

# **STRATEGIC LITIGATION AS A TOOL FOR ABORTION RIGHTS**

## **REFORM:**

### **Examining Legal Possibilities in Common Law African Countries with Restrictive Political Systems**

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Vienna, 05 Month 2025

\_\_\_\_\_ Sibonelo Dlamini \_\_\_\_\_

## *ABSTRACT*

This thesis explores the potential for strategic litigation to advance abortion rights in politically restrictive common law African countries, focusing specifically on Nigeria, Uganda, Zimbabwe, and Eswatini. While existing scholarship often dismisses litigation in such contexts as futile, this research challenges that assumption by analyzing women's rights litigation cases that have succeeded despite political and judicial constraints.

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## ***LIST OF ABBREVIATIONS***

**ACRWC** African Charter on the Rights and Welfare of the Child

**CEDAW** Convention on the Elimination of All Forms of Discrimination Against Women

**CRC** Convention on the Rights of the Child

**CSO(s)** Civil Society Organization(s)

**FIDA** International Federation of Women Lawyers

**ICRW** International Centre for Research on Women

**LAW-Uganda** Law and Advocacy for Women in Uganda

**NGO** Non-Governmental Organization

**SRHR** Sexual and Reproductive Health and Rights

**UN** United Nations

**WIN** Women Impact Nigeria

**WLW** Women's Link Worldwide

## *INTRODUCTION*

To what extent can courts serve as arenas for advancing women's rights in politically restrictive regimes? This question feels especially urgent in the wake of the U.S. Supreme Court decision to overturn *Roe v. Wade* and eliminate the constitutional right to abortion in the United States. For people worldwide, the Supreme Court's ruling signalled not just the fragility of legal protections but their impermanence. It rightfully cast doubt on the reliability of courts to protect and uphold monumental gains in women's rights advocacy. Yet, even if it feels as though human rights are contracting every day in a democratic state long considered for litigation efforts, hope for courts as tools for women's rights advocacy ought not to be abandoned. What should remain on our minds is that law is not inherently emancipatory or oppressive, but rather, it is both. Therefore, all legal landscapes can be sites of systemic violence as well as sites revolution. Nowhere is the duality of rule of law more visible than in legal struggles over women's rights. While feminist movements have long turned to courts to expand women's rights in democratic states, the potential of law in politically restrictive regimes remains underexplored (Brickey and Comack 1987). These are contexts where executive power often has a lot of influence over the judiciary, where legal institutions are shaped by religious, statutory or customary law, and where political participation is constrained. In such environments, legal reform is frequently assumed to be impossible or, at best, marginal. Yet the persistent efforts of women's rights advocates and civil society activists, coupled with selective judicial openness to treaty-based arguments, suggest that the role of courts in such contexts is more complex than what the existing literature suggests.

A large body of existing literature implicitly suggests that strategic litigation in politically restrictive regimes is pointless, as dictatorial leaders and/or political landscapes could at any point reverse years of hard work and legal progress (Höglund and Schaffer 2021) (Roa and

Klugman 2014)(‘Attorney General v. Unity Dow’ 1992)(Fuchs 2013) . However, this perspective overlooks two important points. Firstly, while it is true that years of legal progress can be reversed almost overnight, doing so is far more complicated than it sounds. Secondly, even in such regimes, revoking legal reform or striking down new legislation would not come without significant pushback and backlash. More importantly, even if the judiciary or the executive were to reverse progressive legislation, the impact of litigation cannot be reversed; laws can be struck down overnight, but public interest and legal consciousness cannot.

Strategic litigation has been instrumental in securing landmark victories on gender justice issues such as marital property, inheritance, and child marriage. However, abortion rights remain notably absent from this body of litigation in most non-democratic settings. Existing scholarship on strategic litigation has focused primarily on liberal democracies, where access to courts is relatively secure and judicial independence is more robust. In these contexts, precedent-setting abortion cases have helped shape national and international standards, most notably in Latin America and parts of Europe. For example, legal victories in countries like Colombia and Ireland have demonstrated that abortion rights can be advanced through sustained legal pressure and public advocacy (Fletcher 2005) (Roa and Klugman 2014). However, little attention has been paid to whether similar strategies could be adapted to contexts where the legal system is constrained by authoritarian governance, religious conservatism, or limited judicial autonomy.

Scholars such as Elizabeth Schneider have argued that feminist engagement with “law must grapple with its contradictory nature”. That it often reflects the very structures of patriarchy it seeks to dismantle (Bowman and Schneider 1998). Yet, as Brickey and Comack assert, law is not a static institution. It can become a contested space in which dominant norms are challenged, and new meanings are produced. This insight is particularly relevant for politically restrictive regimes, where women’s rights victories in court may seem unlikely but

are not entirely unprecedented (Brickey and Comack 1987). In Nigeria, for instance, the Supreme Court held in *Ukeje v. Ukeje* (2014) that the Igbo customary law barring daughters from inheriting property was unconstitutional (*Ukeje v. Ukeje* 2014). In Zimbabwe, the Constitutional Court's decision in *Mudzuru and Tsopodzi v. Minister of Justice* (2016) struck down child marriage as a violation of girls' constitutional rights (*Mudzuru & Another v Ministry of Justice* 2016). In Eswatini, one of Africa's last remaining monarchies, the Supreme Court ruled in *Doo Aphane v. Registrar of Deeds* (2010) that women must be allowed to register property in their own names (*The Attorney-General v. Mary-Joyce Doo Aphane*, 2010).

These cases suggest that despite the limitations of their political environments, domestic courts have occasionally been responsive to gender equality claims. In all three examples, the litigants made strategic use of constitutional provisions, regional treaties like the Maputo Protocol, and the language of international human rights. This approach allowed them to frame women's rights not as Western impositions but as obligations already accepted by their own governments. Yet, despite these openings, there has been no equivalent push for abortion rights through the courts in these same contexts. This absence raises an important question:

**Can strategic litigation contribute to changes in abortion legislation or judicial precedent in restrictive political regimes?**

This thesis seeks to answer this question by examining whether and how strategic litigation might be used to advance abortion rights in politically restrictive regimes. It focuses on four countries: Nigeria, Uganda, Zimbabwe, and Eswatini (Swaziland) that share a common law tradition, a colonial legal legacy, and contemporary features of political restriction according to reports published by Freedom House from 2017 to 2025 (Freedom House 2025a; 2025c; 2025d; 2025b) These include limited judicial independence, executive influence over legal institutions, and strong religious or customary norms that often dictate family and reproductive law. The

central argument of this research is that existing women's rights litigation in these countries provides a foundation on which to build more ambitious legal challenges, including those related to reproductive autonomy.

## ***METHODOLOGY AND ANALYTICAL FRAMEWORK***

### **Theory and Hypothesis**

This thesis adopts a case study methodology that combines legal analysis with feminist legal theory. It draws on primary legal sources, including domestic constitutions and court judgments, as well as international and regional treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Maputo Protocol (African Union 01/072003; United Nations General Assembly 1979). Each case study will analyse the legal landscape before litigation, the strategies used by litigants and their advocates, and the outcomes that followed. Particular attention will be paid to how courts interpreted international commitments in domestic law, how legal networks framed their arguments, and whether the rulings led to changes in policy, practice, or legal doctrine.

By situating abortion rights within the broader trajectory of women's rights litigation in restrictive regimes, this thesis makes both a theoretical and practical contribution.

Theoretically, it challenges dominant assumptions that litigation is ineffective in politically constrained environments. Practically, it offers insights for advocates, legal practitioners, and transnational networks seeking to expand reproductive rights through legal means. In doing so, the thesis underscores the possibility that courts, even in difficult settings, can become sites of feminist legal transformation.

## *LITERATURE REVIEW*

Strategic litigation has for decades served as a powerful tool in advancing human rights and bringing about social change. Through strategic litigation, we have seen the dismantling of segregation, the expansion of LGBTQIA+ rights and the expansion of women's reproductive rights to include:

- the right to sexual and reproductive health services
- the right to choose if, when and whom they marry (extends itself to all forms of gender-based violence, including rape)
- the right to equality and non-discrimination in marriage and family life (extends itself to all forms of gender-based violence including marital rape, which is often overlooked)
- Where judicial systems and politicians alike are often restricted by political, social, cultural, and/or religious forces, strategic litigation, or public interest litigation has served as an avenue through which civil society activists can directly participate in expanding human rights. This thesis, in seeking to explore whether strategic litigation can contribute to changes in abortion legislation or judicial precedent in restrictive political regimes, grounds itself in both the theoretical underpinnings of legal reform and the operationalization of its application within African common law countries. The importance of this research lies in the significant role that rule of law plays in challenging gender inequality particularly in contexts where socio-political forces restrict the expansion of women's reproductive rights. The controversy of not just

abortion rights, but sexual reproductive health and rights (SRHR) in their entirety is a compelling area of research because it requires the tactful navigation of judicial independence, rule of law, and socio-political ramifications (Mayall, Zampas, and Grimà Algora 2024; Durojaye, Mirugi-Mukundi, and Ngwena 2021) . In countries where social, cultural or religious norms around gender and reproduction are deeply entrenched, the law can both restrict and expand opportunities for reform.

The current state of literature in this area is considerably limited, particularly when it comes to understanding how strategic or public interest litigation can contribute to the expansion of abortion rights in African countries with restrictive political and judicial freedom. Although literature examining the role of strategic litigation in human rights and gender equality is extensive, its specific application to abortion rights reform in politically restricted regimes, particularly in the global south, remains underexplored. Understandably, existing literature has primarily focused on litigation for women's rights within democratic regimes, with research on how international human rights frameworks such as CEDAW and the Maputo Protocol intersect and interact with legal systems in politically restricted African countries remaining incredibly scarce. This thesis hypothesizes that strategic litigation for SRHR has the potential to lead to changes in abortion rights legislation and judicial precedents in politically restrictive regimes, especially if it draws on a combination of international rights frameworks and constitutional commitments. The belief that this hypothesis is worth investigating stems from the growing body of research that demonstrates how legal frameworks, even in restricted political environments, can provide pathways for social and legal reform. Drawing from Comack and Brickey, who discuss the law's dual role as an instrument of 'oppression and resistance', this thesis argues that rule of law can be leveraged to challenge restrictive abortion laws by setting judicial precedents and mobilizing public opinion.

Additionally, the strategies used by Women’s Link Worldwide as outlined in their analysis of strategic litigation for women’s rights, provide what they refer to as the *Four Condition Test* which assesses the viability of strategic litigation for women’s rights within a given political context: rights frameworks, independent judiciaries, civil society engagement and supportive networks. The conditions identified by Women’s Link Worldwide are an essential component in understanding how litigation can effectively be employed. However, these conditions are not always met in the case examples discussed in this thesis. Part of the contribution of this thesis will be to argue that while the *Four Condition Test* is valuable, exceptions exist, specifically in common law African countries. This thesis theorizes that these countries not only represent an exception to the widely accepted framework but also challenge the academic assumption that litigation efforts are futile in politically restrictive regimes. With adaptation, the test can be altered to reflect the realities of these legal systems, thus offering a more nuanced and tailored approach to strategic litigation for abortion rights in these contexts. By incorporating the *Four Condition Test* proposed by Women’s Link Worldwide, this thesis not only evaluates the potential for strategic litigation to expand abortion rights but also provides a framework to understand factors that contribute to its success or lack thereof in such regimes. The criteria established by Women’s Link Worldwide is not only theoretical but grounded in practical experience from strategies used by the organization's successful litigation for women’s rights in cases like Colombian Constitutional Court C-355/06, “which granted women the right to therapeutic abortion”(Mayall, Zampas, and Grimà Algora 2024).

This research also draws on feminist legal theory, developed by scholars like Sibongile Ndashe, Sylvia Tamale, Leslye Amede Obiora, Stephen Brickey, Elizabeth Comack, Cynthia Bowman, and Elizabeth Schneider. Brickey and Comack, in line with this thesis, argue in their paper on *The role of law in social transformation*, that the possibility of using legal systems to resist oppressive structures lies in the ability to not only strategically engage with

the law, but to leverage existing legal norms to promote social justice (Brickey and Comack 1987). Moreover, feminist scholars like Leslye Amede Obiora, Sylvia Tamale, Cynthia Bowman and Elizabeth Schneider have expanded on the idea that feminist legal theory should not only critique existing legal frameworks but proactively seek to transform them. Bowman and Schneider, in their investigation into the genealogy of feminist legal theory, argue that feminist legal theory has historically not only critiqued existing legal systems, but actively reshaped them through ‘feminist lawyering practices’. They refer to “spiral relationship” existing between theory and practice, where challenges faced by feminist lawyers in the courtroom lead to the development of new legal theories and practices, which in turn influence future legal action. This dynamic is crucial when it comes to understanding how strategic litigation can function as both a tool for immediate legal change and the foundation for reforming entire legal landscapes.

Additionally, attorney at law and scholar Eugene Manzi’s contributions to *In Search of Equality: Strategic litigation of women’s constitutional rights in Rwanda*, highlights the practical implications of applying strategic litigation within African common law systems, especially in the face of plural legal systems influenced by political and religious forces.

Additionally, Eugene Manzi’s contributions in *In Search of Equality* illuminate the practical implications of applying strategic litigation within African common law systems, especially in the face of judicial systems influenced by political and religious forces (Asimwe et al. 2014).

The approach taken in this thesis reflects the evolution of not just academic thinking concerning strategic litigation, but its practical application transnationally. Traditionally, strategic litigation was viewed primarily as a tool for advancing rights within democratic legal systems that enjoyed more judicial freedom. However, over time, legal activists have come to leverage its potential in more hostile and non-democratic environments where judicial freedom may be limited. This practical application informed the methodological approach

used in this thesis, which combines case studies from countries like Zimbabwe and Eswatini to examine how litigation has been successfully utilized in countries where existing academic research would have suggested it would be improbable.

## *UKEJE V. UKEJE (NIGERIA)*

### **Context:**

Nigeria's legal system is shaped by a combination of customary, statutory, and Islamic legal systems, which can sometimes conflict with each other; often creating additional barriers when it comes to cases involving gender biases. While the constitution and various statutes like the Wills Act guarantee non-discrimination, Islamic law and customary law, which can vary across ethnic groups, continue to play a major role in Nigeria's legal system, often disadvantageous to women. Women who marry under either legal system (customary or Islamic) have fewer legal protections compared to those who marry under statutory law, where civil marriages set out to protect the rights of women both during the marriage and outside of it, whether it be due to divorce or death. The difference in rights guaranteed to women is perhaps most evident in Nigeria's inheritance law frameworks, where the type of marriage, and whether or not the deceased left a will, largely determine which inheritance system applies. Unlike statutory law, which arguably promotes more gender equality, customary practices tend to follow the primogeniture system<sup>1</sup>, which often favors male heirs. Fortunately, in recent years, there have been significant interventions by the Supreme Court and the Court of Appeal that have challenged and in some cases struck down discriminatory

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<sup>1</sup> The Primogeniture system refers to a system of inheritance in which the property of the deceased is passed onto "their first born legitimate child upon their death" ('Primogeniture' 2025)

customs. One such example is the case of *Ukeje v. Ukeje*, which is widely recognised as a pivotal moment in the litigation of women's rights in Nigeria.

### **Litigation Strategies: Treaty-Based Arguments, Foreign Case Law, and Public Advocacy:**

Gladys Ada Ukeje, the respondent, had been excluded from her late father's estate solely based on her gender. The argument put forward by the appellants Mrs Lois Chitutu Ukeje and Enyinnaya Lazarus Ukeje ( her step-mom and half brother) made reference to Igbo customary law, which barred female children from inheriting property from their father. Despite providing proof of her paternity, Gladys was denied recognition in the administration of her father's estate, which ultimately forced her into court proceedings at the Lagos Supreme Court. The respondent's legal representation argued that the male-primogeniture system observed by Igbo customary law and brought forth by the appellants was unconstitutional in that it directly violated section 43(1)(a and (2) of the 1999 constitution. As is the case in most countries, the constitution supersedes all other laws and customs; therefore, the customary law being relied upon in this case was null and void. The Supreme Court upheld the constitution and ruled in Gladys' favour in what has become a landmark case in Nigerian history, as it not only reaffirmed the constitutional right of Nigerian women to inherit the property of their deceased parents, but it also effectively struck down the male-primogeniture system present in Igbo customary law (Fombad 2014).

What makes this case particularly interesting in terms of strategic litigation is that it challenged long-standing legal and social tensions and exposed contradictions within the Nigerian legal system. Under customary law, which varies slightly depending on the ethnic group, property rights had historically observed the male-progeniture system in spite Nigeria's ratification of international human rights commitments such as the Convention of

the Elimination of All Forms of Discrimination Against Women (CEDAW) and constitutional guarantees under Section 42(1) of the 1999 constitution, which criminalises discrimination based on sex.<sup>2</sup>06/05/2025 07:20:00 Before *Ukeje v. Ukeje*, attempts to challenge discriminatory inheritance customs in court had been fragmented and had varying outcomes, particularly in smaller courts where the plural legal system of customary, Islamic, and statutory law made litigation complicated. By explicitly invoking Section 42 of the Nigerian constitution, declaring that customary practices must submit to constitutional standards, the ruling marked a significant victory for women's rights as it would later be referenced beyond the scope of inheritance laws. The case also drew on the repugnant test, which is a common law principle that states that 'customary law must not be repugnant to natural justice, equity or good conscience.'<sup>3</sup>

### **Post-Litigation Legal Outcomes:**

The *Ukeje v. The Ukeje* case ought to be understood through the broader socio-political context of women's rights battles in Nigeria. Women's rights groups and advocates have for years worked tirelessly to challenge discriminatory laws and practices within the country's socio-political landscape, with organisations such as Women Impact Nigeria (WIN) and the International Federation of Women Lawyers (FIDA) campaigning against gender inequality and advocating for increased female representation within the country's political system.

Despite their efforts, legal victories such as this one are rare to come by and are often undermined by strong customary and/or religious resistance, particularly the further away you

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<sup>2</sup> According to UN Women, under CEDAW, discrimination is defined as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."(United Nations General Assembly 1979)

<sup>3</sup> The Doctrine of Repugnancy addresses contradictions within plural legal systems. It is generally applied when there are contradictions between two or more legislative frameworks "which when applied to the same facts, produce different results ('Doctrine of Repugnancy', 2023)

get from the main cities. In countries with plural legal systems such as Nigeria, where culture, tradition, and religion permeate the political sphere, governments and politicians alike are often reluctant to intervene in matters that involve any conflict between customs and law. Strategic litigation thus becomes one of the more viable options, meaning that civilians don't have to wait for politicians or governments to take on specific human rights issues when it suits them, but can empower themselves by pursuing litigation. Through litigation, women's rights activists and progressive lawyers can use constitutional interpretation as a tool for social change and leverage the judicial system to expose contradictions within legal frameworks.

## ***LAW ADVOCACY FOR WOMEN IN UGANDA V ATTORNEY GENERAL***

### **Context:**

The Constitutional Court of Uganda's decision in *Law and Advocacy for Women in Uganda v. Attorney General* marked a monumental moment in the history of women's rights litigation within the common law system, not just in Uganda, but on the continent as well. The case, brought forward by Law and Advocacy for Women in Uganda (LAW-Uganda) called into question the constitutionality of gender-based discrimination embedded in both Uganda's Penal Code and in sections of its Succession Act with the intention to expose legal structures that continued to perpetuate the unequal status of women long after Uganda's 1995 Constitution had criminalised discrimination based on gender.<sup>4</sup> The petitioner, LAW-Uganda, first challenged Section 154 of the Penal Code Act, which criminalized adultery for men and

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<sup>4</sup> Established by women lawyers in 1997, LAW-Uganda is an NGO that sets out to promote and protect the rights of women and girls. Rights guaranteed to them under the 1995 Constitution of the Republic of Uganda and the International Human rights Convention. ('LAW-Uganda' 2016)

women differently. Under section 154, married women could be prosecuted for committing adultery with any man, whereas men could only be brought to trial if they committed adultery with a married woman. As part of their second petition, LAW-Uganda contested Sections 27 and 43 of the Penal Code Act, which address the “distribution of property of intestate deceased persons” as well as the guardianship of children belonging to intestate deceased persons. At the time of litigation, Sections 27 and 43 did not include any instruction on the distribution of the property of intestate women, nor did they include instruction for women to choose a guardian should they pass on whilst their children are minors.<sup>5 6</sup> It is worth noting that the LAW-Uganda submitted these petitions with the backing of Professor Sylvia Tamale who is a well accomplished feminist legal scholar. Dr Tamale provided affidavits detailing the disputed laws structurally disadvantaged women in the country.

### **Litigation Strategies: Treaty-Based Arguments, Foreign Case Law, and Public Advocacy**

Through litigation, LAW-Uganda was able to lay bare the fact that parts of Uganda’s legal system did not align with its constitutional commitments to gender equality and gender equity. Their petition was part of a much larger wave of strategic public interest litigation in Uganda following earlier legal efforts and victories such as *Uganda Association of Women Lawyers & Others v. Attorney General (2004)* which disputed gender-discriminatory legislation within Uganda’s Divorce Act.<sup>7</sup> Women's rights litigators made emphasis on the fact that not only did the 1995 Constitution guarantee equality before the law, protection from degrading treatment, and non-discrimination within marriage and family relations (Uganda

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<sup>5</sup> The term ‘intestate deceased persons’ refers to people who pass away without having left behind a will.

<sup>6</sup> *Law and Advocacy for Women in Uganda v. Attorney General*, Constitutional Petitions Nos. 13/05 and 05/06 [2007] UGCC 1, 2–3

<sup>7</sup> LAW-Uganda challenged sections 2n (i) and (ii),14,15,23,26,29,43 & 44 of the constitution.

Association of Women Lawyers and Ors v Attorney General 2004).<sup>8</sup> Legal counsel, with the support of an affidavit provided by Jacqueline Asiimwe, CEO of CivicSource Africa and Board Chair of the International Center For Research on Women (ICRW), in their petition, cited the international human rights instrument to which Uganda is a signatory.<sup>9</sup> Perhaps most notably, they cited the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the African Charter on Human and Peoples' Rights, both of which set out to support and reinforce state obligations to address gender discrimination within the country (cite CEDAW & Charter). Legal counsel also supported their petitions by invoking several regional and transnational case rulings. Arguably the most notable ruling invoked by legal counsel was *Unity Dow v. Attorney General of Botswana [1992] LRC (Const.) 623*; a strategic litigation case brought to the High Court of Botswana by human rights lawyer Unity Dow. Dow successfully convinced the court that in not allowing married women to pass on their citizenship to their children as it did for men, Botswana's Citizenship Act discriminated against women and thus violated constitutional commitments.

### **Post-Litigation Legal Outcomes:**

The reference to cases like *Unity Dow v. Attorney General* and *Pyrali Esmail v. African Sibbo (Uganda)* arguably reflects a deliberate strategy of not only using African constitutional jurisprudence to persuade courts, but also leveraging the power of the common law system to set judicial precedent ('Attorney General v. Unity Dow' 1992; Pyrali Abdul Rasul Esmail v

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<sup>8</sup> Uganda Association of Women Lawyers and Ors v Attorney General (Constitutional Petition No. 2 of 2003) [2004] UGCC 1 challenged gender discrimination within the Divorce Act that at the time did not grant both sexes equal access to the grounds of divorce.

<sup>9</sup> Through litigation by Uganda Association of Women Lawyers (FIDA), the court not only ruled that Sections 4, 5, 21, 22, 23, 24 and 26 of the Divorce Act were unconstitutional, but the victory included remedies such as the applicability of "compensation for adultery, co-respondent costs and alimony" regardless of gender.

Adrian Sibbo 1998). State counsel initially defended the contested provisions, arguing that instead of completely striking down the contested legislation, the court could instead modify them under Article 274 of the constitution which allows courts to interpret legislation made before the 1995 Constitution in a way that aligns with the constitution.<sup>10</sup> <sup>11</sup>Fortunately, the court rejected state counsel's argument, asserting that its role would be to determine constitutionality, not rewrite legislation. In its final judgment, the court ruled that because Section 154 of the Penal Code contradicted Articles 20,21,24,31, and 33 of the constitution, Section 154 was unconstitutional and thus declared void. Similarly, relevant sections of the Succession Act involving inheritance, guardianship, and matrimony were also declared unconstitutional as they not only contradicted constitutional commitments but reinforced patriarchal norms that excluded women from full recognition within the judicial system.

In a legal climate where customary, statutory, and Islamic legal biases continued to shape the realities of women in Uganda, the court's decision sent a clear message that vestigial discriminatory laws would not survive under the country's new constitutional order. By opting to completely strike down the contested provision as opposed to modifying it, the court not only demonstrated the power of the constitution to challenge long-standing and deeply entrenched legal inequality but also situated itself within the realm of judicial activism.

Both socially and politically speaking, the ruling was indicative of a wave of legal activism that broke out in East Africa during the 2000s, which saw activist organizations increasingly relying on courts and judicial systems to challenge gender inequality. As Eugene Manzi,

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<sup>10</sup> Judicial courts have the power to 'modify' contracts, statues and laws by creating amendments or adding to existing legislation('Modification' 2023)

<sup>11</sup> The problem with reinterpreting or modifying legislation such that it fits the constitution is that it is a temporary band-aid and a bad one at that. Modifying legislation not only means that discriminatory provisions can continue to exist on paper, but that legislation can be interpreted on a case by case basis which often leads to inconsistent application. This tension between judicial restraint and judicial activism is a very fine line to toe for both the judiciary and legal counsel.

Attorney at Law, noted in a chapter on *Strategic litigation of women's constitutional rights in Rwanda*, “the objectives of strategic litigation are achieved through the establishment of effective and enforceable law. By creating a record of official practices, strategic litigation documents institutionalized injustice, thereby laying the foundation for future efforts”. *Law Advocacy for Women in Uganda v Attorney General* is evidence that even within politically restrictive regimes with plural legal systems, rule of law can be leveraged through litigation to expand the rights of women (‘Uganda Association of Women Lawyers and 5 Others v. The Attorney General’ 2004).

### ***MUDZURU & ANOTHER V. THE MINISTER OF JUSTICE (2016)***

#### **Context:**

In 2016, the Constitutional Court of Zimbabwe delivered a landmark ruling that declared child marriage unconstitutional. *Mudzuru & Another v. Minister of Justice* was a case brought under section 85(1) Amendment (No.20) of the Constitution of Zimbabwe in 2013 by two young women, Loveness Mudzuru and Ruvimbo Tsofodzi. Although neither Loveness nor Ruvimbo were married at the time, they petitioned the Court in the interest of the public to challenge section 22(1) of the Marriage Act, which allowed girls to marry at the age of 16 with ministerial consent, while boys could only marry at the age of 18. Their petition also challenged the Customary Marriages Act, which did not state a minimum age requirement, thus implicitly allowing child marriage in the country. This case was strategic not only in its framing for systemic reform, but in the way that it leveraged constitutional commitments and international human rights frameworks to address culturally and legislatively sanctioned human rights violations. The appellants argued that in permitting child marriage, the contested legislation violated Sections 78(1) which allows for any person age 18 and older to start a family and Sections 8(1) of the 2013 Constitution which outlines the rights of children, which

includes amongst other things, the right to protection from economic and social exploitation and from any form of abuse. The appellants argued that section 85(1) Amendment (No.20) not only violated constitutional commitments but also perpetuated systemic discrimination and harm against girls.

### **Litigation Strategies: Treaty-Based Arguments, Foreign Case Law, and Public Advocacy**

Represented by the Attorney General, the respondents contested the appellants' entire standing by arguing that, because both petitioning parties were legal adults, unwed and childless, they lacked locus standi under section 85(1)(a)<sup>12</sup>. Fortunately, the Court rejected this narrow interpretation and instead relied on section 85(1)(d), which allows anyone acting in the interest of the public to approach the Court with issues that affect said public. The justices highlighted the fact that "the primary purpose of [section 85(1)(d)] is to ensure effective protection to any public interest shown to have been or to be adversely affected" by a violation of fundamental rights. Consequently, the court found it unnecessary for the appellant or appellants to have personally suffered the infringement brought to the Court. After having dismissed the Attorney General's first claim, the Court then turned to the material of the constitutional claim. It held that section 78(1), when read in conjunction with section 81(1), outlines an absolute ban on child marriage in Zimbabwe. The Court reasoned that the right to start a family can only be exercised by persons legally recognized as adults, which the Constitution defines as persons age 18 and older. Consequently, the court ruled that any law,

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<sup>12</sup> **Locus standi** refers to the right or capacity to bring an action or to appear in a court. In this particular case, the Attorney General was essential arguing that because neither party was directly affected, they had no place to bring this case to court ('Locus Standi' 2025)

custom, or practice that allowed marriage for persons under the national legal age is unconstitutional and therefore null and void (pg.33). As was the case in *Unity Dow v. Attorney General of Botswana*, the Constitutional Court of Zimbabwe crucially chose not to interpret the Constitution in isolation, meaning that the Court's decision would set a precedent for all future cases involving child marriage (*Mudzuru & Another v Ministry of Justice* 2016).

### **Post-Litigation Legal Outcomes:**

Tendai Bit, Lawyer and former Minister of Finance, represented Loveness and Ruvimbo in the court proceedings. His involvement in the case brought not only legal expertise, but public visibility to the case as media outlets heavily reported on case details, reinforcing the strategic character as a public interest case. Both the Court and Counsel situated their analysis and argument within Zimbabwe's international legal commitments and obligations. Citing human rights frameworks such as the:

- Convention on the Rights of the Child (**CRC**)
- Convention on the Elimination of All Forms of Discrimination Against Women (**CEDAW**)
- African Charter on the Rights and Welfare of the Child (**ACRWC**),

all of which define age eighteen as the minimum legal age for marriage and stipulate that individual State Parties must take the necessary action to prohibit and prevent child marriage (p. 22-24). The Court also referenced Article 16(2) of CEDAW, which explicitly states that “the betrothal and the marriage of a child shall have no legal effect” (p.31). The appellants' legal counsel also referenced Section 26(a) of the Constitution, arguing that it strengthens the argument for a complete ban on child marriages by requiring all marriages to be entered into with the free will and full consent of both parties. Given that the national legal age was set to

eighteen, no one under the age of 18 could be presumed to have the legal or emotional maturity to give consent, much less enter into a marriage. Given the provisions of Section 26(a), allowing child marriage would not only violate their right to dignity and protection under the law, but would also violate their right to freely choose whether and whom they marry.

Although in this particular case, litigation was initiated by two individuals and not a legal firm or human rights organization, it is still classified as a victory for strategic litigation given that the case was brought to court with the specific intention for the ruling (if in their favor) to expand the rights of not just a single individual but of all girls living in Zimbabwe. In refusing to reinterpret the contested legislation, the Zimbabwean Constitutional Court, much like the Ugandan Court, displayed acts of judicial activism, sending a strong message about the superiority of constitutional law over customary law.

### ***ATTORNEY GENERAL V APHANE (2009)***

#### **Context:**

The 2009 case of *Attorney General v. Mary-Joyce Doo Aphane* in the Supreme Court of Eswatini (previously known as Swaziland) stands as a legal marvel and formative moment in the intersection of gender equality, strategic litigation and land rights in Southern Africa. The case, brought to the court by Women's right advocate and Lawyer Mary-Joyce Doo Aphane, challenged Section 16(3) of the Deeds Registry Act of 1968 which barred women married under community of property from owning land in their own names or mutually with their spouse. The respondent, Ms Doo Aphane had tried to register property jointly acquired by her and her spouse under her maiden name (which she had used throughout their marriage) and that of her spouse. When informed that the law currently barred such registration, Ms Doo

Aphane filed a case with the Supreme Court of Eswatini, arguing that Section 16(3) violated her fundamental human rights (*The Attorney-General v. Mary-Joyce Doo Aphane*, 2010).

This case is of particular significance to me because it originates from my home country, Eswatini, an absolute monarchy in which the king holds significant influence over all branches of government, including the judiciary. Growing up hearing about this case is in fact what sparked my interest in following this line of research. Witnessing what is considered a pretty progressive ruling given the socio-political climate, emerging from what remains a largely conservative and patriarchal state, revealed to me the potential for courts, even in politically restrictive regimes, to serve as meaningful stepping stones for social and legal reform. The case challenged my assumptions about the limitations of litigation and planted the earliest seeds of this thesis on strategic litigation in common law countries.

### **Litigation Strategies: Foreign Case Law and Public Advocacy**

Ms Doo Aphane's claim was introduced under Section 20 and 28 of the 2005 Constitution of the Kingdom of Eswatini. According to the constitution, Section 20 guarantees equality before the law and protection against discrimination. Section 28 guarantees women's right to 'equal treatment with men in all spheres, including economic and social life'. She argued that the Deeds Registry Act, along with the practices codified and therefore condoned, not only violated women's right to dignity and equal treatment under the law but also actively discriminated against them. In an affidavit she submitted before the court, Ms Doo Aphane expressed her dissatisfaction with being denied the right to register her property in both her last name and her spouses, both of which she argues, were her 'expressions of personal identity and marital equality'.

## Post-Litigation Legal Outcomes:

Unlike in the aforementioned cases in Nigeria, Uganda and Zimbabwe, the court, although ruling in her favor and declaring parts of Section 16(3) unconstitutional, initially chose to reinterpret the contested provision to align with the Constitution. Had this decision remained unchallenged, cases involving Section 16(3) would have to be argued on a case-by-case basis, which often leads to inconsistent outcomes. The Attorney General appealed against the appropriateness of the remedy, arguing that the High Court had exceeded its judicial limits by “legislating from the bench”. The appellant argued that the court should have withheld any declaration of validity or lack thereof and instead should have given Parliament the option to amend the contested legislation. The Supreme Court sided with the Attorney General's argument and ultimately left the decision up to the Parliament's purview. In response to the ruling, the Parliament amended the Deeds Registry Act in 2011 so that it was in line with constitutional commitments. As of July 2011, women married in community of property in Eswatini are legally allowed to register property in their own maiden names and/or jointly with their husbands.

An interesting detail in this case is that the Court referenced foreign jurisprudence in countries like Canada and South Africa, both democracies. For example, both parties cited *R v Big M Drug Mart Ltd* (1985), which struck down restrictive laws on abortion in Canada, and *President of South Africa and Another v. Hugo* 1997, a case about equality and presidential discretion. The court's engagement with foreign jurisprudence concerning cases on constitutional remedies and gender equality demonstrates not just the courts' willingness to participate in judicial activism, but also the permeability of legal action across common law jurisdictions. This shows that strategic litigation efforts have the potential to not only influence local legal landscapes but also impact transnational legal landscapes as well.

## *STRATEGIC LITIGATION FOR ABORTION RIGHTS*

### **Context:**

The success of litigation efforts in cases like *Attorney General v Aghane*, as in other cases examined in this thesis, is deeply rooted in their common law context. To understand the following argument, there are a few key aspects of the common law system that one should understand:

- The common law system, unlike the civil law system, is uncodified. This essentially means that in a common law system, laws are not written down on a single document, but are rather spread out across multiple sources such as statutes, court decisions, customary practices, and constitutional provisions
- Given that common law systems are uncodified, they rely heavily on precedents from similar cases when it comes to establishing legal norms (Shiddiky 2025)
- Common law systems follow the **stare decisis** doctrine, which allows the rulings of constitutional courts to serve not just as remedies for individual cases, but as legally binding or, at the very least, significantly persuasive rulings for lower courts and for the use of future litigants ('Stare Decisis' 2021)

### **Consequences**

In countries where precedent carries legal leverage, a single ruling can alter the interpretation and implementation of laws across future cases. This, of course, is a double-edged sword. The same flexibility and predictability that lends itself to the advantage of litigants can backfire. For instance, when lower courts are bound to unconstitutional decisions made by higher courts, or when a single conservative ruling has a domino effect on the legal landscape and perpetuates injustice. Yet, it is precisely the same doctrine of stare decisis that makes the

common law system particularly suitable for strategic litigation, especially when traditional legislative reform is either unresponsive or politically constrained.

### **The four cases examined in this thesis:**

- Zimbabwe: *Mudzuru & Tsopodzi v. Minister of Justice*
- Uganda: *Law & Advocacy for Women in Uganda v. Attorney General*
- Nigeria :*Ukeje v. Ukeje*
- Eswatini: *Attorney General v. Aphané*

all came from common law jurisdictions. Across all four cases, litigants relied heavily on constitutional rights frameworks and international human rights frameworks to challenge gender discrimination within their respective legal systems.

Such frameworks, supported by legal doctrines like the repugnancy clause in Nigeria and the ratification of international human rights agreements like CEDAW, provided legal avenues simultaneously to address individual grievances whilst expanding the rights of a much broader group of people. In *Ukeje*, the court reaffirmed the supremacy of constitutional equality over customary legislation, explicitly invoking Section 42 of Nigeria's 1999 Constitution to strike down Igbo male-primogeniture (*Ukeje v. Ukeje*, 2014). In *Mudzuru & Another v. Minister of Justice*, the Zimbabwean Constitutional Court declared section 22(1) of the Marriage Act unconstitutional for allowing child marriage. Basing its decision on Sections 78 and 81 of the 2013 Constitution, the court confirmed that even culturally accepted norms must conform to constitutional protections (*Mudzuru & Another v Ministry of Justice* 2016; United Nations General Assembly 1979).

## ***CROSS-CASE ANALYSIS***

What links all four cases is not just their tactful use of strategic litigation, but their ability to leverage the advantages of the common law system within their respective jurisdictions. In each country, both legal counsel and courts relied on a combination of previous rulings, international human rights frameworks such as **CEDAW**, **CRC**, **ACRWC**, and the **Maputo Protocol**, and in some cases, referencing international jurisprudence, as was in *Unity Dow v. Attorney General of Botswana* in *Law and Advocacy for Women in Uganda*. This receptivity to transnational legal reasoning is a characteristic of the common law system in that, by having an uncodified structure, the system lends itself to progressive interpretation through case law.

In politically restrictive regimes where legal reform is either slow, politically impossible, or discouraged entirely, the judiciary, even with limited power, can still be an avenue through which reform can be initiated. The Doo Aphane ruling is an example of what strategic litigation can do even within non-democratic countries. The court not only ruled in Ms Doo Aphane's favour but when prompted to, deferred to the Parliament for a remedy, effectively exercising constitutional authority; a huge feat in a country where the absolute monarch holds significant power over all branches of government (*The Attorney-General v. Mary-Joyce Doo Aphane*, 2010).

These cases demonstrate that strategic litigation aimed at advancing abortion rights and reproductive autonomy does not need to begin from ground zero. The legal infrastructure from the constitutions, court systems, and relevant precedents already exists. Arguments grounded in constitutional rights to equality, dignity, and non-discrimination have already been accepted by African courts in matters of inheritance, marriage, and personal autonomy.

Extending those arguments to challenge abortion restrictions is a logical and legally possible next step.

Litigators working within common law African countries can build upon existing rulings that have already affirmed women's rights and constitutional supremacy. Contrary to what a majority of academic literature on strategic litigation suggests, litigation does not require perfect political conditions. Instead, it requires legal creativity, constitutional grounding, and a judiciary willing to act within its interpretive mandate. The cases examined here illustrate that the groundwork has already been laid. What remains is for women's rights advocates to extend the legal logic of those victories into the domain of abortion rights reform.

### *CONCLUSION*

This thesis set out to investigate whether strategic litigation could contribute to abortion law reform and precedent in common law African countries with politically restrictive regimes. While limited by word count and scope, it has demonstrated that litigation, even in authoritarian or partly-free regimes (as defined by Freedom House), holds more potential than is often commonly assumed. Drawing from landmark gender justice cases in Nigeria, Uganda, Zimbabwe, and Eswatini, the research shows that feminist legal gains have already been made through national courts using constitutional arguments, international treaties, and strategic framing. These cases, though not in the realms of abortion legislation, illustrate those legal systems, even when shaped by patriarchal, religious, or conservative customary norms, are not beyond radical reform.

While not all elements of the Four Condition Test met in these case studies, their outcomes reveal that common law systems offer unique opportunities for legal advocacy, particularly due to their reliance on precedent and openness to transnational jurisprudence. The fact that

constitutional courts have previously upheld progressive women's rights rulings even in highly conservative environments such as Eswatini, suggests that the legal infrastructure exists for extending these arguments to abortion rights. This thesis does not claim that strategic litigation is the ultimate answer or the *raison d'être* of all women's rights struggles. It instead argues that abortion rights litigation in politically restrictive regimes need not start from ground zero; rather, it can build on victories of strategic litigation cases such as the ones mentioned in this thesis. While unable to exhaust some of the nuances of strategic litigation and abortion reform, with this thesis I dare to place the question of legal possibility back on the table. After all, what is the value of law if its promises of justice, dignity, and equality only hold true in so-called ideal conditions? If we abandon its possibilities in politically restrictive regimes, we abandon its promises.

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