

Trends in the distribution of matrimonial property in Zimbabwe: A feminisation of poverty?

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Abstract

*The paper discusses trends in the distribution of matrimonial property in Zimbabwe. The study is a desk top research based on an analysis of literature review of cases on sharing of matrimonial property that were heard by the High Court and Supreme Court of Zimbabwe from 1999 to 2017. It is the finding of this paper that courts are unfairly distributing matrimonial property to the prejudice of women. This is because of the undervaluing of women's contribution towards the acquisition of immovable property through house work. The unfair distribution of matrimonial property significantly contributes to the phenomenon of feminisation of poverty in Zimbabwe. The paper concludes that the decisions of the court in distributing matrimonial property are not alive to the nuances in women's lives. Using the case of *Mautsa v Kurebgaseka* as a point of departure, the paper argues that the undervaluing of women's work is a major contributor to the phenomenon of feminisation of poverty. The paper recommends law reform and judicial activism. It is hoped that the paper will be a resource tool that guides intervention by law makers and women's rights activist in safeguarding women from poverty caused by unfair distribution of matrimonial property at separation or divorce.*

Key terms: distribution of matrimonial property, undervaluation of domestic work, indirect contribution, feminisation of poverty

Introduction

Women's contribution through unpaid domestic work is generally undervalued (Grimshaw & Rubery, 2007). This has resulted in unfair distribution of matrimonial property with women getting smaller shares at divorce or separation (Ncube, 1989).

As a result women become poorer after divorce as compared to men. The unfair distribution of property is a violation of women's right to equality and non discrimination in marriage. Zimbabwe ratified several international and regional instruments that promote equality during marriage and at its dissolution. These are the Universal Declaration of Human Rights (UDHR, 1948), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, 1981) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol, 2003). The Universal Declaration of Human Rights (UDHR) guarantees the right to equality during marriage and at its dissolution. Article 16 of the UDHR provides that women and men are entitled to equal rights during marriage and at its dissolution. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) also prohibits discrimination of women during marriage and at its dissolution. At the regional level, the Maputo Protocol provides for a right to an equitable sharing of matrimonial property upon dissolution of a marriage or union.

In addition to the regional and international human rights instruments, the 2013 constitution of Zimbabwe protects women's property rights upon death and divorce. Section 26 of the Constitution provides for the right to equality at the dissolution of a marriage. However, as will be discussed in the paper, the law discriminates women in unregistered customary law union. The Matrimonial Causes Act of 1985 which has favourable provisions when it comes to distribution of matrimonial property does not apply to unregistered customary law unions. Katsande argues that protection of women at dissolution of marriage applies to all women including those in unregistered customary law union (Katsande, 2016). As such, the selective application of the Matrimonial Causes Act to registered marriages is discrimination on the basis of marital status and class. (Katsande, 2016). As aptly pointed by Katsande discrimination between women and women is being overlooked by the law in cases of distribution of matrimonial property.

This paper argues that the undervaluing of the contribution made by women towards the purchase of matrimonial home through house work exposes them to poverty upon divorce. The selected cases in this paper reveal that the courts are awarding women between 25% to 35% share of the matrimonial home upon separation or divorce. This percentage is not only unfair but does not enable them to find alternative accommodation. The unfair distribution of matrimonial property is a result of different factors. Firstly, the use of different systems of law in the adjudication of property

sharing matters results in discrimination of women when customary law is applied. The application of customary law in the distribution of matrimonial property results in unfairness on the part of women as they are entitled to *maoko* and *umai* property only which is of little value.

Secondly, there are gaps in law in relation to the application of the provisions of the Matrimonial Causes Act in deciding the allocation of matrimonial property. The provisions of Matrimonial Causes Act of 1985 that are more favourable to women are not uniformly applied to all property sharing cases. This leaves women at the discretion of the judge. Lastly, the law seems to be staggering behind the social and economic realities in Zimbabwe. The courts have held that women are no longer entitled to post divorce maintenance for the rest of the life on the basis that they would get employed. This is against the reality of high unemployment rates in Zimbabwe. It is acknowledged that post divorce maintenance may be burdensome to the other spouse. As such the best approach would be to award a reasonable share of the immovable property. The allocation of 50 % share will cushion women from homelessness and reduce the feminisation of poverty.

Theoretical perspectives on the undervaluing of women's work

Grimshaw and Rubery (2007) have defined the undervaluation of women's work firstly as referring to being paid less than men for the same job and secondly as being employed in jobs that are themselves undervalued. In this paper, undervaluation refers to a situation where women's household work is not recognised at all. Work done by women in marriage is unpaid and is not considered as "work". It does not even reflect in the country's national income (Narayan, 2017).

The Marxist feminist theory interrogates the causes of undervaluing of women's work. This theory postulates that capitalism and patriarchy collude to undervalue women's work in order to oppress them. Gordon (1996, p.14) argues that, "Women are cheap reserve labour force for capitalism and women's free labour in the home as housewives allows capitalists to pay men less for their labour and provides for the reproduction of the labour force."

Marie (1994) also cements Gordon's analysis and argues that capitalism itself is the cause of women's oppression. It has also been argued that capitalism's masculine nature cause the "exploitation of women through the division of labour that dichotomizes the public and the private sector" (Gordon, 1996, p.23). Work done in

the private sphere and in particular domestic set up is undervalued. The binary terms of direct and indirect contribution that are utilised as a basis for distribution of property at courts confirms the assertion that sexual division of labour between the private and public divides leads to the oppression of woman and undervaluing of their work. Housework falls under indirect contribution which is valued less than direct contribution. This reinforces capitalist and patriarchal notions of looking down upon housework performed by women.

Method

The paper is a desk research. It adopted the doctrinal, comparative and descriptive analysis of the High Court and Supreme Court cases heard between the years 1999 to 2017. The cases were randomly selected on the basis of their relevance to the study. All the cases selected dealt with distribution of matrimonial property in civil marriages, customary marriages and in unregistered customary law unions. This was done for comparative purposes of the award of property that women get in the different marriage regimes. The research used the case of *Mautsa v Kurebgaseka* as a springboard to compare the approach adopted by the courts in this case and other previous decisions on the evaluation of women's work in divorce cases.

Mautsa v Kurebgaseka case

The Herald of 4 March 2017 celebrated the case of *Mautsa v Kurebgaseka* as a landmark ruling that had brought relief to women in unregistered customary law unions (HH 106-17). What needs to be interrogated is whether this case brought any significant improvement to the valuing of women's unpaid domestic work upon divorce or rather the court simply buttressed the status quo as regards the matrimonial property rights of women in unregistered customary law unions.

A woman in this case entered into an unregistered customary law union in 1996. An unregistered customary law union is a union where one pays bride price and does not proceed to register the marriage in terms of the marriage laws of Zimbabwe. This union is recognised as a marriage only for purposes of inheritance and maintenance of minor children. At the dissolution of the union, the parties approached the court for a distribution of matrimonial property. The husband who was the Plaintiff claimed that the property should be distributed according to customary law provisions since their union was solemnised in terms of customary law. The Defendant submitted that

general law instead of customary law should apply. She therefore pleaded tacit universal partnership and alternatively unjust enrichment. Justice Chitakunye held that general law was applicable to this case as the lifestyle of the parties reflected that they were more close to general law than customary law. He further held that both causes of unjust enrichment and tacit universal partnership applied to the case although the latter was more applicable. The parties had two immovable properties and various movables. The woman was awarded 25% share of one of the immovable property and the right of use to one of the properties registered in their children's names for the rest of her life. Post divorce maintenance was denied.

Was this case a victory for women in unregistered customary law union?

The question that needs to be addressed in this paper is whether this case was a victory for women in unregistered customary law unions. Did this case bring any new developments pertaining to the fate of women in unregistered customary law unions after divorce? Secondly did the case improve the value that is attached to unpaid domestic work upon divorce? Thirdly is the 25% share awarded to the woman a fair evaluation of unpaid domestic work? Firstly, the *Mautsa v Kurebgaseka* case indeed can be applauded for applying the concept of tacit universal partnership in recognition of indirect contribution through housework. The judge's observations in this case are quite important as they show an appreciation of the housework and the potential income that the woman lost during the years she was married. Justice Chitakunye stated as follows:

At the time of marriage she was 20 years old and expecting to advance in her education. That expectation was not realised as she was now devoted to taking care of the home. She suppressed her educational advancement for the sake of the family. She, in a way, suppressed her income earning capacity. Having made such sacrifices she is now being asked to leave with virtually nothing for her 14 years of toil as a house maker and bearer of their children. She is in a way the poorer as she leaves the union whilst plaintiff retains the wealth created during the union (*Mautsa v Kurebgaseka*, p.19).

The above statement highlights the court's sensitive appreciation of women's lived realities. Women mostly spend three quarters of their lives as housewives and if customary law is applied they would walk empty handed upon divorce. Customary law does not value women's contribution through housework at all. In this case, the court also rejected the application of customary law on the basis that the home making efforts of the woman and the commercial enterprises of the husband amounted to a partnership which resulted in the acquisition of matrimonial property. The statement

by the court is significant in recognising that indeed housework is a form of work that should be seriously considered upon the parties' separation. That recognition is very important and goes a long way in rewarding women's efforts as housewives. It also expels the notion that when a wife contributes in marriage, such contributions should not be considered on the basis that household work is a natural consequence of a marriage and women should not expect any payment from it. While it is accepted that payment of housework in a marriage set-up is complicated, at least at divorce such house work should be significantly rewarded.

Good analysis wrong conclusion?

While the outcome of *Mautsa v Kurebgaseka* case has some positive elements in the recognition of household work, the conclusion reached contradicts the reasoning process. Having considered that the woman got married at a young age, lost an opportunity to further her studies and that for the 14 years of marriage, she contributed through housework, the court concluded that all she is worthy of receiving is a mere 25% share of the matrimonial property. It is argued that the decision to award 25% of the matrimonial home after all the mouthful reasoning process still depicts the undervaluing of women's work. While it is conceded that a confirmation of the existence of a partnership does not automatically result in equal share, it is argued that a marriage is a *sui generis* (of its own kind) partnership and equating it to commercial partnership where direct injection of financial resources and skill is required to guarantee entitlement of 50% is quite misleading. The loss of opportunities to advance oneself in the hope that you have security in marriage is a serious factor that should never be taken lightly. To compensate for such loss, an award of at least 50% share will alleviate the loss and reduce feminisation of poverty.

Further, the 25% share awarded to the woman in *Mautsa v Kurebgaseka* case seem to have been justified by the court on the basis that she was awarded a life usufruct (right of use for the entire life) in another property that was registered in the name of the minor children. There are a lot of assumptions here that seem to be the basis of the decision to award a 25% share. Firstly, there is an assumption that the woman would enjoy undisturbed occupancy at the property. This is a property that is registered in the minor children's names and the father of the child still has a right to access and use the property as well. Given the animosity that normally prevails after separation, co-existence might be problematic. The woman might be forced to look for alternative accommodation. Secondly, it is assumed that once the children have reached the majority status, they would want to keep the property so that their mother can maintain

occupancy. Such assumption is devoid of lived realities where sometimes children sell their property and get shares in monetary value. The law of property is quite clear that an owner has absolute and unreserved right to dispose of his or her property at will. Thirdly, the reasoning seems to have been based on moral tenets that a child will always look after their parents which is not always the case.

Lastly the decision to award 25% share of the property does not take into account the economic environment of Zimbabwe. The economy of Zimbabwe is so uncertain that once immovable property is disposed of, acquiring one is difficult. The price of immovable property continues to sky rocket as the country grapples with the cash shortages in the banks. If anything, the *Mautsa v Kurebgaseka* case is one step backwards if one is to compare it with the earlier Supreme Court decision in *Usayi v Usayi* case where the woman was awarded 50% of the matrimonial property on the basis on indirect contribution through housework. (SC 11/03). While it is agreed that the duration of the marriage in *Usayi v Usayi* case was 35 years, the rationale still remains the same. The reality is that if a woman who has no income, vested a greater part of her life in marriage and views such marriage as social security, divorce certainly exposes the woman to the caprice of poverty. The *Mautsa v Kurebgaseka* case being the latest decision was expected to be progressive as compared to the previous cases. However, the case has not made any significant contribution towards improving women's property entitlements at divorce. The case did not offer women any protection from vulnerability to poverty after divorce or separation.

Considerations on distribution of matrimonial property

In considering how to distribute matrimonial property upon separation or divorce, the courts first take into account the applicable system of law. The court has to decide whether general law or customary law applies. Customary law and general law provisions have different proprietary consequences as will be explained in this paper.

Distribution of matrimonial property under general law

Distribution of matrimonial property under general law is governed by Section 7 of the Matrimonial Causes Act Chapter 5: 13. Section 7 outlines the factors that the court should take into account in determining what each spouse should get at the dissolution of a marriage. These are as follows:

- The income-earning capacity, assets and other financial resources which each spouse and child has or is likely to have in the foreseeable future.

- The financial needs, obligations and responsibilities which each spouse and child has or is likely to have in the foreseeable future.
- 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.
- The age and physical and mental condition of each spouse and child.
- 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.
- 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.
- The duration of the marriage.

Section 7 further provides that the court should endeavour as far as is reasonable and practicable to place the spouses and children in the position they would have been in had a normal marriage relationship continued. It is indeed admitted that life after divorce will never be the same for the majority of people. This is due to the fact that resources that were pulled together will now be shared. Courts should at least make an attempt towards ensuring that the living conditions do not significantly deteriorate. This approach protects women from vulnerability to poverty.

Placing a value on the contribution of women through housework has always been a mammoth task for the court. The provisions of sections 7 are a guiding framework but at the end of the day, it is the judge's discretion that applies. The justice in this case would be according to the judge's perspective. Socialisation of that judge becomes important under these circumstances and definitely has a bearing on the value that one can put on the household work. The emphasis that judges place on any of the factors in section 7 depends on the judge's discretion again. Some place emphasis on indirect contribution at the expense of all the other factors. For instance in the *Matongov Matongo* case, the court placed more emphasis on contribution and held that the women's enterprises of dress making was not meaningful contribution. (HH 14/12). As a result, the woman was awarded a 35% share of immovable property after 25 years of marriage. In *Chigunde v Chigunde* the court took a different approach and emphasized on consideration of the needs of the parties as the main factor for sharing

the property. (121/15). In the case of *Chigunde v Chigunde*, the court held that assessing contributions in a 29 year old marriage is not easy as such the “needs and expectations of the parties should carry more weight than direct financial contribution” (p.5). It is argued that this approach is progressive and takes into account the realities that couples are faced with upon divorce. The needs of the parties after divorce would be ignored if focus is placed more on the contribution of the parties in acquiring matrimonial property. There is therefore a need to look at the individual cases and tailor made each remedy. While it is conceded that one of the elements of law as propounded by positivist theorists is that law is law regardless of its moral content. It however does not detract the discretion by the judge to work within the confines of the law and provide an expansive interpretation so as to achieve social justice.

Distribution of matrimonial property under customary law

Distribution of matrimonial property under customary law is discriminatory and unjust as it allows women to claim *mawoko* and *umai* property only (Ncube, 1989). The *mawoko* property refers to assets acquired by a woman as a result of her labour. Under customary law this would include produce from the piece of land specifically allocated to a woman such that she has total and exclusive control of the produce. *Umai* property are assets acquired after a woman's daughter is married. *Umai* property includes *mombe yeumai* which is a cow that is given to a mother when her daughter is married and *mbudzi yemasungiro* (a goat given to the mother when her daughter falls pregnant). *Mombe yeumai* is the only valuable property that a woman gets when bride price is paid for her daughter. The bigger share of the bride price is given to the father. The challenge with applying customary law is that it fails to recognise the wife's contribution towards the family upkeep. Ncube (1989) describes the injustice of customary law principle on distribution of matrimonial property as follows:

Under customary law all meaningful property is owned and controlled by the husband. Women are often, if not always, reduced to the status of property-less dependants who have to submit to the will of their husbands in order to survive. The customary laws on matrimonial property perceive a married woman as unpaid servant of her husband. She works for him, looks after his family, acquires and preserves property for him. At the end of the marriage she leaves the matrimonial property-less and destitute like a sacked employee. She has no claim to a share in his property. All she

can claim is her *mombe yohumai* and *mawoko* property.

Post divorce maintenance

Post divorce maintenance can cushion women from poverty by ensuring that they get monthly allowances till they remarry, die or get back on their feet. Post divorce maintenance enables women to claim support from their spouses and maintain the lifestyle that they had before divorce (Duncan v Duncan, HH 232/17 & Leopold 2018). However, our courts have ruled that marriage is not a bread ticket to life. In the case of Chiomba v Chiomba, the court held that “marriage can no longer be seen as providing a woman a bread ticket for life” (1992, 2. 197). As such a marriage certificate is not a guarantee of maintenance after the marriage has been dissolved.

In the case of Kangai v Kangai (HH 51-07), Gowora J stated the circumstances under which a divorced woman can get maintenance. These include a situation where a woman is in her old age and is no longer able to work. Young women who can be trained will only be given maintenance for a short period until they get back on their feet. This approach is now lagging behind the reality and social developments. The reality of the Zimbabwean economy is that one will never get back on their feet after losing security of upkeep. Furthermore, the assumption that if one is young, she can be retrained to get a job may remain an ideal in Zimbabwe because of high unemployment rates. Post divorce maintenance is therefore not an option to the majority of divorced women and also considering the economic environment it would be unfair to expect a man to pay maintenance until the wife remarries or dies whichever occurs first. What is therefore required is a just consideration of women’s work and attaching economic value on it so that it gives them a start in life.

This paper is not advocating a lifetime maintenance but a share of property that takes due consideration of women’s indirect contribution. The decision by the courts is a wake up call to women not to solely depend on the husband for a living. Instead marriages should result in reciprocal duties of support and not solely wait on the husband to provide for the wife and children. The equality that women yearn for is totally lost if they are to fold their hands and expect the man to do everything for them. In the case of Mackintosh v Mackintosh, the court reiterated the Chiomba judgement and went on to state that “.....in this day and age where equality is the central aspect in all spheres of life maintenance of an ex-spouse cannot be indefinite (HH 3/99).

Women in Unregistered customary law unions

Women in unregistered customary law union are more vulnerable to poverty after divorce (Ncube, 1989). These women cannot claim post separation maintenance

because in the first place their unions are not recognised as marriages and the court only deal with distribution of matrimonial property if the proper cause of action is pleaded. The guidelines of Section 7 of the Matrimonial Causes Act highlighted above do not apply to these unions. In the case of *Mashingaidze v Mugomba* (HH3/99), Gwaunza J reiterated this position. Gwaunza J held as follows:

However, while I would support the view that a proven unregistered customary law union should be treated like any other marriage when it comes to dissolution and division of assets jointly acquired by the parties during its subsistence, such a view is currently not supported by the law (HH. 3/99)

The position is that the law does not recognise such marriages hence judges have made numerous calls for law reform. The same principle applies to cohabitation. Cohabitation relationships are not recognised as marriages at all regardless of the number of years. Women in such relations are not even recognised as wives for purposes of maintenance, inheritance and distribution of property. Such relationships are not recognised as marriages and as such a proper cause of action such as unjust enrichment, tacit universal partnership or joint ownership has to be pleaded. The non application of the Matrimonial Causes Act to women in unregistered customary law unions is discrimination on the basis of marital status. This discrimination increases the exposure to poverty for women in these unions.

Claiming a share of property at the dissolution of an unregistered customary law union is quite onerous to women (Chirawu, 2014). Women in such unions have to overcome numerous hurdles in order to claim a share of matrimonial property. Firstly these women have to justify the application of general law to their cases because this is a union solemnised in terms of customary practices, it follows that customary law is applicable to such cases. These women have to convince the court that in as much as the union has been contracted in terms of customary law, general law should apply because of the circumstances of the case. However, courts have held that general law automatically applies in cases where there is an immovable property since application of customary law out rightly amount to injustice. In the case of *Mashedza v Mutsvangwa*, Mawadze J held that general law should apply in cases where land rights are involved despite the fact that the union is not registered because failure to do so will result in discrimination of women married under customary law (HH 214/13). The same position was held in the case *Jengwa v Jengwa* (1999(2) ZLR 121H). Secondly, these women have to plead a proper cause of action. In the case of *Ferembav Matika*, Makarau J held that dissolution of the union on its own is not a cause of

action at general law (HH 33/07). Proving unjust enrichment requires proof of contribution since the central argument would be that the other party is being enriched while you are being impoverished. There is therefore a need to quantify the level of contribution that a woman put in the acquisition of matrimonial property. The issue of direct and indirect contribution then comes into effect. Indirect contribution through housework is undermined such that under this concept a woman will walk away with a very small share.

Joint ownership is also problematic in the sense that one has to be a registered owner of property. Culture and religion sometimes contributes to the denial of title of immovable property to women because of male dominance (Ncube, 1989). Religion stresses on submission as provided in the Bible. Similarly culture also places emphasis on the husband being the head of the family. These religious and cultural beliefs are sometimes taken to extremes to imply that men virtually should be in control of all assets and women just play along with every decision made regardless of its adverse consequences to their proprietary interests. Under such circumstances, registration of an immovable property in the name of the husband is the expected norm.

Tacit Universal partnership

In *Ntini v Masuku*, Cheda J held that a mere averment of the presence of an unregistered customary law union does not entitle a party to successfully claim her right under the principle of tacit universal partnership (HB- 69/03). A proper justification should be made for such a claim of tacit universal partnership to succeed. Such claim should meet the following requirements for it to be successful:

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

Proving tacit universal partnership is an uphill task because the partnership has to go beyond the expected duties of a husband and wife. It should be like a business whose objective is to make profit of which a marriage's objective is love and companionship. Hahlo and Khan aptly describe what a tacit universal partnership should be. The authors state as follows:

There must be something to indicate that the parties intended to operate as a partnership. The mere fact that the wife worked in her husband's business without pay is not sufficient. Unless it can be shown that she made a substantial financial contribution or regularly rendered services going beyond those ordinarily expected of a wife in her situation, the courts will not be readily persuaded to imply a partnership agreement (Hahlo & Khan, 1982, p. 189).

Tacit universal partnership is therefore difficult to prove in most of the instances and as such women who base their claim on such cause of action have limited success.

Thirdly the monetary value of the property in question determines whether a claim can be instituted at either the Magistrates Court or the High Court. It follows that if there is an immovable property, the value normally exceeds the monetary jurisdiction of the Magistrate Court. As such, a litigant has to approach the High Court which has complex procedures which self actors find difficult to navigate.

Feminisation of poverty

Poverty is a multidimensional phenomenon and its definition depends on the social context (Bourguignon & Chakravarty, 2003). However, the simplest definition of poverty is that it is a state or situation where one is failing to meet the basic necessities of life such as food, health and adequate shelter.

Medeiros and Costa (2010) have defined the concept of feminisation of poverty into categories. Firstly, the term refers to an increase in difference in the levels of poverty among women and among men. Secondly the concept is also used to define an increase in difference in the levels of poverty among female-headed households as well as among male and couple-headed households. This paper adopted the first category which looks at the differences in levels of poverty among men and women that result after distribution of matrimonial property. In the majority of cases on dissolution of property, women have been getting between 25% to 35% share of the matrimonial home as will be highlighted in the cases discussed below.

In the case of *Ntini v Masuku*, 25% was awarded to the woman (HB69/03). This was despite the fact that the judge had noted that:

The woman in this case "was no ordinary rural woman whose job was to carry a bucket of water, firewood and bear children as it were. She had one leg in the rural areas where she subscribed to customary dictates but at the same time had another

leg in the urban centre where she was employed both formally and informally thus contributing to development and upkeep of this property (p.6).

Both her direct and indirect contribution were undervalued and she got 25% of the immovable property.

In *Matongo v Matongo*, the woman got 35 % share of the matrimonial home (HH 14 /12). This is despite the fact that both direct and indirect contribution was proved and that the marriage had lasted for 25 years. A woman's entitlement to a 50 % share increases when the duration of the marriage is longer. In this case, this was not considered and the woman got less than a half a share despite significantly carrying out household work for a quarter of a century.

In the case of *Masveto v Masveto*, 35% share of the matrimonial home was awarded to the woman on the basis of her indirect and direct contribution towards the purchase of the property. (HB-75-04). She also played a pivotal role in overseeing the construction and improvements on the matrimonial home. The court held that the husband's direct contributions outweighed her indirect and direct efforts towards the purchase of the matrimonial home. This is despite the fact that she was instrumental towards the purchase of the property. The husband had no interests whatsoever in acquiring an immovable property. The woman was the one who had applied for the stand at council and paid the initial amount. However after that initial payment, her main contribution has been indirect through housework. The marriage had lasted for 12 years.

In the case of *Mutenda v Mutenda*, 30% of the matrimonial home was allocated to the woman (HH177 /10). This is despite the fact that the woman was at some point employed and also indirectly contributed through household work. The court held that the lack of direct contribution on the part of the woman did not justify an award of 50 % share of the matrimonial home to the woman.

In the case of *Chikomba vs Chikomba*, a woman was granted a 35% share on the basis of indirect contribution (HH 128/12). The duration of the marriage was ten years. The judge noted that woman had been responsible for taking care of a large number of people from the extended family who lived with the couple. She was also responsible for overseeing the building of the house which included cooking for the

builders and receiving construction materials. Lastly, in the case of *Mhondiwa v Mhondiwa*, the woman was awarded 35% based on indirect contribution (HH 31/17).

It is argued that with a percentage of less than 50%, one cannot afford to purchase alternative accommodation. The removal of the secure accommodation after divorce exposes women to the caprice of poverty. The Zimbabwean economy itself also poses serious challenges to families where both men and women are pulling resources together (Ministry of Finance and Economic Development, 2016.) The situation is worsened by divorce resulting in loss of support and division of resources. The harsh economy in Zimbabwe quickly accelerates the poverty levels. The courts have also ruled out post divorce maintenance for life which in some way protects women from poverty.

Interrogating the causes for undervaluing women's household work by the courts and society in general

The common thread that can be deduced from the cases highlighted above is that indirect contribution through house work is greatly undermined. In some of the cases highlighted above, women have in addition to housework directly contributed financial resources towards the acquisition of the matrimonial property though not at the same level as the husband. The courts have not valued that contribution and still awarded less than a half share. This greatly depicts the undermining of household work.

Scholars have advanced reasons why women's work is undervalued. Enloe (1990), Ferrant, Pesando and Nowacka (2014), Grimshaw and Rubery (2007) and Wong (2013) have argued that women's work is undervalued because housework is considered a feminine responsibility. It is one of the normal responsibilities that any woman is expected to fulfil. Secondly housework is considered as natural and women are born with it. They do not require a skill or training in order to do housework (Wong 2013, p. 41). This understanding transcends to paid domestic work. Domestic work force which is constituted largely by women gets low wages because domestic work on its own is undervalued. Research has shown that women's unpaid work costs an estimated \$10 trillion of output per year, roughly equivalent to 13 percent of global GDP (Woetzel et al., 2015). According to UN "women spend, on average, three hours more per day than men on unpaid work in developing countries and two hours more per day than men in developed countries; when all work paid and unpaid is considered, women work longer hours than men" (UN 2015, p. 87). These statistics cement the Marxist

feminist perspective that women subsidise the capitalist economy through unpaid labour.

The undervaluing of housework by the courts is a result of the meaning assigned by society and institutions to the term “work” Work is normally conceptualised as paid labour outside the home. As a result even, the legislation governing paid work such as the Labour Act of 1985 focuses on work outside the marriage set up. The Labour Act postulates that paid work is between an employer and an employee. It is a fact that women are not employees in marriage relationships. As such their work does not accumulate monetary value. The legal framework on social security also does not cover housewives. The International Labour Organisation (ILO)’s definition of social security reflects that housework is not considered as work that requires to be insured in the event that one loses the status of a housewife. The International Labour Organisation (1989) defined social security as:

The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age, and death; the provision of medical care; and the provision of subsidies for families with children (p.3)

This definition of social security by ILO has been criticised for leaving “insufficient room for development of social security for new answers to any new social problems that may arise” (Pieters, 1993, p.2). It is argued that the new social problems can include the insecurities of women after divorce.

Social security has two elements which are social insurance and social assistance (Pieters, 1993). Social insurance is designed for wage or income earners as such housewives are not covered. Social assistance which is non contributory in nature is no longer fully operational in Zimbabwe as a result of the ailing economy. Even if it was fully operational, its scope is limited as it mainly cushions old people, orphans and vulnerable children. Besides the formal social security system, the extended family is also another form of social security. Under normal circumstances, the extended family is supposed to take care of the needs of its members but urbanisation and the harsh economic environment have totally eliminated the capacity of the extended family to look after its members. The urban set up only accommodates the nuclear family and there is no place for members of the extended family. Besides the inability to cope, divorced women suffer from stigma and get labelled sarcastically as returnees.

As such, these women refrain from seeking support from the extended family which is also struggling.

In addition to the inadequate legal framework as explained above, capitalistic and patriarchal notions of the public and private division and assigning roles under such divisions exacerbates the undervaluing of women's work (Gordon, 1996). Work done in the private sphere is unpaid and this is where most women are found. The same work done by women in the private sphere attracts a good income in public sphere in particular if it is performed by men. Its undervaluing then is based on the person who is performing the work rather than the work itself. Marriage on its own as an institution contributes to the undervaluing of women's work because such kind of labour is considered normal and is expected of every woman including women in formal employment. Bride price is also viewed as an entitlement for men to get labour as a package that comes with marriage (Mangena & Ndlovu, 2003). Women are therefore expected to provide the services without expecting payment. It is quite sad to note that women's protection from destitution is upon death of the spouse as the law entitles them to inherit the full share of the matrimonial home and all the household effects in it. Section 3(a) of the Deceased Estates Succession Act of 1873 and section 68 of the Administration of Estates Act of 1929 provides that a surviving spouse is entitled to the matrimonial home and all household goods at the death of the spouse. This is the same position despite the type of marriage including the unregistered customary law union. If the law recognises the importance of protecting women from destitution at the death of the spouse, it is illogical that such reasoning does not extend to cases of separation or divorce.

Conclusion

The unfair distribution of matrimonial property by the courts is a result of the undervaluation of women's contribution towards the acquisition of property through domestic work. The cases cited above reflect that domestic work is considered less yet it enables the men to focus on the paid work and pull resources to provide for the family. The paper concludes that the allocation of lower shares to the matrimonial home awarded to women at divorce increase their vulnerability to poverty. Women in unregistered customary marriages are in a worse off position when it comes to their property entitlements. In addition to the prejudice of undervaluation of the household work that they suffer with other women, they further face encumbrances in terms of

claiming a share of matrimonial property upon separation. The courts are discriminating them by selectively applying the matrimonial Causes to registered marriages only to their exclusion. Finally, the case of *Mautsa v Kurebgaseka* has not provided any new solutions to the undervaluing of women's domestic work and unfair distribution of matrimonial property. Women's contribution through domestic work remains undervalued by the society and the legal system.

Recommendations

- Law reform should be adopted to ensure that the provisions of the Matrimonial Causes Act are applicable to all cases of property sharing including in unregistered customary law unions. Such kind of law reform should adopt the approach taken in SI 53/ 2004 which defines a spouse in a manner that is inclusive of women in unregistered customary law union.
- Pending law reform, judicial activism is recommended so as to provide temporary remedies to women in unregistered customary law unions.
- Gender trainings for judges is recommended. This ensures that judges do not fall into the trap of socialisation which views women's domestic work as natural and therefore not deserving any payment.
- Women need to be economically empowered so that they are able to engage in income generating projects which cushion them from poverty after divorce.
- Legal literacy is necessary. Women need to be enlightened on the provisions of the law on distribution of matrimonial assets. Such legal awareness will assist in terms of decision making on whether one can be a full time housewife or not.

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