortion and statutory rape laws, and other laws and policies to protect violations of women's human rights in the private and public sphere, are a consequence of feminists' efforts, whether or not they have been labelled as such in the literature.

The passing of laws that benefitted women in Zimbabwe should be lauded still because at the time of the drafting and passing of the laws, advocating for legislation to be passed was a useful strategy to address women's oppression and advocate for laws giving rise to their rights, as

---

<sup>124</sup> OHCHR 'Committee on the Elimination of Discrimination against Women urges Zimbabwe to close implementation gap, address gender-based violence' (2020) at <https://www.ohchr.org/SP/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25553&LangID=S>, accessed 7 December 2021.

<sup>125</sup> Ibid.

<sup>126</sup> Girls Not Brides 'Zimbabwe urged to deliver justice for Memory Machaya' 18 August 2021 at <https://www.girlsnotbrides.org/articles/zimbabwe-urged-to-deliver-justice-for-memory-machaya/>, accessed 7 December 2021.

Catheryn Albertyn argues in her work on women and the law in post-apartheid South Africa.<sup>127</sup> This strategy of writing and enacting gendered laws was appropriate at the time that the laws were written and enacted because it offered an opportunity for women centred laws and not only the striking out of offensive provisions or mere formal inclusion of women in already enacted laws.<sup>128</sup> This is part of what the courts could offer at that time – formal and not comprehensive and substantive inclusion and recognition of women’s rights. Feminist litigation is an appropriate strategy because the courts can ‘be used to define rights, to preserve legislative process or to defend legislative gains’.<sup>129</sup> Further, courts also provide an avenue to allow advocacy for women’s rights in the ‘private sphere’ where the state and parliament has traditionally been unable to act.

However, despite the equality provisions and non-discrimination laws, there are still very few women in decision-making positions and women’s participation in Parliament and local government is low. A 2019 survey found that men constituted 73% of senior management positions compared to 27% women; 79% of CEOs in state enterprises compared to 21% women; only 31% of women chair boards of state enterprises compared to 69% men; only 28% of women are ministers, and only 9% of women are in ambassadorial positions.<sup>130</sup>

Internationally, Zimbabwe is a party to the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and has submitted six periodic reports, to date, in its efforts towards the implementation of the provisions in CEDAW. CEDAW was enacted to promote women’s rights and equality between men and women. Article 5a is particularly important in this quest because, recognizing the significance of social and customary bias in the discrimination against women, it calls for states to modify social and cultural practices in order to eliminate prejudices, practices and stereotypes based on the idea of the inferiority or superiority of either of the sexes.<sup>131</sup> In addition to CEDAW, the Committee passed General recommendation

---

<sup>127</sup> Albertyn op cit note 5 at 222. In the context of South Africa, Albertyn notes that little energy was expended on the courts, and most political and legal activity in the period between 1994-1999 was directed at government, the South African Law Reform Commission, the ruling party (African National Congress) and parliament.

<sup>128</sup> Ibid.

<sup>129</sup> Albertyn op cit note 5 at 223.

<sup>130</sup> Zimbabwe Gender Commission ‘Annual Report 2019’ (2019) available at <https://zgc.co.zw/annual-reports/>, accessed 29 June 2021.

<sup>131</sup> OHCHR ‘The Convention on the Elimination of All Forms of Discrimination against Women’ (CEDAW) *United Nations* 18 December 1979 at <https://www.ohchr.org>, accessed 30 June 2021.

No.33 on women's access to justice which sets out states' obligations to ensure that women have access to justice through the removal of obstacles which impede women's access to justice.

The supremacy of the Constitution means that international treaties such as CEDAW do not automatically become part of the law once ratified, they have to be passed into law by an act of parliament or approved by parliament as law.<sup>132</sup> Zimbabwe has also not ratified the optional protocol to CEDAW which would allow the Committee to hear complaints from individuals and inquire into grave violations of CEDAW. During the consideration of the sixth periodic report on CEDAW submitted by Zimbabwe in February 2020, the Committee on the Elimination of Discrimination against Women (the Committee) applauded Zimbabwe's efforts towards implementing the provisions of CEDAW through its implementation of laws and policies in line with CEDAW such as the non-discrimination provisions in the 2013 constitutional amendment. However, the Committee encouraged the delegation from Zimbabwe to improve the implementation of laws which have been promulgated to give effect to and comply with CEDAW, highlighting that there was a gap in implementation, weak compliance with the Constitution, laws not aligned with the Constitution and consequently CEDAW, and inadequate oversight mechanisms.<sup>133</sup>

At the regional level, Zimbabwe is party to the African Charter on Human and Peoples' Rights (ACHPR); the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol); the African Charter on Rights and Welfare of the Child (ACRWC), and the Southern Africa Development Community Protocol on Gender and Development. All of these statutory and international instruments mentioned are utilized by ordinary women who are aware of the law and women's advocacy organizations when they seek legal redress for violations of women's rights.<sup>134</sup>

The role of women's advocacy organizations within Zimbabwe's legal system must be highlighted because without these organizations, a significant proportion of women and underprivileged groups would not know the law and would not be able to access the courts. During colonialism and in the early years post-independence, the black Zimbabwean women who could

---

<sup>132</sup> AS Tsanga 'A critical analysis of the women's constitutional and legal rights in Zimbabwe in relation to the Convention of the Elimination of All Forms of Discrimination Against Women' (2002) 54 *Mein Law Review* 217 at 219.

<sup>133</sup> Ibid.

<sup>134</sup> See, for example, Zimbabwe Women Lawyers Association 'Success Stories' at <http://www.zwla.co.zw/media-room/success-stories>, accessed 4 December 2021.

access the courts were those supported by their male relatives, those who had support from their husband's family, those who came from families with some experience with litigation, those who were able to speak English, those confident enough to speak with lawyers and appear in court, those with experience dealing with court hierarchy and practices, and those with access to money needed for litigation.<sup>135</sup> This was a very limited number of women. There is still very limited access to free legal aid in Zimbabwe and women are disproportionately affected by this reality, but women's advocacy groups have tried and continue working towards bridging the gap between women and the law in Zimbabwe. Women's advocacy groups have stepped in to fill the vacuum that the state has failed to fill in educating women about the law and providing women with free legal aid when they need it most.<sup>136</sup>

Post-independence, governing parties with a majority in government and public service positions, like the ruling party in Zimbabwe for example, have been preoccupied with maintaining their hold on power and they have made use of the court system to suppress any voices of dissent, including those of women. This has been illustrated numerous times in Zimbabwe through violence against women in the political opposition perpetrated using state machinery such as the courts and the police; the sexual violence against women in politics; and the rampant violence by prominent political figures such as vice presidents against women especially their spouses.<sup>137</sup> These are some examples of how the state remains a symbolic patriarch and has only superficially endeavoured to promote and protect women's human rights. In many ways, the state has failed to protect and uphold women's human rights and often the court system remains one of the limited avenues available to fight for human rights to be upheld. The courts are limited in this instance because while they can issue favourable and positive orders of retribution or amendment of discriminatory laws, the application of and adherence to these orders is sometimes an insurmountable challenge. This limitation is not one that can be addressed by having more feminist judgments per se, however, it can be argued that feminist thinking in our courts might be a vehicle

---

<sup>135</sup> Banda op cit note 92 at 20.

<sup>136</sup> L Sithole & C Dziva 'Eliminating harmful practices against women in Zimbabwe: implementing article 5 of the African Women's Protocol' (2019) 19 *African Human Rights Law Journal* 585 at 588.

<sup>137</sup> See, for example, J Burke and N Chingono 'Zimbabwean MDC activists 'abducted and sexually assaulted'' The Guardian 17 May 2020 at <https://www.theguardian.com/world/2020/may/17/zimbabwean-mdc-activists-abducted-and-sexually-assaulted>, accessed 8 February 2022 and L Munhende 'Zimbabwe: Mohadi ex-wife turns up the heat On VP, demands his arrest' All Africa 25 October 2019 at <https://allafrica.com/stories/201910250307.html>, accessed 8 February 2022.

through which change in social perspectives and implementation of judgments, laws and policies can be achieved over time.

Customary law as interpreted by patriarchs, both colonial and African, forms part of the present day national legal system in Zimbabwe and is recognized and protected by the Constitution, so long as it does not go against the provisions in the Constitution.<sup>138</sup> This was not always the case. Previously, Zimbabwean statutory law and the Constitution allowed for some level of discrimination in favour of customary law.<sup>139</sup> In Zimbabwe, highly entrenched disparities continue to exist between men and women in several fundamental aspects: in the area of legal rights as discussed in this thesis, labour divisions and decision making roles, access to and control over productive resources, education and health amongst others, despite changes and advancements in statutory law and customary law as it was under colonialism and post-colonial customary law.<sup>140</sup>

Zimbabwe is a largely religious society with a large section of the population identifying as Christian.<sup>141</sup> The Christian bible makes provisions that women are subordinate to men as they are made from the ribs of men.<sup>142</sup> These problematic bible provisions and other patriarchal and misogynistic beliefs under the guise of religion are taught to both children and adults in church and in schools. Many educational institutions in Zimbabwe are run by churches such as the catholic church and the Anglican church.<sup>143</sup> The church has, sometimes, become a site for child marriages and violence for many women and girls.<sup>144</sup> Religious leaders are often the perpetrators of gender-based violence such as sexual assault and rape. Several high profile religious leaders have been accused of rape with no consequence as their congregations rallied behind them and the law secured their freedom as they have been tried in court and freed on various grounds or had their cases dismissed for various legal or technical reasons before getting to court.<sup>145</sup> Zimbabwe might

---

<sup>138</sup> Banda op cit note 92 at 14.

<sup>139</sup> Ibid.

<sup>140</sup> Banda op cit note 92 at 23.

<sup>141</sup> V Magezi & P Manzanga 'Gender-based violence and efforts to address the phenomenon: Towards a church public pastoral care intervention proposition for community development in Zimbabwe' (2019) 75 *HTS Teologiese Studies/Theological Studies* at 4.

<sup>142</sup> Ibid.

<sup>143</sup> T Mutangi 'Religion, law and human rights in Zimbabwe' (2008) 8 *African Human Rights Journal* 526 at 529.

<sup>144</sup> Ibid.

<sup>145</sup> Ibid

not be governed under religious law, but provisions within the Zimbabwean constitution giving rise to religious freedoms have allowed violence against women and girls in the church to continue with very little consequence. In addition, the Zimbabwean state itself, through various heads of government, have openly embraced certain religious sects blurring the lines between religion and state.<sup>146</sup>

There are also many aspects of different Zimbabwean cultures which contain similar traditions of the subordination of women to men.<sup>147</sup> For example, in the Shona culture women are the property of their husbands and their husbands' family.<sup>148</sup> This cultural practice does not account for women's contributions to the income of the household and does not regard women's agency to the extent that women are of the same status as children.<sup>149</sup> This is how women continue to be dispossessed despite the existence of maintenance laws and inheritance laws in the country. Cultural practices which make women and girls obedient and submissive to men at home and in the community at large have largely been maintained and continue to be taught to women and girls in their homes, in schools, in church, and through their social interactions.<sup>150</sup> Culture often overrides the legislation of a country especially in rural and underserved areas. It also underpins the reactions of public service providers who believe in these cultural norms such as the police, court personnel, court judges, teachers, and healthcare professionals.<sup>151</sup>

### Conclusion

Feminist legal theory in Africa and abroad has been practically implemented through women's engagement with legal systems in court as women sought to exercise their rights. However, this implementation has been hampered by some limitations as briefly discussed above. Despite this, the law remains a vital tool in addressing the 'woman question'. In Zimbabwe, there is a significant

---

<sup>146</sup> See P Musoni 'White garment churches (Vapostori) and ZANU-PF party politics in Zimbabwe: True marriage or marriage of convenience during and post-Mugabe era' (2019) 75 *HTS Theological Studies*.

<sup>147</sup> Amnesty International "'Treated like Furniture'" Gender-based Violence and COVID-19 Response in Southern Africa' 2021 at 32, available at <https://www.amnesty.org/download/Documents/AFR0334182021ENGLISH.pdf>, accessed on 18 June 2021.

<sup>148</sup> See G Makaudze 'Women, wealth generation and property ownership in traditional Shona culture in Zimbabwe' (2014) 30 *Latin American Report* 18 - 29.

<sup>149</sup> Ibid.

<sup>150</sup> Amnesty International op cit note 147.

<sup>151</sup> Ibid.

level of engagement with the law that can benefit from an anti-essentialist feminist perspective as will be shown in the sections below.

## METHODOLOGY

This thesis has been inspired by previous feminist judgments projects, including the English project edited by Rosemary Hunter, Clare McGlynn, and Erika Rackley in 2010.<sup>152</sup> While the project has not been the only feminist judgment project, for example, there have been projects in India, Mexico, Canada and a pilot in Africa, the book edited by the three scholars largely inspired the format and form of this paper.<sup>153</sup>

There are many different methods of legal research. Feminist research by rewriting judgments falls under the category of practical legal research. Here judgments are selected because they are an apparatus through which the law engages with the day to day lives of people – they make some social facts legally cognizable, give certain behaviours legal consequences and offer redress to victims of harm.<sup>154</sup> They provide an opportunity for holistic consideration of facts and the law by the judiciary. In addition to considering how judgments deal with a particular set of facts and how those facts fit into existing legal doctrine as done under mainstream legal research, feminist researchers go a step further by looking at judicial reasoning, how gender and sexuality has been constructed within the judgments, paying attention to the concepts and language used within the judgment, and the way the argument has been constructed.<sup>155</sup> These additional steps widen the scope of consideration to include non-legal discourse and the potential socio-legal effects of the judgments.<sup>156</sup>

Like the feminist judgments project mentioned above, this thesis reassesses prominent Zimbabwean judgments from a feminist perspective. To this extent, this thesis looks at three selected cases and discusses how the judgments in these cases would be decided differently from an anti-essentialist feminist perspective. This is done in order to show that feminist theory can be

---

<sup>152</sup> R Hunter, C McGlynn & E Rackley (eds) *Feminist judgments: from theory to practice* (2010).

<sup>153</sup> For other feminist judgment projects, please see the following works: S Cowan, C Kennedy and V Munro (eds) *Scottish feminist judgments : (re)creating law from the outside in* (2019); J McCandless, M Enright and A O'Donoghue 'Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity in Northern/Irish Courts' (2016) Policy Briefing Paper No. 17 *LSE Law*; and LL Berger, KM Stanchi, and BJ Crawford *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016).

<sup>154</sup> UNODC 'Judicial decision-making with a gender perspective: A protocol' (2013) [https://www.unodc.org/res/ji/import/guide/judicial\\_decision\\_making\\_gender\\_protocol/judicial\\_decision\\_making\\_gender\\_protocol.pdf](https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf) accessed 23 November 2022.

<sup>155</sup> R Hunter 'Analysing judgments from a feminist perspective' (2015) 15 *Legal Information Management* 8 – 11 at 8.

<sup>156</sup> *Ibid.*

incorporated into judicial reasoning and make a difference in society. Anti-essentialist feminist legal theory has been selected as the ideological basis from which these judgments are reformulated because it engages with the context in which the judgment is being handed down and it distinguishes the law from social attitudes which are inimical to justice for women and affected parties.

The three cases selected were chosen after a reading of the most prominent Zimbabwean cases in the last 20 years, paying attention to the factual details and tracing the logical implications of the legal rules and principles applied and considering the ramifications of those rules and principles on Zimbabwean women, Zimbabwean society as a whole and the parties affected by the judgments, including children. These cases were readily available on Zimbabwean legal databases.

Because of the impact these decisions had on the rights of women, they had also garnered the attention of feminist organizations in Zimbabwe such as Veritas Women and had been discussed on virtual Zimbabwean feminist legal platforms such as the Feminist Voices Zimbabwe platform.<sup>157</sup> In addition to desktop research and the above-mentioned online resources, this thesis also utilized university library resources including books on women and the law in southern Africa authored by prominent African legal feminists for a theoretical understanding of how women interact and have interacted with the law over the years. These works are cited throughout the thesis, together with journal articles covering the different topics discussed within the thesis such as sexual and reproductive rights, family law, and feminist legal theory in Africa.

The three judgments discussed are appeal judgments. Appeal judgments were selected to circumvent the complications associated with cases involving disputes of fact because they require access to case files, founding and supporting affidavits and witness statements. Further, appeal judgments are often longer than trial court judgments and they reveal the legal reasoning behind decisions and the process by which a particular decision has been reached.<sup>158</sup>

The three cases discussed fall under the following areas of law:

1. The right to termination of pregnancy in Zimbabwe,
2. Custody rights of unmarried parents, and

---

<sup>157</sup> Veritas Women and Feminist Voices Zimbabwe, accessed at <http://www.feministvoiceszimbabwe.com/>, is a non-profit organization working at the intersection of the law and women's rights in Zimbabwe and a resource for Zimbabwean feminist legal scholarship.

<sup>158</sup> JE Artis 'Judging the best interests of the child: Judges' accounts of the tender years doctrine' (2004) 38 *Law & Society Review* 769 at 772.

### 3. Sharing of matrimonial property upon the dissolution of a marriage.

The first case considers how an anti-essentialist feminist perspective would influence a dissenting judgment. In so doing, a different interpretation and application of the law to be aligned with international humanitarian law standards and to give rise to women's legally protected rights without administrative barriers is offered.

The second and third cases are discussed from the perspective of a concurring judgment. In these instances, the merits of the main judgments are recognised but viewed from a feminist and gendered perspective. This approach highlights previously ignored or invisible social and economic circumstances which have a bearing on the effect of the law on women.

Because I limited myself to appeal judgments where facts had been resolved it became difficult to address some of the other important issues affecting women arising from these cases because these aspects were not in dispute and were not raised on appeal. It would have been beneficial for the court in *Mapingure v Minister of Health and Others* to discuss other important issues emanating from the case, for example, the issues of medical negligence and the principle of the duty of care would have been important to consider under the facts of the case and may have led to a different remedy under the law. In as much as this is couched as one of the challenges rising from the chosen methodology, it also illustrates the importance of feminist perspectives when determining the facts of the case and deciding which laws are applicable to a case. While there isn't a way to say for sure, had a feminist litigator been involved in this case, perhaps as legal counsel or a feminist organization taking part in the case as *amicus curiae*, this issue might have been raised on appeal.

While this thesis has only discussed three cases, these cases concern several areas of law and raise several socio-legal issues. For example, while the *Mapingure* case mentioned above immediately concerns the right to termination of pregnancy in Zimbabwe, the case also broadly concerns sexual and reproductive health rights, the question of whether the police have a duty of care, the right to bodily integrity, the right to dignity, the right to self-determination, amongst other rights, the issue of medical negligence, and highlights the importance of policy to facilitate the application of laws.

Engaging with decided cases offered an insight into the application of Zimbabwean laws and policies in their local context – the law in action. This approach falls under socio-legal research (also referred to as inter-disciplinary research, law-in-action, law reform research, law and (reality)

approaches, law-in-context, and law and society) which sets out to highlight the difference between the law in theory and the law in action.<sup>159</sup> Socio-legal research goes beyond traditional legal research which often involves legal practitioners looking for a particular law or provision on a particular point.<sup>160</sup> Instead, socio-legal research shows the gaps between the ideal image of the law contained in books and statutes and the social reality of the application of the law, the law in action.<sup>161</sup> Law in action highlights the actual effects produced by the law when translated into reality and the impact of the law on groups that are most affected by its operation.<sup>162</sup> Socio-legal research was the most suitable methodology to interrogate already decided cases, analyse the policy and potential bias behind legal rules, and identify both the strengths and weaknesses of particular laws.

---

<sup>159</sup> S Qureshi 'Research Methodology in Law and Its Application to Women's Human Rights Law' (2015) 22 (2) *Journal of Political Studies* 629 at 632.

<sup>160</sup> Qureshi op cit note 159 at 631.

<sup>161</sup> Qureshi op cit note 159 at 632.

<sup>162</sup> Ibid.

## FEMINIST JUDGMENTS

### EXERCISING THE RIGHT TO TERMINATION OF PREGNANCY IN ZIMBABWE WITHIN THE AMBIT OF THE APPLICABLE LAWS

**Judgment:** MILDRED MAPINGURE v MINISTER OF HOME AFFAIRS; MINISTER OF HEALTH AND CHILD WELFARE AND MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS<sup>163</sup>

#### **Case summary**

This case was an appeal against the decision of Bere J<sup>164</sup> dismissing an application for default judgment against the respondents in the High Court in *Mapingure v Min of Home Affairs & Ors HH-452-12*, delivered 12 December 2012. The appellant's claim was for damages in the sum of US\$10,000 for physical and mental pain and US\$41,904 for maintenance in respect of her minor child conceived as a result of rape. The applicant's claim in the High Court was dismissed with no order for costs.

#### **The case**

On the 4th of April, 2006, the appellant was attacked and raped by robbers at her home in Chegutu. Immediately after this attack, she lodged a report with the police in Chegutu and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. The appellant waited at the police station from 4am on the night of the assault until midday the following day before the police accompanied her to get medical attention because the

---

<sup>163</sup> *Mapingure v Minister of Home Affairs & Others* (SC 22 of 2014, Civil Appeal SC 406 of 2012) [2014] ZWSC 22 (24 March 2014) available at <https://uniteforreprorights.org/wp-content/uploads/2017/10/Mildred-Mapingure-v.-Minister-Of-Home-Affairs-and-2-Others-.pdf>, accessed 11 January 2022.

<sup>164</sup> While there is existing feminist judgment literature that places emphasis on the gender identity of the judges deciding on selected cases, particularly women judges, this thesis does not identify the gender of the judges in the cases discussed. This is because this thesis is arguing for judging from a feminist perspective regardless of the gender of the judges. Bias exists regardless of gender identity or expression. The gender identity of judges does not contribute to the arguments made within the thesis because the thesis argues against bias, regardless of gender identity or sociological background. Further, the material referred to during the course of the thesis does not emphasize the gender identity of the judges.

only officer assigned to assist rape survivors was not present at the time the appellant arrived at the police station.<sup>165</sup>

The doctor attending to the appellant, despite her request for medication to prevent pregnancy and sexually transmitted infections, only treated her injured knee. The doctor informed her that he could only attend to her request for preventive medication in the presence of a police officer. The doctor further indicated that the medication had to be administered within 72 hours of the rape. The appellant went to the police station the day after she was attended to by the doctor and was advised that the officer who dealt with her case was, again, not available. She then returned to the hospital, but the doctor insisted that they could only treat her if a police report was made available. On 7 April 2006, the appellant finally found a police officer to accompany her to the hospital. At that stage, the doctor informed her that she could not be treated because the prescribed seventy – two (72) hours within which the emergency contraception had to be administered had lapsed. On the 5th of May 2006, the appellant’s pregnancy was formally confirmed.

Thereafter, the appellant went to see the investigating police officer seeking information about a lawful termination of the pregnancy and was referred to a public prosecutor. In July 2006, acting on the direction of the police, the appellant visited the prosecutor’s office and was advised that she required a pregnancy termination order. The prosecutor in question then consulted a magistrate who erroneously stated that the appellant could only obtain the magisterial certificate after the rape trial had been completed. The appellant finally obtained the necessary magisterial certificate on 30 September 2006. By that time, the hospital matron who was assigned to carry out the termination advised that it was no longer safe to carry out the procedure and declined to do so. The appellant gave birth on 24 December 2006.

Judge Bere in the court *a quo* dismissed the appellant’s claim in its entirety. Bere J held that the appellant’s misfortune was the result of her ignorance as to the correct procedure to follow and that it was her responsibility to initiate the process for the termination of her pregnancy by way of affidavit or oath before a magistrate. Bere J further held that it was not the mandate of the officials involved to advise the appellant on questions of procedure. In sum, the court *a quo* held that the respondents were not directly or vicariously liable to the appellant.

---

<sup>165</sup> T Mhaka & MB Brings ‘Termination of pregnancy in Zimbabwe & failure of the State: Reopening the case of Mildred Mapingure’ available at <https://www.feministvoiceszimbabwe.com/termination-of-pregnancy-in-zimbabwe-failure-of-the-state-reopening-the-case-of-mildred-mapingure/>, accessed on 6 January 2022.

In the appellant's grounds of appeal against the High Court decision, the High Court was stated to have erred in the following respects:

- (i) applying the provisions of the Termination of Pregnancy Act in relation to the failure to prevent her pregnancy immediately after she was raped and finding that the appellant had not complied with the relevant provisions of the Act;
- (ii) holding that the negligence of the police in relation to the prevention and termination of the appellant's pregnancy was not material;
- (iii) finding that the duties of the officials in question did not include the provision of proper guidance on the procedure to be followed;
- (iv) not finding that the "authorities" referred to in the Act meant the employees of the respondents;
- (v) not holding that the police and prosecutors were enjoined by the Act to submit the requisite documents to the magistrate; and
- (vi) holding that the liability of the respondents did not extend to extra-statutory duties founded on the public's expectation of their official standing.

The issues determined in the appeal were as follows:

- (i) First, whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament, and
- (ii) Secondly, assuming an affirmative answer to the first, whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents are liable to the appellant in damages for pain and suffering and for the maintenance of her child.

The appeal court held that the police and the attending doctor were negligent in the way they dealt with the appellant's case and had a legal duty to assist with the prevention of the pregnancy, but only until the day the appellant's pregnancy was confirmed. To this extent, they were liable for damages suffered by the appellant during the first month of her pregnancy. The appeal court also concluded that the termination of the pregnancy was the sole responsibility of the appellant and found that the respondents were not liable for the failure of the termination of the appellant's pregnancy. The appeal partially succeeded without an order on costs.

### **The applicable Zimbabwean Law**

Termination of pregnancy (used interchangeably with abortion) is unlawful in Zimbabwe and it is criminalized by the Criminal Law (Codification and Reform) Act 23 of 2004 which makes

unlawful termination of pregnancy punishable by a sentence of up to five years.<sup>166</sup> The Constitution of Zimbabwe contains a provision which protects unborn children and only allows for abortion in limited instances provided by the law.<sup>167</sup> These instances under which an abortion is permitted, set out in s 7 of the Termination of Pregnancy Act 29 of 1977, are where the continuation of the pregnancy endangers the life of the woman or is a threat to her health; where there is serious risk that the child to be born will suffer a serious physical or mental handicap; or where there is a reasonable possibility that the foetus was conceived as a result of unlawful intercourse such as rape or incest.<sup>168</sup> However, women have failed to receive abortions even in the instances where the law allows for abortions due to administrative barriers, stigma attached to abortions, financial barriers, misinformation, and a lack of information, amongst other reasons as illustrated by this case.

### **The common feminist position in respect of abortion and reproductive health**

The reproductive autonomy of women has long been contested on patriarchal grounds by individuals, religious groups and nation states, and has been an area where patriarchy has always exercised its control over women, girls and gender diverse communities.<sup>169</sup> Feminists across the world have advocated for reproductive and sexual rights under international human rights laws in order to protect women's human rights. The position taken by feminists in respect of abortion and reproductive health is largely echoed in international human rights treaties and conventions. The criminalization of abortion is one way whereby the State uses criminal laws to regulate the sexual conduct and decision-making of women and substitutes its will for that of the individual.<sup>170</sup> In this instance patriarchy also wields its control through socioeconomic and political conditions and

---

<sup>166</sup> Section 60 of the Criminal Law (Codification and Reform) Act 23 of 2004.

<sup>167</sup> Section 48 (3) of the Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>168</sup> The Termination of Pregnancy Act 29 of 1977.

<sup>169</sup> NAL Mubeezi 'Making Maputo Protocol a reality through feminist litigation of women's sexual and reproductive health and rights' *African Feminism* 19 August 2021 available at <https://africanfeminism.com/making-maputo-protocol-a-reality-through-feminist-litigation-of-womens-sexual-and-reproductive-health-and-rights/>, accessed on 9 January 2022.

<sup>170</sup> Special Rapporteur of the Human Rights Council 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health' *United Nations General Assembly* 3 August 2011 at 6 available at <https://undocs.org/A/66/254>, accessed on 10 January 2022.

religious and cultural norms, compounded by a lack of political will and conservative governments.<sup>171</sup>

The legalization of abortion is supported by numerous international human rights bodies because it is an instrumental component of women's human rights.<sup>172</sup> The advances that have been made in this regard have largely been inspired by the work of feminists who have fought tirelessly for the recognition and protection of women's human rights. Under women's human rights, abortion incorporates the right to non-discrimination, the right to liberty, the right to equality, the right to autonomy, the right to health, and the right to freedom from violence amongst other intersecting human rights.<sup>173</sup>

The Special Rapporteur of the Human Rights Council, writing on 'The right of the enjoyment of the highest attainable standard of physical and mental health' noted that the criminalization of reproductive health choices has an adverse impact on the right to health and human dignity of women and girls.<sup>174</sup> Criminal laws which restrict the right to abortion amount to a violation of the right to health.<sup>175</sup> The right to dignity is incorporated here because it requires that individuals be free to make choices and personal decisions without interference from the State, and the criminalization of abortion takes away these freedoms.<sup>176</sup> Put simply, abortion rights afford women the basic right to decide when they want to have children.

While abortions are illegal, that has not stopped them from happening. The criminalization of abortion only makes abortions unsafe. Many women and girls across the globe face long-term and short-term harm from the unsafe abortions they are forced to undergo as a consequence of the criminalization of abortions and the stigma attached to abortions. Some of the injuries that can result from unsafe abortions include haemorrhage; sepsis; trauma to the vagina, uterus and abdominal organs; cervical tearing; peritonitis; reproductive tract infections; pelvic inflammatory disease and chronic pelvic pain; shock and infertility.<sup>177</sup> The criminalization of abortions also limits the amount of information about safe abortions that is made available and the resources required to facilitate safe abortions in the few instances they are permitted by the law and,

---

<sup>171</sup> Mubeezi op cit note 169.

<sup>172</sup> R Rebouché 'Abortion rights as human rights' (2016) 25 *Social and Legal Studies* 765 at 766.

<sup>173</sup> Ibid.

<sup>174</sup> Special Rapporteur op cit note 170.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Special Rapporteur op cit note 170 at 9.

consequently, lay the ground for abortions performed by unskilled providers in unhygienic conditions, abortions by healthcare workers outside of appropriate facilities, and self-induced abortions which can be extremely dangerous.<sup>178</sup>

Sithole and Dziva, citing the National Adolescent and Youth Sexual and Reproductive Health Strategy in Zimbabwe highlight that high rates of unplanned pregnancies, early child bearing, adolescent marriages, gender-based violence and maternal mortality are some of the key challenges faced by the youth, between the ages of 10 and 24 years, in Zimbabwe.<sup>179</sup> Zimbabwe is also faced with the challenge of child marriages which are endemic in certain provincial areas and within certain religious sects.<sup>180</sup> These challenges and their detrimental side effects such as unwanted pregnancies and early pregnancies can be mitigated by the provision of reproductive health services such as legalizing abortions, providing information about medical and safe abortions and information about contraception.

### **How a feminist judge might have interpreted the existing law**

The High Court case and appeal judgment in the matter of *Mildred Mapingure v Minister of Home Affairs, Minister of Health and Child Welfare and Minister of Justice, Legal and Parliamentary Affairs* has attracted the attention of feminists and human rights scholars across the world. The appeal, devoid of any feminist perspective, substantively failed. The outcome may have been different if the appeal court had employed international human rights laws and norms in interpreting and applying the relevant law. While the matter might have been appealed successfully, the appeal judgment is lacking in some respects which a feminist judge would have decided differently by employing international human rights laws and norms and interpreting the provisions in the Termination of Pregnancy Act differently.

### **International human rights laws and norms**

A feminist analysis of the Zimbabwean legal position on reproductive health rights and the termination of pregnancy provides insights into the violation of women's human rights by identifying the barriers and violations embedded in the criminalization of the termination of

---

<sup>178</sup> Special Rapporteur op cit note 170 at 9.

<sup>179</sup> L Sithole and C Dziva 'Eliminating harmful practices against women in Zimbabwe: implementing article 5 of the African Women's Protocol' (2019) 19 *African Human Rights Law Journal* 568 at 585.

<sup>180</sup> Ibid.

pregnancy. This is achieved by employing international human rights laws, norms and standards. As correctly stated by the learned Patel JA in the appeal judgment, ‘it is proper and necessary for national courts, as part of the judicial process, to have regard to the country’s international obligations, whether or not they have been incorporated into domestic law’.<sup>181</sup>

The judges in the appeal judgment discuss a few international human rights treaties and instruments which Zimbabwe is a party to and the provisions they contain on the right to termination of pregnancy.<sup>182</sup> These treaties and instruments are important because they ‘embody norms of great persuasive value in the interpretation and application of our statutes and the common law’.<sup>183</sup> In some instances, they are also legally binding instruments which can be used to hold governments accountable for the provisions they have signed and ratified.<sup>184</sup> International human rights commitments do not stop at being inspirational and aspirational instruments of persuasive value, they also need to be translated into practical achievable realities and a feminist court would assist in this aspect by interpreting the Termination of Pregnancy Act in line with international human rights instruments. This is because reproductive rights are human rights, forming part of a State’s human rights duties.<sup>185</sup> More specifically, they form an inextricable part of women’s international human rights and reflect the experiences of women.<sup>186</sup>

At the international level, the right to sexual and reproductive health forms an essential component of human rights, including the right to health and States are urged to uphold both rights simultaneously by improving access to maternal health and sexual and reproductive health services.<sup>187</sup> The special grounds for termination under the Termination of Pregnancy Act flow from human rights principles e.g., termination permitted on the grounds that the continued pregnancy threatens the woman’s health is underpinned by the right to health and permission to terminate a pregnancy resulting from rape and severe foetal malformation are underpinned by the right to freedom from inhumane treatment and the right to bodily integrity respectively.<sup>188</sup>

---

<sup>181</sup> *Mapingure v Minister of Home Affairs & Others* at 14.

<sup>182</sup> The court refers to CEDAW, the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003, and the United Nations Declaration on the Elimination of Violence against Women 1993.

<sup>183</sup> *Mapingure v Minister of Home Affairs & Others* at 16.

<sup>184</sup> *Mubeezi op cit* note 169.

<sup>185</sup> *Rebouché op cit* note 172 at 771.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Special Rapporteur op cit* note 170 at 5.

<sup>188</sup> *Rebouché op cit* note 172 at 769.

International human rights instruments assert that the criminalization of the right to abortion, which Zimbabwean law under the Constitution and the Termination of Pregnancy Act does, generates and perpetuates stigma which distorts the perceptions among State professionals (such as the professionals employed by the respondents) which, consequently, hinders women's access to healthcare.<sup>189</sup> The facts of this case illustrate this point. While we are not privy to the exact perceptions of the doctor, the police officers and the prosecutor and magistrate implicated in this case, their lack of urgency in providing the appellant with assistance to terminate her pregnancy points to negative perceptions about the termination of pregnancy most likely informed by the criminalization of abortion.

Further, a feminist judgment would draw on international precedent in respect of reproductive rights. For example, the Supreme Court of Nepal, in *Lakshmi v. Government of Nepal*, explained the universality of reproductive rights by setting out the connection between reproductive rights and women's international human rights such as the right to liberty and equality.<sup>190</sup> This decision was informed by CEDAW and other international human rights commitments and illustrates how courts should consider universal human rights commitments, not only as aspirational tools, but as instruments for the practical implementation of women's human rights. It should be the duty of the court to emphasise the importance of the accessibility of the rights accorded by our domestic law. The appellant was legally entitled to an abortion under the Termination of Pregnancy Act because her pregnancy was a result of rape and the respondents failed in their duty to provide access to a legal abortion, consequently violating several human rights including the right to health and the right to dignity.

In the Argentine case of *F., A. L. s/ Medida Autosatisfactiva (2012)*, with facts similar to those at hand whereby a girl who had become pregnant following rape had been denied access to an abortion by lower courts, the National Supreme Court, on appeal, stated that forcing a woman who had suffered a sexual abuse to carry a pregnancy to full term infringed the woman's right to dignity and amounted to institutional violence.<sup>191</sup> The National Supreme Court further held that the state had a duty to provide the conditions necessary to enable such women to access abortion

---

<sup>189</sup> Special Rapporteur op cit note 170 at 6.

<sup>190</sup> *Lakshmi v. Government of Nepal*, 2009 available at <https://reproductiverights.org/case/lakshmi-dhikta-v-government-of-nepal-amici-supreme-court-of-nepal/>, accessed 11 January 2021.

<sup>191</sup> *F., A. L. s/ Medida Autosatisfactiva* available at <https://www.globalhealthrights.org/f-a-l-s-medida-autosatisfactiva/>, accessed 11 January 2022.

quickly and safely and that the authorities should provide the necessary protocols for the performance of lawful abortion and remove any administrative barriers, including the need for third party authorisation.<sup>192</sup>

A feminist analysis of the Termination of Pregnancy Act also provides insight into the shortfalls of the supposed neutrality of human rights law and practice. Upholding the right to reproductive health is not only about enacting laws, but also includes the provision of information about sexual and reproductive health services, improving access to the health services and access to resources.<sup>193</sup> This implementation aspect is lacking under Zimbabwean law because there is no accompanying policy to the Termination of Pregnancy Act. Where the termination of pregnancy under special circumstances is legislated in the Termination of Pregnancy Act, there is no accompanying policy to regulate the termination of pregnancy under those circumstances. The legislature needs to enact policies and rules which inform the lawful termination of pregnancies as provided in the Termination of Pregnancy Act.

Courts have the power to give human rights law real meaning and to demonstrate a state's commitment to justice and to prevent the revictimization of those whose rights have been violated and this court failed on both these aspects.

### **Administrative barriers to reproductive health services**

In *L.M.R. v. Argentina*, the United Nations Human Rights Committee found violations of several rights when a girl who became pregnant as a result of rape was denied access to abortion services, to which she was legally entitled. The Human Rights Committee lamented the administrative hurdles that the victim had been subjected to in trying to exercise her legal right to abortion.<sup>194</sup> The administrative hurdles lamented by the United Nations in the Argentina case are also seen in the *Mapingure* case in that the police and the doctor failed to terminate the pregnancy at the outset, but their liability in the case has been wrongly limited to a one month time period by the appeal court.

---

<sup>192</sup> F., A. L. s/ Medida Autosatisfactiva available at <https://www.globalhealthrights.org/f-a-l-s-medida-autosatisfactiva/>, accessed 11 January 2022.

<sup>193</sup> Special Rapporteur op cit note 170 at 5.

<sup>194</sup> *L.M.R. v. Argentina* available at <https://www.eschr-net.org/caselaw/2013/lmr-v-argentina-un-doc-cprc101d16082007>, accessed 11 January 2022.

In the testimony of the appellant in the *Mapingure* appeal judgment, the appellant waited for hours at the police station on the night of her assault because there was only one police officer assigned to handle rape matters and she had to wait for that one officer to report to work the following day. The police form part of an emergency response system in the event of a crime or accident. The availability of only one officer equipped to handle rape cases in the police station was an administrative barrier which had an immense bearing on the appellant's access to reproductive health services. Further, the capacity of the one police officer trained to handle rape cases is also questionable because of the failure to attend to the appellant's request for medication to terminate any unwanted pregnancy and to prevent sexually transmitted diseases timeously.

The doctor who attended to the appellant in the *Mapingure* case informed her that she needed to have a police report or to be accompanied by a police officer before he could provide her with the 72 hour emergency contraception. This requirement is not set out in the Termination of Pregnancy Act and it is not clear whether there is any legal basis for this requirement.<sup>195</sup>

Section 5 of the Termination of Pregnancy Act sets out the conditions under which pregnancy may be terminated and these provisions further complicate access to abortion because they are taxing, requiring the person in need of an abortion to go through multiple people and systems, and they are unclear. The Termination of Pregnancy Act sets out that the termination must be performed by a medical practitioner in an institution designated by the Ministry of Health.<sup>196</sup> This limits the number of clinics and hospitals where a termination may be conducted and adds to the cost to access an abortion for women located in rural or remote areas. Abortions are not specialised medical procedures necessitating the need for only designated institutions to be enabled to perform them. Women should be able to access abortions at any registered private or public medical institution. The fact that victims must consult a list to determine which institutions are permitted to carry out an abortion, when they could just go to their nearest registered clinic or hospital, is another barrier to the access to abortions.

Further, the Termination of Pregnancy Act states that 'the termination itself must be performed by two medical practitioners who are not from the same medical institution'.<sup>197</sup> There is no scientific or medical reason to support this requirement. It only serves as another hurdle that

---

<sup>195</sup> GD Kangaunde (ed) *Legal grounds III: reproductive and sexual rights in Sub-Saharan African courts* (2017) 84.

<sup>196</sup> Section 5 of the Termination of Pregnancy Act.

<sup>197</sup> *Ibid.*

victims of rape and women medically unfit to continue their pregnancies must pass in their quest for an abortion. Abortion in the instances set out by the Termination of Pregnancy Act and under international human rights law is a right which women should be able to access without the complications added by restrictive statutory requirements.

The process to institute proceedings for the issuance of a magisterial certificate allowing the termination of the pregnancy was started by the appellant when she visited the case investigating officer who advised her to consult a prosecutor to get the certificate required for the abortion. The Termination of Pregnancy Act does not set out the procedure to be followed in instituting these proceedings. In the appeal judgment,<sup>198</sup> Patel JA states that the provisions in the Termination of Pregnancy Act are not clear. Where the text of the Termination of Pregnancy Act has perplexed a trained legal mind, the conclusion that the appellant should, instead, have been able to understand the words of the text is irreconcilable. The finding that the onus was on the appellant to know the procedure to be followed was erroneous. It places a burden on victims of all crimes and absolves the legislature and the State from their responsibility to enact laws and policies that are clear to all citizens. The enactment of a policy document accompanying the Termination of Pregnancy Act is necessary to address this gap in reproductive health legislation. It follows, however, from a teleological reading of the Act that the appellant did what was required of her in visiting the prosecutor's office who, together with the magistrate, failed to assist the appellant.

While we are not privy to what transpired between the prosecutor and the magistrate when they were consulted by the appellant, it does not appear to be in dispute that they erroneously told the appellant that she could only get the magisterial certificate after the completion of the rape trial. The majority in the appeal judgment took the view that the prosecutor and the magistrate had no legal responsibility to inform the appellant of the law and that she should have sought private legal help. Not only is private legal advice costly, it is not a substitute for the State's responsibility to enact laws which citizens can understand and to employ suitably qualified persons to enact and interpret the law. The fact that a prosecutor and a magistrate did not know the law and gave the appellant wrong advice, which drastically changed the course of her life, should be a matter of extreme concern for the third respondent and the judiciary as a whole. In order for magistrates and prosecutors to perform their duties, they must know the law. The court of appeal should have made a finding of the negligence on the part of the magistrate and prosecutor in question. The court of

---

<sup>198</sup> *Mapingure v Minister of Home Affairs & Others* at 28.

appeal failed in its duty to punish and eradicate violence against women and failed to hold the prosecutors, medical practitioners and the police accountable for their failure to act with due diligence to prevent additional harm against women.

The failure to terminate the pregnancy was a combination of the police and doctor's negligence to prevent the pregnancy in the first place, and the administrative barriers which the appellant encountered when she sought the magisterial certificate allowing for the termination of her pregnancy including the erroneous information provided by the prosecutor and magistrate consulted. It is highly likely that a feminist judge, informed by a feminist perspective, would have allowed the appeal in its entirety after evaluating the legal text and its gaps and applying international human rights laws and norms. The judge essentially failed to establish the necessary legal, judicial, and administrative mechanisms to ensure that women victims of violence have effective access to reparations, damages, and other fair and effective means of redress as established in CEDAW which Zimbabwe is a party to. This case offered an opportunity to progressively implement measures and call for inclusive policy to create awareness of and respect for women's rights as contained in the Termination of Pregnancy Act and, at the very least, to make a pronouncement on the need to improve the capacity of those who interpret the law.

### **Conclusion**

The Constitution of Zimbabwe makes a provision for the protection of a foetus and also expressly protects women's human rights, particularly the right to health and the right to dignity. The criminalization of abortions has created a situation whereby the Constitution contains provisions that are in conflict with each other and requires legislative intervention. The legislature needs to investigate this. However, this is also an opportunity for feminist litigators to utilize strategic litigation and advocate for the right to abortion. If women are only allowed legal abortions when they have been violated, are they truly free as the Constitution suggests? Restricting access to abortions is also discriminatory because it disproportionately affects women who risk both their physical and mental health by continuing with unwanted pregnancies from rape or other forms of abuse or violence.<sup>199</sup>

---

<sup>199</sup> Special Rapporteur op cit note 170 at 6.

The role that Zimbabwean courts can play in this regard is that of interpreting the legislation on abortions to give rise to human rights such as the right to health and sexual and reproductive health rights and by urging the State to enforce reproductive health rights and enact legislation which protects and gives rise to these reproductive health rights. However, while legislative reform is needed, it will not be successful without a reform in social perspectives on reproductive health rights. Anti-essentialist feminist legal theory is a useful tool in this aspect because of its argument that legal reform is limited if it is not accompanied by intersectional social reform. We need to trace gendered injustice across all key social structures of society.

This social reform can begin in our courts with a reform in the attitudes of the personnel within and outside the judiciary. From feminist legal researchers supporting and challenging matters through amicus briefs, feminist clerks who support administrative staff to ensure that files are not lost in the judicial system and feminist prosecutors who are guided by feminist legal theory in their arguments, to the vendor on the street knowing their rights when they are harassed by municipal or police officers, people on the street standing up for women being cat-called in the streets, to congregants protecting women and girls from abuse by church leaders. Feminist advocacy and work must not begin and end in our courts or lecture venues only, it is holistic and rounded work which should cover all aspects of our societies.

A reform is needed within legal personnel mentioned above because of the institutional structures within the legal system which often serve as the barrier to women's justice as seen through the *Mapingure* case above. Institutional problems require deliberate and concerted institutional responses, supported by social movements. A group of feminists within the judiciary as opposed to single judges hearing cases provide more effective expression of the interests of women and the legal feminist movement.

## CUSTODY AND GUARDIANSHIP RIGHTS UPON SEPARATION OF UNMARRIED PARENTS

**Judgment:** MUTESWA V SADIQI [2021] ZWSC 131 (07 June 2021)<sup>200</sup>

### **Case summary**

The ex tempore Supreme Court judgment analysed in this section arose from a constitutional challenge against the validity of the common law position that the mother of a child born out of wedlock is the sole guardian of, and has exclusive custody over, that child.<sup>201</sup> The court a quo held the common law rule to be in contravention of the Constitution of the Republic of Zimbabwe<sup>202</sup> (hereinafter the Constitution) and awarded joint custody and guardianship to the parents of the child. This decision was appealed in the Supreme Court challenging the court's finding that joint custody and guardianship was in the best interests of the child. The Supreme Court upheld this appeal.

### **The case**

The appellant and the respondent had a child together out of wedlock. The parties lived in South Africa at the time of the child's birth. When the relationship between the appellant and the respondent ended, the appellant moved to Zimbabwe with the child. At that time the appellant and respondent signed an agreement which accepted and recorded that the appellant had custody and guardianship of the child by operation of law. The parties also agreed, in a memorandum, that the respondent would be given access to the child and that he had certain obligations in respect of the maintenance of the child.

In his constitutional challenge, the respondent argued that his access to the child became subject to the whims of the appellant who constantly reminded him that she had sole guardianship and custody over the child. The respondent also argued that the exercise of exclusive custody and guardianship by the appellant was not in the best interests of the minor child. The respondent, in approaching the court a quo, sought to dispute the constitutional validity of the common law

---

<sup>200</sup> Muteswa v Sadiqi [2021] ZWSC 131 (07 June 2021) available at [https://media.zimlil.org/files/judgments/zwsc/2021/131/2021-zwsc-131\\_0.pdf](https://media.zimlil.org/files/judgments/zwsc/2021/131/2021-zwsc-131_0.pdf), accessed 28 January 2022.

<sup>201</sup> Sadiqi v Muteswa [2020] ZWHHC 249 (18 March 2020) available at <https://zimlil.org/zw/judgment/harare-high-court/2020/249>, accessed 30 January 2022.

<sup>202</sup> The Constitution of Zimbabwe Amendment Act 20 of 2013.

position on custody and guardianship of a child born out of wedlock. The respondent argued that the common law position in respect of custody and guardianship of children born out of wedlock is contrary to the provisions of ss19(1) & (2), s 56 (3), and s 81 of the Constitution of Zimbabwe.<sup>203</sup> The respondent, in addition to seeking an order on constitutional invalidity of the common law position sought an order granting him joint custody and joint guardianship of the child together with the appellant.

The court a quo held that the common law rule giving the mother of a child born out of wedlock sole guardianship and custody was inconsistent with the Constitution of Zimbabwe and invalid. The court a quo granted joint custody and joint guardianship and ordered that a court appointed social worker should submit a report within 30 days of the judgment with recommendations on how the parties should exercise joint custody and guardianship without disrupting the social life of the child.

On appeal, the appellant challenged the court a quo's decision to grant joint custody and joint guardianship without first determining the best interests of the child. The appeal was upheld by the Supreme Court which held that 'the welfare of the minor child ... should not be prematurely exposed to unverified parental circumstances' and remitted the matter to the court a quo to first conclude its inquiry into what was in the best interests of the child before deciding on joint custody and joint guardianship.

### **The applicable law on custody and guardianship in Zimbabwe**

#### The common law position:

Under the common law, all parental rights to a child born to parents out of wedlock are vested in the child's mother. The mother is considered the natural guardian of the child with the sole custody of the child. The child born out of wedlock is regarded as illegitimate and having no father.<sup>204</sup> The child's father is only legally recognized for maintenance purposes and not guardianship or custody.<sup>205</sup> The father does not have parental power and is not the guardian of the child and does not automatically have joint guardianship or joint custody of the child. In the case that the mother of a child born out of wedlock is a minor, the mother who is a minor is disqualified from being the

---

<sup>203</sup> The Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>204</sup> Sadiqi v Muteswa op cit note 206 at 5.

<sup>205</sup> Ibid.

guardian of the child. In such cases, a guardian is appointed by the court.<sup>206</sup> The court is also the upper guardian of all minors under common law and has the power to deprive a mother, even when they are a major, of her guardianship and award guardianship to any suitable third party, including the child's father, if it is satisfied that the mother's guardianship is harmful to the welfare of the child.<sup>207</sup> The parental power over a legitimate child, however, is said to rest with the child's father.<sup>208</sup>

### The Constitution

Section 19 of the Constitution sets out the rights of children which must be facilitated by the State, including the right to enjoy parental care, the right to healthcare and nutrition and the paramountcy of the right to have their best interests considered. The Constitution of Zimbabwe guarantees the right to equality of all persons under s 56 and children are guaranteed the right to equal treatment before the law under s 81.<sup>209</sup> Further, under s 81, the Constitution provides that the best interests of the child are paramount in all matters concerning the child.<sup>210</sup>

### **Feminists on child custody and guardianship rights upon separation**

Under the modern family law position, in most jurisdictions, male and female spouses owe reciprocal duties of financial support and child custody disputes are determined according to what is in the best interests of the child.<sup>211</sup> The modern family law position fits in well within the equality stage feminist discourse because it establishes formal legal equality between spouses in terms of custody and maintenance rights. Equality feminists generally support gender-neutral child custody rights for divorcing parents over maternal preference.<sup>212</sup> This was, for a long time, viewed as the 'mainstream' feminist view of custody rights, even though mainstream feminists themselves would agree that formal sexual equality often operates to the detriment of women.<sup>213</sup> However, an

---

<sup>206</sup> Sadiqi v Muteswa op cit note 206 at 5.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> The Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>210</sup> Ibid.

<sup>211</sup> SB Boyd 'Equality: An uncomfortable fit in parenting' in Robert Leckey (ed) *After Legal Equality: Family, Sex, Kinship* (2015) 89.

<sup>212</sup> NS Erickson 'The feminist dilemma over unwed parent's custody rights: The mother's rights must take priority' (1984) 2 *Minnesota Journal of Law & Inequality* at 447.

<sup>213</sup> Boyd op cit note 211.

anti-essentialist feminist would argue that the formal equality position found in a lot of legislation is lacking because it does not accommodate same-sex partnerships, same-sex parents and reproductive technologies. The formal equality approach in family law which posits that a child's birth mother and genetic father should have equal parenting rights solely because of the genetic ties between them and the child asserts a sexual family based on implicit heteronormativity.<sup>214</sup> This approach has the potential to do more harm in families experiencing abuse.<sup>215</sup>

The earliest common law courts granted custody of children to the divorced father.<sup>216</sup> Fathers were granted custody because of their assumed ability to care for the children financially and the view that the children were the property of the father.<sup>217</sup> This changed during the mid-19th century when mothers gained the right to seek custody.<sup>218</sup> By the mid-20th century, the flow of custody rights had swung in favour of the mother.<sup>219</sup> This included the tender years presumption – in terms of which it is assumed that during the child's 'tender years', before they reached the age of maturity, they should be cared for by their mother. This led to default custodial preference being given to the mother unless the mother was found to be unfit.<sup>220</sup> This custodial preference lasted until the 1960s. During this time, feminists argued against the legal presumption that children belong with their mothers because this presumption reinforced the stereotype that women are instinctive child rearers.<sup>221</sup> Child custody law has shifted from a paternal preference to a maternal interest, to a more egalitarian standard informed by formal legal equality and, finally, to the best interests of the child.<sup>222</sup>

Feminists have also posited that courts ought to consider both the gendered aspects of child-care and the primary care of the child where the primary care-giver, often the mother, must be awarded custodial rights because of their role as the primary caregiver of the child.<sup>223</sup>

---

<sup>214</sup> Boyd op cit note 211 at 92.

<sup>215</sup> Ibid.

<sup>216</sup> Erickson op cit note 212.

<sup>217</sup> MA Kushner 'Whose Best Interests' (2006) 44 *Journal of Divorce & Remarriage* at 18.

<sup>218</sup> Erickson op cit note 212.

<sup>219</sup> Ibid.

<sup>220</sup> Erickson op cit note 212 at 448.

<sup>221</sup> Erickson op cit note 212 at 449.

<sup>222</sup> JE Artis 'Judging the best interests of the child: Judges' accounts of the tender years doctrine' (2004) 38 *Law & Society Review* at 769.

<sup>223</sup> Ibid.

### **How a concurring feminist judgment might have been argued**

Feminists and activists have different views on child custody and guardianship rights upon separation. Some feminist scholars argue that in addition to modern family laws on custody and guardianship being gender-neutral, they should also make provision for gendered social realities supported by social and economic structures such as domestic labour in the family, company hiring and promotion practices and the gender pay gap.<sup>224</sup> This argument highlights the need to consider custody and guardianship beyond the formal equality of the parents of the child. A feminist judge subscribing to this school of thought might have concurred with the Supreme Court's *ex tempore* judgment on account of this argument.

There has also been a move, by some feminists and activists, towards directing attention to the primary care of the child.<sup>225</sup> This means courts are directed towards the primary care responsibility for a child taken by a parent.<sup>226</sup> This point has been raised by feminist legal scholars who have emphasized women's relationship to family and care in their arguments against gender-blind parenting laws.<sup>227</sup> These feminists argue that hastily embracing equal parenting and custody rights in the name of the child's best interests ignores structurally embedded and deeply gendered patterns of care.<sup>228</sup> Granting equal parenting and decision-making rights without consideration of the responsibility and care that each parent has invested in the child often results in fathers being granted equal rights and equal responsibilities while making women's care labour invisible.<sup>229</sup> This argument is made on the basis that shared parenting can work well for separated families who have the psychological and financial means to cooperate with one another, but where the separation involves conflict, power dynamics or abuse, formal equality creates difficult scenarios for mothers and children.<sup>230</sup> When children's rights to relationships with fathers are prioritised within the legal system, protection from harm is sometimes not prioritised and this can subsequently cause damage.<sup>231</sup> A Supreme Court judge subscribing to this argument might have concluded that the court *quo* hastily prioritised the father's rights while undermining the child's interests under the

---

<sup>224</sup> Boyd *op cit* note 211 at 90.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid.

<sup>227</sup> Boyd *op cit* note 211 at 92.

<sup>228</sup> Ibid.

<sup>229</sup> Boyd *op cit* note 211 at 93.

<sup>230</sup> Ibid.

<sup>231</sup> Boyd *op cit* note 211 at 94.

guise of the child's relationship with his father being in the 'child's best interests'. Evidence of this conclusion might have been found in the court a quo's judgment<sup>232</sup> where the judge merely states that it is in the best interests of the child that custody be shared jointly without any weighting of what the child's best interests are and how these have been determined.<sup>233</sup> A feminist judge adjudicating on this matter in this instance might have applied s 81(2) of the Constitution and concurred with the Supreme Court that the best interests of the child ought to be determined first before granting custody and guardianship rights.

The best interests of the child requirement incorporates factors such as the history of the child's care, the child's physical, psychological and emotional safety, security and well-being and family violence and abuse.<sup>234</sup> The emphasis on care has grown out of feminist research on the sexual division of labour.<sup>235</sup> It is also based on the notion that the labour an adult puts into parenting should be relevant to determining parental rights and custody disputes.<sup>236</sup>

The case of *Fletcher v Fletcher*<sup>237</sup> is a South African landmark case on the paramountcy of the best interests of the child. In this case, the court held that the first consideration when determining the custody of children is the best interests of the child.<sup>238</sup> The court also held that the fact that a party is the father of the child is irrelevant.<sup>239</sup>

In *Van Deijl v Van Deijl*,<sup>240</sup> a case similarly concerning custody and guardianship, the court set out the following considerations in deciding the best interests of the child: the welfare of the minor, with the term welfare including economic, social, moral and religious considerations, the emotional needs and the ties of affection.<sup>241</sup>

However, despite the jurisprudence emphasising the child's best interests, child custody cases are still subject to judges' personal bias.<sup>242</sup> If a father earns more money there might be a bias in his favour, disregarding the gender pay gap and gendered hiring practises; if a mother is

---

<sup>232</sup> *Sadiqi v Muteswa* op cit note 206 at 9.

<sup>233</sup> *Ibid.*

<sup>234</sup> *Boyd* op cit note 211 at 109.

<sup>235</sup> *Boyd* op cit note 211 at 112.

<sup>236</sup> *Ibid.*

<sup>237</sup> 1948 (1) SA 130 (A).

<sup>238</sup> 1948 (1) SA 130 (A) para 134.

<sup>239</sup> *Ibid.*

<sup>240</sup> 1966 (4) SA 206 (R).

<sup>241</sup> *Ibid.*

<sup>242</sup> *Artis* op cit note 222.

more emotional as a result of a divorce, they might be considered too weak to care for the child; if the mother is employed there might be a bias that they will not have time to care for the child.<sup>243</sup> Sometimes, the decision hinges on the judges' perceptions of custody and this makes anti-essentialist feminist perspectives important in our judiciary.<sup>244</sup> The judge's bias might be shown by the weight they choose to place on the psychological report produced by a social worker or their preference for the ability of a parent to supply the child with a certain standard of living. The best interests of the child standard might be neutral, but some scholars have questioned this neutrality and argued for a much more definitive standard.<sup>245</sup> While this is an important observation and argument, it might be difficult to resolve because the determination of the best interests of the child relies on the facts and circumstances of each case.

More recent family laws have responded to calls for the recognition of same-sex partnerships and reproductive technologies and have incorporated this in their definitions of legal parenthood and accompanying norms on custody rights.<sup>246</sup> Where such laws do not yet exist, an anti-essentialist feminist judge would be an important asset in a court hearing a matter concerning child custody rights because they would highlight the paramountcy of the 'best interest of the child' consideration and the shortfalls in formal legal equality.

## **Conclusion**

The judgment of the court a quo establishes crude formal equality which has the potential to function as a powerful form of law. While it is too early to know the full impact of the case, the potential for harm has already surfaced by overshadowing the best interests of the child. The Supreme Court rectified this on appeal, however, an anti-essentialist judge in the court a quo might have emphasized this requirement thereby negating the need to appeal. The overriding principle in child custody cases should always be the welfare of the child. This is a principle which an anti-essentialist would have applied in concurring with the Supreme Court's *ex tempore* judgment. However, the influence of a feminist perspective should not have to end at a concurring judgment. The Supreme Court ordered that the court a quo should first decide on the best interests of the child

---

<sup>243</sup> Erickson op cit note 212 at 449.

<sup>244</sup> Artis op cit note 222.

<sup>245</sup> Ibid.

<sup>246</sup> Boyd op cit note 211 at 90.

before deciding on custody and guardianship. A feminist perspective might be beneficial in deciding on the best interests of the child without bias or prejudice.

## MATRIMONIAL PROPERTY RIGHTS UPON DISSOLUTION OF MARRIAGE IN ZIMBABWE

**Judgment:** MHORA V MHORA<sup>247</sup>

### **Case summary**

The respondent in *Mhora v Mhora* was the plaintiff in the court a quo who issued summons for divorce and ancillary relief in 2010 seeking post-divorce spousal maintenance and equal distribution of movable and immovable property. The court a quo granted this order but forgot to grant the divorce decree. On appeal, the appellant (defendant in the court a quo) sought an order for the divorce decree and appealed against the court a quo's finding that the immovable property be sold and split equally amongst the parties.

### **The case**

The respondent issued summons for divorce in 2010 seeking a decree of divorce, post-divorce spousal maintenance and distribution of the immoveable and moveable property.<sup>248</sup> The appellant contended that the respondent was not entitled to maintenance and that the immovable property was acquired through his individual efforts to raise and secure payment for the house. Consequently, he argued that there was no basis for the proposed sharing and sale of the immovable property.

The appellant was employed as a police officer and the parties lived in Goromonzi before moving to Marondera after the appellant was promoted. The respondent was under the belief that they were renting the house in Marondera. The parties then moved to Cranborne Park in Harare and later on to the house in Lomagundi Road in Harare. The appellant received a grant to purchase the house in Cranborne Park. This house was subsequently sold and the house in Lomagundi Road purchased and registered under the appellant's name.

In 1982, the appellant married another woman in terms of the Marriage Act. His customary marriage with the respondent concluded under the Customary Marriages Act in 1971 was still in subsistence at the time of this second marriage. The parties, together with the appellant's second

---

<sup>247</sup> [2020] ZWSC 89 (29 June 2020) at <https://zimlil.org/zw/judgment/supreme-court-zimbabwe/2020/89>, accessed 18 December 2021.

<sup>248</sup> *Mhora v Mhora* HH 446-18 at <http://www.veritaszim.net/node/3140>, accessed 28 December 2022.

wife, lived together in Cranborne Park and in the house in Lomagundi Road. The appellant and the respondent had four children together and the appellant and his second wife had three children together.

The respondent was never formally employed and she did not contribute financially to the purchase of the immovable properties. However, she sold chair-backs at some point during the course of the marriage and gave the defendant some of the money.

The parties settled the issue of the sharing of the movable property at a pre-trial hearing. The issues that were outstanding and required the court's determination were the following:

- a. Whether the immovable property was matrimonial property?
- b. If it was matrimonial property, what was the equitable distribution thereof?

The court a quo referred to s 7(4) of the Matrimonial Causes Act that governs the distribution of property at divorce and interpreted it to be in line with s 3(1)(g) and s 26(c) and (d) the Constitution. The court a quo upheld the respondent's claim to 50% of the immovable property. The court held that granting the 50% share was in line with the tenets of the Constitution as well as international law and was based squarely on the discretion afforded to the judge under s 7(4) of the Matrimonial Causes Act.

On appeal, the appellant appealed against that part of the High Court judgment upholding the respondent's claim of a 50% share of the immovable property. The appellant argued that the court a quo erred in the distribution of the immovable property and argued that he was entitled to 100% or, at least, 70% of the immovable property because of his direct and indirect contribution in the purchase and maintenance of the immovable property. The appellant also argued that the court a quo had misdirected itself by proceeding as if it was determining a gender equality issue when the only issue before it concerned the distribution of the matrimonial asset purely on the weight of each party's contribution.

The main issue for determination in the court of appeal was whether the court a quo erred in awarding the respondent a 50% share of the immovable property. The court of appeal emphasised the needs of the parties rather than the fact that their contributions ought to be recouped as argued by the appellant. The court of appeal also held that the decision made by the court a quo

was one which put the spouses in the position they would have been in had the relationship continued normally and dismissed the appeal.

### **Applicable law on the division of matrimonial property upon divorce in Zimbabwe**

#### **Matrimonial regimes in Zimbabwe**

Three types of marriages exist within the Zimbabwean legal system. The first is marriage under the Marriage Act 81 of 1964.<sup>249</sup> A marriage under the Marriage Act is monogamous and the consequences of this marriage are governed by general law.<sup>250</sup> Divorce, under the Marriage Act, can only be obtained in the High Court through an application for a decree of divorce and the maintenance of spouses and children and matrimonial division of property.

The second type of marriage is a registered customary union. The registered customary marriage is contracted under the Customary Marriages Act 23 of 1950.<sup>251</sup> Customary marriages are potentially polygamous.<sup>252</sup> However, if the husband does not practice polygamy, the registered customary marriage can be converted to a civil monogamous union under the Marriage Act.<sup>253</sup> A registered customary marriage is governed by a mixture of general law and customary law.<sup>254</sup> The marriage can be dissolved upon application in the High Court or the Community Court and the distribution of matrimonial property upon dissolution of the registered customary marriage is conducted under the Matrimonial Causes Act.<sup>255</sup>

The first two types of marriages set out above are automatically out of community of property unless the parties conclude a written contract stating otherwise.<sup>256</sup> This matrimonial property regime is set out in the Married Persons Property Act 10 of 1928 which states that all marriages concluded after 1929 are out of community of property and each party in a marriage, without a written agreement stating the contrary, can own property in their individual capacity during the subsistence of the marriage.<sup>257</sup>

---

<sup>249</sup> Act 81 of 1964.

<sup>250</sup> F Banda 'The provision of maintenance for women and children in Zimbabwe' (1995) 2 *Cardozo Women's Law Journal* 71 at 71.

<sup>251</sup> Act 23 of 1950.

<sup>252</sup> Banda op cit note 250 at 72.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid.

<sup>256</sup> The Married Persons Act 10 of 1928.

<sup>257</sup> Ibid.

The third type of marriage is a customary law union. A customary law union is treated as a valid marriage for the purposes of status, guardianship, the rights of succession of children, the reciprocal duty of spousal support, and the surviving spouse's claim for loss of support in the event of the unlawful killing of the other spouse.<sup>258</sup> The customary law property regime generally excludes women from sharing in the matrimonial property at divorce.<sup>259</sup>

### The Constitution of Zimbabwe<sup>260</sup>

Section 3(1)(g) of the Constitution states the gender equality principle which forms part of the founding values and principles of Zimbabwe.<sup>261</sup> Section 26(c) and (d) calls upon the state to ensure that there is equality of rights and obligations of spouses during marriage and at its dissolution and to make provisions for the necessary protection of children and spouses in the event of the dissolution of the marriage through divorce or death.<sup>262</sup>

### The Matrimonial Causes Act<sup>263</sup>

The distribution of matrimonial property upon the dissolution of a registered marriage is left to the discretion of the presiding judge at the dissolution of the marriage.<sup>264</sup> The judge decides on the fair and equitable distribution of property in conjunction with the Constitution of Zimbabwe and the Matrimonial Causes Act 33 of 1985. In particular, s 7(4) of the Matrimonial Causes Act sets out a list of factors to be considered in redistribution of property. This list includes:

- (a) the income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future;
- (c) the standard of living of the family, including the manner in which any child was being educated or trained or expected to be educated or trained;

---

<sup>258</sup> The Married Persons Act 10 of 1928.

<sup>259</sup> W Ncube 'Defending and protecting gender equality and the family under a decidedly undecided constitution in Zimbabwe' (1997) 14 *Zimbabwe Law Review* 1 at 16.

<sup>260</sup> The Constitution of Zimbabwe Amendment Act 20 of 2013.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> The Matrimonial Causes Act 33 of 1985.

<sup>264</sup> Banda *op cit* note 250 at 74.

- (d) the age and physical and mental condition of each spouse and child;
- (e) 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;
- (f) the value to either of the spouses or to any child of any benefit, including a pension or gratuity, which such spouse or child will lose as a result of the dissolution of the marriage;
- (g) the duration of the marriage.<sup>265</sup>

The parties in the case under discussion solemnised their union in terms of the Customary Marriages Act (then the African Marriages Act) in 1971 and the marriage was upgraded under the Marriage Act in 2005.

### **Feminist position on matrimonial property rights**

In her work on feminism and family law, Katherine T. Bartlett traces how women's groups played a large role in reforms associated with the consequences of the dissolution of marriage, including property distribution, maintenance, child support, and custody.<sup>266</sup> The objectives they were advocating for included women's ability to obtain a fairer share of assets for women at the dissolution of marriages.<sup>267</sup> These objectives were viewed as a way to both secure continuing support for women upon divorce and to correct the systematic erasure of women's unpaid labour.<sup>268</sup> Most women during this time favoured the equitable distribution of matrimonial property and they all agreed that radical change was necessary to secure women's futures upon dissolution of their marriages and financial security for women.<sup>269</sup> By the early 1980s, courts and the legislature in different states and countries had adopted equitable distribution in one form or another inspired by the work of feminists in the 1970s.<sup>270</sup> Katherine T. Bartlett notes that this change had been initially difficult to imagine because women's groups advocating for these changes were considered too radical at the time.<sup>271</sup>

---

<sup>265</sup> The Matrimonial Causes Act op cit note 268.

<sup>266</sup> KT Bartlett 'Feminism and family law' (1999) 33 *Family Law Quarterly* 475 at 479.

<sup>267</sup> Ibid.

<sup>268</sup> Bartlett op cit note 266 at 480.

<sup>269</sup> Ibid.

<sup>270</sup> Ibid.

<sup>271</sup> Ibid.

The feminist position on women's matrimonial property rights has been informed by the historical fact that women have always been marginalised when it comes to matrimonial property rights upon the dissolution of marriage either by death or divorce.<sup>272</sup> The mainstream feminist views on matrimonial property at the end of a marriage due to divorce, death or separation have consequently circled around different forms of equality.

Archampong, in an article envisioning the Ghanaian matrimonial property legislation, defines formal equality as the recognition of each spouse's contribution and the consequent significance afforded to that contribution in the acquisition of property in the marriage.<sup>273</sup> This is the type of equality referred to in the Matrimonial Causes Act and other pieces of international legislation such as the Maputo protocol. The distribution of property upon dissolution of a marriage based on contribution is often not equitable because of the disadvantaged position of women.<sup>274</sup> Formal equality is purely formal and results in all people being treated alike regardless of circumstances.<sup>275</sup>

The substantive equality approach to matrimonial property legislation acknowledges the differences between men and women's experiences and favours women to ensure that they catch up with and are equal to their historically advantaged male counterparts.<sup>276</sup> The substantive equality position is favoured because, as Catherine MacKinnon has argued, mere equality only ensures that men are further advantaged and real equality is never achieved.<sup>277</sup> This is the feminist position that shapes the imagined concurring judgment.

Considering the law from a substantive equality lense often requires the court to also consider transformative equality and indirect discrimination.<sup>278</sup> Substantive and transformative equality requires one to look beyond formal legal equality and also consider the removal of barriers

---

<sup>272</sup> PO Phiri & B Sefah 'Women's right to matrimonial property is still in murky waters: A review of Federation of Women Lawyers v the Attorney-General' (2019) 20 *ESR Review* 14 at 14.

<sup>273</sup> EA Archampong 'Matrimonial property division at marriage breakdown: The way Forward' (2007-2008) 4 *KNUST Law Journal* 78 at 83.

<sup>274</sup> Phiri & Sefah op cit note 272 at 18.

<sup>275</sup> R Graycar & J Morgan 'Feminist legal theory and understanding of equity: One step forward or two steps back' (2005) 28 *Thomas Jefferson Law Review* 399 at 399.

<sup>276</sup> Archampong op cit note 273.

<sup>277</sup> Ibid.

<sup>278</sup> Phiri & Sefah op cit note 272 at 16.

which may affect women's acquisition of matrimonial property such as gendered structures and systematic inequality.<sup>279</sup>

### **How a feminist judge might have applied the law in their concurring judgment**

The appellant contested the finding of the equitable distribution of the immovable property and, consequently, the judges' exercise of discretion in distributing the immovable property. A concurring feminist judge might have commented on the appellant's argument for a higher percentage of the property from a feminist perspective and commented on the benefits and disadvantages of the discretionary nature of the applicable law. The court of appeal took some time answering the following question by citing precedent on the issue: How can you put monetary value on the duties carried out by a wife during the tenure of the marriage? This question might benefit from a feminist analysis given that there is increasing recognition of women's domestic work on the continent.

Domestic work is significantly undervalued. Women who are employed as domestic workers make very little money and women who are unemployed and do the domestic work in their marital homes are often not compensated for this work. In contrast, however, when men take up what is traditionally domestic work such as au pairing or cooking as chefs in restaurants, they are paid more than women working the same jobs.<sup>280</sup> Women who do not contribute financially to the matrimonial homes still serve as homemakers and caregivers and they help acquire, build and maintain matrimonial property alongside their husbands.<sup>281</sup> Non-monetary contributions in matrimony include a wide range of contributions such as household and familial care, companionship, farm work, and tangible or intangible contribution to a spouse's professional or economic development.<sup>282</sup>

The recognition of non-monetary contribution in the Matrimonial Causes Act, while a step in the right direction, cannot, on its own, alleviate the systematic inequalities and gendered structures which form barriers to women's access to matrimonial property. As it stands, the non-

---

<sup>279</sup> Phiri & Sefah op cit note 272 at 16.

<sup>280</sup> A Chamberlain 'Demystifying the gender pay gap: Evidence from Glassdoor salary data' *Glassdoor* 23 March 2016 at <https://www.glassdoor.com/research/gender-pay-gap/> accessed 8 October 2022.

<sup>281</sup> N Mbhele 'Constitutional triumph on matrimonial property rights' *Mail & Guardian* 19 September 2021 at <https://mg.co.za/opinion/2021-09-19-constitutional-triumph-on-matrimonial-property-rights/>, accessed 6 February 2022.

<sup>282</sup> Phiri & Sefah op cit note 272 at 17.

monetary contributions are still undervalued by some judges and the law currently functions as a lottery system highly dependent on the judge who hears the matter.<sup>283</sup> Depending on the judge one gets, the monetary contributions to the acquisition of matrimonial property are sometimes given more weight which leads to the contributor getting a higher percentage of the property.<sup>284</sup> In patriarchal societies, the person making the monetary contribution is usually the husband. Employed wives still have gendered systems to confront such as the gender pay gap or gendered barriers to accessing promotions and higher compensation. A feminist perspective in judicial decision making is important because it highlights the systematic barriers to women's access to matrimonial property.

There is growing recognition and jurisprudence on the recognition of women's domestic labour. In 2021, Justice Mumbua Matheka from Kenya, declared that being a housewife is a full-time payable job.<sup>285</sup> Justice Matheka argued that the domestic labour performed by a housewife in her matrimonial home would ordinarily have been outsourced and paid for, therefore it should be considered work capable of compensation.<sup>286</sup> Justice Matheka further held that the housework and care-work performed by a female spouse entitled her to an equal share of the matrimonial property at the dissolution of the marriage. This judgment has been heralded as an important contribution to the recognition of previously invisible women's domestic and unpaid labour. The court also raised the issue of the "artificial" distinction between "productive" and "non-productive work" which has led to women's labour being undervalued because it often does not involve the transaction of money.<sup>287</sup> The transaction of money is the valued economic measure and signifier of value to the extent that women's agricultural labour which feeds entire nations is not visible in the statistics of a country's gross domestic product because it is often not exchanged for money.<sup>288</sup>

---

<sup>283</sup> Phiri & Sefah op cit note 272 at 17.

<sup>284</sup> Ibid.

<sup>285</sup> N Hako 'R54 800 per month': Kenyan judge declares that being a housewife is a full-time job worthy of compensation' *News24* 30 September 2021 at <https://www.news24.com/parent/family/relationships/kenyan-judge-declares-that-being-a-housewife-is-a-payable-full-time-job-20210930#:~:text=A%20Kenyan%20high%20court%20judge,attract%20some%20form%20of%20compensation,> accessed 6 February 2022.

<sup>286</sup> Ibid.

<sup>287</sup> G Bhatia 'Equality, family and unpaid domestic work: Kenyan High Court ruling' *Elephant* 1 October 2021 at <https://www.theelephant.info/ideas/2021/10/01/equality-family-and-unpaid-domestic-work-kenyan-high-court-ruling/>, accessed 5 February 2022.

<sup>288</sup> Banda op cit note 250 at 83.

The appellant's argument in *Mhora v Mhora* that - the distribution of property should be based on contributions made by each spouse - disadvantages women because it makes women's domestic labour invisible and undervalues their labour.<sup>289</sup> While there is a growing recognition of women's domestic labour by courts in different jurisdictions, including Zimbabwe, the discretionary power awarded to judges by the Matrimonial Causes Act provides an example of a law which is otherwise perceived as neutral, but when considered in its totality (and the evidence of its use is gleaned from the precedent cited by the appellant in his argument,) this law shows that its application adversely affects women's access to matrimonial property.

The case law cited by the appellant's counsel as well as the judges in the Supreme Court, for example *Kambuzuma v Athol Evans Hospital Home Complex*,<sup>290</sup> highlights how judges can apply the discretion in the Matrimonial Causes Act to either benefit or disadvantage women.<sup>291</sup> The provision giving judges discretionary power in respect of the dissolution of matrimonial property has led to the inconsistent and uneven distribution of matrimonial property, often to the detriment of women.<sup>292</sup> The matrimonial law landscape requires a more equitable matrimonial property regime to undercut the discretionary powers granted to judges under the Act.<sup>293</sup> A more equitable property regime can be in the form of a legal presumption of equal sharing which can be bypassed only in exceptional circumstances.<sup>294</sup> This legal presumption needs to be established by statute.<sup>295</sup> All spouses should be deemed to have equally contributed to the family and matrimonial property and this should be the legal presumption contained in our law, not a discretionary provision. The discretion has the potential for bias whereby judges give eminence to financial contributions over other forms of contributions. A legal presumption of equal contribution would forestall any potential bias while ensuring that the spouses are entitled to equal proportions of the matrimonial property at the dissolution of a marriage.<sup>296</sup> The legal presumption does not have to be absolute. It should be rebutted in instances where rebuttals are necessary where its application

---

<sup>289</sup> Phiri and Sefah op cit note 272 at 16.

<sup>290</sup> *Kambuzuma and Others v Athol Evans Hospital Home Complex* SC 118/04 at page 9 – 10. See also *Eastern Highlands Electrical (Pvt) Ltd v Gibson Investments (Pvt) Ltd* SC 264/2 at page 7 – 8.

<sup>291</sup> *Mhora v Mhora* op cit note 252 at 10 - 21.

<sup>292</sup> Ncube op cit note 259.

<sup>293</sup> Ibid.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Archampong op cite note 273 at 94.

would lead to an injustice e.g., where a spouse incurs reckless debt without the knowledge of the other spouse or intentionally depletes the value of the matrimonial property.<sup>297</sup>

### **Conclusion**

Feminist agendas have informed the provisions for the equitable distribution of matrimonial property upon dissolution of marriage to ensure women's financial security and to highlight the value of women's domestic work and unpaid domestic labour. These provisions informed by equality have made a difference in women's matrimonial property rights across the world, however, more advocacy is needed to ensure that substantive and not formal equality underlies these legal provisions and to develop a legal presumption in favour of this substantive equality. The importance of feminist judges and feminist perspectives in our law is to highlight the unfinished work in achieving true and substantive equality for women across the world. The feminist perspective discussed under this section raises the need for a legal presumption in favour of substantive equality to do away with the inconsistencies currently plaguing this area of Zimbabwean matrimonial property law.

---

<sup>297</sup> Archampong op cite note 273 at 94.

## THE VALUE OF ANTI-ESSENTIALIST FEMINIST LEGAL THEORY IN OUR COURTS

The methodology employed above revisits already decided cases and applies anti-essentialist feminist legal theory to the judgments in those selected cases. However, feminist legal theory is not only beneficial at the tail-end of judicial proceedings. It can be applied before legal proceedings are instituted, during the investigative stages of any matter, right through to the judgment stage. The following section briefly looks at some of the ways anti-essentialist feminist legal theory can be applied at all stages of a trial and concludes with a discussion on how feminist legal theory has been of benefit to our judicial system.

At the pre-trial stage, anti-essentialist feminist ideology can be applied when determining the facts of a case and admitting evidence. The way the facts are determined, the way a case is investigated and the way in which evidence is admitted should espouse the anti-essentialist notions of rejecting bias and stereotypes. This is important because the way evidence is assessed and facts are established goes on to determine which laws to apply to the facts of a case, the damages to be sought and the allocation of civil or criminal responsibility.<sup>298</sup>

During the trial, anti-essentialism is useful during the legal analysis and reasoning stage. During the analysis and rationale stage, anti-essentialism requires more than simply determining the applicable laws and applying them to the facts of a case. Judges need to go a step further and question the supposed neutrality of a particular law or rule, the social, legal and sometimes political context in which the facts of a case have occurred in, the effects that the judgment may have on both parties with additional consideration given to the party that has been traditionally overlooked within the judicial system, and also look beyond what has been presented by legal counsel to what may be missing within the bigger picture of the case. As illustrated in the discussion of the *Mapingure* case above, judges need to be attentive to not only how laws are applied to the facts of a case, but also how some laws and jurisprudential practices diminish women's sexual and reproductive autonomy. This was one of the missing elements in the *Mapingure* judgment. Judges need to be attentive to social norms and practices that devalue, when compared to men, the work that women do in the home and the roles to which they have traditionally been assigned, as

---

<sup>298</sup> UNODC 'Judicial decision-making with a gender perspective: A protocol' (2013) [https://www.unodc.org/res/ji/import/guide/judicial\\_decision\\_making\\_gender\\_protocol/judicial\\_decision\\_making\\_gender\\_protocol.pdf](https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf), accessed 23 November 2022.

discussed under the feminist judgment in *Mhora v Mhora*. Lastly, they need to be aware of the myriad possible configurations of families and not adjudicate cases erroneously based on legal formality, as discussed under the feminist judgment in *Muteswa v Sadiqi*. The three cases discussed show how structural and social conditions and perceptions which impede access to justice and prevent equal enjoyment of human rights and which condemn persons to predetermined roles, demand special attention from judges otherwise they reproduce systems of inequality and harm and contribute to miscarriages of justice.<sup>299</sup>

Lastly, at the judgment stage, the application of anti-essentialist ideology within the Zimbabwean judicial system is important because of the ripple effect that judgments have. Judgments in both lower and higher courts set a precedent for cases with similar facts and in apex courts judgments also inform policy, laws and give meaning to the rule of law. When deciding upon remedies in cases, feminist legal theory can be useful in not only asking the “woman question” where women may be involved, but in looking at any inequalities, structural or otherwise, which may have come up during adjudication of a case or which may have an adverse impact on parties.

Overall, anti-essentialist feminist legal theory and other strands of feminist legal theory add value to our judicial systems because they incorporate feminist thought and ideology within legal theory and language. This is important because the legal profession, and legal language by extension, has long been dominated by men. This made it easy to ignore gendered perspectives of certain laws and policies and made it easy to ignore harms against women, sometimes because the language to describe gendered harm simply did not exist.<sup>300</sup> Applying anti-essentialist reasoning within the Zimbabwean judicial system brings the woman question to the fore and contextualizes the matter at hand beyond what is prescribed in the legislation or in precedent. It provides the language to describe the harm suffered by disadvantaged parties where it previously did not exist before. Feminist legal scholars have done exceptional work in this regard, and they have managed to achieve this by translating feminist thought into judicial language.<sup>301</sup> For example, the language to describe intimate partner violence, marital rape or sexual harassment was previously not

---

<sup>299</sup> UNODC ‘Judicial decision-making with a gender perspective: A protocol’ (2013) [https://www.unodc.org/res/ji/import/guide/judicial\\_decision\\_making\\_gender\\_protocol/judicial\\_decision\\_making\\_gender\\_protocol.pdf](https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf), accessed 23 November 2022.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

recognised in our courts but is recognised today because of feminist legal scholars.<sup>302</sup> Crawford et al assert that “because feminist judgments translate feminist theory into practical legal writing, these opinions construct a feminist judicial language”.<sup>303</sup>

Therefore, feminist legal theory is important because it provides the language to describe a particular harm and identifies the applicable legal provisions in a given case. This is important because how legal provisions are interpreted affects how they are argued and applied in court and this can either leave victims excluded from the law or defenceless under the law.

The availability of language to describe and define harm is particularly important for women and historically disadvantaged litigants such as refugees, the poor or children because, as Joanne Conaghan argues, harm is not only vested in the individual who sustains it, it is also social.<sup>304</sup> Conaghan explains that harm is social because social location plays a role in determining the incidence and spread of harm, e.g., line workers are more likely to be harmed on the job than managers, and our understanding of harm is a product of social relations and the meanings they create.<sup>305</sup> If gendered harms are not recognised by our courts as harm, then they are not only excluded from the law but from our societies as well. Moreover, as the feminist judgment of *Mapingure* hopefully illustrates, gendered harms occurring within the security and health systems of a country need to be recognised as such in order for appropriate relief to be administered by the law. In *Mapingure*, there is a failure to understand the social location in which the harm to the appellant occurred and this leads to the judgment that the appellant has not suffered any harm in that context.

The exercise of rewriting the judgments above using the exact facts of the cases as well as the applicable laws in Zimbabwe illustrates that perspective is key at all stages of the Zimbabwean judicial system.<sup>306</sup> This thesis has argued that anti-essentialist feminist legal theory is a useful and important perspective when investigating, hearing and deciding cases. This is because it rejects the tunnel vision that has been demonstrated in all the cases discussed above. Anti-essentialist theory

---

<sup>302</sup> UNODC ‘Judicial decision-making with a gender perspective: A protocol’ (2013) [https://www.unodc.org/res/ji/import/guide/judicial\\_decision\\_making\\_gender\\_protocol/judicial\\_decision\\_making\\_gender\\_protocol.pdf](https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf), accessed 23 November 2022.

<sup>303</sup> Ibid.

<sup>304</sup> J Conaghan ‘Law, harm and redress: A feminist perspective’ (2002) 22 (3) *Legal Studies* 320 at 322.

<sup>305</sup> Ibid.

<sup>306</sup> BJ Crawford, K Stanchi & LL Berger ‘Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment’ (2017) 47 *University of Baltimore Law Review* 167 at 181.

takes into account the social impact the decision will have on the affected parties and society at large, a broader analysis on what is missing from the decisions of the lower courts, detailed facts of each case, as well as international precedent which is applicable to the facts of the cases.

## CONCLUSION

The purpose of this thesis was to study the law in context or the law in action. The research undertaken during this thesis involved both finding the law on a particular point and investigating the effects and influences of other social factors on the law. By working within the law applicable at the time of the original judgment, with the material available to the original judges, using standard techniques of legal reasoning, and then applying anti-essentialist feminist ideology, the commentary offered demonstrates how the law is not predetermined and is rather an evolving tool. Even at the same time and subject to the same constraints as the original decision-makers, the feminist analysis of the cases shows that the cases could have been reasoned and decided differently by negating tunnel vision, considering the socio-legal impacts of the applicable laws, debunking stereotypes, and analysing the social and economic context in which the harm occurred.

The first case considers how an anti-essentialist feminist perspective would influence a dissenting judgment. In so doing, a different interpretation and application of the law to be aligned with international humanitarian law standards and to give rise to women's legally protected rights without administrative barriers is offered. The second and third cases are discussed from the perspective of a concurring judgment. In these instances the merits of the main judgments are recognised but viewed from a feminist and gendered perspective. This approach highlights previously ignored or invisible social and economic circumstances which have a bearing on the effect of the law on women.

While one of the comments argues for a different ruling, the other two cases discussed reach the same conclusions but for different reasons, highlighting details of women's lives and raising arguments that the courts overlooked – this is where the value of feminist legal theory to our judicial systems lies, in highlighting issues that might be overlooked, in asking the woman question, and in debunking stereotypes. Moreover, the commentary helps us see how the incorporation of viewpoints and perspectives from sections of society which remain under-represented on the bench might improve the quality of judicial decision-making.

The gap between feminist theory and judicial decision making has been narrowed significantly by feminist scholars across the globe. The cases discussed under this thesis are real life cases with real consequences and not fictional judgments. While the law offers one of the best tools available to secure the rights of women, on its own, the text of the law contains numerous deficiencies and discrepancies which can be corrected by the purposeful addition of an anti-

essentialist feminist perspective. As argued throughout this thesis, anti-essentialist feminist perspectives offer a holistic view of the law from the perspective of women and other affected parties and is a valuable addition to the Zimbabwean legal system.

## BIBLIOGRAPHY

### Primary sources

#### International case law

F., A. L. s/ Medida Autosatisfactiva available at <https://www.globalhealthrights.org/f-a-l-s-medida-autosatisfactiva/>, accessed 11 January 2022.

Fletcher v Fletcher 1948 (1) SA 130 (A).

L.C. v. Peru available at <https://www.globalhealthrights.org/l-c-v-peru/>, accessed 11 January 2022.

Lakshmi v. Government of Nepal, 2009 available at <https://reproductiverights.org/case/lakshmi-dhikta-v-government-of-nepal-amici-supreme-court-of-nepal/>, accessed 11 January 2022.

L.M.R. v. Argentina available at <https://www.eschr-net.org/caselaw/2013/lmr-v-argentina-un-doc-ccprc101d16082007>, accessed 11 January 2022.

Van Deijl v Van Deijl 1966 (4) SA 206 (R).

#### Zimbabwean case law

Eastern Highlands Electrical (Pvt) Ltd v Gibson Investments (Pvt) Ltd SC 264/2.

Kambuzuma and Others v Athol Evans Hospital Home Complex SC 118/04.

Mapingure v Minister of Home Affairs & Others (SC 22 of 2014, Civil Appeal SC 406 of 2012) [2014] ZWSC 22 (24 March 2014) available at <https://uniteforreprorights.org/wp-content/uploads/2017/10/Mildred-Mapingure-v.-Minister-Of-Home-Affairs-and-2-Others-.pdf>, accessed 11 January 2022.

Mhora v Mhora [2020] ZWSC 89 (29 June 2020) at <https://zimlil.org/zw/judgment/supreme-court-zimbabwe/2020/89>, accessed 18 December 2021.

Mhora v Mhora HH 446-18 at <http://www.veritaszim.net/node/3140>, accessed 28 December 2022.

Muteswa v Sadiqi [2021] ZWSC 131 (07 June 2021) available at [https://media.zimlil.org/files/judgments/zwsc/2021/131/2021-zwsc-131\\_0.pdf](https://media.zimlil.org/files/judgments/zwsc/2021/131/2021-zwsc-131_0.pdf), accessed 28 January 2022.

RM v Zizhou and Another [2021] ZWHHC 675 (01 December 2021) at <https://zimlil.org/zw/judgment/harare-high-court/2021/675>, accessed 20 December 2021.

Sadiqi v Muteswa [2020] ZWHHC 249 (18 March 2020) available at <https://zimlil.org/zw/judgment/harare-high-court/2020/249>, accessed 30 January 2022.

### Zimbabwean legislation

The Customary Marriages Act 23 of 1950.

The Criminal Law (Codification and Reform) Act 23 of 2004.

The Labour Act 16 of 1985.

The Marriage Act 81 of 1964.

The Married Persons Act 10 of 1928.

The Matrimonial Causes Act 33 of 1985.

The Constitution of Zimbabwe Amendment Act 20 of 2013.

The Termination of Pregnancy Act 29 of 1977.

### Books

A Armstrong (ed) *Women and Law in Southern Africa* (1987) Zimbabwe Publishing House, Harare.

B Somekh and C Lewin *Research Methods in the Social Sciences* (2004) Sage Publications: London.

KD Weisberg (ed) *Feminist Legal Theory Foundations* (1993) Temple University Press: Philadelphia.

GD Kangaunde (ed) *Legal grounds III: reproductive and sexual rights in Sub-Saharan African courts* (2017) Pretoria University Law Press: Pretoria.

LL Berger, KM Stanchi, and BJ Crawford *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016) Cambridge University Press: Cambridge.

M Chamallas *Introduction to Feminist Legal Theory* 2 ed (2003) Aspen Publishers: New York.

PD Gqola *Female Fear Factory* (2021) Melinda Ferguson Books: Cape Town.

R Hunter, C McGlynn & E Rackley (eds) *Feminist judgments: from theory to practice* (2010) Hart Publishing: Oxford.

SB Boyd 'Equality: An uncomfortable fit in parenting' in Robert Leckey (ed) *After Legal Equality: Family, Sex, Kinship* (2015) Routledge: Abingdon.

S Cowan, C Kennedy and V Munro (eds) *Scottish feminist judgments : (re)creating law from the outside in* (2019).

VE Munro & M Davies *The Ashgate Research Companion to Feminist Legal Theory* (2016) Routledge: London.

### Journal articles

A Mama 'African feminist thought' 2019 *Oxford Research Encyclopedia of African History* 1.

AS Tsanga 'A critical analysis of the women's constitutional and legal rights in Zimbabwe in relation to the Convention of the Elimination of All Forms of Discrimination Against Women' (2002) 54 *Mein Law Review* 217.

BJ Crawford, K Stanchi & LL Berger 'Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment' (2017) 47 *University of Baltimore Law Review* 167.

C Albertyn 'Defending and securing rights through law: Feminism, law and the courts in South Africa' (2005) 32 (2) *Politikon: South African Journal of Political Studies* 217.

CP Christ 'A new definition of patriarchy: control of women's sexuality, private property, and war' (2016) 23 *Feminist Theology* 214.

DC Byrne & Z Imma 'Why 'Southern Feminisms'?' (2019) 33 (3) *Agenda* 2.

E Quansah 'Distribution of matrimonial property on divorce: Perspectives from Southern Africa' (2010-2011) 5 *KNUST Law Journal* 1.

E Schmidt 'Negotiated spaces and contested terrain: men, women, and the law in colonial Zimbabwe, 1890–1939' (2007) 16 *Journal of Southern African Studies* 622.

EA Archampong 'Matrimonial property division at marriage breakdown: The way Forward' (2007-2008) 4 *KNUST Law Journal* 78.

F Banda 'The provision of maintenance for women and children in Zimbabwe' (1995) 2 *Cardozo Women's Law Journal* 71.

F Banda 'Women, law and human rights in Southern Africa' (2006) 32 *Journal of Southern African Studies* 13.

G Makaudze 'Women, wealth generation and property ownership in traditional Shona culture in Zimbabwe' (2014) 30 *Latin American Report* 18.

G Swenson 'Legal Pluralism in Theory and Practice' (2018) 20 *International Studies Review* 438.

J Conaghan 'Law, harm and redress: A feminist perspective' (2002) 22 (3) *Legal Studies* 320.

J Scott 'Pragmatism, feminist theory, and the reconceptualization of sexual harassment' (1999) 10 *UCLA Women's Law Journal* 205.

J Wong 'The anti-essentialism v. essentialism debate in feminist legal theory: The debate and beyond' (1999) 5 *William & Mary Journal of Race, Gender, and Social Justice*.

JE Artis 'Judging the best interests of the child: Judges' accounts of the tender years doctrine' (2004) 38 *Law & Society Review* 769.

J McCandless, M Enright and A O'Donoghue 'Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity in Northern/Irish Courts' (2016) Policy Briefing Paper No. 17 *LSE Law*.

JM Modiri 'The colour of law, power and knowledge: Introducing critical race theory in post-Apartheid South Africa' (2012) 28 *SAJHR* 405.

KT Bartlett 'Feminism and family law' (1999) 33 *Family Law Quarterly* 475.

L Sithole & C Dziva 'Eliminating harmful practices against women in Zimbabwe: implementing article 5 of the African Women's Protocol' (2019) 19 *African Human Rights Law Journal* 585.

M Thornton 'Postscript on feminist legal theory in the 21st century' (2020) 9 *Laws*.

MA Kushner 'Whose Best Interests' (2006) 44 *Journal of Divorce & Remarriage* 18.

NS Erickson 'The feminist dilemma over unwed parent's custody rights: The mother's rights must take priority' (1984) 2 *Minnesota Journal of Law & Inequality* 447.

P Mcgee Crotty 'Family law in sub-saharan Africa' (2009) 30 *Journal of Women, Politics & Policy* 341.

P Musoni 'White garment churches (Vapostori) and ZANU-PF party politics in Zimbabwe: True marriage or marriage of convenience during and post-Mugabe era' (2019) 75 *HTS Theological Studies*.

PO Phiri & B Sefah 'Women's right to matrimonial property is still in murky waters: A review of Federation of Women Lawyers v the Attorney-General' (2019) 20 *ESR Review* 14.

P Scully "Should we give up on the State? Feminist theory, African gender history and transitional justice" (2010) 9 (2) *African Journal on Conflict Resolution* 29.

R Graycar & J Morgan 'Feminist legal theory and understanding of equity: One step forward or two steps back' (2005) 28 *Thomas Jefferson Law Review* 399.

R Hunter 'Analysing judgments from a feminist perspective' (2015) 15 *Legal Information Management* 8.

R Rebouché 'Abortion rights as human rights' (2016) 25 *Social and Legal Studies* 765.

S Qureshi 'Research Methodology in Law and Its Application to Women's Human Rights Law' (2015) 22 (2) *Journal of Political Studies* 629.

S Tamale & J Bennett 'Legal voice: challenges and prospects in the documentation of African legal feminism' (2011) 15 *Feminist Africa* 1.

TB Johnson "Waves of Feminism and the Media" (2017) 32 *University of Kentucky Lewis Honors College Capstone Collection* 1.

T Mutangi 'Religion, law and human rights in Zimbabwe' (2008) 8 *African Human Rights Journal* 526.

V Magezi & P Manzanga 2019, 'Gender-based violence and efforts to address the phenomenon: Towards a church public pastoral care intervention proposition for community development in Zimbabwe' (2019) 75 *HTS Teologiese Studies/Theological Studies* 1.

W Ncube 'Defending and protecting gender equality and the family under a decidedly undecided constitution in Zimbabwe' (1997) 14 *Zimbabwe Law Review* 1.

See also TB Johnson "Waves of Feminism and the Media" (2017) 32 *University of Kentucky Lewis Honors College Capstone Collection* 1 at 9.

#### Internet sources

A Chamberlain 'Demystifying the gender pay gap: Evidence from Glassdoor salary data' *Glassdoor* 23 March 2016 at <https://www.glassdoor.com/research/gender-pay-gap/> accessed 8 October 2022.

Amnesty International "'Treated like Furniture'" Gender-based Violence and COVID-19 Response in Southern Africa' *Amnesty International* 9 February 2021 at <https://www.amnesty.org/en/documents/afr03/3418/2021/en/> accessed 5 February 2022.

C Blouws and PD Gqola 'Courts designed for women should not gag them' *New Frame* 1 December 2021 at <https://www.newframe.com/courts-designed-for-women-should-not-gag-them/>, accessed 24 November 2022.

G Bhatia 'Equality, family and unpaid domestic work: Kenyan High Court ruling' *Elephant* 1 October 2021 at <https://www.theelephant.info/ideas/2021/10/01/equality-family-and-unpaid-domestic-work-kenyan-high-court-ruling/>, accessed 5 February 2022.

Girls Not Brides ‘Zimbabwe urged to deliver justice for Memory Machaya’ 18 August 2021 at <https://www.girlsnotbrides.org/articles/zimbabwe-urged-to-deliver-justice-for-memory-machaya/>, accessed 7 December 2021.

H Hani ‘Feminist Theory: A New Take on Sexual Harassment’ *The American University in Cairo* 16 February 2017 at <https://www.aucegypt.edu/news/stories/feminist-theory-new-take-sexual-harassment>, accessed 1 February 2022.

J Burke and N Chingono ‘Zimbabwean MDC activists 'abducted and sexually assaulted'’ *The Guardian* 17 May 2020 at <https://www.theguardian.com/world/2020/may/17/zimbabwean-mdc-activists-abducted-and-sexually-assaulted>, accessed 8 February 2022.

L Munhende ‘Zimbabwe: Mohadi ex-wife turns up the heat On VP, demands his arrest’ *All Africa* 25 October 2019 at <https://allafrica.com/stories/201910250307.html>, accessed 8 February 2022.

N Hako ‘‘R54 800 per month’: Kenyan judge declares that being a housewife is a full-time job worthy of compensation’ *News24* 30 September 2021 at <https://www.news24.com/parent/family/relationships/kenyan-judge-declares-that-being-a-housewife-is-a-payable-full-time-job-20210930#:~:text=A%20Kenyan%20high%20court%20judge,attract%20some%20form%20of%20compensation>, accessed 6 February 2022.

N Mbhele ‘Constitutional triumph on matrimonial property rights’ *Mail & Guardian* 19 September 2021 at <https://mg.co.za/opinion/2021-09-19-constitutional-triumph-on-matrimonial-property-rights/>, accessed 6 February 2022.

NAL Mubeezi ‘Making Maputo Protocol a reality through feminist litigation of women’s sexual and reproductive health and rights’ *African Feminism* 19 August 2021 available at <https://africanfeminism.com/making-maputo-protocol-a-reality-through-feminist-litigation-of-womens-sexual-and-reproductive-health-and-rights/>, accessed on 9 January 2022.

OHCHR ‘The Convention on the Elimination of All Forms of Discrimination against Women’ (CEDAW) United Nations 18 December 1979 at <https://www.ohchr.org>, accessed 30 June 2021.

OHCHR ‘Committee on the Elimination of Discrimination against Women urges Zimbabwe to close implementation gap, address gender-based violence’ (2020) at <https://www.ohchr.org/SP/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=25553&LangID=S>, accessed 7 December 2021.

S Setlaelo 'African feminism and its project of decolonisation' (2021) at <https://thoughtleader.co.za/african-feminism-and-its-project-of-decolonisation/> (accessed 18 September 2021).

Southern Africa' 2021 at 32, available at <https://www.amnesty.org/download/Documents/AFR0334182021ENGLISH.pdf>, accessed on 18 June 2021.

Special Rapporteur of the Human Rights Council 'Right of everyone to the enjoyment of the highest attainable standard of physical and mental health' *United Nations General Assembly* 3 August 2011 at 6 available at <https://undocs.org/A/66/254>, accessed on 10 January 2022.

T Mhaka & MB Brings 'Termination of pregnancy in Zimbabwe & failure of the State: Reopening the case of Mildred Mapingure' available at <https://www.feministvoiceszimbabwe.com/termination-of-pregnancy-in-zimbabwe-failure-of-the-state-reopening-the-case-of-mildred-mapingure/>, accessed 6 January 2022.

United Nations Committee on the Elimination of Discrimination against Women 'The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) General recommendation No. 33 on women's access to justice' *United Nations* 3 August 2015 at <https://digitallibrary.un.org/record/807253?ln=en#record-files-collapse-header>, accessed 1 November 2023.

UNODC 'Judicial decision-making with a gender perspective: A protocol' (2013) [https://www.unodc.org/res/ji/import/guide/judicial\\_decision\\_making\\_gender\\_protocol/judicial\\_decision\\_making\\_gender\\_protocol.pdf](https://www.unodc.org/res/ji/import/guide/judicial_decision_making_gender_protocol/judicial_decision_making_gender_protocol.pdf) accessed 23 November 2022.

Zimbabwe Gender Commission 'Annual Report 2019' (2019) available at <https://zgc.co.zw/annual-reports/>, accessed 29 June 2021.

Zimbabwe Women Lawyers Association 'Success Stories' at <http://www.zwla.co.zw/media-room/success-stories>, accessed 4 December 2021.