

UNIVERSITY OF ZIMBABWE



“THE EQUITABLE DIVISION OF THE MATRIMONIAL HOME VIOLATES WOMEN’S RIGHTS IN THEIR MATRIMONIAL HOMES UPON DIVORCE”: A CRITICAL ANALYSIS OF THE CURRENT LEGAL APPROACH IN THE DIVISION OF THE MATRIMONIAL HOME REGISTERED IN THE HUSBAND’S NAME UPON DIVORCE AND HOW IT VIOLATES WOMEN’S RIGHTS

By

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ABSTRACT

Women's rights in their matrimonial homes that are solely registered in their husbands' names are not adequately protected under the current legal system in Zimbabwe. This is because the current legal approach of equitable division of the matrimonial home based on apportioning shares in the immoveable property in relation to each spouse's contribution places a heavier legal burden on women. Based on judicial practices in the division of the matrimonial property upon divorce, women who only contributed indirectly are normally awarded lesser shares in the matrimonial home. Again, the dual legal system in the division of the matrimonial home discriminates against women in unregistered customary law unions. Customary law is fraught with discriminatory practices because women based on their gender cannot own the matrimonial home that is solely registered in the name of the husband. Women in unregistered customary law unions who therefore seek to protect their rights in the matrimonial home have a heavier legal burden, unlike women in civil marriages, of rebutting the application of customary law and invoking general law principles so that their rights in the matrimonial home are protected. Furthermore, the legal complexities of rebutting customary law; invoking general law principles of tacit universal partnership or unjust enrichment and proving indirect contribution force most women to seek legal representation. Generally private experienced divorce lawyers are more efficacious in assisting women to enforce their rights in the matrimonial home upon divorce but because some women have a high financial domestic burden during divorce they cannot afford private legal representation. As a result they are forced to rely on overwhelmed legal aid services whose quality of service may compromise their rights in the matrimonial home. Moreover, the law infringes upon women's rights in the matrimonial home registered in their husband's names. This is because property law does not recognize a matrimonial home and the rights of a wife in the immoveable property that is not registered in her name. As a result some men have been circumventing women's rights in the matrimonial home by donating, hypothecating or selling the matrimonial home. Consequentially, some women are dispossessed of their matrimonial homes and this violates their right to property, shelter, food, an adequate standard of living, health and equal protection of the law. These legal gaps reinforce gender inequality as women based on their gender are denied ownership of economic resources in the form of the matrimonial home. Furthermore, these legal obstacles subordinate wives to their husbands. This is because women would rather negotiate continued access and control of the matrimonial home through the husband than engage with the legal complexities and hurdles involved in protecting their rights in the matrimonial home through the law. This study therefore recommends that an equal 50/50 rather than an equitable legal approach in the division of the matrimonial home registered in the name of the husband upon divorce can effectively protect women's rights.

DECLARATION

I, SHINGAI JOYLYN MABASO, do hereby declare that this dissertation is my original work and has not been presented or submitted anywhere else before the award of certificates or any form of assessment.

Signed.....

Date.....

This work is approved for submission by the supervision of Professor Julie Stewart, Director of SEARCWL

Signed.....

Date.....

DEDICATION

To my children,

You mean the world to mean to me,

You inspire me to be a better Mum & friend,

You inspired me and challenged me to push myself to the limit even though times were difficult so that I set a milestone for you to exceed.

I love you.

VaZimudzi my dearest, I thank you for your support

I love you.

Mainini Kudzi, if it were not for you I would not be here

I love you

My brother you are not forgotten,

I love you

I love you all!

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I extend my gratitude to my husband. You assisted me immensely in perfecting this work. Your input is greatly appreciated.

I wish to extend my gratitude to my children for patiently braving through the times when I was not physically available for them not only during this research but throughout the whole programme.

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And to all the unnamed people who contributed to this research, I acknowledge your input and wish to thank you all for your assistance, patience and support

May God bless you all!

LIST OF ACRONYMS

CEDAW - The United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979)

ICCPR - The United Nations International Convention on Civil and Political Rights (1996)

ICESCR - The United Nations International Convention on Economic, Social and Cultural Rights (1966)

SADC Protocol - Southern African Development Community Protocol on Gender and Development

UDHR - Universal Declaration of Human Rights (1948)

ZIMLII - Zimbabwe Legal Information Institute

ZWLA- Zimbabwe Women Lawyers Association

WLSA- Women and Law in Southern Africa

LIST OF STATUTES

List of Domestic Statutes

Constitution of Zimbabwe, 2013

Customary law and Local Courts [Chapter 7:05]

Customary Marriage Act [Chapter 5:07]

Deeds Registries Act [Chapter 20:05]

Matrimonial Causes Act [Chapter 5:13]

High Court Act [Chapter 7:06]

International human rights

Bangalore Principles of Judicial Conduct, 2002

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The Human Rights Committee General Comment 28

The Maputo Protocol - The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

The Southern African Development Community Protocol on Gender and Development

The United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979)

The United Nations International Convention on Civil and Political Rights (1996)

The United Nations International Convention on Economic, Social and Cultural Rights (1966)

Universal Declaration of Human Rights (1948)

LIST OF CASES

Annie Mutsa Mazvita Madzara v Stanbic Bank Zimbabwe & Ors HH 546/15

Chiparaushe v Chiparaushe HH 312/17

Chiyangwa v Chiyangwa HH 263/17

Feremba v Matika 2007 (1) ZLR 337

Gutu v Gutu HH 162/17

Industrial Equity v Walker 1996 (1) ZLR 208

Jemali v Jemali HH 32/17

Kafesu v Kafesu HH 284/17

Knowledge Ntini v Defienet Masuku HB 69/03

Mapiye v Mapiye HB 66/17

Mautsa v Kurebgaseka HH 106/17

Mhondiwa v Mhondiwa HH 31/17

Mtuda v Ndudzo 2000 (1) ZLR 710

Muswere Godfrey v Gertrude Rudo Makanza HH16/2005

Muzanenhamo and Anor v Katanga and Ors 1991 (1) ZLR 182 (SC)

Shelter Mavata v James Chibande HH 43/12

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CHAPTER ONE

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

Given the progressiveness of women's rights enshrined for the first time in the 2013 Constitution and section 26(c) that mandates the judiciary and legislature to take appropriate measures to ensure that in the event of divorce, both spouses should have equality of rights upon divorce, I decided to question the meaning of section 26(c) in relation to division of matrimonial property upon divorce. Does the Constitution now provide for a new legal approach to division of matrimonial property based on the equality of rights? Does equality of rights mean both spouses have equal 50/50 shares in the matrimonial home regardless of the indirect or direct contribution of each spouse in the purchase of the matrimonial home that is solely registered in the husband's name? Does the equal protection of the law in terms of section 56 of the Constitution mean that unregistered customary law unions (UCLUs) should also have equal protection under the Matrimonial Causes Act for purposes of division of matrimonial assets upon divorce? These questions necessitated research because if the answers were in the affirmative it would definitely mean that the judiciary and legislature should intervene and reform the current legal approach from a legal approach of equitable division to a legal approach based on equal 50/50 shares for both spouses regardless of their form of contribution or type of union.

I use several gender focused methodologies and complementary data collection methods to provide a critical analysis of the relationship between the law and women. I take the lived realities of women as a starting point to expose the legal gaps in the division of the matrimonial home upon divorce. This dissertation therefore, exposes the legal and other various obstacles that prevent urban women from realizing their human right to equality in the division of the matrimonial home that is registered in the husband's name upon divorce. The recommendations proposed by this study are intended to improve the legal position of women as they access justice to enforce their rights in the matrimonial home upon divorce.

1.2 Problem Statement

Despite the gender neutrality of section 7(4)(e) of the Matrimonial Causes Act which provides for the equitable division of the matrimonial home based on each spouse's contribution in the acquisition of the property, the law places a heavier burden of proof on women. This is because women mostly contribute indirectly/non-financially to the purchase of the matrimonial home because of their gender and gender assigned roles, whilst men, on the other hand, mostly contribute directly/financially to the acquisition of the matrimonial home. Indirect contribution is more difficult to prove as compared to direct contribution because direct contribution is easily quantifiable in monetary value whilst indirect contribution is difficult if not impossible to ascertain in monetary terms. Therefore, based on judicial practice, if a woman fails to satisfy the court how her indirect contribution equals the financial contribution of her husband in the acquisition of the matrimonial home, she will most likely be awarded fewer shares in the matrimonial home. This form of equitable division based on the quantification and subsequent apportioning of shares based on each spouse's contribution in the matrimonial home ignores the special nature of a marriage partnership wherein roles / contributions / responsibilities of both spouses in whatever form are equally important for the acquisition of matrimonial assets.

The plural legal system in the division of matrimonial assets upon termination of an unregistered customary law union (UCLU) violates women rights to equal protection of the law and reinforces gender inequality. Customary law presumably applies in the division of matrimonial property upon termination of an unregistered customary law union and under customary law women, because of their gender, cannot own the matrimonial home registered in the name of the husband. Unregistered customary law marriages make up more than 80 % of unions in Zimbabwe but, surprising enough, they are not recognized as valid unions under the current legal system. In addition, this duality of legal systems in the division of the matrimonial home places a heavier burden on women in unregistered customary law marriage. This is because their rights in the matrimonial home can only be protected by invoking general law and successfully rebutting the application of customary law. Furthermore, women in unregistered customary law unions are discriminated against on the basis of their marital status since women in civil marriages upon divorce merely invoke the Matrimonial Causes Act to determine division of the matrimonial home notwithstanding its sole registration in the husband's name.

Women's rights in the matrimonial home and right to equal protection of the law are violated under the Matrimonial Causes Act because the Act gives judges a wide discretion in determining a just and fair apportionment of shares for each spouse in the matrimonial home. Some judges' gender role stereotypes influence their quantification of indirect contribution and subsequent apportionment of shares in the matrimonial home and, as a result, the rights a woman retains in her matrimonial home upon divorce is at mercy of judges. This is why there are various legal approaches to the division of the matrimonial home in Zimbabwe which explains why it is difficult for women to appeal against inexplicable decisions.

Women's rights in the matrimonial home are violated under the current legal system because property law in Zimbabwe does not recognize a matrimonial home or the rights of a wife in the immovable property if her name is not registered against the title deeds. At law the husband has the right to sell, donate and/or hypothecate the matrimonial home without his wife's consent simply because only his name registered against the title deeds of the property. The findings of this research will show that gendered power dynamics in the home prevent some women from jointly registering the matrimonial home. Therefore it is neither just nor fair that the law confers full rights of ownership on the husband simply because the matrimonial home is registered in his name. Courts for decades have been expressing the need to correct this legal gap which has bound their hands to protect women's rights in the matrimonial home registered in the husband's name but the legislature is yet to rectify this legal problem.

1.3 Point of Departure

The Constitution is the supreme law of land and actually provides for equal rather than equitable division of matrimonial property upon dissolution of all forms of unions in Zimbabwe. However, the judiciary implements provisions of the Matrimonial Causes Act and the Customary Marriages Act that conflict with the provisions of the Constitution. Section 56(1) of the Constitution provides that all persons are equal before the law and have the right to equal protection and benefit of the law. Section 46(d) also mandates that the judiciary must pay due regard to all provisions of the Constitution and, in particular, the principles and objectives set out in Chapter 2. Section 26(c) of the Constitution, a national objective, mandates that the judiciary should take appropriate measures to ensure that there is equality of rights and obligations of spouses upon dissolution of marriage. An interpretation of these provisions as read together means that there is a presumption of equality of rights of spouses

upon divorce and this also extends to the division of matrimonial property irrespective of the sole registration of the assets. Courts are therefore mandated to ensure that they award equal shares to each spouse in the matrimonial property irrespective of their contributions in the acquisition of the property. For this reason, section 7(4)(e) of the Matrimonial Causes Act violates women's Constitutional rights to equality in the division of matrimonial assets upon divorce as it mandates courts to equitably divide matrimonial assets based on each spouse's contribution.

The dual legal system in the division of matrimonial assets upon divorce is a violation of women's rights as protected by the Constitution. Section 56 as read together with section 80(1) provides that every woman has full and equal dignity of the person with men and section 80(3) provides that all laws, customs, traditions and cultural practices that infringe the rights conferred by the Constitution are void to the extent of their infringement. Application of customary law in the division of matrimonial assets reinforces gender inequality because customs and traditions involved in the division of matrimonial assets upon dissolution of an unregistered customary law union do not recognize the rights of a woman to own the matrimonial home registered in the husband's name on the basis of her gender. Therefore, the application of customs and traditions in the division of matrimonial property upon divorce constitutes an infringement of women's Constitutional rights of equality and non-discrimination on the basis of their gender and marital status.

1.4 Scope of the research

This research focuses on how the legal system impacts upon the rights of urban women to own equal shares in the matrimonial home that is solely registered in the name of the husband upon divorce. The research is limited to two major forms of unions in Zimbabwe, mainly unregistered customary law unions (UCLUs) and civil marriages. I will not focus on registered customary law unions because the same legal obstacles in the division of matrimonial property upon divorce that affect women in civil marriages also affect women in registered customary law unions. This is particularly so considering that a registered customary law union is legally recognized in terms of the Matrimonial Causes Act for purposes of the distribution of matrimonial property.

I also look at the how the dual legal system on the division of matrimonial assets upon the dissolution of an unregistered customary law union violates women's rights in the

matrimonial home. I equally focus on how section 7(4)(e) of the Matrimonial Causes Act obstructs women from protecting their rights in the matrimonial home upon divorce because it is the provision that direct courts to apportion shares to each spouse in the matrimonial home based on their contribution. The overall goal of this study is to juxtapose two main legal approaches of equal and equitable division of matrimonial property and assess which legal approach can effectively protect women's rights in the matrimonial home that is registered in the husband's name upon divorce.

1.5 Research Objectives

The objectives of this research are:

- a. To ascertain existing laws that govern the division of matrimonial property in Zimbabwe.
- b. To examine whether the current legal system enables or prevents women from accessing justice for purposes of division of matrimonial home registered in the name of the husband upon divorce.
- c. To examine other factors that prevent women from accessing justice for purposes of division of matrimonial home registered in the name of the husband upon divorce.
- d. To examine whether equal instead of equitable distribution of matrimonial property will better protect women's rights in the division of matrimonial property.
- e. To recommend reform based on women's experiences with the law.

1.6 Research Assumptions

- a. Equitable division of the matrimonial property violates women's rights in the matrimonial home that is solely registered in the husbands' name upon divorce.
- b. Equal rather than equitable division of matrimonial property will protect women's rights in the matrimonial home that is solely registered in the husbands' name upon divorce.
- c. The dual legal system on the division of matrimonial assets violates the rights of women in the matrimonial home that is solely registered in the husbands' name upon divorce.
- d. Lack of knowledge and financial factors prevent women from accessing justice for purposes of division of the matrimonial home.
- e. Legal interventions are necessary to enable women to protect their rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

1.7 Research Questions

- a. Does equitable division of the matrimonial property violate women's rights in the matrimonial home that is solely registered in the husband's name upon divorce?
- b. Can equal rather than equitable division of matrimonial property protect women's rights in the matrimonial home that is solely registered in the husband's name upon divorce?
- c. Does the dual legal system on the division of matrimonial assets violate the rights of women in the matrimonial home that is solely registered in the husbands' name upon divorce?
- d. Do lack of knowledge and financial factors prevent women from accessing justice for purposes of division of the matrimonial home?
- e. Are legal interventions necessary to enable women to protect their rights in the matrimonial home that is solely registered in the husbands' name upon divorce?

CHAPTER TWO

2.0 LAW & LITERATURE REVIEW ON THE DIVISION OF MATRIMONIAL IMMOVEABLE PROPERTY REGISTERED SOLELY IN THE NAME OF THE HUSBAND

2.1 Introduction

This chapter gives a detailed analysis of the legal framework governing the division of matrimonial property upon divorce in Zimbabwe. I mainly use literature and case law to analyse how the legal system impacts on women's rights in the matrimonial home solely registered in the name of the husband upon divorce. I also use a constitutional analytical framework to assess to what extent the legal system in Zimbabwe infringes upon women's Constitutional rights.

2.2 Definition of key terms

2.2.1 Unregistered Customary Law Union

This union is a potentially polygynous union, wherein parties marry according to their customs and it is governed by the Customary Marriages Act. The difference between a registered customary law marriage and an unregistered customary law union is that the former has been solemnized by registering the union through a Magistrate, an official or chief appointed to be a customary officer in terms of the Customary Marriages Act. In other words, an unregistered customary law union, unlike a registered customary law union, is a customary law union which meets all the requirements of a marriage under customary law except for registration in terms of the Customary Marriages Act. Note that when I refer to dissolution of the union I mean dissolution by divorce.

2.2.2 Civil Marriage

A civil marriage is a monogamous marriage governed by the Marriage Act [Chapter 5:11]. This marriage is only conducted by a Magistrate or designated marriage officer as provided by the Act.

2.2.3 Mavoko Property

The proprietary consequences of an unregistered customary law union upon divorce are governed by customary law and under customary law women are only entitled to retain their *mavoko* (Shona) /*impahlazezandla* (Ndebele) and *mombeyeumai/ inkomoyohlanga* property. *Mavoko* property, according to Holleman, is the property that a woman acquires through her own personal labors or by making use of her skills in such crafts as pottery or acting as a midwife or herbalist (Holleman, 1952:351). A woman's wages or salary also falls into this category. Upon divorce a woman is entitled to retain her hands property however Welshman Ncube argues that the major problem women face in this respect is proving that a piece of property falls within the *mavoko* category (Ncube 1989:171).

2.2.4 MombeYohumai

According to Welshman Ncube, this is property that a married woman acquires when her daughter is married. Upon such marriage, one head of cattle payable as bride price is given to her mother and she receives the beast in recognition of her status as mother of the bride. The beast is absolutely hers and she does not require the husband's consent to deal with the beast in whatever manner she deems fit (Ncube 1989:171).

2.2.5 Equal division

According to the CEDAW Committee, equal division of the matrimonial home means that the property should be divided "equally" between the spouses upon divorce (General Comment 29, paragraph 45). "Equally" means that spouses are entitled to an automatic 50/50 share in the matrimonial home upon divorce "irrespective of their contribution ... in the marriage" (Kamberi-Mbote, 2016).

2.2.6 Equitable division

In the light of section 7(4)(e) of the Matrimonial Causes Act, the equitable division of the matrimonial home means that upon divorce the matrimonial home is apportioned to each spouse in relation to their contribution in the acquisition of the property. Their contributions may either be direct or indirect.

2.2.7 Indirect contribution

Indirect contribution consists of non-financial contribution through duties such as cooking, cleaning, reproducing and supervising builders. Financial contribution can be indirect contribution if the money is used for domestic obligations instead of directly purchasing the matrimonial home. Such obligations may include purchasing domestic appliances such as a stove and a fridge, paying school fees, water and electricity bills.

2.2.8 Direct contribution

Direct contribution refers to financial contribution used to purchase and/or construct the matrimonial home.

2.3 The Legal Framework *vis a vis* Unregistered Customary Law Unions

Zimbabwe has a dual legal system that governs the division of matrimonial assets upon divorce. This means that both customary law and general law apply in the division of matrimonial property upon the dissolution of an unregistered customary law union.

2.3.1 The Customary Marriages Act

In terms of section 3 of the Customary Marriages Act, a customary law union is legally valid if the union has been solemnized. However, an unregistered customary law union is only recognized by the law for the limited purposes of:

“...customary law and customs relating to the status, guardianship, custody and rights of succession of the children ...”

According to Welshman Ncube, unregistered customary law unions are therefore invalid marriages on the grounds of their non-registration. This means that the parties are unmarried before the law and consequentially their property is treated as property of unmarried individuals. “Upon separation each party takes with him or her property which he or she acquired and therefore owns. Any joint property is shared in accordance with the shares the parties hold in it” (Ncube 1989:167).

2.3.2 The Customary Law and Local Courts Act

This Act governs the application of customary law in Zimbabwe. There is a rebuttable presumption that when parties enter into an unregistered customary law union they want customary law to be the choice of law that applies to them in the event of divorce and division of matrimonial property. For this reason, upon termination of an unregistered customary law union, customs and traditions govern the process of divorce and division of matrimonial property. Divorce takes place when a spouse is given *gupuro* (a token of rejection in the form of money) usually in a family gathering and not through formal courts. In the same vein, under customary law, a wife has no rights in the matrimonial home registered in her husband's name. She is only entitled to her *mavoko* and *mombeyohumai* (Shona) / *inkomoyohlanga* (Ndebele) property. This, according to Welshman Ncube, is so because customary law regards women as perpetual minors with neither contractual nor proprietary capacity and any property they acquire, save for the *mavoko* and *mombeyeumai* property, is automatically vested in the husband. Furthermore, he states that this is particularly so considering that customary rules governing matrimonial rights of spouses were formed and shaped by the "feudal relations of production under which men, because of their control and ownership of productive resources, assumed a dominant role over women." As a result, the present customary rules inevitably reflect the dominant position of men over women based on this feudal production process (Ncube 1989:170).

Therefore, given that customary law does not recognize the rights of a woman in the matrimonial home registered in the husband's name, a wife who wants to secure her rights in the property will have to rebut the application of customary law and invoke general law since general law recognizes the rights of a wife in the matrimonial home notwithstanding its sole registration in the name of the husband (Irene Sithole, 2018). As a result, unlike women in civil marriages who merely invoke section 7 of Matrimonial Causes Act to divide their matrimonial home upon divorce, irrespective of its sole registration in the husband's name, women in the unregistered customary law unions have a higher legal burden of rebutting the application of customary law and invoking general law principles so that their rights in their matrimonial homes registered in the husband's name are protected.

In terms of section 3 of the Act, the application of customary law is rebuttable and a party who seeks to rebut the application of customary law upon divorce should prove that the circumstances of the case/union are closer to general law as opposed to customary law and/or that the justice of the case demands general law should apply. In **Tinei Mautsa v Melody**

Kurebgaseka HH106/17 the plaintiff/husband and defendant/wife were married in accordance with their customs and their marriage was not registered. During the subsistence of their union they lived a westernized lifestyle which could not be compared to people living according to customary law. The parties lived in the low density suburb of Mandara. The husband was a businessman and his wife a housewife. Their children attended private schools and often the parties would go on holiday and shopping trips. The husband argued that division of the matrimonial property should be governed by customary law and not general law since their union was an unregistered customary law union. The wife successfully rebutted the application of customary law on the basis that they lived a western lifestyle and the justice of the case demanded that general law should apply.

2.3.3 The Law & Women in Unregistered Customary Law Unions

The dual legal system on the division of matrimonial property is discriminatory against women in unregistered customary law unions since customary law discriminates against women on the basis of their gender and as a result their rights in the matrimonial home registered in the husband's name are violated (Ncube 1989: 170,171). This is because under customary law women are only entitled to *mavoko* and/or *mombeyehumai* property. Welshman Ncube argues that most women fail to even claim *mavoko* property upon divorce because:

“The urban woman without income of her own ... has no *mavoko* property since she works as a housewife. Customary law does not recognize her domestic role as entitling her to a share in property acquired by her husband so that she usually leaves her marriage with virtually nothing. It is only the professional urban woman who can point to some form of *mavoko* property if her income was not utilized for subsistence purposes while that of her husband was used to acquire property.”

Therefore, the application of such customs and traditions in the division of matrimonial assets is manifestly unjust as they reinforce gender inequality and violate women's right to the equal protection of the law on the same basis with men, dignity, shelter and an adequate standard of living (Georgetown Journal of International Law 2009). Williams argues that:

“...such systems are deeply problematic because they often violate human rights and other constitutional norms. In particular, most customary system include gender discriminatory rules or procedures” (Williams 2013:29).

In addition, Welshman Ncube states that women are often reduced to the status of propertyless dependents who have to submit to the will of their husband in order to survive because the customary laws on division of matrimonial property upon divorce turn her into an unpaid servant of her husband. During the marriage she works for her husband by maintaining the property and fulfilling her domestic duties but upon divorce she leaves the matrimonial home “property-less and destitute like a sacked employee” (Ncube 1989:171). Therefore, upon divorce women’s standard of living decrease as they have no access to the matrimonial home that provided them and their children with shelter, food and good health (Georgetown Journal of International Law 2009).

Some men intentionally take advantage of the injustices inherent in the dual legal system as they insist on the application of customary law upon the dissolution of their unregistered customary law unions in a bid to circumvent their wife’s rights in the property. This puts a heavy legal burden on the woman to rebut the application of customary law. Justice Chitakunye in the **Tinei Mautsa** case quoted above had this to say:

“The husband’s position seems to be informed by a desire to take advantage of the customary law position where the wife would only be entitled to *umai/mawoko* property on dissolution of the marriage. It is my view that the customary law position whereby a wife under customary law is only entitled to *umai/mawoko* property has been found to be unjust in a number of instances. I would also say that to award the defendant *umai/mawoko* property in terms of customary law in the circumstances of this case would indeed be unjust and an affront to a modern day democratic society where both locally and internationally calls have been made for equal rights and opportunities. This is a union that lasted 14 years and to expect the defendant to move out with only *umai/ mawoko* property would be the height of judicial injustice. It is in that regard that I firmly hold the view that the circumstances of this case require that general law should apply.”

Had it not been that the wife successfully rebutted the application of customary law and that the judge intervened on the basis of justice, customary law would have applied and the wife’s rights in the matrimonial property would have been violated.

2.3.4 General Law Principles

The principles of tacit universal partnership and unjust enrichment are principles which courts have applied judiciously in an attempt to protect women's rights in the matrimonial home that is solely registered in the name of the husband. In **Knowledge Ntini v Defienet Masuku HB 69/2003**, Justice Cheda indicated that tacit universal partnership and unjust enrichment are principles that are applied by the courts to assist women in unregistered customary law unions because:

“Gauging by the number of claims coming before these courts, brought by the impoverished and desperate women against their husbands, time has come, in my view, for the courts to take a positive and progressive approach in addressing the inequalities in our legal system in order to where practically possible assist women in their endeavor to find justice.”

In this case the appellant/husband was appealing that the court *aquo* had erred in awarding the respondent/wife 25% shares in the matrimonial property because the general law principles of tacit universal partnership did not apply to unregistered customary law unions. The matrimonial home was registered in the name of the husband. The appeal was dismissed and the husband was ordered to pay his wife 25% of the value of the proceeds of the sale of the matrimonial property.

However, these general law principles have been heavily criticized because proving them is very difficult for most women especially if they are not legally represented. As a result, if a wife fails to satisfy these legal elements, “in the worst-case scenario, the case will be dismissed and the woman will walk away empty-handed” (Chirawu 2013:16). **Feremba v Matika 2007 (1) ZLR 337** was an appeal case. The trial magistrate had divided the matrimonial assets on the basis that the parties had been in an unregistered customary law union for 8 years. He awarded the wife some shares in the matrimonial assets because she had indirectly contributed to the acquisition of the property. However, the appellant/husband was dissatisfied with the decision and appealed. Justice Makarau held that:

“The current legal approach is that distribution of assets of parties in an unregistered customary law union should not be apportioned as if they were a couple divorcing in terms of the Matrimonial Causes Act. A party should first provide reasons why customary law should not apply using choice of law considerations in the Customary Law and Local Courts Act. When general law is the choice of law, then, a recognized

cause of action must be pleaded. Such cause of action may be unjust enrichment or tacit universal partnership. An averment merely to the effect that the parties were in an unregistered customary law union is not sufficient to found a cause of action at general law. She further held that in the present case the trial magistrate had erred because he did not advert to the choice of law considerations before he decided to apply general law. Secondly having chosen to apply general law to the dispute the trial magistrate erred in considering the union as a cause of action.”

On the basis of the foregoing, the court allowed the appeal and set aside the decision of the trial magistrate who had awarded some shares in the matrimonial assets to the wife. This case reflects that rebutting the application of customary law and invoking general law principles in the division of matrimonial assets upon divorce is difficult for most women. This is because the principles are not only complex legal principles that require legal expertise but also they are strict business principles ignorant of the special nature and equal importance of each partner’s role/contribution in a marriage partnership. This means that the majority of women in Zimbabwe, in the event of divorce, have to rely on legal representation to secure their rights in the matrimonial home registered in the husband’s name upon divorce. This is particularly so considering that 80% percent of Zimbabwean marriages are unregistered customary law unions (The Financial Gazette 2018).

Judges’ roles in apportioning shares in the matrimonial home based on quantifying the contributions of each spouse in the acquisition of the matrimonial home have also been heavily criticized. In the **Knowledge Ntini** case (above), the wife was awarded a 25% share of the matrimonial property despite judicial activism. This reveals that despite judges being aware of the prejudicial proprietary position of women in unregistered customary law unions upon divorce, women often face biased judges who refuse to recognize their indirect contribution as equal to the financial contribution made by men (Georgetown Journal of International Law 2009). The trend by some judges of apportioning fewer shares to a woman who only contributed indirectly to the acquisition of the matrimonial property reflects that some judges place more value on financial contribution by men as opposed to the non-financial contributions made by women (Muchawa, 2005:10). Welshman Ncube argues that “the law/judiciary fails to take account of the realities of married life in which spouses form a real partnership in respect of their different but equal and complementary contributions to the welfare of the family”(Ncube 1989:172). This, according to Carol Smart, results in the law “reproducing and perpetuating the most secure foundations of patriarchal relations” (Smart

1984:4). Based on this analysis, judges' gender role stereotypes reinforce gender inequality and influence the extent to which women can enforce and retain their rights in their matrimonial home upon divorce (Georgetown Journal of International Law 2009: 38).

2.3.5 Tacit Universal Partnership

In order to invoke this principle, parties in an unregistered customary law union should prove that they were in a union and that they both brought something into or made a commitment to bring something into the union, for example, in the form of money and or labor. In **Mtuda v Ndudzo 2000 (1) ZLR 710** the wife invoked tacit universal partnership for the division of the matrimonial assets that had been acquired during the subsistence of their unregistered customary law union. Justice Garwe summarised the four requisites of a tacit universal partnership as follows:

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

The first element allows the courts to consider the indirect contribution in the form of non-financial contribution of women. For example, the courts will consider the financial contribution of the husband in purchasing the immovable property and also the non-financial contribution of the wife which may include the domestic upkeep of the home. The rationale is that a wife's domestic contribution allows the husband to comfortably and freely work to acquire money (per Ziyambi JA in **Usayi v Usayi SC 11/03**). The number of shares a spouse will get in the immovable matrimonial home will therefore be based on each party's quantified contribution in the acquisition of the property (Irene Sithole, 2018).

In addition, for a tacit universal partnership to exist, the acquisition of the immovable property should be carried out for the mutual benefit of the parties. A clear example would be in cases where the property is jointly registered. In cases of sole registration, the intention of mutual benefit will be present when both spouses through their joint efforts work to erect the matrimonial home (Irene Sithole, 2018).

The third element of making a profit is easily satisfied when a wife proves that the marriage partnership / joint venture made profits to acquire the immovable property. In summation, a tacit universal partnership is an implied and not express agreement in which the parties agree to enter into a marriage partnership to make profits to acquire property for their mutual benefit (Irene Sithole, 2018).

2.3.6 Unjust enrichment

Another general law principle in the division of matrimonial property available to parties in an unregistered customary law is that one party can allege that the proposed division of the property by the other party will unjustly enrich that party. In **Industrial Equity v Walker 1996 (1) ZLR 208**, although the facts of the case did not deal with matrimonial assets, the court held the plaintiff should prove that the defendant was enriched; that the enrichment was unjustified and that it was at the expense of the plaintiff. There should be a causal connection between the impoverishment of the plaintiff and the enrichment of the defendant. For example, a wife can claim that the husband has unjustifiably enriched himself by chasing her away from the matrimonial home registered in his name and has made her homeless as she has no access, control or ownership of the matrimonial home that they both contributed to acquiring. If a woman satisfies these legal requirements the court will be obliged to intervene and equitably divide the matrimonial immovable property despite its sole registration in the name of the husband (Irene Sithole, 2018).

2.4 The Matrimonial Causes Act

This Act governs division of matrimonial assets upon divorce of spouses in civil and registered customary law marriages. In particular, section 7 of the Matrimonial Causes Act provides for various factors which should direct courts in apportioning shares for spouses in the matrimonial home which include:

- 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;

- 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; and
- g. The duration of the marriage.

In addition, this section essentially gives the court a wide discretion to apportion property of the parties upon divorce by endeavoring:

“as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children in the position they would have been in had a normal marriage relationship continued between the spouses.”

This means that the final process of quantification and apportioning of shares in the matrimonial home is predominantly determined by the exercise of a judicial discretion.

2.4.1 The Law and Women in Civil Marriages

Women face more difficulties in proving how their domestic labour purchased the matrimonial home as indirect contribution is not easily assessable in monetary value. According to Welshman Ncube this is because:

“Housework produces use value rather than exchange value, and since the economic status of a domestic work is very depressed, its proper financial value is ambiguous” (Ncube 1989:178).

Therefore, quantifying domestic labour of a woman is difficult if not impossible. As a result, this puts a heavy legal burden on women during civil litigation as they will be trying to prove the monetary value of their domestic roles such as cooking, cleaning and reproducing in the acquisition of the matrimonial home. **Usayi v Usayi SC 11/03** was an appeal case against an order of the High Court granting the respondent/wife an equal share in the matrimonial property. The husband and wife were married in 1961 after having lived together as husband and wife from 1952 in an unregistered customary law union. In 1995, they stopped living together because of various differences that had arisen between them. Justice Ziyambi

acknowledged the injustices effected upon women by section 7(4)(e) of the Matrimonial Causes Act in the division of matrimonial assets upon divorce when she stated:

“The Act speaks of direct and indirect contributions. How can one quantify in monetary terms the contribution of a wife and mother who for 39 years faithfully performed her duties as a wife, mother, counselor, domestic worker, housekeeper, day and night and nurse for her husband and children? How can one place a monetary value on the love, thoughtfulness and attention to detail that she puts into all the routine and sometimes boring duties attendant on keeping a household running smoothly and a husband and children happy? How can one measure in monetary terms the creation of a home and the creation of an atmosphere therein from which both husband and children can function to the best of their ability? In the light of these and many various duties, how can one say, as is often remarked: “throughout the marriage she was a housewife? She never worked”. In my judgment, it is precisely because no monetary value can be placed on the performance of these duties...”

The Honourable Judge had to embark on judicial activism to correct the injustices occasioned upon women as a result of the inherent injustices in the law based on quantifying the domestic labour of women for purposes of division of matrimonial property upon divorce; and she awarded the wife an equal share in the matrimonial property. According to Welshman Ncube, courts should not attempt to formulate a legal approach to attaching monetary value to the intangible and unquantifiable domestic contributions of a housewife (Ncube, 1989:178). This is because if a woman fails to adequately prove the financial worth of her domestic roles against the financial contribution of the husband in the purchase of the matrimonial home, a judge may award her fewer shares in the matrimonial home. This has resulted in many judicial decisions that have undervalued and dismissed women’s contribution and as a result violated their rights in the matrimonial home upon divorce (Georgetown Journal of International Law 2009).

The lack of certainty and uniformity in the enforcement of laws governing the division of matrimonial property upon divorce affects women’s rights in the matrimonial home differently because the Act gives judges wide discretionary powers in determining a just and fair division of matrimonial property upon divorce. This has created “indefinite legal rights” and “uncertainty in law” as “courts are free to make almost any order they see fit”. As a

result, judges apportion shares to women differently notwithstanding that their cases will have similar circumstances (Ncube, 1989:185).

In addition, women cannot determine in advance the outcome of their case because of the various legal approaches and wide discretionary power judges have in apportioning shares in the matrimonial home to each spouse upon divorce. Welshman Ncube states that as a result women are “unable to determine in advance how a particular case will be decided since the outcome of each case depends on weighing a variety of factors as well as the individual discretion and attitude of the judge involved” (Ncube 1989:185). The law should be certain and applied objectively but the test of considering the extent to which a woman retains her rights in the matrimonial home is a test that “remains the prerogative of the presiding judge” and this has created an inability in the legal system “to effectively ensure adequate protection of women’s property rights” (Georgetown Journal of International Law 2009).

Women have a heavy legal financial burden as they enforce their rights in the matrimonial home upon divorce as they are forced to seek legal representation. This is because the absence of clear guidelines that direct the exercise of judicial discretion has created an “unpredictable judicial discretionary based formula system” that “naturally leads to extensive litigation” (Ncube 1989:185). According to ZWLA, legal fees are expensive and they remain prohibitive and impede some women from accessing justice to enforce their rights in the matrimonial home upon divorce because during divorce women usually have a heavy domestic financial burden (ZWLA, 2017:6).

2.5 Constitutional Framework Analysis

In terms of sections 56 and 80(3) of the Constitution, women have the right to equal protection of the law and all laws and customs that infringe upon women’s rights conferred by the Constitution are void to the extent of their inconsistency with it. The dual legal system governing the division of matrimonial assets upon divorce in Zimbabwe violates the right of women in registered customary law unions to equal protection of the law. This is so considering that the Matrimonial Causes Act does not legally recognize women in unregistered customary law union for purposes of division of the matrimonial home upon divorce, while, on the other hand, it protects women in civil marriages. The application of customs and traditions to determine the matrimonial proprietary rights of women in unregistered customary law unions violates their rights to equality and non-discrimination on

the basis of their gender and social status. In **Shelter Mavata v James Chabande HH43/12** Justice Hlatshwayo stressed:

“Thus, just to add one’s voice to the chorus of calls for legislative intervention in this area, women litigants in unregistered customary law unions seeking equitable relief in the distribution of property on the dissolution of their marriages have been knock, knock knocking on heaven’s door of section 7 of the *Matrimonial Causes Act* for far too long with varying degrees of success. More often than not they have had the door slammed shut in their faces. Occasionally, they have had the indignity of being grudgingly served from the side-door or even the window. Isn’t it just time, right now, that this forbidding door was thrown wide open for them as well?”

This was a case in which the appellant/wife appealed a decision of a Chitungwiza Magistrate who had awarded her 15% value of the immovable property acquired by the parties during the subsistence of their four year unregistered customary law union. She argued that she deserved to be awarded more shares since she had contributed indirectly in acquiring the matrimonial property. The appeal was granted and she was awarded a 50% share in the matrimonial property. Therefore, in the light of sections 56 and 80(3) of the Constitution, the Matrimonial Causes Act and the Customary Marriages Act are void to the extent that they do not afford women in unregistered customary law unions equal protection of the law under the Matrimonial Causes Act for purposes of division of matrimonial property upon divorce.

Furthermore, section 7(4)(e) of the Matrimonial Causes Act discriminates against women because it places a heavier burden of proof on women as indirect contribution is more difficult to prove (ZWLA, 2017:6). Section 56(4) of the Constitution provides that a person is treated in a discriminatory manner if:

- a. They are subjected directly or indirectly to a condition, restriction or disability to which other people are not subjected; or
- b. Other people are accorded directly or indirectly a privilege or advantage which they are not accorded.

In the light of section 56(4) of the Constitution, proving contributions as provided in section 7(4)(e) of the Matrimonial Causes Act is a discriminatory legal practice which subjects women to a legal disadvantage during civil litigation for the division of the matrimonial home upon divorce. This is because indirect contribution is more difficult to prove as it is not easily

quantifiable in monetary terms, while direct contribution is easier to prove through pay slips and receipts that are easily assessable in monetary value (ZWLA, 2017:6). Women's gender roles make them the parties more likely to have to prove indirect contribution upon divorce as during marriage it is usually the woman who fulfills the domestic roles of cooking, reproducing and cleaning the home.

Women are dispossessed of their homes because of the current trend among some judges of apportioning fewer shares to women in the matrimonial home upon divorce because they only contributed indirectly in the acquisition of the matrimonial home (Georgetown Journal of International Law 2009:39). This violates their rights to property as enshrined in section 71 of the Constitution because, after divorce, some women are frequently incapable of purchasing another immoveable property/home. Normally when a wife is given fewer shares in the matrimonial home, the court gives the husband an option to buy out the wife. The money she receives cannot purchase another immoveable property of the same value/quality as the matrimonial home and often women are "forced to leave the matrimonial home with little more than their personal effects often rendering them homeless and ultimately forcing them to relocate to 'slums' or to engage in survival or transactional sex to support themselves and their children" (Georgetown Journal of International Law 2009).

Overall, the Constitution in terms of sections 80(3) and 56 clearly buttresses the equality of rights for all spouses in Zimbabwe regardless of sex, gender and marital status upon divorce. The equality maxim interpreted in the light of the Constitutional provisions presumes that both spouses upon divorce are equal and are automatically entitled to 50/50 shares in the matrimonial home notwithstanding sole registration of the property in the husband's name. Welshman states that:

"Marriage, whether or not both spouses work outside the home, should be viewed as a collaborative enterprise of both spouses...The evaluation process should not seek to formulate to determine how much the housekeeper is worth in comparison with, for example, a university lecturer, nor should the processes seek to determine the value of a wife's cooking, washing and rearing of children as compared to, say, a government minister's work. The proper approach would be to presume that in the majority of marriages, the spouses assume equivalent, though different, duties which are equally beneficial to the welfare of the family" (Ncube 1989:170, 178).

Based on this analysis, the quantification of contributions as provided in section 7(4)(e) of the Matrimonial Causes Act violates women's Constitutional right to equality. Gray explains this as follows:

“The wife's domestic efforts should be regarded as a dynamic causal factor in the acquisition of matrimonial property since the performance of her supportive and complementary role is a functional *sine qua non* of the viability of the family as an economic unit... A just and realistic evaluation of her efforts depends upon the avoidance of absolute terms of cash value in preference for the relative approach of differential equality between financial and non-financial contributions to the acquisition of the matrimonial assets” (Gray 1976:35, 71).

Therefore, the legal approach of automatically awarding equal shares to both spouses will promote and protect gender equality as enshrined in the Constitution as both financial and non-financial contributions of spouses will be equally recognized (The Georgetown Journal of International Law 2009:41). In addition, this legal approach based on equality, will fetter the wide discretionary powers of judges, increase judicial efficiency and will promote legal certainty, economic empowerment of women through the ownership of immovable property and gender equality by uprooting notions that the “wife is the property of her husband” (The Georgetown Journal of International Law 2009:41).

2.6 Conclusion

In conclusion, this theoretical analysis of the legal framework governing the division of the matrimonial home upon divorce in Zimbabwe exposes the legal gaps that impact on women as they access justice to enforce their rights in the matrimonial home registered in the name of their husband upon divorce. However, all hope is not lost as the Constitution clearly provides for an equal and not equitable legal approach on the division of matrimonial assets upon divorce. The mandate is now upon the judiciary and the legislature to enforce the principles of equality as provided in the Constitution so as to protect women's rights in the matrimonial home on an equal basis with men.

CHAPTER THREE

3.0 DATA COLLECTION METHODS

3.1 Introduction

This chapter outlines the research methods that I used for this research. I used several gender focused methods which helped me collect data on women's lived realities *vis a vis* the legal system governing the division of the matrimonial home registered in the husband's name upon divorce. I used various methods to collect data such as in-depth interviews with women and key informants, a group discussion with men, internet and desk research of literature and case law. These methods gave me a deeper understanding on how the current legal system impacts on women's rights in the matrimonial home upon divorce.

3.2 Delimitation of Research

I delimited this research to Tynwald North because it is an upcoming middle class suburb and most families do not rent the matrimonial homes in which they live. Given the nature of this research it was important to get a perspective from women and men who were married/divorced but who had worked together as spouses in acquiring their matrimonial home. In addition, it was easier for me to secure interviews with the women as I reside in the area.

3.3 Research Methods

3.3.1 In-depth Individual Interviews

This research was mainly conducted through in-depth individual interviews with women and key informants. The in-depth interviews with women were mostly conducted in their homes and all interviews with key informants were held at their offices. I did random door-to-door in-depth individual interviews with women because I was selecting a particular group of women (women who did not rent the immovable property in which they resided). In addition, this method created an atmosphere of confidentiality allowing the women to freely air their views as I had observed that women seemed to be restrained or unwilling to fully engage in group discussion interviews on issues of divorce. I asked divorced women about their experiences with the law in relation to the division of matrimonial assets upon divorce. I also asked all women for their views on the legal system governing the division of matrimonial assets upon divorce. I noticed that most of the married women who had never

divorced had a very shallow understanding on the Zimbabwean legal system that governs the division of matrimonial assets upon divorce. I asked the women to describe and explain their customs and traditions that governed the division of matrimonial property upon divorce, their personal details, such as their form of marriage, whether their matrimonial home was jointly registered, whether they were full time housewives, whether they earned an income and the division of labour with their husbands in their marriages.

I mainly enquired from key informants on the how the legal system impacted on women's rights as they accessed justice to protect their rights in the matrimonial home that was solely registered in the husband's name.

3.3.2 Group Interview

I did an unstructured group interview with men who sat by the beer hall in Tynwald North on a Sunday afternoon. Any male respondent was allowed to join the discussion. The day was also relevant in that most men did not go to work on Sunday and usually in the afternoon they went to the local beer hall. This also provided me with access to a male perspective from men who actually owned immovable matrimonial property. I observed that men freely aired their views on divorce and the division of matrimonial property so this method helped me to capture more data than I would have by interviewing many respondents separately.

3.3.3 Internet Search /Library Search

This method was very useful as it allowed me to access reported judgments from ZIMLII and materials for the literature and law review.

3.4.4 Orthodox case analysis

I did a random collection of cases that were available on ZIMLII that had been decided in the High Court of Zimbabwe in 2017. It should be noted, however, that some of the cases involve jointly registered immovable property. The significance of this tabulation was to highlight the significant similarities involved in civil litigation on the division of matrimonial assets upon divorce.

3.4.5 Experiential Data

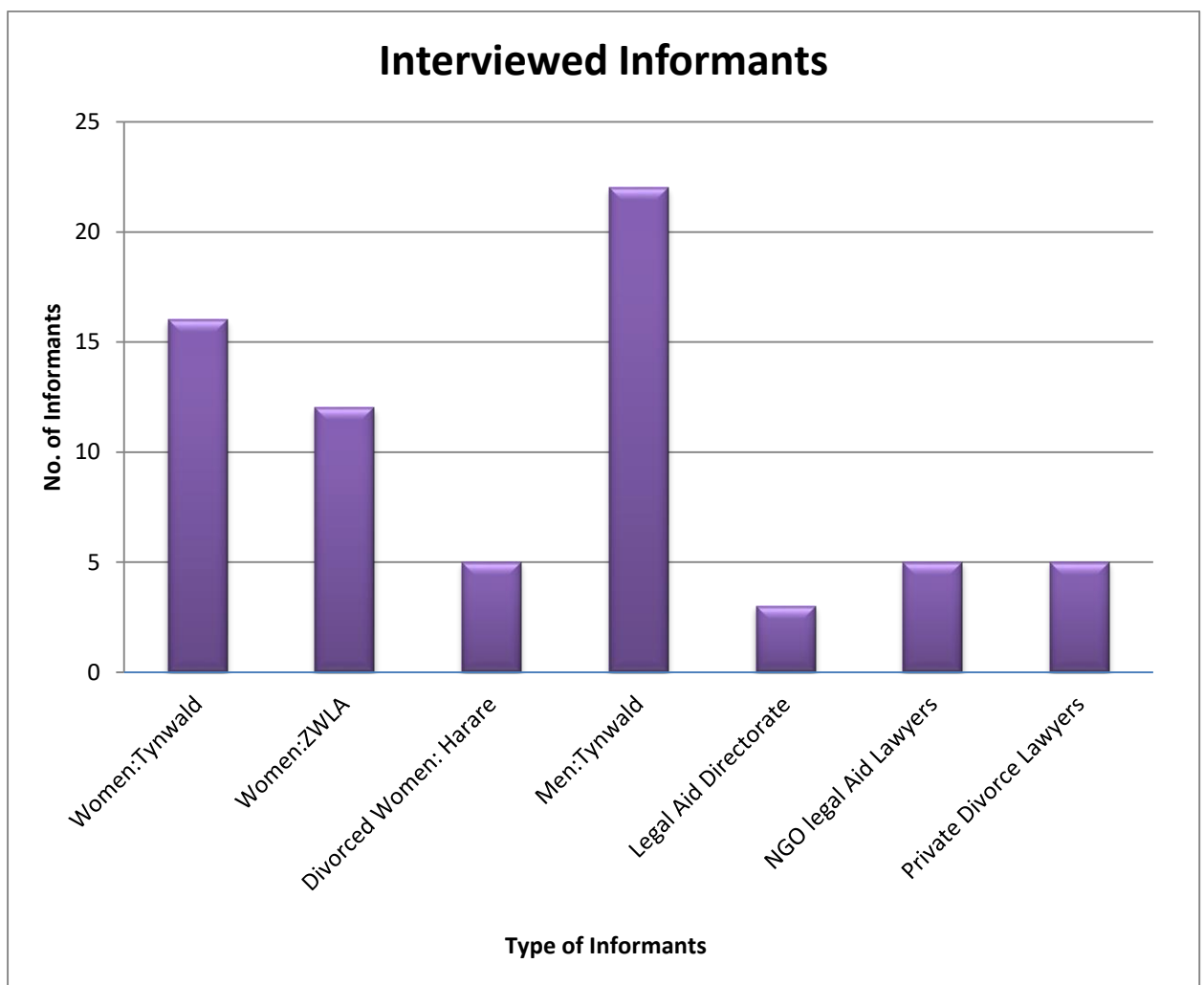
As a legal practitioner who had engaged with the legal system on the division of matrimonial property upon divorce and now coupled with the human rights advocacy in me influenced by my Master's in Woman's law, I used my experiential data to identify key informants, analyse case law, ask relevant questions and carry out a general analysis of data grounded in women's law.

3.5 Research Sample

3.5.1 The research informants

The bar chart (Figure 1) depicts the number and type of respondents that I interviewed for this research.

Figure 1: Type and number of respondents interviewed for this research



I interviewed:

Women in Tynwald	16
Women at ZWLA	12
Women Divorced in Harare	5
Men at the beer hall in Tynwald	22
Legal Aid Directorate Informants	3
Non-Governmental Legal Aid Lawyers	5
Private Divorce Lawyers	5

Total	<u>68</u>

3.5.2 Why those Respondents?

Despite having delimited this research to Tynwald North, after conducting interviews in the area I realized that I had only interviewed two divorcees and only one had actually engaged with the legal system in the division of matrimonial assets. Based on the assumptions and general nature of this research, I had to look for more divorced women who had actually engaged with the legal system upon divorce. I randomly chose my ‘divorced women of Harare’ respondents based on the willingness of the divorced woman from a list given to me by a private divorce lawyer I had previously interviewed.

Given also that none of these women had engaged with governmental and non-governmental legal services, for purposes of this research I extended my research to include a class of women who had actually engaged with legal aid services in Harare so that I could capture data on how the legal aid system in Zimbabwe assists women in the division of matrimonial property upon divorce. However, I only interviewed women at ZWLA since I did not have authorization from the Legal Aid Directorate to interview their women clients.

All of my key informants were lawyers although some were private divorce lawyers while others Legal Aid lawyers. All of my non-governmental Legal Aid lawyers were from women’s rights activist groups like ZWLA, WLSA and the Musasa Project. All the key informants provided me with data based on their engagement with women and the law and, as a result, I was able to capture data on the law and the experiences of women as they sought to enforce their rights in the matrimonial home upon divorce.

3.6 Challenges and Limitation

As explained above, despite delimiting this research to Tynwald North, I had to extend my research to other women chosen randomly who had engaged with the legal system in division of matrimonial property. It was difficult to secure interviews in Tynwald North with all the women I had requested to interview because some of them were uncomfortable discussing the subject matter of divorce. I also failed to interview women who had engaged with the Legal Aid Directorate because I failed to get its permission. I only managed to access case law through ZIMLII and there were less than 20 straightforward divorce and division of matrimonial property cases.

CHAPTER FOUR

4.0 FINDINGS

4.1 Introduction

This Chapter discusses the findings in relation to my research assumptions and questions in Chapter 1. The current legal structure on the division of matrimonial assets discriminates against women on the basis of their gender and marital status; as a result, their rights in their matrimonial homes registered in their husband's names are violated upon divorce. Based on the research findings, I found that generally women unlike men have a greater legal burden in satisfying the legal elements involved in protecting their rights in the matrimonial home registered in the name of the husband upon divorce. Given that judges have wide discretionary powers in apportioning shares in the matrimonial home to spouses upon divorce, I observed that their gender role stereotypes may skew their judgments. As a result, women are victims of the current trend by some judges of awarding women fewer shares because they had only contributed indirectly in the acquisition of the matrimonial assets. Furthermore, women as compared to men upon divorce have less financial resources which prevent them from protecting their rights in the matrimonial home through the law. It appears as though both men and women lack knowledge of the law pertaining to the division of matrimonial assets upon divorce and this misinformation particularly prevents women unlike men from jointly registering their matrimonial home so that they protect their rights in the immovable property under property law in Zimbabwe.

I will provide the findings under the following headings:

- a. Analysis of case law;
- b. The fallacy of quantification of contributions;
- c. The financial burden of legal representation;
- d. The indigent woman and legal aid services;
- e. Gendered power dynamics in the home; and
- f. Emerging issue.

4.2 Analysis of Case law

Table 1 shows details of the 2017 cases that I analyzed for purposes of data collection. The table reflects the name and case number; the name and sex of the judge who decided the matter; the form of contribution made by the wife; the form of the union; the duration of the

union and the number of shares granted to the husband and wife, respectively. Note that for purposes of this table UCLU refers to an unregistered customary law union.

Table 1: Cases analyzed for this research

Case	Name and sex of Judge	Contribution	Form of union	Duration of Union	Shares Husband/Wife
Mautsa v Kurebgaseka HH 106/17	Chitakunye J Male	Indirect	UCLU	29 years	75/25
Jemali v Jemali HH 32/17	Chitakunye J Male	Indirect	Civil Marriage	10 years	50/50
Mapiye v Mapiye HB 66/17	Takuva J Male	Indirect	Civil Marriage		55/45
Chiyangwa v Chiyangwa HH 263/17	Chitakunye J Male	Indirect	Civil Marriage	16 years	65/35
Chiparaushe v Chiparaushe HH 312/17	Chitakunye J Male	Direct and Indirect	Civil Marriage	28 years	65/35
Kafesu v Kafesu HH 284/17	Chitakunye J Male	Indirect	Civil Marriage	40years	50/50
Mhondiwa v Mhondiwa HH 31/17	Chitakunye J Male	Indirect	Civil Marriage	35 years	65/35

4.2.1 Observations on Case Law

Judges rely heavily on section 7(4)(e) of the Matrimonial Causes Act which directs them to quantify and apportion shares in the matrimonial home based on each spouse's contribution. I detected that it is mostly women who prove indirect contribution whilst men normally prove direct contribution upon divorce. Women have a heavier legal burden of proving how their indirect contribution acquired the matrimonial property because it is not easily quantifiable in monetary value. Men, on the other hand, can fairly easily prove how their direct/financial contribution acquired the matrimonial home by tendering evidence of pay slips and receipts which are easily assessable in monetary terms.

There are two main legal approaches practised by judges in the division of matrimonial immovable property upon divorce. There is a legal approach based on equality of spouses in

which judges award equal 50/50 shares to both spouses regardless of their form of contribution. For example, in the case of **Kafesu v Kafesu HH 284/17** the plaintiff/husband sought a division of matrimonial property so that he would be awarded 80% of the shares in the matrimonial property whilst the defendant/wife would be awarded 20%. However, Justice Chitakunye awarded equal shares to both spouses. He acknowledged the equal value of the indirect contribution of the wife against the financial contribution of the husband in the acquisition of the matrimonial property.

There is also another legal approach of equitably dividing the matrimonial assets based on quantifying the contributions of each spouse and thereafter apportioning shares to each spouse in relation to their contribution. Based on the table, normally when judges use this approach they follow a trend of awarding fewer shares to a spouse who only contributed indirectly in the acquisition of the matrimonial property. As a result women are the main victims of receiving fewer shares to their matrimonial homes since women, based on their gender roles in marriages, mostly contribute indirectly to the acquisition of matrimonial property.

Judges acknowledge that the Matrimonial Causes Act gives them a wide discretion to determine a just and fair apportionment of shares to each spouse based on the circumstances of each case. As a result the same judge or different judges can quantify indirect contribution of women differently in different cases however with apparently similar circumstances. This has caused women to experience division of matrimonial assets upon divorce differently, irrespective of the similarities in their circumstances. An example is the **Kafesu** case indicated above in which Justice Chitakunye awarded 50% of the shares to the wife despite her having only contributed indirectly to their acquisition. The parties in that case had been blessed with 5 children and the marriage had subsisted for 40 years. But in **Chiparaushe v Chiparaushe HH 312/17** the same judge awarded the wife 35% shares in the matrimonial property whilst the husband received 65% shares. In this matter the plaintiff/wife sought the division of the matrimonial property in equal shares. The parties had been married in Botswana but they were domiciled in Zimbabwe. The marriage was blessed with four children and had existed in excess of 28 years. The wife had contributed both directly and indirectly to the acquisition of the matrimonial assets.

Women in unregistered customary law unions have a heavier legal burden of rebutting the application of customary law and invoking general principles of tacit universal partnership or unjust enrichment to protect their interests in the matrimonial home because, unlike customary law, general law recognizes their rights to the matrimonial home registered in the name of their husband. This is apparent in the case of **Mautsa v Kurebgaseka HH 106/17** as explained in Chapter 2 of this dissertation.

In all of the cases analyzed all women were legally represented. This shows that legal representation is important for women to protect their interests in the matrimonial home. In addition, there seems to be fewer cases that go before the courts to determine the division of matrimonial assets of unregistered customary law unions as compared to civil unions. I determined that this is because of misinformation and lack of knowledge of the law. Based on my findings, it emerged that most women in unregistered customary law unions are of the view that their unions are not legally recognized for purposes of the division of matrimonial assets upon divorce and as a result few women approach the courts for division of matrimonial property upon divorce.

I observed that when women were given fewer shares in the matrimonial home the husband was given an option to buy out the wife over a specified time. I determined that women are dispossessed of their matrimonial home which provides them with an adequate standard of living upon divorce because the few shares they are awarded usually cannot buy an immovable property of similar quality to their former home. In addition, their dignity is violated as it is the husband who remains at the matrimonial home which for decades the woman would have also labored to develop and maintain.

4.3 The Fallacy of Quantification of Contributions

My findings confirmed that:

- a. Indirect contribution is difficult to prove;
- b. Proof of direct contribution through receipts, agreements of sales and any other documentary evidence is misguided as it does not tell the true and whole story of the spouses' contributions;
- c. Indirect contribution is difficult to quantify; and
- d. Quantification and apportionment of shares in the matrimonial property is a subjective and not an objective test.

I will present data collected in relation to each point raised above seriatim.

4.3.1 Indirect contribution is difficult to prove

Divorce lawyers affirmed that proving indirect contribution places a greater burden of proof on women as compared to men. Proving indirect contribution and how it acquired the matrimonial home is more burdensome because most women do not keep account/records of all their domestic duties/roles/contributions during the subsistence of the marriage. Most men, on the other hand, can easily prove their direct contribution through receipts, pay slips, agreement of sales, title deeds and other relevant documentary evidence reflecting their name.

I observed that normally women's role in the marriage is determined by their gender and as a result they are responsible for fulfilling the domestic responsibilities in the marriage. This makes them more likely to be the parties who have to prove indirect contributions upon divorce. Furthermore, I found that most women still have to satisfy their domestic duties in the marriage even though they are formally employed. I noticed that after working hours, most women cook for their family and supervise their children's homework whilst men usually drink at the local pub or go home and watch television whilst waiting to be served supper by their wife.

In addition, it emerged that the salary of the woman is mostly used for domestic financial obligations such as buying groceries, clothes, furniture and paying electricity and water bills whilst the husband's salary is saved over time to purchase the matrimonial home. I observed that women do not keep receipts or records of their domestic financial obligations in the marriage and as a result this makes it more difficult for them to prove their contribution upon divorce. I determined that it is impossible to keep all receipts of daily domestic financial obligations like bread, tomatoes, milk and transport costs because for some purchases receipts are rarely issued. However, it emerged that most women usually keep receipts of large household furniture such as fridges, televisions and beds mainly for purposes of guarantee rather than as evidence of contribution in the event of divorce.

4.3.2 Proof of direct contribution through receipts is misguided

It emerged that receipts, agreements of sale and title deeds are misleading pieces of evidence in proving the direct contribution of a husband upon divorce because relying on such evidence does not tell the full story of the respective spouse's contribution in the purchase of

the matrimonial home. It arose that most women actually earn an income and they also contribute financially in the purchase of the matrimonial home but there are various factors that prevent some women's names from jointly appearing on the receipts, agreement of sales and/or the title deeds of the matrimonial home. I found that this is because some women feel that it is respectful to the husband that the matrimonial home is registered in his name because he is the head of the family. Some women also stated that they have a heavy burden of multiple roles such as formal employment, the school run, cooking and supervising homework and therefore the husband attends to the purchase of immovable property. Inevitably because of this division of labor in the marriage the receipts, agreements of sale and title deeds are in the husband's name. It emerged that women in civil unions feel no need to jointly register the matrimonial home because they believe that the law guarantees them an award of equal shares in the matrimonial home despite its sole registration in the name of the husband. I determined that this misconception prevents them from jointly registering the matrimonial home and consequentially the receipts, title deeds and agreements of sale will be in the husband's name.

4.3.3 Indirect contribution is difficult to quantify

A constantly emerging concern raised by most respondents is that indirect contribution is difficult to assess in monetary terms. They questioned how the duties performed by women were quantifiable in monetary terms? In the case of women with matrimonial homes in Tynwald, I observed that women instead of men were mostly responsible for clearing the stand;¹ supervising, cooking and fetching water for builders; purchasing building material and assisting with the architectural designs. Women asked how their labour was quantified as they believed that it is unfair to quantify their labour in relation to commercial labour because when they execute their duties they also invest their love and care. Most women affirmed that it is actually impossible to put a monetary value to reproduction, cooking, cleaning the home, sleepless nights at home or at the emergency room because of an ailing family member and the general rearing of the children without undervaluing their priceless contribution in the marriage. One woman expressed this frustration when she asked:

“Shuwa mungaise price pakutakura mimba, kurera vana kusvika vapedze chikoro mobva mati haah zvinoita mari yakati?”

¹ A stand is a piece of undeveloped land on which spouses can construct their matrimonial home.

(Meaning, “Can you put a price on reproduction, child rearing until all children finish school and then you say it is worth this amount?”)

It also emerged that in some marriage set-ups the husband dictates that the wife should be a full-time housewife. Most women indicated that in the event of divorce it would be unjust and unfair to give a woman fewer shares in the matrimonial home because during the marriage she only contributed indirectly.

4.3.4 The Subjectivity of ‘Just & Fair’

Legal Practitioners observed that the wide discretionary powers judges have to determine a just and fair division of the matrimonial home upon divorce is a subjective test and as a result this has created different legal approaches in division of the matrimonial home upon divorce. They averred that the exercise of discretion is so subjective to the extent that, based on the practice of judges in court, they know that if their case is before a certain judge, that judge will award either equal shares or fewer shares to their client (woman) who only contributed indirectly to the acquisition of the matrimonial home. In addition, they suggested that perhaps the reason why there are so many jurisprudential inconsistencies in the division of matrimonial home is because judges are influenced by their own gender and gender role stereotypes which in turn influence how each judge will divide the matrimonial property upon divorce.

In addition, lawyers also claimed that these wide discretionary powers cause the judiciary to hand down puzzling and inexplicable judgments. One divorce lawyer expressed this frustration when he stated that it is inexplicable how a judge awards fewer shares to a wife who only contributed indirectly after referring to similar cases in which other judges had awarded 50/50 equal shares to both spouses regardless of their form of contribution.

I observed this in the case of **Chiyangwa v Chiyangwa HH 263/17**. The plaintiff /husband and the defendant/wife were married in terms of the Marriage Act. The marriage was blessed with three children and had subsisted for 16 years. The husband sought 100% shares in the matrimonial property because in his view he thought that the wife had not contributed anything to the acquisition of the property. Justice Chitakunye averred that women were entitled to shares in the matrimonial property because their indirect contribution assisted their husbands to acquire the matrimonial assets. He also acknowledged that even if the wife had

only contributed indirectly she was entitled to equal shares in the property. He then made reference to **Usayi v Usayi SC 11/03** and stated that the court in that matter:

“Considered the duration of the marriage and the needs of the spouse and confirmed a 50% share in the matrimonial home awarded to the wife when she had not directly contributed towards its purchase.”

He also quoted the **Tangirayi v Tangirayi HH 65/13** in which Justice Guvava emphasized:

“Although the defendant was unemployed she contributed considerably as a wife, mother, counselor, housekeeper and day and night nurse for the family. In the ten years she was married to the plaintiff she had four children which is not an easy task. She was a wife and mother and ensured that plaintiff had her support to get his degree. The wife in the said matter was awarded a fifty percent share in the property due to her indirect contributions.”

However, despite his reference to cases on an equal 50/50 division of matrimonial property the learned judge awarded 35% shares to the wife and 65% to the husband.

4.4 The Financial Burden of Legal Representation!

During my research, I found that the legal complexities in the dual legal system of rebutting the application of customary law, invoking the general principles of tacit universal partnership or unjust enrichment and proving indirect contribution in the acquisition of the matrimonial home forces women to seek legal expertise to assist them to overcome these legal hurdles and protect their rights in the matrimonial home. It seems as though the current legal structure does not protect a legally unrepresented woman in the division of the matrimonial home because her rights in the matrimonial property are enforceable only if she can satisfy the legal elements involved in the division of matrimonial property.

Most respondents confirmed that an efficacious legal practitioner is normally an experienced lawyer of above 5 years' experience. I know that the more years of experience a lawyer has the more expensive the lawyer is. Appendix 1 attached shows the Law Society Tariff that regulates a lawyer's charges per hour based on their years of experience. This means that a lawyer of five years' experience charges US\$150 per hour. A further perusal of Appendix 2, which is a bill levied by a lawyer of 5 years' experience rendered for services in an uncontested divorce, will show that on average a lawyer will invest about 14 hours in an

uncontested divorce. This means that a woman who is legally represented by a private divorce lawyer of 5 years' experience in an uncontested divorce for purposes of division of the matrimonial home will roughly pay legal fees in excess of US\$1,500. On the other hand, a woman who seeks to secure her rights in the matrimonial home that is registered in the name of her husband in a contested divorce will have to pay higher legal fees because a contested divorce takes more time to complete as compared to an uncontested divorce case (Appendix 3).

Based on the above, engaging a private experienced lawyer for legal representation in a divorce case for purposes of division of matrimonial assets is expensive. Based on this, I determined that financially resourced women as compared to indigent women have access to private divorce lawyers because of the high legal fees they charge. I observed also that these high legal fees prevent some women from accessing justice for purposes of the division of the matrimonial home. Some women emphasized that during their marriage they were full time housewives and therefore upon divorce they could not afford to pay high legal fees because they did not earn an income. Other women specified that although they were employed during their divorce, they had a heavy domestic financial burden because their husband was either not paying or was paying insufficient maintenance for the upkeep of the family and as a result they could not afford to engage a private lawyer.

4.5 The Indigent Woman and Legal Aid Services

Given the financial burden of engaging private legal representation and the heavy legal burden of proof women have as they seek justice for purposes of the division of the matrimonial home, I observed that indigent women are forced to seek legal representation from either governmental or non-governmental legal aid services.

The Legal Aid Directorate is a governmental legal aid service that provides legal assistance to all Zimbabweans. I found that although the Legal Aid Directorate took divorce cases they normally referred women who sought legal assistance to ZWLA, a women's rights activist group. Upon interviewing lawyers at the Legal Aid Directorate, they indicated that this was because ZWLA was in a better position to assist women because they have a better understanding of women's rights and international human rights law on the issue. I determined that perhaps this is why ZWALA has a large divorce case load which could also be handled by the Legal Aid Directorate.

4.5.1 Lack of Resources

Legal Practitioner to Client Ratio

It emerged that there are too few lawyers at both governmental and non-governmental legal aid services to serve the number of clients seeking legal representation and therefore their quality of service is negatively impacted. ZWLA and the Legal Aid Directorate acknowledge that a lack of resources prevents them from hiring more lawyers to increase their efficacy and quality of service in representing indigent women in divorce cases. Key informants affirmed that contested divorce cases are resource demanding. A legal practitioner at ZWLA showed me more than 70 pending cases which are her sole responsibility. This informant noted that the common scenario in court is that the woman is usually represented by a legal aid lawyer whilst the husband is represented by a private legal practitioner from a reputable law firm. This is because normally the husband is formally employed and earning more money as compared to the wife.

Based on this inefficiency of legal aid services to assist indigent women, it emerged some legal aid lawyers were advising some women to consent to their husbands' proposal on the division of the matrimonial property upon divorce which in most circumstances is unfair and violates their rights to equal shares in the matrimonial home.

Court disbursements & indigent women

I observed that legal aid services do not pay court disbursements for their clients and as a result indigent women have to pay for them. Women only received legal representation from the legal aid. This prevents some indigent women from accessing justice through legal aid services if they cannot afford to pay these court disbursements. One woman, a formally employed mother of three who had been deserted by her husband in 2008, had commenced divorce proceedings in 2016 but the matter is yet to be finalized because at every stage during proceedings she has to save money to pay for court disbursements. She stated that court disbursements were financially burdensome as she had used more than US\$350 for the Deputy Sheriff's costs, Revenue Stamps, the divorce Summons and other court disbursements for filing and serving various court documents.

4.5.2 Skepticism of their efficacy

Some women especially those who had not yet engaged with the legal aid indicated that they would not be effectively represented by legal aid services mainly because they lacked sufficient resources. However, women I interviewed at ZWLA who had actually engaged with the legal aid system and who acknowledged that although legal aid is overwhelmed with cases and lacks resources nevertheless play an important role in representing them and protecting their rights in the matrimonial home. I therefore determined that skepticism of legal aid efficiency is an unfounded notion circulating among ordinary women who have not yet engaged with the legal aid system. It is however important to recognize this issue because such misinformation prevents some women from accessing justice through legal aid services.

4.6 Gendered Power Dynamics in the Home

I observed that not all women have the power to negotiate joint registration of the matrimonial home and/or determine their type of union because of their gender. Women seem to be powerless compared to men because they believe that a good woman is respectful and submissive to her husband and as a result it is difficult for them to negotiate joint registration of the matrimonial home or to enter a civil union that has more legal protection so as to protect their rights in the matrimonial home upon divorce. It emerged that most men register the matrimonial home in their own name and enter into an unregistered customary law union because they believe such unions are not legally protected by the law for purposes of the division of matrimonial assets upon divorce and sole registration guarantees them full rights of ownership in the matrimonial home. In addition, I found that men preferred unregistered customary law unions because in the event of divorce, customary law preserves their rights of full ownership in the matrimonial home registered in their name. I determined that because more than 50% of the informants I interviewed were in unregistered customary law unions and this confirmed the statistics that more than 80% of marriages in Zimbabwe are unregistered customary law unions.

Interestingly, I found that both men and women were misinformed in believing that being in an unregistered customary law union meant that a wife did not have rights in the matrimonial home registered in the name of the husband and that a civil union guaranteed a 50/50 division of the matrimonial home despite its being registered in the name of the husband upon divorce. This may be the reason why some women in civil unions are not jointly registering

their matrimonial homes and why there are only a few cases for division of the matrimonial home involving unregistered customary law unions as compared to civil unions.

I observed that the matrimonial home is commonly known by the patrilineal name of the husband and men's masculinity is reinforced through ownership and continued ownership of the matrimonial home because a man is a man amongst other men if he owns immovable property. I found that most men prevent joint registration of the matrimonial home because they fear that sharing of the matrimonial home upon divorce challenges their masculinity because he would no longer own the immovable property.

4.7 EMERGING ISSUES

During my research two major issues emerged. Firstly, despite legal aid services being available to assist indigent women to access justice in the division of the matrimonial home upon divorce, indigent women are required to pay for their own court disbursements. As a result, this prevents most indigent women from accessing justice to secure their rights in the matrimonial home registered in the name of their husband. Secondly, despite family law recognizing the rights of a wife in the matrimonial home, notwithstanding its sole registration in the name of the husband, property law does not recognize a matrimonial home and the rights of a wife in the immovable property if it is only registered in the name of her husband. Consequently, before and during a divorce a husband can sell, donate and or hypothecate the matrimonial property without his wife's consent and this violates her rights in the matrimonial home.

4.7.1 Court disbursements vis-à-vis the Indigent woman

Despite the efforts of legal aid services to assist indigent women, another barrier that can prevent women from accessing justice for purposes of the division of matrimonial property through their services may be the court disbursements the woman has to pay. The indigent woman who has no source of income or who only has a small amount of financial resources which she uses for the livelihood of her family may not have access to justice for the division of the matrimonial home through legal aid service in Zimbabwe. It emerged that some women may want to access justice through legal aid services to protect their rights in the matrimonial home but because they cannot afford to pay court disbursements and other

related indirect expenses, such as bus fare, this prevents them from protecting their rights in the matrimonial home through civil litigation.

There is therefore some need for some form of exemption of court disbursements provided to indigent women either by the court or the legal aid service providers. However, considering the resource strained current status of legal aid organizations, this may be an impossible endeavor. There is a need for further research into this issue because some women do not have access to the equal protection of the law in the division of matrimonial property in Zimbabwe because of their financial status. As a result, I observed that rather than engage with the law to protect their rights in the matrimonial home, some women are subordinating themselves to their husbands in order to negotiate continued access to and control of the matrimonial home.

4.7.2 Property Law vis-à-vis Family Law

I found that while Zimbabwe family law recognizes a matrimonial home and the rights of a wife in that property despite its being registered only in the name of her husband, the Deeds Registry does not do so. According to Justice Makarau in *Muswere Godfrey v Getrude Rudo Makanza* HH16/2005:

“... the position at law is that a wife ... has no real right in immovable property that is registered in her husband’s sole name, even if she contributed directly and indirectly towards the acquisition of that property. Her rights in relation to that property are limited to what she can compel her husband to do under family law to provide her with alternative accommodation. Her rights, classified at law as personal against her husband only, are clearly subservient to the real rights of the husband as owner of the property”

Most divorce lawyers confirmed in most of the cases that they had handled in which the matrimonial home was registered in the husband’s name, upon divorce, he would have either sold or hypothecated it in a bid to circumvent wife’s rights to it. Based on this, they stated, it was not surprising to find that before divorce proceedings commenced the wife is in court battling a writ of eviction² issued against her because the law confers full rights of ownership on her husband simply because the property is registered in his name.

² This is a warrant of ejection that orders the wife to vacate the matrimonial home within a certain period of time, failing which the Sheriff will forcibly remove her.

I found that this legal gap has troubled courts on how they can actively intervene on behalf of a woman when the law gives full rights of ownership to her husband merely because the matrimonial home is registered in his name. In **Muzanenhamo and Anor v Katanga and Ors 1991 (1) ZLR 182 (SC)**, McNally JA observed that this is a serious legal gap and a problem which is difficult for the courts to solve. The facts of the case were that a husband had initiated divorce proceedings but whilst in the process and unbeknown to his wife he sold the matrimonial home to Muzanenhamo (the third party). The wife only knew of the sale when Muzanenhamo had come to take occupation of the matrimonial home. Muzanenhamo took the matter to court seeking her eviction as the wife had refused to vacate the matrimonial home. However, the court found no legal basis to intervene on her behalf because, in terms of the law, the sale was legal because her husband had full rights of ownership in the property because it was registered in his name.

In the case of **Muswere Godfrey** (quoted above) Justice Makarau handed down a judgment similar to the Muzanenhamo case as she felt that the court hands were tied and could not intervene on behalf of Mrs. Makanza. The facts of the case were that despite the parties being still married and not yet divorced, Dr Makanza (the husband) had sold the matrimonial home unbeknown to his wife because it was solely registered in his name. Thereafter the husband relocated to Inyanga and invited his wife to join him in his rural home. The wife refused since she was formally employed in Mutare. She argued that the sale was null and void because she should have first been consulted as she had contributed both directly and indirectly to the purchase of the property.

Justice Tsanga also expressed the same frustration in **Annie Mutsa Mazvita Madzara v Stanbic Bank Zimbabwe & Ors HH 546/15** when she stated as follows:

“Thus legislative reform is where energy should have been placed a long time ago. These are not issues that can be addressed through the enthusiastic pen of an overly activist judge. These issues require informed dialogue and the legislator’s engagement with relevant stakeholders on what would be realistic.”

In this case, the property had been registered in the husband’s name since, at the time of purchase of the immovable property, the parties were in an unregistered customary law union and the bank required a marriage certificate before advancing a mortgage loan for the purchase of the immovable property. She had not only paid the full deposit price for the

property but she had also serviced the mortgage bond and made additional developments to the matrimonial property. However, her husband secured a loan from a bank using the matrimonial home as security unbeknown to his wife. This case reflects the various stumbling blocks even financially empowered women face in negotiating joint registration. Based on my findings, the sole registration of the title deeds of a matrimonial home in the name of a husband does not necessarily mean that he has purchased it by himself. Therefore there is a need for the law to protect the rights of women in matrimonial homes which are not registered in their names. There are various issues at play that prevent the joint registration of matrimonial property and when the law gives full rights of ownership of the matrimonial home to a husband because the matrimonial home is registered in his name, it defeats the ends of family law, turns a blind eye to the lived realities of women and as a result women's rights in the matrimonial home are violated.

The Human Rights Committee (General Comment 28 paragraph 25) recommends that:

“To fulfill their obligations under article 23, paragraph 4, state parties must ensure that the matrimonial regime contains equal rights and obligations for both spouses with regard to the ownership or administration of property, whether the... property is in the sole ownership of either spouse. States parties should review their legislation to ensure that married women have equal rights in regard to the ownership and administration of such property, where necessary.”

Therefore as provided in Chapter 6 of this dissertation, there is a need for legislative reform of both property and family law in as far as protecting the rights of women in matrimonial homes which are registered in their husbands' names. This will curb and correct the injustices visited upon women by the current laws which give full rights of ownership to a husband simply because the matrimonial home is registered in his name.

CHAPTER FIVE

5.0 METHODOLOGY AND ANALYSIS OF THE LAW AND FINDINGS

5.1 Introduction

In this chapter I will use the women's law approach and its various analytical tools to analyse the data I collected during this research. It is my intention to expose the legal gaps in the legal system on the division of the matrimonial home solely registered in the name of a husband upon divorce based on the empirical evidence on women's lived realities gathered during this research. Each heading is styled in relation to the tool used for analysis.

5.2 The Women's Law Approach

This research is based on a women's law approach. The women's law approach takes women as a starting point. This approach explores the lived realities of women's experiences in relation to the law with the aim of exposing the legal gaps so as to make recommendations which will improve the legal position of women in society (Stang Dahl 1988). I began this research with an assumption that the current equitable legal approach undermines women's rights in the matrimonial home that is registered in the name of her husband. Gubberman and Wolfe state:

“The inherited bias of male dominated institutions contributes to a situation where it is difficult for women to get help” (Gubberman and Wolfe 1985:55).

This study, therefore, took urban women as a starting point to identify their experiences and challenges they faced as they sought access to justice for purposes of division of their matrimonial homes that were solely registered in the name of their husbands.

According to Dengu-Zvobgo:

“The methodology of women's law is cross disciplinary and pluralistic and calls for a rather free use of the available material wherever it can be found...[T]his term implies that we wish to see law, reality and morality from women's point of view” (Zvobgo, 1994:21).

Having this research grounded in the lived realities of women helped me expose the legal gaps in the division of matrimonial assets upon divorce in Zimbabwe in relation to women

despite the gender neutrality of the divorce laws governing the process. I used this approach to compare how the law affects women's rights in the matrimonial home as compared to men's and how women as a result are having their rights in the matrimonial home violated. In this sense, I used a women-centered approach to reveal how the social, cultural and biological differences between men and women cause women to face more challenges under the current legal system in protecting their rights in the matrimonial home that is solely registered in the name of their husbands.

As I conducted this research I constantly asked myself, based on women's realities in the context of their daily life as they engage with the law, "Do women have the same legal burden as men in proving their contribution to the acquisition of matrimonial property, and if not, why not? And what solutions could address the gender inequality in the division of matrimonial assets in Zimbabwe?"

It appeared that the gender neutrality of the laws pertaining to the division of the matrimonial home enforced equality of spouses upon divorce. However, when I interrogated the law *vis a vis* the lived realities of women, I realized that women, because of their gender, faced various disadvantages in the legal system and this impacted upon their rights in the matrimonial home. Section 7(4)(e) of the Matrimonial Causes Act places a heavier legal burden on women because indirect contribution is more difficult to prove and because of their gender women are more likely to be the parties who have to prove indirect contribution upon divorce.

In addition this approach provided me with a variety of gender sensitive tools to analyse the data that I had collected so as to expose the legal gaps *vis a vis* women's experiences within the legal system. I used human rights, legal pluralist, sex and gender, intersectionality and actors and structures analytical frameworks to analyse how the legal system and other various factors prevent women from accessing justice for the purposes of equal division of the matrimonial home upon divorce.

5.3 Human Rights Framework Analysis

Sections 46(c) and 327(6) of the Constitution mandate the judiciary to interpret legislation and its Bill of Rights consistently with any international convention and or treaty to which Zimbabwe is a party. In analyzing the legal system in relation to the division of matrimonial property and assessing any necessary reform that may be needed, regard should therefore be

paid to regional and international instruments to which Zimbabwe is a party. Three of my assumptions were, firstly, that the equitable approach to the division of matrimonial property upon divorce is a violation of women's rights in the matrimonial home; secondly, that the approach of equal rather than equitable division would better protect women's rights in the matrimonial home despite its being registered in only the name of the husband; and, thirdly, that women in unregistered customary law unions were being discriminated against in their right to the equal protection of the law based on their gender, marital and social status. It was therefore imperative that I use a human rights approach to determine the extent to which Zimbabwe, as a state party to various international human rights instruments that mandate state parties to ensure equality of spouses upon divorce, has complied with its obligations to which it is bound.

Human rights are universal rights to which every human being is entitled to by virtue of their being a human being regardless of their sex, religion, customs, economic and any other status. This approach therefore helped me to examine women's lived realities in relation to the law and to what extent the law violates women's rights as embodied in international human rights statutes which Zimbabwe had ratified. Based on this approach, I managed to demonstrate that women have a right to an equal 50/50 division of the matrimonial home despite its sole registration in the husband's name. I determined that the equitable division of the matrimonial home based on the quantification of spouses' contributions is in fact a discriminatory practice which violates women's rights in the matrimonial home and that women in unregistered customary law unions have just as much right to equal protection under the Matrimonial Causes Act as women in civil marriages.

5.3.1 International human rights law on equal 50/50 division

According to the international human rights instruments it has ratified, Zimbabwe is obliged to provide equal rights to spouses upon the dissolution of their unions. Article 16(c) of CEDAW provides that Zimbabwe shall take appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women, that spouses have the same rights and responsibilities upon the dissolution of their marriage. Article 23(4) of the United Nations International Convention on Civil and Political Rights (1996) (ICCPR) mandates Zimbabwe as a state party to take appropriate steps to ensure equality of rights and responsibilities of

spouses at dissolution of marriage. Article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) states that Zimbabwe should ensure that women and men are regarded as equal partners in marriage. Article 8 of the SADC Protocol calls upon Zimbabwe to ensure women and men have equal rights and are regarded as equal partners in marriage. In its General Recommendation 21, the CEDAW Committee states that "any law or custom that grants men a right to a greater share of property at the end of a marriage...is discriminatory." And in its General Comment 29, the Committee states that:

"The guiding principle should be that the economic advantages and disadvantages related to the relationship and its dissolution should be borne equally by both parties. The division of roles and functions during the spouses' life together should not result in detrimental economic consequences for either party.'

In the light of these international human rights instruments, spouses have equality of rights upon divorce. Equality of rights extends to the division of matrimonial assets upon divorce (Kamberi-Mbote, 2016). The CEDAW Committee recommends that the equality of spouses upon divorce can only be achieved if the rights in the matrimonial home are equally divided between the spouses. Based on this interpretation of equality of rights in the division of the matrimonial home upon divorce by the CEDAW Committee, Zimbabwe is mandated to ensure that upon divorce both spouses have equal 50/50 shares in their matrimonial assets irrespective of their contributions. Therefore, section 7(4)(e) of the Matrimonial Causes Act infringes upon women's human rights to equality because it mandates courts to divide matrimonial assets upon divorce equitably and not equally. As a result, women are being awarded fewer shares in their matrimonial homes upon divorce. Based on this understanding, the law is discriminatory as it "grants men a right to a greater share of property at the end of a marriage" (CEDAW Committee: General Recommendation 21).

5.3.2 International human rights law on equal protection of the law

Article 7(b) of the SADC Protocol provides that state parties must take measures to ensure the equal legal status of women and men in civil and customary law marriages including full rights to acquire property. Articles 2 and 15 of CEDAW mandate Zimbabwe to condemn all forms of discrimination against women in all its various forms and to accord women equality

with men before the law. Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Article 8 of the Maputo Protocol provides that women and men are equal before the law and shall have the right to equal protection and benefit of the law. In paragraph 17 of its General Comment 21, the CEDAW Committee emphasizes that:

“...many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of ... customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status”

Therefore, Zimbabwe is obliged to protect both men and women equally in the division of the matrimonial home upon divorce without discrimination on the basis of gender. In the same vein, women in both unregistered customary law unions and civil unions in Zimbabwe should enjoy equal protection of the law under the Matrimonial Causes Act without discrimination on the basis of their marital status.

The dual legal system and consequential application of customary law in the division of matrimonial assets upon dissolution of an unregistered customary law union violates women’s rights to the equal protection of the law. Customary law governs the division of the matrimonial home upon the dissolution of an unregistered customary law union whilst division of the matrimonial home upon divorce in a civil marriage is governed by the Matrimonial Causes. Under customary law, women have no rights in the matrimonial home registered in the husband’s name but the Matrimonial Causes Act recognizes the rights of a woman in the matrimonial home irrespective of its being registered only in the husband’s name. This means that upon divorce women in unregistered customary law unions have their rights in the matrimonial home violated on the basis of their marital status. Therefore, Zimbabwe is in violation of failing to afford equal protection to women in unregistered customary law union as those in civil law unions.

In addition, Zimbabwe is in violation of its obligation to abolish customs that discriminate against women on the basis of their cultural, gender and marital status in the division of matrimonial assets. Article 2(f) of CEDAW states that state parties should take appropriate

measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Customary law discriminates against women on the basis of their gender, since it does not recognize the rights of a woman in the matrimonial home which is registered only in her husband's name. Therefore, women in unregistered customary law unions are subjected to discriminatory customary law practices upon divorce that violate their rights in the matrimonial home upon divorce and their right to equality and non-discrimination on the basis of their gender. This puts a heavy legal burden on women to rebut the application of customary law and invoke general law principles as it is the only way of securing their rights in a matrimonial home registered in their husband's name. I observed that these legal obstacles prevent women in unregistered customary law unions from accessing justice and as a result some women remain in abusive and/or loveless marriages in order to negotiate continued access to and control of the matrimonial home.

5.3.3 The right to housing and its interrelatedness with other human rights

Women's right to housing is undermined at divorce when some judges award women fewer shares in the matrimonial home upon divorce simply because they only contributed indirectly to the acquisition of the property. In addition, the operation of legal pluralism in the division of matrimonial assets upon divorce also means that upon divorce women in unregistered customary law unions will have no rights of access, control and ownership of their matrimonial homes. Article 16 of the Maputo Protocol provides that state parties should "grant to women, whatever their marital status, access to adequate housing." The UN Rapporteur emphasized that "it is the right of every woman ... and child to gain and sustain a secure home and community in which to live in peace and dignity" and "discriminatory cultural and social norms in family or personal laws - including civil law.... have been identified as significant determinants of women's right to adequate housing..." (U.N. Special Rapporteur 2004). In addition, the right to housing refers "not just to housing but to adequate housing...Adequate housing means adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities" (ICESCR General Comment 4).

Women's rights to housing and adequate housing are violated when they are driven away from their matrimonial home with money that cannot purchase another immovable property of the same quality as their matrimonial and as a result they lose their house/home and

undergo a severe drop in the standard of living for themselves and their children in respect of whom they retain primary caretaking responsibilities.

I observed that women's matrimonial homes provide them with clean water and food such as vegetables. General Comment 4 of the ICESCR states that the right to adequate housing is a human right "derived from the right to an adequate standard of living" which "is of central importance for the enjoyment of all economic, social and cultural rights" (ICESCR General Comment 4). In other words, women's right to housing is interrelated with their human right to food, clothing and the highest attainable standard of physical and mental health. Moreover, this right is also related to women's right to dignity. Article 11 of the ICESCR is interpreted to mean "that the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This inherent dignity of the human person from which the rights in the Covenant are said to derive requires that ...the right to housing should be ensured to all persons irrespective of income or access to economic resources" (General Comment 4). Therefore women are humiliated and degraded when they are chased away from their matrimonial home that for decades they knew as their homes, which they had labored for as they improved the home and performed their domestic chores, simply because some judges regard women's indirect contribution as having a lower monetary value to the financial contribution of their husbands. Based on this, the current legal approach of equitably dividing matrimonial assets violates all these rights, especially considering that women are mostly awarded fewer shares in the matrimonial home upon divorce.

5.3.4 International human rights convention on judicial discretion

The wide discretion given to judges in the absence of clear guidelines / law on the division of matrimonial property arguably makes judgments vulnerable to various interpretations given that 'just and fair' is truly a subjective and not an objective test. The Bangalore Principles of Judicial Conduct, 2002 (Value 2 on Impartiality, Value 3 on Integrity and Value 5 on Equality) encourage judges to perform all their judicial duties without favor, bias or prejudice. The conduct of judges should reaffirm people's belief in the integrity of the judiciary. However, the wide discretionary powers judges have in the division of matrimonial property may arguably render respect of these principles difficult.

5.4 Legal pluralism

According to Sieder and MacNeish, legal pluralism prevents women in unregistered customary law unions from obtaining their equal rights in matrimonial property upon divorce. (Sieder and MacNeish, 2013:182). Griffiths states:

“The law is and should be the law of the state, uniform applied to all people exclusive of all other law, and administered as single set institutions. That is a circumstance where multiple laws which operate together are recognized by the state” (Griffith 1996:3).

This analytical framework reveals that the existence of two legal systems in the division of matrimonial assets upon divorce discriminates against women in unregistered customary law unions as opposed to those in civil unions. Women in unregistered customary law unions face more legal hurdles, unlike women in civil unions, in legally protecting their rights in the matrimonial home registered in their husband’s name upon divorce. This is because women in civil unions upon divorce automatically invoke section 7 of the Matrimonial Causes Act, whereas women in unregistered customary law unions have to satisfy more legal elements of rebutting the application of general law and then invoking general law principles before their rights in the matrimonial home registered in the husband’s name can be legally protected.

Legal pluralism frustrates efforts to eliminate gender discrimination in law as the co-existence of general law and customary law in the division of the matrimonial home registered in the name of the husband leads to divergent legal consequences for women. This is because customary law in the form of customs and traditions does not recognize the rights of a wife to own the matrimonial home registered in the name of the husband on the basis of her gender; whilst, on the other hand, general law recognizes the rights of a wife in the matrimonial home despite her gender and regardless of its sole registration in the name of her husband.

The discriminatory nature of customs and traditions in the division of the matrimonial home raises serious Constitutional problems as women under customary law are regarded as inferior to men because of their gender and, as a result, they cannot own the matrimonial home registered in the name of their husband. Such customs and traditions in dividing matrimonial assets violate women’s Constitutional right to equality with men before the law as provided in sections 56 and 80 (3) of the Constitution. In terms of sections 2 and 80(3) of the Constitution, the dual legal system should not apply in relation to the division of

matrimonial assets upon divorce because customs involved in the process are void in so far as they are inconsistent with the Constitution, which is the supreme law of the land.

5.5 Sex & Gender Analysis

Hellum and Stewart argue that many theories about the role and position of women in the law and society are based on notions of sex and gender differences (Hellum and Stewart, 1998: 82). The social construction of gender influence gender roles and how the law relates to each gender. This analytical tool revealed that:

- a. Women have a heavier burden of proving indirect contribution in the acquisition of the matrimonial home as compared to men upon divorce because of their gender;
- b. Women have a heavier legal burden of rebutting the application of customary law because of their gender;
- c. Most women have less power to negotiate the joint registration of the matrimonial home to protect their rights in the property because of their gender;
- d. In some cases, the judiciary apportions fewer shares to women because of their gender and gender roles during the subsistence of the marriage; and
- e. Most women have less financial income than their husbands because of their gender and gender roles.

I will analyse data collected as raised above *seriatim*.

- a. Women have a heavier burden of proving indirect contribution in the acquisition of the matrimonial home as compared to men upon divorce because of their gender.

As highlighted in Chapters 2 and 4, indirect contribution is more difficult to prove than direct contribution. This is because domestic labour is not easily quantifiable in monetary value and women rarely keep records and receipts of all their domestic responsibilities. According to West and Zimmerman, the effects of division of labor within a marriage are as a result of men and women “doing gender” (West & Zimmerman 1987). Women strengthen their feminine identity by completing housework, caring for the children and using their salary for domestic financial responsibilities. Men, in contrast, perform masculinity by securing a breadwinning employment position, purchasing immovable property and not practising domestic labor. As a result, upon divorce, it is mostly the wife who, due to her gender and gender roles, has to

prove indirect contribution whilst her husband, due to his gender and gender roles, usually proves direct contribution.

Based on this analysis, it means that upon divorce, husbands have an advantage over their wives because if they fail to satisfy their heavier burden of proof that her indirect contribution (of cooking, reproducing, etc) purchased the matrimonial home and that it is equal to the direct contribution of her husband, she will be awarded fewer shares in the matrimonial home than her husband.

- b. Women have a heavier legal burden of rebutting the application of customary law because of their gender

Women in unregistered customary law unions face more legal obstacles unlike men in trying to protect their rights in the matrimonial home upon divorce because customary law does not recognize a woman's right to own the matrimonial home registered in the name of her husband on the basis of her sex and gender. Therefore a woman who wants to protect her interests in the matrimonial home will have to rebut the application of customary and invoke general law principles of either tacit universal partnership or unjust enrichment. There is no rational reason why women in unregistered customary law unions should have to suffer having to satisfy all these legal impediments in order to secure their rights in the matrimonial home, especially considering that the rights of widows in the matrimonial home are adequately protected, regardless of the legal form nature of their union.

Perhaps the rationale can be understood from a radical feminist perspective. Kelly Welsh states that the legal system in the division of matrimonial property is a way in which the "law reinforces gender inequality as the laws we have are both masculine in terms of their intended beneficiary and authorship" (Welsh, 2016). This is the case considering that the dual legal system in the division of matrimonial home mostly benefits men. Frye also notes that the legal system is "a system of interrelated barriers and forces which reduce, immobilize, and mold people who belong to a certain group, and effect their subordination to another group" (Frye, 1983:3). Based on this analysis, the dual legal system is a male-calculated strategy to reinforce structures of gender inequality based on male supremacy and female subordination through their ownership of resources, especially considering that most women in Zimbabwe are in unregistered customary law unions.

- c. Most women have less power to negotiate joint the registration of the matrimonial home to protect their rights in the property because of their gender

Some women do not have the power to negotiate the joint registration of the matrimonial property to protect their interests in the matrimonial home because of their sex and gender. As a result there are some women whose rights are violated by both men and the laws because they are failing to jointly register the matrimonial home. If women could jointly register the matrimonial home it would protect them from husbands who sell, hypothecate or donate the matrimonial property as the law would require a wife's consent as joint owner before her husband could do deal with the matrimonial home in these ways.

Using a radical feminist analysis of gender power in the home will reveal that the reason why some women have less power in the home to negotiate joint registration of the matrimonial home is because of their sex and gender. Our patriarchal society has distributed privileges and power between spouses primarily on the basis of their sex and gender. MacKinnon compares the power in the home as a relation of dominance and subordination based on sex as she states "women/men is a distinction not just of difference, but of power and powerlessness....Power/powerlessness is the sex difference" (MacKinnon, 1989). Therefore, based on MacKinnon's assessment, women are powerless in a marriage because of their sex. She adds that "...no woman escapes the meaning of being a woman within a gendered social system" (MacKinnon, 1989:104). In other words, society has defined gender power relations in the home by constructing each gender in relation to power. A good woman/wife has been socialized to be quiet, obedient, accommodating and long-suffering. These qualities make her a powerless woman. Whilst, on the other hand, a real man is outspoken, in control and able to impose his will particularly over the woman. These qualities make a man powerful.

Therefore, socialization on the grounds of gender qualities based on sex difference reinforces gender power relations in a marriage and, as a result, some women are unable to jointly register the matrimonial home. It is necessary that the law intervenes by recognizing the rights of a wife in the matrimonial home that is registered in her husband's name. This is because wives are being evicted from their homes because their husbands choose to exercise their rights of ownership as given to them by the law to the detriment of women and children.

- d. In some cases, the judiciary apportions fewer shares to women because of their gender and gender roles during the subsistence of the marriage

Some women receive fewer shares in the matrimonial home because some judges allow their gender role stereotypes to influence their judgment in apportioning shares between the spouses. This trend followed by some judges lends itself to scrutiny because it is a discriminatory practice that discriminates against women on the basis of their gender and gender assigned roles in a marriage. This is because some judges seem to idealize masculine forms of financial contribution of a man and undervalue feminine forms of indirect contribution by women. Perhaps this is the reason why there are several different legal approaches to the division of the matrimonial home upon divorce. Some judges who are conscious of gender equality value the role of women and apply equal division without attempting to quantify a woman's contribution against that of her husband. Whilst other judges allow their judgments to be skewed by their sexist notions about gender roles *vis-a-vis* property ownership and as a result women's rights to equal protection of the law are violated.

- e. Most women have less financial income than their husbands because of their gender and gender roles

Gender scholars argue that when women reduce their employment hours because of their gender roles in a marriage they become financially dependent on their husbands and this is the reason why women are subordinated to them (Blood and Wolfe, 1960). Some women are fulltime housewives because of their gender and gender roles of performing domestic responsibilities. It is rare to see a fulltime 'house-husband'. In addition, due to their gender roles, most working women have to work less hours than their husbands so that they can also fulfill their gender-assigned domestic roles of doing the school run, supervising their children's homework and cooking. Men, on the other hand, have more time to secure a breadwinning position and invest more time at work because women take care of most of the domestic duties. As a result, women, because of their gender roles, earn less than their husbands. It is this financial status that prevents some women from accessing justice for the purposes of dividing the matrimonial property upon divorce because some women have little or no income to pay for legal representation or court disbursements. It also means that during divorce proceedings, most women have to rely on legal aid services as they cannot afford to pay expensive legal fees charged by private divorce lawyers because during the subsistence

of their marriage they would have invested their time and effort in unpaid domestic work. Given that most legal aid services lack resources, their quality of service is compromised and this certainly impacts on women's rights in the matrimonial home.

5.6 Male hegemony and the law

Another perspective that can be used to analyse why the law oppresses women is a feminist analysis of masculinity. Women face various legal obstacles that are strategically and methodically placed to prevent them from owning the matrimonial home because of the male hegemonic power struggle in society wherein powerful men (men who own immovable property) use the law to preserve their masculinity that is reinforced through continued ownership of the matrimonial home. According to Allan Johnson:

“What drives patriarchy as a system - what fuels competition, aggression, and oppression - is a dynamic relationship between control and fear. Patriarchy encourages men to seek security, status, and other rewards through control; to fear other men's ability to control and harm them; and to identify being in control as both their best defense against loss and humiliation and the surest route to what they need and desire. In this sense, although we usually think of patriarchy in terms of women and men, it is more about what goes on among men. The oppression of women is certainly an important part of patriarchy, but, paradoxically, it may not be the point of patriarchy” (Johnson 2005).

Some men intentionally register the matrimonial home in their own names as they believe that sole registration guarantees them full ownership and, in the event of divorce, they will retain full ownership of the property. In Zimbabwe the matrimonial home is called by the patrilineal name of the husband. Male hegemony is defined in relation to ownership of resources and, as a result, masculinity is reinforced through ownership of the matrimonial home. In other words, a powerful / real / masculine man is a man who owns and controls immovable property. Men, therefore, fear that sharing the matrimonial home with their wife upon divorce will erase their patrilineal name from the property and challenge their masculinity. A husband also fears that if his wife remarries, her new husband will benefit from the matrimonial home for which he laboured. These patriarchal and masculine views show that the law reinterprets and reinforces this male hegemonic struggle. Connell identifies hegemonic masculinity as an “*active struggle for dominance*” (Connell and Messerschmidt,

2005: 832). This concept makes one realize that men are not a monolithic group but that there exists a hierarchy of masculinities in society.

5.7 Actors and structures

The law is created, interpreted and enforced by some people socialized to believe that the role of a wife is inferior to that of her husband. Given the wide discretion conferred on judges in the division of the matrimonial home, their role in enabling women to realize their rights in the matrimonial home registered in their husband's name cannot be underestimated. An analysis of the jurisprudential inconsistencies in the quantification of indirect contribution as explained in paragraph 5.5 d above shows that judges' gender role stereotypes either constrain or enable a woman to protect her rights in the matrimonial home. According to Bentzon:

“The actor perspective is particularly useful in obtaining a dynamic and processual understanding of gender and legal change in the context of societies where state-law interplays with other normative orders. It assumes that social and legal change takes place through interaction between human beings as individuals or groups and not through some seemingly abstract medium such as the law” (Bentzon 1998).

I used this approach to examine how the relationship that exists between women and actors involved in the legal system either limits or assists women to access justice for the purpose of division of the matrimonial home upon divorce. I looked at lawyers, judges and legal aid service providers as actors and structures that interface with women as they seek division of the matrimonial home registered in the name of their husband upon divorce.

The current laws on the division of the matrimonial home upon divorce are legally complex and as a result they force women to seek legal representation. In most cases of division of matrimonial property upon divorce the parties are legally represented. Legal practitioners therefore play a pivotal role in assisting and enabling women to secure their rights in the matrimonial home that is registered in the name of the husband. In addition, the role of an experienced lawyer cannot be underestimated given the numerous complexities in the legal system. However, engaging an experienced lawyer is expensive meaning that an indigent woman may have to rely on an inexperienced and/or overwhelmed legal aid lawyer whose quality of service may negatively impact her rights in the matrimonial home.

5.8 Intersectionality of women's identities

Although women suffer gender discrimination at home and at law (as shown above), it is not only their gender which shapes their experiences of discrimination, marginalization and oppression in accessing justice for the purpose of the division of the matrimonial home, but also their economic, marital and knowledge of the law identities. By using the methodology of intersectionality, I realized that women have multi-faceted identities that intersect with each other and, as a result, simultaneously impact the extent to which a woman can secure her rights in the matrimonial home. Crenshaw argues that understanding identity requires us to see all of its facets as intertwined and co-constitutive; as intersecting rather than as being separate and independent of each other (Crenshaw, 1989).

As also shown above, women in unregistered customary law unions are discriminated against on the basis of their marital status because the law does not regard their unions as legally valid for the purposes of the division of matrimonial assets upon divorce. Upon the application of customary law, her social and cultural status concurrently intersect with her gender to oppress her. This is due to the fact that her customs and traditions in the division of the matrimonial home registered in the name of her husband do not recognize the rights of a woman on the basis of her gender to own the matrimonial home registered in her husband's name. Based on these injustices visited upon her on the basis of her gender, social, cultural and marital status, a woman in an unregistered customary law union has a heavier legal burden of rebutting the application of customary law. This is because she will only be able to protect her rights in the matrimonial home by invoking general law principles of tacit universal partnership or unjust enrichment.

As emphasized above, women in both civil and unregistered customary law unions have a heavier legal burden of proving indirect contribution. This is the case considering that they are the parties who must generally prove this legal element because of their gender and gender assigned roles during the subsistence of the marriage. In addition, it is their gender status as constructed in society and socialized upon them that recreate and reinforce power hierarchies in marriages that result in women having less negotiating power than men to jointly register the matrimonial home and protect their rights in the matrimonial home.

Due to their gender and marital status, women have a heavier legal burden of proof that forces them to seek legal representation. However, it is when a woman seeks legal assistance that her economic status determines the extent to which the law, through legal representation,

will protect her rights in the matrimonial home. A financially resourced woman has access to an experienced lawyer, whilst an indigent woman, due to her financial incapacity, will have no choice but to rely on a legal aid lawyer. Having a competent lawyer to legally represent a woman is very important to the extent that if an indigent woman is legally represented by an incompetent legal aid lawyer, she may fail to secure her rights in the matrimonial home because she received poor legal representation.

Once again, the economic status of a woman plays a part in determining the extent to which she will be able to access justice through legal aid services in Zimbabwe. Legal aid services in Zimbabwe do not pay court disbursements for women and therefore an indigent woman who cannot afford to pay her court disbursements will not be able to benefit from legal representation through legal aid services and this may prevent her from accessing justice for the purpose of division of the matrimonial home.

Generally the level of knowledge a woman has about the legal system in relation to the division of matrimonial assets upon divorce influences the extent to which she can access the law for purposes of division of the matrimonial home. There seems to be general misinformation that the law protects and guarantees the rights of women in civil unions to equal shares in the matrimonial property upon divorce regardless of the sole registration of the matrimonial home. Some women in unregistered customary law unions are misinformed to believe that the law does not protect their rights in the matrimonial home registered in the name of the husband because their unions are not legally valid. For the sake of clarity, I summarise:

a. To women in civil marriages

The law equitably and not equally divides the matrimonial home upon divorce. Given the legal gap between property and family law, it is in the best interests of such women to jointly register the matrimonial home in the names of both spouses so as to fully protect their rights in the matrimonial property during and upon divorce.

b. To women in unregistered customary law unions

The law does protect these women's rights in the matrimonial home registered in the names of their husbands. Such women have to satisfy more legal requirements of rebutting the application of customary law and invoking the general principles of either unjust enrichment or tacit universal partnership in order to protect their rights in

the matrimonial home. This is unlike the women in civil unions who rely on the Matrimonial Causes Act.

5.9 Conclusion

Based on the foregoing, I have shown that despite the gender neutrality of the laws governing the distribution of the matrimonial home upon divorce in Zimbabwe, most women are at a legal disadvantage in relation to their husbands and this violates their rights in their matrimonial homes. The current legal system seems to reinforce gender inequality by enforcing the sameness of women and men. Section 56(6) of the Constitution mandates the legislature and the judiciary to take reasonable legislative and other measures to promote the achievement of gender equality in Zimbabwe. It is therefore imperative that law reform in this area is conscious of the fact that in order to achieve equality for women in the division of matrimonial property upon divorce, women need special laws that specifically address the differences which have been imposed on them and which make them inferior to men. This will correct the inherent gender injustices in the current legal system that violate the rights of women in their matrimonial homes upon divorce.

CHAPTER SIX

6.0 CONCLUSIONS & RECOMMENDATIONS

This chapter discusses the conclusions and recommendations based on the findings of the research.

6.1 Conclusion

The following conclusions are drawn, based on the assumptions of the research:

1. The equitable division of matrimonial property violates women's rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

The major research finding shows that the current legal approach of equitably dividing the matrimonial home based on the quantification of each spouse's contribution as provided by section 7(4)(e) of the Matrimonial Causes Act is a discriminatory legal practice. This is because it puts a heavier burden of proof on women and as a result women are awarded fewer shares in their matrimonial homes upon divorce. This violates women's rights to property and equal protection of the law as enshrined in the Constitution. Indirect contribution is more difficult to prove because most women do not keep account of all their domestic responsibilities. Men on the other hand easily prove their contribution through evidentiary documents like receipts and pay slips. Moreover, indirect contribution in the form of domestic labour is difficult if not impossible to assess in monetary value. This is not the case with direct contribution which is easily assessable in monetary value because men, unlike women, are paid for their labour at work. Judicial gender role stereotypes have violated women's rights in the matrimonial home upon divorce because some judges are awarding women fewer shares simply because in their view non-financial/domestic contribution is of a lower monetary value than financial contribution. Therefore this current legal approach of equitable division mostly affects women because, based on their gender, they are the parties most likely to have to prove indirect contribution upon divorce.

2. Equal rather than equitable division of matrimonial property will protect women's rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

Given that equitable division of matrimonial property places a heavier legal burden on women, equal division of the matrimonial home can effectively protect the rights of women upon divorce. This is because division of the matrimonial home based on a presumption of automatic 50/50 shares for each spouse will equally recognise the different but equal roles spouses fulfil in a marriage. In addition, such a presumption will guide the judiciary and simultaneously check judicial gender role stereotypes that prevent some judges from awarding women equal shares in matrimonial property. Furthermore, equal division will fetter the exercise of wide judicial discretion which: has led to indefinite legal rights and legal uncertainty; will discourage extensive litigation which imposes a heavy financial burden on women often forcing them to seek legal representation; and will enable women to determine in advance the outcome of their case.

3. The dual legal system on the division of matrimonial assets violates the rights of women in the matrimonial home that is solely registered in the husbands' name upon divorce

The dual legal system violates the rights of women to equal protection of the law because upon dissolution of unregistered customary law unions, women's rights in the matrimonial home are determined by customary law. Customary law does not recognise the rights of a wife in the matrimonial home registered in the husband's name and, as such, customary law discriminates against women on the basis of their gender. In contrast, women in civil marriages upon divorce merely invoke the Matrimonial Causes Act to determine their rights in the matrimonial home irrespective of whether the house is registered in the name of their husband. In addition, women in unregistered customary law unions, unlike women in civil marriages, have a heavier legal burden because they have to satisfy more legal elements before their rights in the matrimonial home are legally protected. This heavy legal burden often prevents women in unregistered customary law unions from accessing justice and, as a result, only a few cases go before the courts to determine the division of the matrimonial home upon the dissolution of such marriages.

4. Lack of knowledge and financial factors prevent women from accessing justice for purposes of division of the matrimonial home.

Both men and women are misinformed that unregistered customary law unions are not legally recognised for purposes of division of the matrimonial home registered in the husband's name; that sole registration guarantees the husband 100% shares in the matrimonial home upon divorce; and that a civil marriage guarantees a wife equal shares in the matrimonial home solely registered in the husband's name upon divorce. This misinformation prevents some women in civil unions from jointly registering the matrimonial property and protecting their rights in the matrimonial home and some women in unregistered customary law unions from enforcing their rights in the matrimonial home upon divorce.

The legal complexities and judicial discretionary-based legal system encourages litigation which forces women to seek legal representation upon divorce. Most women have a heavy financial domestic burden and they do not earn as much as their husbands. Consequentially, indigent women may have to rely on overwhelmed legal aid services whose quality of service may compromise enforcing their rights in the matrimonial home. In addition, indigent women who cannot afford to pay court disbursements may fail to access justice for the purposes of division of the matrimonial home upon divorce.

5. Legal interventions are necessary to enable women to protect their rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

There is a need for the judiciary and legislature to enforce the legal approach of equal and not equitable division as mandated by the Constitution and international human rights law to which Zimbabwe is a party. There is a need to close the legal gap between family law and property law so that the law effectively protects the rights of women in their matrimonial homes that are registered in their husbands' name. A massive awareness campaign is necessary to educate citizens on the legal system pertaining to the division of matrimonial assets upon divorce.

6.2 Recommendations

From the findings and conclusions, the following recommendations are made:

1. Equitable division of the matrimonial property violates women's rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

It is recommended that the judiciary should declare null and void section 7(4)(e) of the Matrimonial Causes Act because it is *ultra vires* the Constitution. Section 80(3) provides that all laws that infringe upon the Constitutional rights of women are void to the extent of their inconsistency. The section is therefore void because it is inconsistent with the Constitution that mandates the legislature and judiciary to enforce the equality of rights of spouses upon divorce based on the presumption of automatic equal 50/50 shares for both spouses regardless of their form of contribution.

2. The equal rather than equitable division of matrimonial property will protect women's rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

It is recommended that the judiciary and the legislature should enforce the legal approach of equal rights of spouses rather than equitable rights of spouses in the division of matrimonial property upon divorce. Section 176 of the Constitution provides that the Constitutional Court, Supreme Court and High Court have the inherent power to protect and regulate their own process and to develop common law or customary law by taking into account the interests of justice and provisions of this Constitution. Section 14 of the High Court Act provides that the court can declare a violation of existing or future rights. The law therefore grants these courts the power to make a declaration on the correct position of the law and settle that equal and not equitable division should govern the legal process of division of matrimonial proprietary rights of spouses upon divorce.

3. The dual legal system on the division of matrimonial assets violates the rights of women in the matrimonial home that is solely registered in the husbands' name upon divorce

It is recommended that uniform law should be applied to all forms of marriages in Zimbabwe and therefore the dual legal system in the division of matrimonial property should be abolished. The uniform law must be consistent with the Constitution and international human rights standards that promote equal 50/50 shares for both spouses in

the division of the matrimonial home irrespective of form of their marriage. This will ensure that women in unregistered customary law marriages enjoy the equal protection of the law and are not discriminated against on the basis of their marital, gender, cultural and social status.

4. Lack of knowledge and financial factors prevent women from accessing justice for purposes of division of the matrimonial home.

There is a need for the government in collaboration with other stakeholders to engage in a countrywide awareness campaign programme to inform both men and women on the laws and the general legal system that governs division of matrimonial property upon divorce in Zimbabwe. This will demystify the misinformation circulating and as a result, enable more women to enforce their rights in the matrimonial home upon divorce. An equal legal approach will certainly discourage a litigious atmosphere in the division of matrimonial property upon divorce to the extent that women will be able to access justice even without legal representation that places a heavy financial burden upon them.

5. Legal interventions are necessary to enable women protect their rights in the matrimonial home that is solely registered in the husbands' name upon divorce.

Equal and not Equitable Legal Approach

It is recommended that in addition to declaring that equal division is the correct legal approach in the division of matrimonial assets upon divorce, the legislature should amend the Matrimonial Causes Act by deleting section 7(4)(e). It should clearly provide that matrimonial assets are to be divided based on a presumption of automatic equal 50/50 shares for each spouse upon divorce. In addition, a spouse who seeks to rebut this presumption should bear the onus of having to prove why an automatic equal 50/50 division of the matrimonial home should be departed from and there should be specific provision that proving that the other spouse only provided indirect contribution in the acquisition of matrimonial immovable property shall not rebut the presumption. The Matrimonial Causes Act should clearly provide that all forms of unions in Zimbabwe are valid for the purposes of equal division of matrimonial property under section 7 of the Matrimonial Causes Act.

Property Law versus Family Law

It is recommended that the law should recognize a special property regime relating to the matrimonial home. This could be by way of a restraint on dealings which would prevent a husband from selling or hypothecating the matrimonial home. These could possibly take the form of laws to the effect that before a third party intends to purchase, take as security or receive as a gift any residential immovable property, that third party should diligently take steps to find out whether the wife has consented to such dealings. This would be an extension of the buyer's/third party's verification process involved before a person purchases immovable property. Failure to exercise such due diligence may result in the sale, donation or purchase of the matrimonial home being void. The problem that may arise is that some unscrupulous husbands may make it impossible for the third party to connect with the wife. It is also recommended that computerizing the Deeds Registry and linking it with the Marriages Registry can separate the matrimonial home from ordinary immovable property. However, this can also pose problems considering that more than 80% of unions in Zimbabwe are not registered. However, despite limitations in these recommendations, some women will benefit from their enforcement.

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Appendices

Appendix 1: Law Society Tariff Regulation

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PART II : FEES

ITEM 1 : GENERAL PROFESSIONAL SERVICES

Time reasonably and actually spent in personal attendance by a legal practitioner in performing his or her mandate, including taking instructions, telephone calls, attendances in court, offices of record and the like, research, preparation, drafting, dictation and perusals of letters and documents:

YEARS' EXPERIENCE

BASIC HOURLY RANGES

30 years and over	US\$200.00- US\$350.00
20-29 years 11 months	US\$175.00- US\$310.00
15-19 years 11 months	US\$150.00- US\$270.00
10-14 years 11 months	US\$125.00- US\$210.00
5-9 years 11 months	US\$ 85.00- US\$150.00
2-4 years 11 months	US\$ 70.00- US\$120.00
0-1 years 11 months	US\$ 50.00- US\$ 75.00
Unregistered law graduate whose name is recorded by Law Society	US\$ 30.00-US\$ 60.00

ITEM 2: OPTIONAL STANDARD FEES FOR BASIC WORK

A legal practitioner shall be entitled to charge the following standard fees instead of calculating his or her fees on the above basis, where basic work is involved. If the work is not basic, Notes 1 to 10 apply.

2.1	<u>SALE AGREEMENT</u>	
	residential or farm	US\$500.00 or 1% of the selling-price, whichever is the greater
	business or shares	US\$800.00 or 2% of the selling-price, whichever is the greater
	<u>LEASE AGREEMENT</u>	
	residential or farm	US\$300.00 or one month's rent, whichever is greater.
	business	US\$ 600.00 or one month's rent, whichever is the greater.
2.3	<u>UNCONTESTED DIVORCE</u>	
	(with or without consent paper, with minimal negotiations and including appearance in Court, where necessary)	
	for Plaintiff	US\$1 200.00
	for Defendant	US\$ 800.00

Handwritten signature and initials, possibly "W.S.", and the text "24 WILL..." are visible at the bottom right of the page.

Appendix 2: Uncontested Divorce Invoice

INVOICE

DATE:

ATTENTION :

RE:

	Miscellaneous	OUR FEES	TOTAL
Consultation and taking instructions from Client		100.00 USD	
Attending to peruse document brought by Client and documents at Court (45 minutes)			
Attending meetings with Client X 3(1 hour 30 minutes)			
Attending to draft Summons and Declaration (1 hour 30 minutes)			
Attending to draft Notice to Plead (30 minutes)			
Attending to Drafting Consent papers, Affidavit of Waiver, Plaintiff's Affidavit of Evidence, Draft Order, Notice of Setdown on unopposed Roll (3 hours)			
Attending to draft emails (30 minutes)			
Attending to various telephonic conversation (1 hour)			
Attending to follow ups at Court (2 hours 45 minutes)			
Attending Court including travelling and waiting time (2 hours 30 minutes)			
Attending to drafting letter and billing (20 minutes)			
TOTAL time billed (14 hours 20 minutes)			
Our fees			
15% Vat			
Subtotal			
Disbursements			

<p>Attending to file and deliver various documents, telephonic conversation and emails</p>		<p>1 820.00 USD 273.00 USD 2 093.00 USD</p>	
<p>Total disbursements</p>			
<p>Total amount due</p>	<p>100.00 USD</p>	<p>100.00 USD</p>	
<p>Payment of the amount shown as the total must be made on sight into our FCA account details of which are supplied upon request</p>			<p>2 193.00 USD Authorized by</p>

Appendix 3: Contested Divorce Invoice
INVOICE

DATE:

ATTENTION :

RE:

	Miscellaneous	OUR FEES	TOTAL
Consultation and taking instructions from Client		100.00 USD	
Attending to peruse document brought by Client and documents at Court (45 minutes)			
Attending meetings with Client X 3(1 hour 30 minutes)			
Attending to draft Summons and Declaration (1 hour 30 minutes)			
Attending to peruse Appearance to Defend (15 minutes)			
Attending to draft Notice to Plead (10 minutes)			
Attending to peruse Plea (30 minutes)			
Attending to drafting Replication, Pre Trial Conference Issues, Summary of Evidence, Discovery Affidavit and Notice of Setdown for Pre Trial Conference (3 hours 30 minutes)			
Attending to peruse Defendant's Summary of Evidence, Discovery Affidavit, Pre Trial Conference Issues and Schedule of documents (30 minutes)			
Attending to peruse Notice of Setdown for Pre Trial Conference (10 minutes)			
Attending Round Table meeting with all parties (2 hours)			
Attending Pre Trial Conference Hearing including travelling and waiting time (2 hours 30 minutes)			
Attending to drafting Joint Pre Trial Conference Minutes and Notice of Setdown for Trial (30 minutes)			
Attending to research and preparation for Trial (2 hours)			

<p>Attending Trial (18 hours)</p> <p>Attending to drafting Plaintiff's closing submissions (3 hours 45 minutes)</p> <p>Attending to peruse Defendant's closing submissions (2 hours)</p> <p>Attending to note judgment and perusing same (1 hour 45 minutes)</p> <p>Attending to drafting letter and billing (30 minutes)</p> <p>Applicable rate 150</p> <p>TOTAL time billed (42 hours 50 minutes)</p> <p>Our fees 15% Vat Subtotal</p> <p>Disbursements</p> <p>Attending to file and deliver various documents, telephonic conversation and emails</p> <p>Total disbursements</p> <p>Total amount due</p> <p>Payment of the amount shown as the total must be made on sight into our FCA account details of which are supplied upon request</p>	<p>300.00USD</p>	<p>6 525.00 USD 978.75 USD 7 503.75 USD</p> <p>300.00 USD</p>	<p>7 803.75 USD</p> <p>..... Authorized by</p>
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