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**THE ROLE OF CHIEFS' COURTS IN WOMENS' ACCESS TO JUSTICE: A CASE  
STUDY OF THE COURTS OF CHIEF MAKONI, CHIEF SEKE AND CHIEF  
CHIMOYO IN ZIMBABWE**

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## **Abstract**

The question posed by the lawyer who writes this dissertation on women's access to justice is: How does Zimbabwe enhance the quality of justice administered by its informal local/traditional/customary Law Courts, whilst simultaneously taking heed of universally acknowledged human rights principles, including gender equality (which are more readily associated with the more formal of its Law Courts, e.g., its Magistrates, High and Supreme Courts)? Adopting an open-minded and gender-sensitive stance to this question, the writer conducts hands-on and scientifically rigorous research into the internal and external workings of 3 Courts of Shona Chiefs situated in both rural and urban settings of Zimbabwe. Key to her research and insights is the crucial relationship of mutual trust and respect she has actively nurtured over the years with these communities in her capacity as an employee of an NGO, the Zimbabwe Women Lawyers Association, offering free legal advice to indigent women and children. Her findings uniquely draw upon her observations of court proceedings, either as a silent witness or invited by their Chief to assist the Court and/or its litigants in an advisory capacity. She actively reports on several fascinating court cases and African customs which touch on issues of maintenance, domestic violence, inheritance and witchcraft in which she highlights the vital factors which impact upon the decision of women to access either the Chiefs' or the Magistrates' Courts or both. She effectively invokes several methodologies, especially the grounded theory and human rights approaches, guided throughout by the unique Women's Law Approach to gather, analyse and present a vast array of data (verbal, legal and literary) from a number of key sources both inside and outside court settings, including litigants, adjudicators, government and NGO officials. To her surprise she finds that some of the factors which she initially assumed might necessarily prejudice the quality of justice received by women in Chiefs' Courts (e.g., all male adjudicators; gendered dress and seating arrangements) seemed to matter less to them than the manner in which Chiefs conducted their proceedings. Most well-respected and sought-after Chiefs were those (1) who demonstrate adequate knowledge of both customary and general law and work well with other adjudicatory/advisory bodies; and (2) who empathise well with litigants and emphasise the human right qualities of the customary laws they apply; and, finally, (3) whose judgments succeed in maintaining the harmony of the community because they are the product of the full participation and consensus of its most affected members. Finally, the writer suggests that public trust and confidence in the entire judicial system would improve if the formal court structure took several recommended steps, based on a model emerging from the research, to forge and maintain closer ties with universally respected Chiefs' courts.

**Declaration**

I Abigail Matsvayi certify that this dissertation is my original work; it is an honest and true effort of my personal research. I certify that the work has not been presented anywhere else before for any other thesis.

Signed.....

Date.....

This dissertation was submitted for examination with my approval as the University Supervisor

Signed.....

Date.....

**Dedication**

This work is dedicated to my husband Wellington. Thank you for the stimulating debates we had and your unwavering support throughout this process as we took long drives to the Chiefs' Court. You are the best.

To my family thank you for your words of encouragement, they always seemed to come when I needed them the most. Thank you for believing in me.

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To my Supervisor Professor J.E Stewart, thank you for your words of encouragement as I worked through this write up converting it from a mammoth task to something I could do. Your patience is unbelievable.

To my classmates, I will cherish the memories we made and will surely miss you all.

## **Acronyms**

ZINATHA	Zimbabwe National Traditional Healers Association
ZWLA	Zimbabwe Women Lawyers Association
HIV	Human Immune Deficiency Virus
COPAC	Constitutional Parliamentary Select Committee
CSOs	Civil society organisations
DVA	Domestic Violence Act
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
GPA	Global Political Agreement

## Definition of Shona Terms

<i>Kuchenurwa</i>	A process by which ZINATHA consults the spirits to ascertain the presence of witchcraft.
<i>Kugata</i>	A customary process where, after the death of someone, if the family suspects a mysterious death they consult a <i>n'anga</i> (traditional doctor) to establish the cause of death.
<i>Kuperekwa</i>	The <i>kuperekwa</i> process describes the following. After the traditional marriage ceremony has occurred, the girl is taken by her aunts and presented before her husband and his family. At times they leave her in her husband's bedroom to signify the start of sexual relations between the two.
<i>Kutema nyora</i>	Traditional marks that are cut on different parts of the body and to which traditional medicine is applied for different purposes.
<i>Lobola/Roora</i>	bride wealth
<i>Masungiro</i>	When a woman gives birth she is supposed to go to her maternal home to receive care and support whilst she is recovering from the childbirth process. The timeframe of the duration of her stay varies from place to place but it is usually a minimum of one month. After this period the husband comes to collect his wife and conducts a process of <i>masungiro</i> where he gives his wife goats as a token of thanks.
<i>Mombe yeumai</i>	The cow given to the mother of the bride during the <i>roora</i> ceremony.
<i>Muroyi</i>	witch /wizard
<i>Mukwasha</i>	son-in-law
<i>N'anga</i>	traditional healer

<i>Tete</i>	paternal aunt
<i>Tsikamutanda</i>	a person who has the ability to detect and cast away evil and avenging spirits.
<i>Dhuku</i>	head scarf/traditional head cloth
<i>Zambia</i>	traditional African cloth



**Statutes cited**

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The Domestic Violence Act

Criminal law Reform and Codification

Deceased Estates Act

The Customary Law and Local Courts Act

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## CHAPTER 1

### 1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.1 Introduction



**Figure 1:** A photograph of Women and Men waiting to attend Chief Makoni's Court in Rusape.<sup>1</sup>

The above picture illustrates the reality I found whilst conducting this research and that reality is that women are the main users of Chiefs' Courts. What I came to realise from the research was that women in Rusape used a blend of both the Chiefs' Courts and Magistrates' Courts in order to get appropriate redress for their problems, be it compensatory damages, referrals to the ZINATHA group in cases of witchcraft, the censoring of certain unacceptable behaviour and maintenance orders. The reality of women's lives is that they need wide-ranging remedies (such as those listed above) which neither the Chiefs' Courts nor Magistrates' Courts alone can provide. Women use them in combination with each other in order to solve their problems. The women's use of these Courts in this complimentary

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<sup>1</sup> A photograph taken during my Court monitoring visit.

manner made me realise the extent of the social value of the Chief's Court within society and the high regard in which women in particular hold it in terms of dispute resolution. I asked myself the question: Is there any real justice being served within the system of traditional Chiefs' Courts? Is there any real justice being served by a system that many have criticised, quite rightly at times, as a structure that administers customary law which is often oppressive to women and at odds with the current human rights discourse? The issue of Chiefs and other traditional leaders within the Zimbabwean context becomes even more complex when politics is added to the mixture. Even while I was writing up this research much negative publicity was in the newspapers following the Chief Annual Conference held in Bulawayo (Zimbabwe's second largest city). For instance, the Prime Minister was about to appeal against a Chief's Court order<sup>2</sup>. See also Figures 2 and 3, below:



**Figure 2:** Newspaper article, "Replace Chiefs with qualified personnel", The Standard, 11-17 March 2012.

<sup>2</sup> A case in which the Prime Minister M.Tsvangirai was summoned to Chief Negomo's Court to answer questions about his controversial marriage to Locadia Tembo. He was charged with marrying her in the month of November which is a taboo in Shona culture. The Chief convicted the Prime Minister (in his absence) and ordered him to pay 2 cows and 2 sheep for violating the taboo (Daily News, 11 March 2012).



**Figure 3: Letter to editor, “Chiefs must stop bootlicking”, Newsday, 22 March 2012.**

Given this background, many people are understandably sceptical about the importance of Chiefs’ Courts to citizens desiring to access justice. Many question how good can the justice administered by Chiefs be if they have no legal training and have the right to judge others simply by virtue of possessing a royal birthright? Surely a litigant would be better off in a formal Court that has a presiding officer who has a legal background and is knowledgeable about human rights? This research will take you on an eye-opening journey which, I hope, will convince you, as it did me, of how some of our most progressive Chiefs are, on their own initiative, already modelling their Court systems and procedures based on an amalgam of human rights, general law and positive customary law. Admittedly, although not all Chiefs are doing this and remain quite traditional in their outlook, the empirical data collected clearly shows the emergence of a model that can positively influence and change its more traditional leaders and structures.



## 1.2 Background to the Study

I developed a keen interest in the research topic well before I officially acknowledged this was what I wanted to gather empirical data about. In 2008 whilst working for Zimbabwe Women Lawyers Association (ZWLA) I started working on a project of conscientising the judiciary and traditional leaders on the newly enacted Domestic Violence Act<sup>3</sup>. The project meant working with institutions such as the Magistrates Courts as well as the traditional institutions such as the Chiefs Courts to ensure that these adjudicators were well versed in the newly enacted legislation. Conducting training sessions and workshops with those from the Magistrates' Courts who had a legal background was easier than having to engage with the Chiefs on contentious issues, such as domestic violence<sup>4</sup> and harmful cultural practices that were being outlawed by this legislation.

Sometime in 2010 ZWLA partnered with the Ministry of Justice, the Judicial Services Commission and other non-governmental organisations in a project seeking to establish a Family Law Court. The project was a follow up to an administrative decision made by the Judge President<sup>5</sup>, as she then was, which established a pilot Family Law Court at the High Court. The establishment of a specialised Court would ensure family law cases are dealt with expeditiously in a simple and non-intimidatory manner. Once the relevant legislation is enacted that will formally establish this Court, it would be implemented in other areas as well as in the Magistrates Court. Since Chiefs' Courts already preside over family law cases, they should also be part of this specialised Court structure. A lot of controversy and debate is still going on about how to appropriately incorporate the Chiefs' Courts within this formal structure. At one meeting I attended, the Chiefs stressed the Chiefs Courts should be like a Family Court in the High Court so that their court judgements can go on appeal to the High Court. They argued that Magistrates had no knowledge of customary law. The lawyers objected to this on the basis that it is not feasible to have a Court of no record and which excludes lawyers being placed at such a high level within the formal Court structure. As the debate ensued, I became increasingly interested in wanting to know what really transpires in the Chiefs' Courts.

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<sup>3</sup> Chapter [5:16] of 2007.

<sup>4</sup> In the sense that the customary existing perceptions and attitudes about violence that made it acceptable as the common saying goes '*kurova mukadzi rudo*' ('beating your wife is a sign of love').

<sup>5</sup> The Honourable Mrs Justice Rita Makarau.

As a person who advocates for the full recognition of women's human rights through litigation on behalf of indigent women, I am aware that women do not always approach formal institutions to vindicate their rights. As a matter first recourse they approach other power-wielding institutions such as the family, the church and the traditional Courts, such as the Chiefs' Courts. I am also aware of the challenges and complexities that women face in accessing justice within formal Courts such as the language barrier (English is the official language of the Courts and for most African indigenous people it is a second language), the high cost of litigation and the foreign and intimidating atmosphere of formal Court proceedings (ZWLA 2006). All these areas of interest encouraged me further into wanting to find out how women were faring within an alternative Court system such as the Chiefs' Courts.

### **1.3 Statement of the Problem**

In most cases, when one speaks of 'access to justice' the focus is on the formal as opposed to the less formal justice system such as traditional Courts such as Chiefs' Courts. As a consequence these latter Courts are seldom considered and left to develop on their own. Traditional systems are often seen as archaic, backward and having rigid practices that are not amenable to modernization or development. (Chirayath .et.al 2005). Yet the reality is that these systems are constantly changing and reinventing themselves to suit the people's needs.

Zimbabwe, like many other African countries, has a pluralistic legal system which uses and recognises the existence of multiple sources of law. The most commonly identified is the dualist system of application of both customary law and general law. These pluralities give rise to certain conflicts as a result of the interaction of the different sources of law, although there is no reason why the two may not co-exist and complement each other. The existence of plurality in customary law recognises the concept that customary law is both a living legal dynamic which is ever changing and is also partly codified.

Zimbabwean general law is derived from statutes, case law, legal texts and is recorded whilst customary is not recorded and exists in the minds and behaviours of the people it governs (Stewart et al 1990). Customary law is difficult to ascertain as it is not written and as

such it is wrongly perceived as being backward. Justice is essentially delivered for many through traditional forums of dispute resolution, yet many do not treat these systems as critical to African legal development (Tsanga 2011). The informal means of dispute resolution are not seen as core issues such that the official access to justice in the formal Court system is treated as the core system yet for those who are entitled to access it, it remains foreign and alienating.

Many women have suffered at the hands of formal justice systems because they fail to overcome their many challenges, including their general complexity, expense, inaccessibility and the fact that all communication may be carried out in a foreign language. Seemingly more have also suffered at the hands of customary law being used in a manner that oppresses and discriminates against women. When it comes to access to justice women find themselves at the crossroads of interlocking oppressions<sup>6</sup> where issues such as class, educational status, gender and economic status to mention but a few can affect one's ability to access justice. One's gender unfortunately may determine how you are will be treated in Court as you attempt to vindicate your rights; your class affects which Courts you are able to access because of your financial means and your educational status affects your ability to converse and give evidence and understand complex Court procedures.

The Customary Law and Local Courts Act<sup>7</sup> defines customary law as:

*The customary law of the people of Zimbabwe or any section or community of such people, before the 10<sup>th</sup> of June 1891, as modified and developed since that date.*

It is important to understand the distinction of customary law that at times is perceived to be static and living customary law that is dynamic and ever changing. The latter part of the definition of customary law given above tries to capture its evolutionary aspect. Nyamu-Musembi notes that:

*Local custom can be analysed as both ideology and day to day social practise. What is said to be custom is often a partial truth, whose completeness can only be observed or experienced in actual social interaction. Local practices are varied, as are people's opinions of what is 'customary' in specific situations. Therefore what people actually do in day to day interactions with each other is more revealing of cultural*

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<sup>6</sup> Intersectionality.

<sup>7</sup> Chapter 7:05 as amended. And see Statutory Instrument Number 2 of 1990.

*norms. The ideology contained in assertions of culture will often fail to capture all of social reality.*

Customary law has failed to enjoy the same prestige as human rights .When decolonisation began in Africa, not only were the arbiters of law and development convinced that human rights were a superior value system but they also believed that an inexorable process of acculturation would eventually result in the westernization of all people. (Bennett 1999: 1). One of the key areas of debate in relation to traditional and informal justice systems is whether justice can be made more accessible by encouraging such systems, by adopting or transforming some of their processes or by facilitating a more collaborative approach between such systems and formal justice systems (Stevens 2000).

The fact that the majority of the Zimbabwean population lives in the country's rural areas where customary law is at time the closest or the only avenue to access to justice through the Chiefs' Court structure is reason enough for the need to acknowledge this structure. To this end this research seeks to unearth a means of improving women's access to justice particularly within the traditional Court structures such as Chiefs' Courts. Interventions within the informal justice system must not be neglected but rather encouraged as a component of an overall determination to improve access to justice particularly for the poor or marginalized groups (FIDA Kenya 2010).

#### **1.4 Aims and Objectives of the Study**

In conducting this research the aim was to assess the reality of women's access to justice in the traditional Courts in this human rights era.

#### **1.5 Objectives of the Study**

The objectives of this study were to:

1. To analyze the nature of women's access to justice in selected Chiefs' Courts.

2. To examine the procedures followed in the Chief's Courts so as to ascertain the advantages of such procedures for women in their quest to access justice.
3. To ascertain the cost implications of accessing justice in the Chiefs' Courts.
4. To ascertain the extent to which women get appropriate remedies in the Chiefs' Courts.
5. To come up with relevant and appropriate recommendations on how non-governmental organisations can engage with the Chiefs' Courts.
6. To come up with recommendations on how to improve women's access to justice.

#### **1.6 Mapping the Research Areas**

From the outset there was a need to demarcate the areas of research and the particular Courts upon which to focus. Firstly there is a need to understand that when you talk of traditional Courts, the structure includes the paramount or substantive Chief, the local Chiefs and the headmen, all of who have adjudication roles and powers within the community. Therefore the reality that I was confronted with was that there are numerous Courts that exist. The official number is: 271 Chiefs' Courts and 474 Headmen as well as other unofficial structures, all which adjudicate on cases in their areas. There was a need to streamline and focus on what was possible to investigate meaningfully within the given timeframe of the research. I decided to focus on the paramount<sup>8</sup> Chiefs as they are the overall Chief in the area commonly known as *ishe* and their Court acts as an appeal Court as well as that of a court of first instance. Moreover the paramount Chief plays an oversight role of the other local Chiefs commonly known as *mambo* within the community.

Having decided to focus on the paramount Chief's Court I identified the following areas as focus areas Seke, Mutoko and Rusape. The focus on Chief Seke was prompted by the reality

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<sup>8</sup> The use of the name 'paramount Chief' in this study denotes the 'head Chief'. The reason for this is that some of the Chiefs were acting Chiefs, though officially they are called substantive Chiefs once they are sworn in.

of its proximity to Harare and the need to investigate more of what was happening in this Court having interacted, through my ZWLA work, with women taking the Chief's judgement on appeal at the Magistrate's Court. It also offered an opportunity to compare a Court about 40km from the capital city with those from the rural areas such as Mutoko. Mutoko and Rusape are areas where ZWLA works in and has worked with these Chiefs before and as such it provided an ideal entry point into them. Chief Chimoyo's Court is found in Chisambiro Village in Mutoko whilst Chief Makoni's Court is located in Rusape town in close proximity to Rusape Magistrate's Court.

What also influenced the mapping exercise was the need to juxtapose Chiefs of different age groups, different professional backgrounds and the impact of these characteristics on their application of customary law. Chief Seke is the oldest<sup>9</sup> of the three Chiefs and applies customary law in the traditionalist sense. Chief Makoni and Chief Chimoyo are middle-aged Chiefs<sup>10</sup> with professional backgrounds; for instance Chief Chimoyo is a manager at Edgars, a clothing shop in Harare, and Chief Makoni is educated to degree level.

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<sup>9</sup> By observation he is aged between 50 and 60 years.

<sup>10</sup> Between 35-45 years.

## CHAPTER 2

### 2.0 RESEARCH METHODOLOGIES AND METHODS

This chapter explores the methodologies and methods I used during the journey of conducting the research. It takes you through from the starting point where I was cloaked with stereotypes informed from women's past experiences and mostly media releases about how contentious the Chiefs are, to a point of shedding the prejudices and the development of the research into an analysis of how to build on existing traditional systems of dispute resolution.

#### 2.1 The starting Point of my Research Journey

My starting point of my research journey was a purely fact finding mission to find out how women were faring in terms of accessing justice in the Chiefs Court. It was about looking at customary law and how it is applied in the Chief's Courts. After examining how women are faring in these Courts I assumed my next step would be to come up with recommendations as to how to improve women's legal status and the adjudication process in the Chiefs' Courts.

Having come across numerous newspaper articles of how muddled up things were in the Chiefs' Courts I just thought that women just could not talk of accessing justice in these Courts. My legal background<sup>11</sup> ensured that whenever I came across a woman who had come from the Chiefs' Court, my instant response would be to take the case on appeal at the Magistrates' Court. I had come across articles on how the late Chief Nabot Makoni was proactive in ensuring virginity testing was done in his area as a campaign for reducing the spread of HIV, a practice which is in direct conflict with the Domestic Violence Act that criminalised such conduct. This showed me a failure, by the Chief, to respect state laws, how then could women who are seen as "the other"<sup>12</sup> in a patriarchal Court such as this that which

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<sup>11</sup> I, like so many law students, am taught using the legal centralist approach that assumes that the formal legal system wields ultimate power in society and therefore assumes a central position in it.

<sup>12</sup> Simone de Beauvoir describes women's oppression as stemming from the fact that they are seen as being inessential.

exercises customary law, that is generally oppressive towards women, be able to effectively deliver justice in a non-discriminatory manner?

In my mind the stereotypes that I had about Chiefs were that they were old, with no formal education and they used customary law to oppress women. I was convinced this was the reality I would find on the ground. In hindsight I am in awe at how this research was not just an opportunity to establish fact over fiction in terms of what is actually happening in relation to women's access to justice in selected Chiefs' Courts but more importantly a learning process for me<sup>13</sup>. Maybe the glaring reality was the inadequate documentation of the positive strides that are being made in these Courts to destroy the existing stereotypes. The important lesson I learnt is the way stereotypes are prejudicial and without even investigating the issue, we jump to conclusions without ensuring a deeper understanding of the issue. What I found is that not all Courts are applying customary law in a manner that is oppressive to women. There are examples of hybrid systems of adjudication evolving which enable the co-existence of the Magistrates' Court and Chiefs' Court in a collaborative manner to ensure justice is accessible to all.

As I conducted the research having shed the stereotypes these were my working assumptions:

## **2.2 Assumptions and Sub-assumptions**

### **Assumption**

1. It is assumed that some rural women view and use the Chief's Court as an important structure by which to access justice in civil cases.

### **Sub - assumptions**

- 1.1 Social issues affect women's choice of which Court to use.
- 1.2 Women who go to the Chief's Court may not have a proper understanding of what the Magistrates Courts have to offer.

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<sup>13</sup> My own individual consciousness was essential as a strategy of empowerment proffered by Margret Schuler.



### **Assumption**

2. Some Chiefs may have a working knowledge of and apply the principle of non-discrimination in their trials and judgements in civil cases.

#### **Sub-assumption**

- 2.1 Some Chiefs use the training they have received on human rights and apply them in their Courts.

### **Assumption**

3. Chiefs apply customary law in their Courts which might not have appropriate remedies for women.

### **Assumption**

4. Chiefs' Courts have simple procedures that make it easier for women to approach their Courts.

#### **Sub-assumptions**

- 4.1 Chiefs' Courts have simple ways for bringing an application before them.
- 4.2 Chiefs' Courts use simple ways of adducing evidence in their proceedings.
- 4.3 Chiefs' Courts use vernacular language which makes it easier for women to approach these Courts.

### **Assumption**

5. Some say that the cost of litigation in Chiefs' Courts is cheaper (than other courts, e.g., the Magistrates Courts) and this makes it easier for rural women to access justice in civil cases.

#### **Sub-assumptions**

- 5.1 Some say the financial cost of litigation in the Chiefs' Courts are cheaper.
- 5.2 Some say the time costs of litigation in the Chief's Court are shorter thus making it cheaper and more accessible to rural women.

- 5.3 Physical accessibility of the Chiefs Courts makes it cheaper for rural women to access these Courts.

**Assumption**

6. Some rural women are satisfied with the judgments they get from the Chiefs' Courts.

**Assumption**

7. Most cases coming before the Chiefs' Courts are family law cases.

To be able to conduct the research effectively I formulated the following research questions:

**2.3 Research Questions**

1. Do some rural women view and use the Chief's Court as an important structure of accessing justice in civil cases?
  - 1.1 Are there social issues that affect women's choice of which Court to use?
  - 1.2 Are women who go to the Chief's Court knowledgeable and do they fully understand the functions of the Magistrates Court?
  
2. Do some Chiefs have a working knowledge of the law and apply the principle of non-discrimination in their trials and judgements in civil cases?
  - 2.1 Do some Chiefs use the training they received on human rights and apply it in their Courts?
  
3. Do Chiefs apply customary law in their Courts which might not have appropriate remedies for women?

4. Do Chiefs have simple procedures that make it easier for women to approach and use their Courts?
  - 4.1 Do Chiefs' Courts have simple Court procedures for bringing an application before their Court?
  - 4.2 Do Chiefs' Courts use simple ways of adducing evidence in Court?
  - 4.3 Do Chiefs' Courts use the vernacular language which makes it easier for women to approach the Courts?
  
5. Are the costs of litigation in the Chiefs' Courts cheaper and thereby it make easier for rural women to access their Courts?
  - 5.1 Are the financial costs of litigation cheaper in the Chiefs' Courts?
  - 5.2 Are the time costs of litigation cheaper in the Chiefs' Courts?
  - 5.3 Are the Chiefs' Courts more physically accessible which makes it cheaper for women to access this Court?

## **2.4 Informative Methodological Sign Posts along the Road**

### **2.4.1 *Legal Pluralism***

This approach helped me acknowledge the existence of different sources of law that exist within a community. Intertwined in most African countries is state law (general law) which includes the Constitution and statutes, received systems of common law, the codification of customary law and the operative customs on the ground (Stewart et al 1997). I was able to research the interaction of the dualistic system that is the application of general law and customary law within the legal Chiefs' Court. This framework enabled me to find possible areas of conflict of the application of general law as well the areas of possible co-existence in a manner that gives women the ability to enjoy and enforce their rights.

This approach inevitably lead me to use simultaneously the human rights approach where I was looking at the human rights standards that spoke of the right to culture and the right to access justice within the formal and traditional legal systems as highlighted in the previous chapter. Human rights standards as expressed within different treaties and conventions are a source of law. Zimbabwe is a signatory to a number of international treaties and conventions that guarantee the right to equal access to justice. In Article 7 of the SADC Protocol on Gender and Development, its states that:

*State parties shall put in place legislative and other measures which promote and ensure the practical realization of equality for women. These measures shall ensure:*

*Equality in the treatment of women in judicial and quasi judicial proceedings, or similar proceedings, including customary and traditional Court, and national reconciliation processes;*

*That women should have equitable representation on and participation in all Courts including traditional Courts, alternative dispute resolution mechanisms and local community Courts.*

The question I was asking myself is that if Zimbabwe is a signatory to human rights instruments such as CEDAW and the SADC Protocol on Gender and Development that speak of equality how is this reality in women's lives in a pluralistic society like ours? Can women enjoy some of these rights in a traditional system such as the Chiefs' Court?

#### **2.4.2 The Women's Law Approach**

I used the Women's Law Approach where I considered women as the starting point so as to uncover how women were faring in terms of accessing justice in the Chiefs' Courts. As aptly explained by Stang Dahl:

*As long as we live in a society where women and men follow different paths in life and have different living conditions, with different needs and potential, rules of law will necessarily affect men and women differently. It is the complicated interplay between law and life arising from this that women's law researchers seek to chart and understand, with the specific goal of contributing to real equality, equal worth and greater freedom for women. The main aim is to describe, explain and understand women's legal position especially for the purpose of improving women's position in law and society.*

(Stang Dahl)

I wanted to investigate women's lived realities when they approached the Chiefs for dispute resolution. Instead of looking at the Chiefs' Court and how women fit in to it, I focused on the woman as *she* interacts with this Court system. This approach helped me to identify which women I was to focus on, that is the rural women who mostly use the Chiefs' Courts.

### **2.4.3 Grounded Theory**

This approach is described as an iterative process which leads to constant engaging with the research design and a theory developed throughout the research process (Bentzon et al) (1998). Through this approach I was able to constantly review what I wanted to find out. This approach helped me move from the initial phase of a fact finding mission of establishing how women were faring in the Chiefs Court. The research became about the existence of an emerging model which accommodated the Chiefs' Courts, Magistrates' Courts and non-governmental organisations. I managed to make this shift as my early findings during the research started showing how women in Chief Makoni's Court were better placed to access justice as opposed to areas where the Chief did not have such a relationship with other stakeholders. This led me to find out if such a relationship existed amongst the other Chiefs I had demarcated as part of the research.

### **2.4.4 Actors and Structures**

The continuous engagement with the women's law approach led me to use actors and structures approach within the Chiefs' Court system. The Chiefs, who are the custodians and gatekeepers of customary law were the central actors who adjudicated cases brought by women before their Courts. I was keen on finding out how they administer customary law in their Courts and whether it offered women any appropriate remedies in today's modern world. The focus was on women because their ability to access justice is skewed and different from that of the men. Also significant to the research was the identification of the local Magistrates' Court within the area where the Chiefs' Court was located. It was important to see how the Magistrates' Court interacts with the Chiefs' Courts.

### ***2.4.5 The Empowerment and Participatory Approach through my Presence in the Court***

An empowerment approach involves making extensive use of legal education as a research method (Becker, Heinz 1996). It is also known as the participatory approach where there are interchangeable roles of being the researcher and also participating in the research to enable immediate change. I realised that, though I had not initially planned to conduct legal education whilst doing the research, I was found conducting a semi-structured legal aid clinic during my visits to the Courts. After being introduced in the Court as a lawyer I realised that many women would approach me after Court with legal problems for advice. In some instances the Court would adjourn with the Chief wanting me to conduct individual legal aid before the Court passed judgement. Inevitably during the research I was helping women make informed decisions in their lives having received knowledge of what the law provides in terms of their rights. The outcome was that even within the Chief's Court the women were able to articulate their rights and the Court in turn would ensure that it gave judgements that upheld their rights.

Having discovered the working model in Chief Makoni's Court I continued to go back to visit the Court regularly conducting legal aid and engage in dialogue sessions with the Chiefs after each Court session to share on my experiences as a lawyer and how they conducted their trials. The rapport created with the Chief made him want to get a copy of the research findings so that he can continue to improve women's access to justice in his Court.

## **2.5 Research Methods**

### ***2.5.1 Court Monitoring***

As I set off to conduct the research my first stop was to conduct Court monitoring that is to actually sit in Court sessions and observe how the Chief's Courts<sup>14</sup> were being conducted bearing in mind that women are frequent users of these Courts. I managed to gather the evidence of what was actually transpiring in these traditional Courts. It also enabled me to trace through interviews with the female litigants how they actually felt about the Court process and the Court judgements given.

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<sup>14</sup> That is, the Courts of Chief Makoni, Chief Chimoyo and Chief Seke.

### **2.5.1.1 THE HUSTLE AND BUSTLE OF MY FIRST COURT MONITORING VISIT IN RUSAPE**

My first Court visit to Rusape in Chief Makoni's Court, armed with sufficient knowledge about dressing in the traditional Courts as someone who has worked with Chiefs before, I dressed appropriately in my long ankle length dress and carried a *Zambia* (traditional cloth to wrap myself) just in case. My due diligence was not enough as I forgot to carry a *dhuku* (a head scarf) on the day. It just never dawned on me that my uncovered head would be an issue. As I had called first to give the Court sufficient notice of my arrival, I was welcomed by the clerk of Court. Similar to the clerk of Court in the Magistrates Courts, this man wields a lot of power as he determined which cases came before the Court through a vetting system.

I anxiously entered the Court thinking more of the need to remember my high school lesson on *tsika nemagariro* (appropriate cultural behaviour) as I knew for some reason I would be found wanting in this regard. Sitting in front of the Court room, a panicked quick scan of the room showed me that there were many elderly men sitting on chairs. Before I could even really find my feet I heard I was being chased from the Courtroom because I did not have a *dhuku* (a head scarf).

After getting my headgear sorted out I re-entered the Court with the Chief highlighting that the fault was on the part of the clerk of Court who did not inform me of the necessary formalities. A five minute greeting process then ensued with emphasis on my totem and the rural home where I came from which is under Chief Svosve. In this Court I was to be known and called by my totem *maduve* (the female name for someone whose totem is a zebra) throughout the research. I headed for the *rukukwe* (floor mat) reserved for women whilst the men sitting on the benches. To my surprise and great pleasure when Court began, I was offered a chair next to the Chiefs. That was the beginning of my journey of sitting in Council with the Chiefs and the elevation of my status from being the one sent out of Court for failure to cover her head to sitting in council with the Chiefs. Surprisingly in Mutoko I was immediately given a place at the high table sitting with the Chiefs. As for the head scarf though not mentioned in the other two Courts in Chief Seke's and Chief Chimoyo's Court as the saying goes once bitten twice shy, I covered my hair anyway.



**Figure 4 :** A photograph of me sitting with the men in Council in Chief Makoni’s Court, Rusape. The Chief had invited me to join them.

#### **2.5.1.2 MY UNKNOWN PRESENCE AND COURT OBSERVATIONS**

My first visit to Chief Seke’s Court was a different encounter. I got to Court late with Court having already started so I just slipped into Court and sat in the gallery and managed to see how the Court was operating. The Court was handling partly heard cases and performing other duties that are not those of adjudication such as land allocation. When the Court adjourned I went to introduce myself as a lawyer conducting research to learn more about the Court process in the traditional Courts. This gave rise to suspicion even after producing my letter of authority from the parent Ministry of Local Government. It mostly stemmed from the fact that I was coming from a non-governmental organisation (NGO) who in the Zimbabwean context are regarded with suspicion as they are branded by the ruling party as advocates for regime change more so when there are elections round the corner.



### **2.5.2 *Discussions with the Women***

After ascertaining and seeing for myself what was going on in the Courts I realised that I had to talk to the women to find out from them how they would describe their experience in accessing justice in these Courts. I went about talking to the female litigants who had their cases before these Courts so as to better understand how they cope in the traditional Courts. I had the opportunity to conduct a focus group discussion at a legal education session that had been organised by ZWLA in Mutoko in Chisambiro Ward. What I found interesting from the women was their ability to use and engage with these seemingly different Court systems and structures of the Chiefs and Magistrates. This reinforced the need to learn more about the adjudication process in the Chiefs' Court which saw me making regular visits to the Courts.

### **2.5.3 *My 'Coat of Many Colours'***

During my visits in some of the Courts I wore the jacket of the researcher whilst in other Courts I was on a learning mission wearing the ZWLA jacket. In essence the two roles are similar because as you are researching you are engaging in a learning process. To the Chiefs there was a distinction, with Chief Makoni and Chief Chimoyo knowing me as the woman on a learning mission to better the legal aid services offered in these areas whilst Chief Seke knew me as the researcher. This distinction, for the Chiefs who had worked with ZWLA before, they found it easier to refer to me using my professional background which also created a relationship of trust and working together. During one Court session a man who introduced himself as coming from the President's office<sup>15</sup> attending to a case which involved his relatives. He was highly suspicious of me (the only young female sitting in council with the Chiefs and giving the position of the law.) He started quizzing me of where I was coming from with the Chief explaining my professional and organisation background which seemed to allay any suspicions.

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<sup>15</sup> He was from the Central Intelligence Organisation (CIO) and was interested in investigating where I was coming from and the ultimate goal. Even though I was from an NGO the fact that the Chief was working with ZWLA continuously in Rusape dispelled any notions of advocating for regime change, an identity which has become synonymous with NGOs.

Whereas where I was known as the researcher that is in Chief Seke's Court, a different relationship was created, one where I was regarded with suspicion. What also seemed to be an aggravating factor is that I was working for a NGO which was not directly working in Seke so the Chief did not seem keen to use my professional background. The fact that ZWLA works in Mutoko and Rusape the research gave me an opportunity of tracking the organisation's engagement with traditional leaders around the law.

#### **2.5.4 Interviews with Key Informants**

Having heard about how the Chiefs' Courts had working relationships this led me to triangulate my information by going to talk to the Magistrates. I had interviews with the local Magistrates<sup>16</sup> in Rusape, Mutoko and Chitungwiza. For the relevant Magistrate in Rusape, I had to have a telephone interview as he had been transferred and was now working in Kwekwe. I also had an interview with the Deputy Director of the Traditional Leadership and Support Services Department in the Ministry of Local Government, Rural and Urban Development<sup>17</sup> so as to find out more about the traditional leadership structure. I also had a semi-structured interview with officials from the Ministry of Justice to follow up on an issue I had come across about returns<sup>18</sup> which are sent to Chiefs Magistrates office. Occasionally in these reports there would be mention of what was happening in the Chiefs Courts but not in detail.

#### **2.5.5 Experiential Data**

I relied on my experiential data that I had as a result of working as a lawyer at ZWLA providing free legal advice and assistance to indigent women and children. I was able to share with the Chiefs in Rusape, as we engaged in end of Court session dialogues, my experiences of how women find the Magistrates' Court process complex, foreign and alienating whereas

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<sup>16</sup> A Magistrate's Court has Regional and Provincial Magistrates. What I found was that there is usually one Provincial Magistrate who engages directly with the Chiefs Court/s.

<sup>17</sup> This is the parent Ministry with the traditional leaders being under this Ministry.

<sup>18</sup> Monthly reports submitted by Magistrates to the Chief Magistrate's office highlighting the cases attended to.

the Chief's Court offered women a simple Court process. The Chiefs were also able to draw on my knowledge of the law.

## **2.6 Challenges**

Initially there was desire to engage with the Chiefs Council which is the overall lead structure in customary law matters to investigate more the work they were doing. Information gathered from ZWLA had shown me how the Chiefs Council was acting as some form of an appeal Court in cases handled by the Chiefs. Women brought their cases where they had grievances about how their cases were handled by the Chiefs and would be assisted by ZWLA to bring these issues before the Chiefs' Council who in turn would summon the Chief for the panel within the Chiefs council to re-examine the facts of the case. I was unable to investigate this further as some of the Chiefs in the Chiefs Council including the Chief's Council President, Chief Charumbira, were busy participating in the Constitutional Parliamentary Select Committee (COPAC) in the process of drafting a new Constitution for the country in accordance with the Global Political Agreement (GPA).

## CHAPTER 3

### 3.0 ANALYSIS OF THE DATA

#### 3.1 Point of Departure in analysing the Data

The departure point for me in terms of collecting and analysing the data was about how to harness the positive changes already occurring within the Chiefs Courts and how to encourage such changes to occur in all traditional Court systems. I realised there is a need to build on the indigenous systems. (Nnaemeka 2003). The concept of the indigenous is aptly captured in the following comment:

*The indigenous refers to whatever the people consider important to their lives, whatever they regard as an authentic expression of themselves. We build on the indigenous by making it determine the form and content of development strategy, by ensuring that development change accommodates itself in these changes by their values, interests, aspirations and or social institutions which are important in the life of people.*

(Ake as cited in Nnaemeka 2004)

This comment for me meant an investigation to find out whether or not women are accessing justice in traditional Court systems and how best do we build on this indigenous Court system to eliminate women's oppression. It was also about exploring how to identify locally appropriate plural sources of regulatory norms and engaging them with human rights imperatives which may move us beyond the abstract rhetoric and negation that is often referred to as western style law versus custom and religion (Hellum et al 2007). How do we enhance our own local Court systems such as the Chiefs Courts which are home grown and use customary law which is about our African identity whilst taking heed of human rights principles such as equality? There is a need for us to identify social and political opportunities within cultures and practices and philosophies that could influence the development of law, institutions and appropriate practices for the benefit of women. (Kaulemu 2011). This means customary law must be analysed within the context of social change (Becker & Heinz 1996), where change is influenced by issues of human rights and customary law is in itself adapting to the current ways of living of the people. Similarly so should the Chiefs Courts adjudicate over disputes in a manner that draws from human rights

concepts. Deconstructing the Chiefs Courts in a manner that we are able to identify the way in which there are positive values that support women's rights.

### **3.2 The Constitutional Argument**

The starting point is the need to address the supreme law of the land that is the Constitution. The current Zimbabwean Constitution provides for non-discrimination in certain matters but has claw back clauses that allow discrimination in matters of personal and customary law. It provides for non-discrimination in terms of section 23(1)(a) which states:

*'subject to the provisions of this section no law shall make any provision that is discriminatory either of itself or in its effect;'*

and Section 23(1)(b) provides:

*'no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.'*

Section 23(2) provides:

*'...a law shall be regarded as making provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner, if as a result of the law or treatment persons of a particular opinion, colour, creed, sex, gender, marital status or physical disability are prejudiced:*

- (a) by being subjected to a condition, restriction or disability to which other persons of another descriptions are not made subject to or*
- (b) by according to persons of another such description of a privilege or advantage which is not accorded to persons of the first mentioned description...'*

The infamous claw back clause found in the non-discriminatory clause under *Section 23(3)(a)(b)(f)* of the Constitution still permits discrimination in matters of personal and customary law. Its provisions are as follows:

### Section 23(3)

*Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters:*

- (a) personal law;*
- (b) the application of customary law in any cases involving Africans or an African...*
- (f) the according to tribe people to the exclusion of others rights or privileges relating to communal land.*

The lived realities of women have shown that most oppression and discrimination both direct and indirect where preference is given to the males is mostly found in customary and personal law. Whereas the supreme law of the land is only concerned with regulating the public sphere and state actors at the expense of the private sphere and non state actors, women continue to suffer discrimination. Customary law with its basis in patriarchy really expounds the sex differentiation for instance in inheritance matters. Whatever changes are occurring on the ground there is still the need for a legislative framework to provide for gender equality and non discrimination.

Through the current ongoing Constitutional reform process<sup>19</sup> people engaged in the process to air their views through the just ended COPAC outreach process of what should be incorporated in the supreme law of the land. According to the local newspaper, The Herald, they released to the public what was thought to be the leaked draft of the Constitution. Controversy has surrounded this draft and has generated a lot of criticism about its contents and authenticity. It is prudent for me to give mention to it as one way or the other the country is going to have a draft Constitution to take to the referendum process where people will vote to confirm it into law or reject it.<sup>20</sup>

The controversial draft Constitution, authentic or not, guaranteed the continued use of customary law within the country. It further subjected its use and operation to the provisions of fundamental rights. This is a similar position in South Africa with the Constitution

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<sup>19</sup> Sanctioned by Article 6 of the Global Political Agreement.

<sup>20</sup> Just as occurred in the 1999 Constitutional Referendum Process in which the people voted no (against the then draft constitution) as a result of which the current Constitution continued in use together with its amendments.

acknowledging both cultural rights and the right to equality. Effectively when looking at the provisions of the South African Constitution the law acknowledges cultural rights but limits them to consistency with the Bill of Rights<sup>21</sup>. So if customary law is discriminatory on the grounds of sex or gender it will be unconstitutional and, hence, outlawed. This was not always the case. Through the negotiation process an Interim Constitution was adopted in 1994 which eventually led to the adoption of the final Constitution in 1996. The issue of gender equality and cultural rights was highly contested with the traditional leaders making arguments that cultural rights should be protected whilst the women's movement strongly opposed this, raising issues of discrimination that is found in most cultures. (Kagana & Murray 1994).

According to Mokgoro, although these cultural normative systems that conflict with equality are recognized, they cannot be nullified. They must instead be modified in terms of the spirit and purport of the Bill of Rights, a process of harmonization that draws on the rich cultural values, while disposing of their oppressive effect, particularly on women. (Mokgoro, 2004)

Using the concept of *cross cultural dialogue* as advanced by An Naim, that is "learning across cultures", can begin by drawing from the lessons learnt in the South African context, especially when it comes to creating a legislative framework that guarantees cultural rights in as far as they are not inconsistent with the Bill of Rights. Cross-learning of how this framework has translated into reality for women can also be drawn from the cases where the Courts were interpreting the Constitutional provisions.

### **3.2.1 Case Law**

For instance in the case of *Shilubana and Others v Nwamitwa (2007)*<sup>22</sup> the issue was also about the application of the customary law rule of male primogeniture.<sup>23</sup> The Court managed

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<sup>21</sup> Section 30, 31 & 211 of the South African Constitution.

<sup>22</sup> CCT 03/07. In 1968 Ms Shilubana's father died without a male heir. Because customary law at the time did not permit a woman to become Hosi, Ms Shilubana did not succeed him as Hosi although she was his eldest child. Hosi Fofozwa was instead succeeded by his brother, Richard Nwamitwa. During 1996 and 1997 the traditional authorities of the community passed resolutions deciding that Ms Shilubana would succeed Hosi Richard, since in the new constitutional era women were equal to men. However, following the death of Hosi Richard in 2001, Mr. Nwamitwa interdicted Ms Shilubana's installation and challenged her succession, claiming

to interpret the Constitutional provisions that lead to a judgement in Mrs Shilubanas favour as the rule of male primogeniture was declared inconsistent with the concept of gender equality.

*Bhe v Magistrate, Khayelitsha and others (2005)*<sup>24</sup> is another case that illustrates the Court's interpretation. Ms Bhe brought the application on behalf of her two minor daughters born out of wedlock who were being prevented from inheriting from their late father's estate. She contended that customary law rule of male primogeniture unfairly discriminated against the two children from inheriting the deceased estate of their late father. The Court held that section 23 of the Black Administration Act of 1927 created a parallel system of succession for black Africans without sensitivity to their wishes and circumstances. It found that Section 23 and its regulations were discriminatory and in breach of the rights to equality and dignity under the Constitution. The Court decided that the African customary law rule of male primogeniture, in the form in which it has come to be applied to the inheritance of property, discriminates unfairly against women and children born out of wedlock. It accordingly declared it to be unconstitutional and invalid. The Court was willing to give a broad interpretation of the equality clause in its analysis of unfair discrimination. In the above case Mrs Bhe successfully challenged the hegemonic law of male primogeniture renaming it discrimination.

This is in stark contrast to the Zimbabwean case of *Magaya v Magaya (1999)*<sup>25</sup> which highlights the way Zimbabwean Courts were interpreting the constitutional legislation. In this case the deceased died intestate. A community Court initially made the deceased's eldest daughter (Venia) the heir to the estate. On appeal however, this was set aside and the second born son of the deceased's second wife was declared the heir. On further appeal to the Supreme Court the decision that the male child was the heir was upheld. The Court reasoned that under customary laws of succession males were preferred over female heirs. The Court found that even though the practise of preferring males was discriminatory, this did not contravene Section 23 of the Constitution as this provision did not forbid discrimination on the basis of sex in the distribution of property of a deceased person's estate under customary law (WILSA 2001).

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that the tribal authorities had acted unlawfully and that he, as Hosi Richard's eldest son, was entitled to succeed his father.

<sup>23</sup> Inheritance is given to the eldest surviving male child excluding females.

<sup>24</sup> 2005(1)SA580 (CC).

<sup>25</sup> 1999(1)ZLR100(S).



### **3.2.2 Compliance with Human Rights**

Zimbabwe sent its combined second to fifth periodic CEDAW report which was considered by the CEDAW committee in February 2012. The Committee also considered the CEDAW shadow report sent to it by civil society organisations (CSOs). The Committee expressed concern on the continued existence of section 23(3) of the Constitution which continued to allow discrimination and is not in accordance with Article 1 of the Convention. There is a need for the legislative framework to align itself with the international convention that it ratified. The CEDAW Committee said in concluding observation:

*The state party is urged to speed up its Constitutional review process and urgently repeal section 23(3) of the Constitution that allows discrimination based on sex/gender in matters that fall within the provisions of personal and customary law.*

There is a need for law reform that provides an over-arching framework that offers a guide and does not allow discrimination. This will be a guide within the adjudication process of customary law for the Chiefs to bear in mind the concept of equality as well the customary law to evolve in a manner that speaks of equality. It is heartening to see positive changes in line with universal human rights already taking place in Chief Chimoyo's and Chief Makoni's Courts. There is a need for the national laws to reflect these changes and for that change to happen in the Courts of more traditionalist Chiefs.

### **3.2.3 Family Law Court Initiative**

Within the Family Law Court initiative, my research provided a possible model of how to move forward with the Chiefs and customary law. As mentioned in the first chapter there was a lot of controversy that arose around the issue of the Chiefs within the family law Court structure. Based on my findings it is possible for the Chiefs' Court to be established within this Court structure. That reality is that Chiefs' Courts have better geographical coverage of the rural areas and are therefore more easily accessible to rural women who constitute the majority of women in Zimbabwe. This is a positive aspect that cannot be denied. The Chiefs Court system that incorporates the headmen that are found closer to the community as such strengthening this institution will mean increasing the access to justice for many.

The people must remain at the centre of legal change and transformation, and the community Courts continue to play a crucial role as community based agencies of social and legal change (Cutshall 1991). As already seen in the Courts of Chief Makoni and Chief Chimoyo this should be used a stimulus to target other Chiefs Court to begin to make changes to influence other traditional Chiefs.

## CHAPTER 4

### 4.0 WHAT THE CHIEFS' COURTS HAVE TO OFFER

*Customary law is regarded as being problematic when it comes to women's rights. It is often seen as being tangent with human rights principles therefore the thrust has been to try and limit as much as possible the jurisdiction of traditional Courts . The fundamental question is: Would access to justice for many women who need it be improved upon significantly by buidling onto traditional systems?*

(Tsanga 2011)

The above quotation provides a good entry point into the issue of traditional dispute resolution fora which include Chiefs Courts. There is usually an uproar when one begins to talk of building customary systems. The findings of how Chief Makoni and Chief Mutoko are modelling their adjudication processes can be a useful pointer in terms of showing how we can build our traditional systems into a model that ensures many more women, especially rural women, access justice.

#### 4.1 Setting the Scene

Traditional leaders are highly controversial in the current Zimbabwean context with their greatest criticism being that they are political .When you read about Chiefs you are likely to bump into their unwavering support of the ruling party or how they are practising customary law which is oppressive and discriminatory towards women. There is a major debate on whether customary norms are compatible with human rights norms contained in international conventions and national laws. (Ndula 2011). The focus of my findings is not an attempt to downplay some of these critiques of the discriminatory nature of customary law but to give evidence-based findings of how some of the Chiefs are executing their adjudication role in a way that reveals how the Chiefs Court and Magistrates Court may co-exist in a complimentary manner. Rethinking custom and tradition means uncovering the ways in which it has both good and bad elements for women, accepting this contradiction and using this contradiction to the benefit of women. (Armstrong 2000). To rethink the application of customary law in the Chiefs Courts means showing how some Chiefs are trying progressive and human rights sensitive approaches in their Courts. We are also confronted with the reality

that as long as the formal Courts remain inaccessible, complex and unknown as they currently are, many within the community will rely on the traditional systems for dispute resolution.

#### **4.1.2 Seating Arrangements within the Chiefs' Courts**

There is a general observed order in term of seating arrangements within the Courts. In the two rural Chiefs Court, that is those of Chief Chimoyo and Chief Makoni, the women sit on the floor whilst the benches are reserved for men. Women move to sit on the benches when they are litigants and their case is the one being handled at that time. Whilst in Chief Seke's Court the women sit with the men the benches. However in one of the visits to the Court I encountered the clerk of Court advising the women to spread their *zambias* and sit on the floor as the Court was full and there were men standing. In one sense Chief Seke embraced modernity where there was no problem with men and women sitting at the same level in another his Court reverted back to gendered seating arrangements that place women in certain social positions which are different from men. In Chief Makoni's Court the clerk of Court constantly made announcements on the need for women to sit in a cross legged manner to enable everyone to fit in the small Courtroom.



**Figure 5:** A photograph of the Men sitting on the benches provided in Chief Chimoyo's Court, Mutoko.



**Figure 6:** A photograph of the Women sitting on the ground in Chief Chimoyo’s Court, Mutoko.

The implications of these seating arrangements were to reinforce the women’s subordinate role within society considering the privileged view of the men given an upper seating position. The underlying gendered issue being the subordinate and inferior status of women within a patriarchy society. The women however seemed not to care about this as much as they were able to engage and voice their opinions during Court sessions. Some women felt that as long as they were present within Court it did not matter where they sat; a problem would arise if they were excluded from the Court or its proceedings.

#### **4.1.3 The Court Set-up**

Section 10 of the Local Courts and Customary Courts Act requires the Chief or presiding officer to be present with two to five assessors, a clerk of Court and a messenger of Court at every properly constituted Court session. Whilst in all the Courts that is Chief Seke and Chief

Chimoyo they complied with this provision, Chief Makoni seemed to take it a step further by having other local Chiefs and opinion leaders present as well. This enabled better sharing and learning on issues of conducting a fair adjudication process. This presents an opportunity for the paramount Chief to influence change within the community as well strengthening the entire structure of the traditional leaders in the area.

#### 4.2 The Reality of the Use of the Chiefs' Courts

The research established that women use the Chiefs' Court a lot, influenced by various reasons such as accessibility. Most cases that come through these Courts are family law cases, witchcraft, land issues, domestic violence cases and family disputes. Women are found as complainants or defendants and witnesses. Their roles change depending on the case.

#### 4.3 A working Model of the Chiefs' Courts

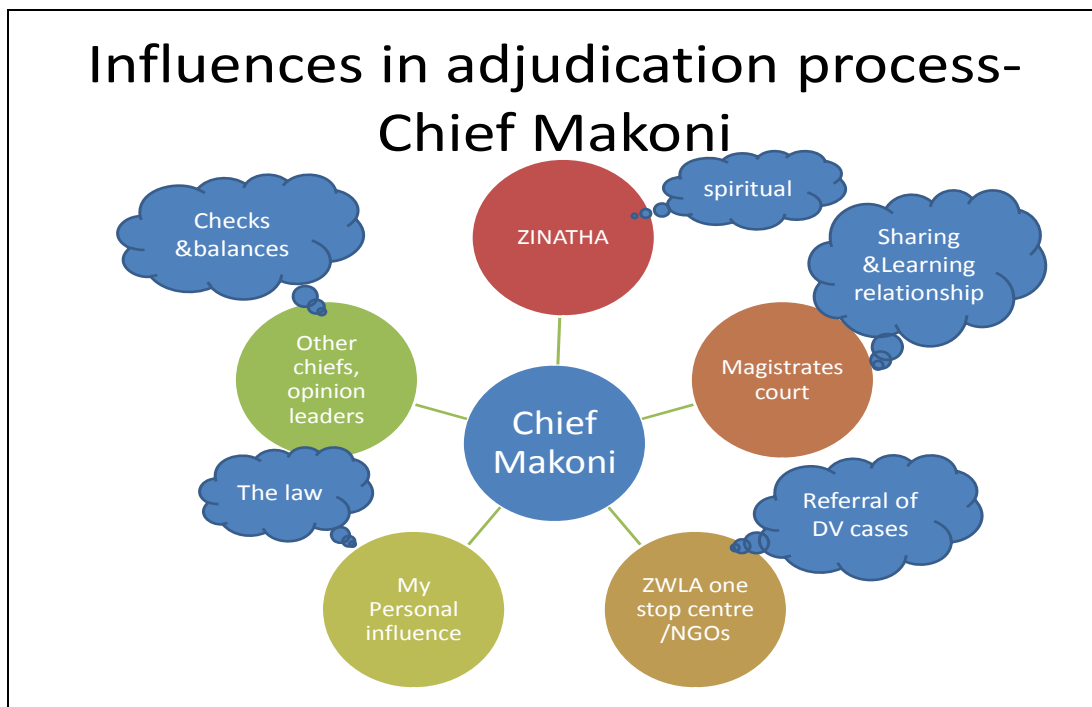


Figure 7: A Diagram of the Influences in the Adjudication Process (Chief Makoni).

The figure above illustrates some of the influences in the adjudication process in Chief Makoni's Court. This figure will be discussed below showing the different stakeholders that can come together to ensure women's better access to justice.

#### **4.3.1 *The relationship between Chiefs' Courts and Magistrates' Courts***

It is important to give consideration to the conceptual and institutional form that customary law has been given expression but we must also endeavour to understand the actors and spaces to map out what is happening on the ground. (Kane et al 2005). The empirical data that I found in Rusape was that there was a working relationship that existed between Chief Makoni and the local Magistrate. This working relationship enabled cross-learning to occur between the two Courts strengthening the idea of how the two Courts could co-exist in a non-antagonist manner for the benefit of the women. The local Magistrate<sup>26</sup> said:

The Chief and I had a working relationship that was really good. I think this Chief has a grasp on the law. I remember in one case where the Court had made a judgement and in enforcing the judgement they attached the defendant's father's property. I had a discussion session with the Chief highlighting how legally the person whose property should be attached is the defendant and not the father.

The kind of relationship that existed between these two Courts is such that exchange visits would occur. The local Magistrate confirmed that the Chief would visit the Magistrates Court for discussions around cases that were happening in the area. The Chief's Court would send their orders for confirmation at the Magistrates Court. At one time the Magistrate held a discussion the local Chiefs' in the area on how to conduct Court to ensure that people receive a fair trial. The Magistrates Court refers cases to the Chief if need be.

In Chief Makoni and Chief Chimoyo's Courts the women were able to represent themselves. This was different in Chief Seke's where the Court would insist that the female litigants be represented by male representatives from their families. This meant that women needed a male representative to be deemed able to acquire full litigation status and status in general. This is not to say that in this Court there were no female litigants but the Court almost always

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<sup>26</sup> He is now working in Kwekwe.



seemed to revert back to the issue of needing the male representative particularly when it came to sentencing<sup>27</sup>. Chief Makoni seemed to require family relatives male or female for entirely different reasons mostly being there to witness the proceedings. In one case of witchcraft that was being referred to ZINATHA<sup>28</sup> to determine whether the woman being accused was indeed a witch, the Chief did a head count of the family there present that would go with her for the process. The representative from the husband's family was in the form of *tete* (an aunt)<sup>29</sup>.

The Court was aware of who the complainant should be (that is the person who has reported the case or the aggrieved party) and who the respondent or accused person should be. This might seem like stating the obvious particularly to those familiar with the Court system but this roles were not always so clear cut within the Chief's Court. At times it was at the instance of the litigants who would report the case and summon the family member of the offender. Chief Makoni's Court's ability to direct the litigants as to who the offender is and who should be summoned to Court was of great significance. For instance in one witchcraft case, a man, who was employed as a farm manager at a game park, summoned and accused the wife of his employer of saying he was a witch as he possessed the skin of a rare snake not commonly found in that area. In giving evidence he highlighted that when he confronted his employer about the issue he was told by his employer that the witchcraft issue had been raised by his wife. On this basis the man had been fired from his employment. Even before hearing evidence from the woman the Court correctly pointed out that the case should be primarily against the employer who was not present in Court on the day in question.

In another case where the complainant a local Chief<sup>30</sup> reported a case against a *tsikamutanda*<sup>31</sup> who had recently started working in the area and was harassing people in the community by entering their homes without their consent claiming to be cleansing the area of evils spirits. Chief Makoni stated that the local Chief should not be the complainant but the people whose homes had been unlawfully entered. This was done because the local Chief was giving

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<sup>27</sup> The underlying gendered concept is that women are viewed as minors and, as such, they need to be represented by a male relative. This creates problems when the Court attaches the property of the male relative, for instance, the father of a female offender.

<sup>28</sup> See discussion on witchcraft allegations.

<sup>29</sup> The aunt in this case was the husband's sister. Culturally this aunt is considered to represent and is the husband. The locally people say "*ndiye murume wacho*" (she is (as good as) the husband.)

<sup>30</sup> One of the Chiefs who reports to the paramount Chief.

<sup>31</sup> One who identifies and destroys evil spirits, avenging spirits.

hearsay evidence on what had transpired in the peoples homes. If the local Chief was to have his own case it would be about how the spiritual healer was operating in the area without first securing the relevant authority from the Chief. He further noted how there should be a distinction between the Chief who is the adjudicator and the complainant who is the person who has been aggrieved.<sup>32</sup> In other words the Chief was speaking about the need to separate roles and powers.

The Court's direction was seen even whilst handling a case and several other cases arose from one action, the Court would direct the relevant parties to issue out their own summons. The issue of several suits arising from one action was quite common possibly because of the nature of the cases being family law cases; a lot happens within the family institution. All these issues and changes were made possible through the constant learning and sharing relationship that existed between the Chief Makoni and the local provincial Magistrate.

#### **4.3.2 ZWLA'S Engagement**

ZWLA has been working with the traditional leaders on different aspects of the law such the Domestic Violence Act mainly through training sessions. Other strategies of engagement have been through information dissemination at platforms such as the Annual Chiefs Conference where the Chiefs gather to strategise about the work they do and the role they play within society. Whilst wearing my coat of many colours I managed to get an opportunity as to ascertain ways of strengthening ZWLA engagement with traditional leaders. Whilst training workshops are a good strategy their major weakness is that workshops are mostly short-lived and not sustainable. What I found is that training workshops with Chiefs need not be done in isolation but need reinforcement strategies. Such strategies include the encouraging dialogue sessions between the Chiefs and the Magistrates as the Magistrates can engage in regular sustainable dialogues as they are found within the area.

Whilst I was conducting the research I was given an opportunity to engage aspects of the law as the Court sessions progressed. This seems to be a more sustainable way of engaging with

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<sup>32</sup> Although there is a hierarchy of the Chiefs in the area, all Chiefs in the area are of the same Chieftainship (i.e., parts of the same body). Thus this local Chief in the area could not be the complainant especially in a case not directly involving himself.

the traditional Courts and impacting on women's lives almost instantly. Having a person in court with a legal background enhanced the manner of the adjudication process in that the Court would ask for the position of the law and be able to dissect the problem so that the Court could deal with what fell under their jurisdiction.

In one case that came before Chief Makoni a woman's sister who lived in Harare died and left a house in Avondale which the husband intended to have his new wife reside in. The dead woman's sister woman approached the Chief's Court for assistance on how to stop the new wife from moving into the house, as customarily it is taboo for a new wife to use the property of the deceased wife, particularly things such as the bed and kitchen utensils<sup>33</sup>. This woman also wanted the return of a *chinu*<sup>34</sup> that her sister left which was not returned to her family. It is considered a cultural taboo for the remarriage to occur without the return of this traditional container. During this session the Court adjourned to enable me to talk the woman about the laws of inheritance. Upon returning to Court one of the local Chiefs explained how the laws of inheritance state that the surviving spouse and children are the primary beneficiaries. Chief Makoni was also able to separate the issue of inheritance that was to be attended to by the Magistrates Court that is distribution of the estate property. The issue of the *chinu* was to be handled in the Chief's Court and as such the woman was advised to summon the brother-in-law to Court. This example shows how the issue of the Chiefs were applying the general law they had learnt about and customary law and thereby resolving jurisdictional tensions.

Chief Makoni and Chief Chimoyo are found in areas that ZWLA has been working in through providing legal aid clinics to the women in the area and conducting legal aid sessions. The existence of legal aid provisions in these areas creates the existence of a structure that the Chiefs can refer women to for legal advice or assistance to take their cases to the formal structure as well as the Chief's Court.

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<sup>33</sup> Whilst this is so, the general law position in terms of the Administration of Estates Act is that if someone dies intestate the house and household goods go to the surviving spouse, in this case the surviving husband.

<sup>34</sup> A traditional container that is used to store oils. This container is given to a woman as she enters marriage and upon death or divorce it should be returned to the woman or her family.

### 4.3.3 Cultural Transformation

I am not making the argument that all Chiefs' Courts apply and adjudicate over cases using customary law in a way that is always favourable to women. I am cognisant that customary law applied even in the formal structure that is at the Supreme Court level, has had some devastating effects on women (for instance in the case of *Magaya v Magaya*, that has been discussed in already the previous chapter.) But if we fail to interrogate normative systems as to the basis on which they regulate and control rights and entitlements this may lead us to deprive women of their rights (Stewart 2008) especially their right to access justice. She further says:

*We may also miss the grounded reality that significant social and customary change that has often already taken place. Also if we assume there are problems and resistance to change on customary matters, and do not investigate we may miss real opportunities for documenting and substantiating changes in attitudes that are taking place.*

This was evidenced by the change in practises I began to see within the adjudication process in Chief Makoni's Court while I conducted my research. In one case of domestic violence and *lobola* it was interesting to note how the Court handled the case. The case was between the complainant, a father-in-law, and the defendant, his son-in-law. The son-in-law was a 29 year old man who owned a butchery in Rusape whilst his wife (the complainant's daughter) was 24 years of age. The parties had been married for 9 years, that is, since the wife was 15 years old<sup>35</sup>. The husband was usually in Harare or away from home. Evidence was given of the fact that the husband was always abusive towards his wife and on one occasion, he had beaten her up, made her move around the farm whilst wearing only her underwear and had threatened to kill her. During another incident he doused her with petrol whilst threatening to kill her. He put 28 marks on his wife's genitals (*kutema nyora*) using a razor. In his defence the husband, during cross examination, said the issue was that his wife was not a virgin when he married her and there was suspicion of adultery. In his defence he continued to outline how he had come from Harare and his wife had refused to have sexual intercourse with him.

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<sup>35</sup> This was an early marriage which occurred as the husband had impregnated her whilst she was still at school.

The following day she then insisted on having a new sexual position that they had never tried before.<sup>36</sup> He said:

It confirmed to me that she was having an affair with the man I had sent to build the toilet because how else could she have known about that sex position. In order to scar her I made the markings on her private parts and told her I had put in some traditional medicine that should she have sex with any other man or else she would get stuck on that man. I was just scaring her so I used ashes to smear her private parts.

As I furiously took notes and captured the proceedings in my notebook I was surprised by what subsequently took place. My expectation was that the Court being a customary Court where customarily notions of “*a good woman, good wife*” are important, that the Court would reinforce this. Chief asked the defendant:

What is wrong with trying out new sexual positions? Your wife is supposed to enjoy marriage including the sexual relations. There is no justification for the violence you perpetrated against her.

The Chief was not only acknowledging women’s sexual agency but denouncing gender based violence. This showed how the traditional leaders can be pro-active in encouraging social change in communities when it comes to gender based violence. Moreover it showed the integration of human rights concepts into customary law. What was also of interest was how during the proceedings the Court gave an opportunity to the community members present in the Court to put forward their opinions before judgement was reached. In this particular case a middle aged woman shared her opinion of how there was the need to break the myth of *kuchengera rudo*<sup>37</sup> if it leads to violence such as a husband scratching twenty seven markings on his wife’s genitals with a razor. There was consensus and murmuring in the gallery a sign of consent showing how change is occurring in regard to issues of gender based violence albeit slowly but one person at a time will create a changed community.

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<sup>36</sup> Some feminists note that femininity denotes that being ‘a good woman’ is perceived as one who does not show her eagerness for sex, whilst hegemonic masculinity describes a man who shows his sexual prowess and should be knowledgeable about sex. This explains the husband’s accusation that his wife was of loose morals and engaging in extra marital affairs.

<sup>37</sup> This is a common saying that means that a person may guard jealously the person they love, even if it means behaving in an inappropriate manner towards them such as stalking them or placing stringent conditions on the way they live their lives.

Debate has raged on amongst feminists<sup>38</sup> as to whether men should be involved in the fight of achieving gender equality and equity and to what extent should there be male engagement to achieve this end. This case shows how it is important to engage with men more so those in leadership positions such as Chiefs who can influence change within the community.

Another interesting aspect was that in Chief Chimoyo's Court the Chief would make references to general law for instance the Domestic Violence Act during adjudication of cases. One such instance was in the case of a husband and wife who had been cohabiting for five years. The man was constantly beating up his wife during the subsistence of the marriage. The woman then ran away and went to stay with her sister saying she was tired of the violence. The man then got his girlfriend to move into the home. The wife came back and chased away the girlfriend. The husband assaulted her asking her why she was "*frustrating his girlfriend.*" The woman then reported the case to the Chief. During the trial the Chief made reference to the Domestic Violence Act outlining which acts are now classified as domestic violence. The Court placed emphasis on what the woman wanted. The woman said she loved her husband but wanted to stay in peace and for his girlfriend to stay away from her house. The Court ordered the man to marry and give a minimum of three cows (*yehumai, danga, yemwana*)<sup>39</sup> and gave the woman a protection order from the Magistrate's Court. ZWLA was also invited to conduct community education sessions in this particular ward as there was a high prevalence of violence. This is significant as it offers an opportunity to engage in dialogue about legal issues as well as strengthen the collaborative synergies between the Chiefs and NGOs.

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<sup>38</sup> Some believe that since patriarchy is the cause of women's oppression, men should be excluded from work to create a more gender equal society. Others, on the other hand, believe in working with men in these patriarchal systems to influence change. Within the country we have an NGO called "Padare Men's Forum" which works with men to achieve gender equality.

<sup>39</sup> That is, the three cows that form part of the lobola (bridewealth). One cow is for the mother; one cow is for the father and the last is a token of appreciation for the children born of the marriage.

#### 4.4 Accessibility of the Chiefs' Courts

One of the important aspects of the Chiefs Court is how accessible it is to the community. Unlike the Magistrates Court the Chiefs are well spread out throughout the rural areas of the country. There are currently 271 Chiefs within the country and 471 headmen. The Chiefs Court structure is located within the community and people are knowledgeable of where to find assistance if a dispute arises and they need immediate assistance. One woman interviewed in Mutoko said:

The Magistrates Court is in Mutoko and we stay 80km from there so it is far for us to go there so the Chiefs is nearer. You can even tell the headman whist the violence is occurring and you will get help immediately.

The geographical coverage and location of the Chief's Courts offers easier access than the Magistrates' Court which is usually located in cities and towns making them less accessible to the rural community. Furthermore the nature of the traditional Courts structure enables easier access to rural women. The Chief's structure is as follows:

Paramount /substantive Chief of the area



Local Chiefs



Headmen

The entire traditional structure is found within the community where the women reside. The headmen are found in each community and this is usually the starting point for reporting a case. Depending on the nature of the case <sup>40</sup>, the case can be submitted to the local Chief who is also usually found close to most rural residences and ultimately to the paramount Chief if necessary. In most instances cases of witchcraft are dealt with by the paramount Chief.

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<sup>40</sup> That is a jurisdictional issue.

The social legitimacy of the Chief's Court also stems from the fact that they make justice available quickly and in a reconciliatory manner. Cases in the Chiefs' Courts are on average dealt with in two sessions, especially if all the relevant parties to the proceedings are present in Court. When a summons is issued it calls on all the parties to bring all their witnesses and any form of evidence on the Court date. In the Magistrates Court, however, the process takes longer. In simple matters you issue a summons and wait for 14 days for the other party to respond then the process goes back and forth with the parties filing written submissions to prosecute or defend their case. You then have to apply for a trial date and wait for the actual trial to commence, thus creating further delays.

#### **4.4.1 Simple Procedures**

There are many aspects of customary law that are good and need to be preserved for instance the fact that it has no institutionalised or complicated procedures and the objective of dispute settlement is reconciliation. (Ndula). Through observation I realised that the Court sessions were simple. Each party would give a recount of what transpired, witnesses would testify to the issues raised and the Court helping in conducting the cross examination. For some the very fact that these procedures are not institutionalised creates problems as there is no uniform format to follow but the reality is that justice might not be done if the Court procedures are complex to an extent that you need a lawyer to represent you.<sup>41</sup>

These procedures are informed by the Customary Law and Local Courts Act <sup>42</sup>. It states that:

- (1) *Subject to this Act, the procedure and law of evidence in local Courts shall be regulated by customary law and not by the general law of Zimbabwe, and the proceedings in such Courts shall be conducted in as simple and informal a manner as is reasonably possible and as, in the opinion of the person presiding over the Court, seems best fitted to do substantial justice.*
- (2) *A legal practitioner shall not be entitled to appear in a local Court on behalf of a party in any case before such Court.*

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<sup>41</sup> This is against a background where, according to the publication, "New Zimbabwe", 65% of Zimbabweans lived below the poverty datum line in 2009. The majority of people just cannot afford lawyers, especially women. Therefore, a Court with simple procedures is the beginning of something we can build on to improve access to justice for all.

<sup>42</sup> Chapter 7:05 as amended.



- (3) *Subject to the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04], all cases in a local Court shall be heard in open Court.*

#### **4.4.2 Use of the Vernacular Language**

Many women find the Chiefs' Court readily acceptable due to the use of vernacular language. During a focus group discussion in Mutoko one woman said:

I have been to both the Magistrate's Court and the Chief's Court and I will tell you that it is foreign and difficult to speak in the Magistrates Court as you have no idea what you need to say and when to say it moreover it's in English, a language that is foreign to us.

The fact that the Court sessions are conducted in Shona which is the local language in the Mashonaland region<sup>43</sup> most women are able to follow the proceedings. As a lawyer working for ZWLA (an organisation that offers free legal assistance to women and works on empowering them to represent themselves in an adversarial formal Court settings), it was intriguing to see women confidently expressing themselves in these Courts. The common perception is that women are often intimidated by the foreign environment of formal Courts, are afraid to represent themselves and, therefore, need male representatives to outline their case or defence. It was an opportunity to see how the simplification of the formal Court system would make a world of difference to the critical issue of women's access to justice. The use of Shona in Court also meant that women were better able to express themselves in Court. Furthermore the lack of '*legalese*' in these Courts meant that one only needed to give an outline of one's case/defence and evidence of the events that took place in support of it. This also enabled people from the community who were present in Court to follow and participate as they were given a platform to voice their opinions on each case as it was deliberated upon<sup>44</sup>.

Efforts to create an environment that was informal also meant that the women were made to feel comfortable in order to express themselves within Court. One woman said, "*I use the*

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<sup>43</sup> All the Courts I visited, that is the Chiefs' Courts of Chief Seke, Chief Mutoko and Chief Makoni, are all based in Mashonaland.

<sup>44</sup> The community and opinion leaders are given a chance to offer guidance to the Court before the case is finalised.

*Chief's Court because we know the Chief well*". The fact that the Chief is from the area, is known by the people and interacts with them helps ease the tension when women go to Court. It seemed to give a human face to the Court for the women as opposed to their encounters when they visited the Magistrates' Court where they would be confronted by people they do not know, complex procedures and the use of the English language. These factors make it all the more difficult for women, especially self actors, who appear in the foreign and intimidating environment of the Magistrates Courts.

Here mention should be made of one case of domestic violence which came before Chief Makoni. The complainant was a 35 year old female who had reported a case against her husband. Her husband was physically violent towards her and he would take her property such as her goats and sell them without her consent. He would also take the maize meal she would receive monthly from some donors and would sell it and spend the money with his girlfriend who was their neighbour. He eventually brought his girlfriend home and chased away his wife from the homestead. She reported the case to the police and to the Chief. She was also locked out of her hut for days. The husband was summoned to the Chief's Court where he came and pleaded and apologised. By consent the parties informed the Court that they wanted to effect a reconciliation. After some weeks the complainant returned to her home but later on she was severely assaulted by her husband saying she should leave because he no longer loved her. She was assaulted with a log whilst she was carrying her one year old baby on her back. The baby sustained head injuries.

Chief Makoni referred the woman to ZWLA for assistance to help her get a protection order so as to claim her property, damages and money for the child's scan. ZWLA was also to help with encouraging local police who were being sluggish in apprehending the husband<sup>45</sup>. The example of this case illustrates how a woman is well able to articulate her case in the Chief's Court due to the simplicity of the process and use of vernacular language. The absence of these factors prohibits most women from being able to prosecute their cases in the

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<sup>45</sup> Section 5 of the Domestic Violence Act outlines that duties of police officers include:

(2) A police officer to whom a complaint of domestic violence is made or who investigates any such complaint shall—

(a) obtain for the complainant, or advise the complainant how to obtain shelter or medical treatment, or assist the complainant in any other suitable way;

(b) advise the complainant of the right to apply for relief under this Act and the right to lodge a criminal complaint.

Magistrate's Courts. As a result of the complexity of Magistrates rules and procedures, the use of English in court proceedings and in the filling out of application forms for protection orders, she required legal assistance which ZWLA was and is able to provide.

#### **4.4.3 The Perception of Costs**

The issue of the costs of Chiefs' and Magistrates' Courts and litigants' perception of them is a mixed bag. Whether the Chief's Court is cheaper than the Magistrate's Court depends on the point of departure of which costs you are looking at. Litigation costs of having the cases presented before the Court varies between the two Courts. In Chief Makoni's Court litigants pay US\$5 each; that is, both the complainant and the defendant pay US\$5 for the right of audience in this Court. Similarly in Chief Chimoyo's Court this was the existing fee structure reflecting that there could be prescribed fees. Through observation there seemed to be varied amounts paid by litigants in Chief Seke's Court possibly depending on the nature of the case. I estimated that around US\$10 -15 was paid by each litigant. As there is no legal representation allowed in this Court there are no representation costs that accrue to either party. Whilst in the Magistrate's Court in similar family matters one pays either \$1 or \$5 to institute pleadings and only the applicant pays. At this point the costs of instituting cases in the Magistrates' Court will be cheaper provided that the litigant is a self actor. The costs in the Magistrates' Court tend to be higher when you start incorporating transport costs that one accrues until the case is finalised depending on the duration of the case and the distance you have to travel to the Court. If so, these expenses can get quite high. If the case is before the High Court then it becomes even more expensive.<sup>46</sup>

The issue of costs takes a different twist when you start considering judgment costs given in the Chiefs Court. The outcome of most cases is an award for compensatory damages which usually takes the form of livestock (cattle or goats) depending on the gravity of the matter. A cow is on average valued at US\$350 with goats having a market price of US\$40-80, depending on their size. This effectively means that if convicted say for instance in a case of domestic violence and you are ordered to pay a goat or cow as a fine or damages, this is more than you would pay if the same case were decided in the Magistrates Court.

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<sup>46</sup> The High Court is found in Harare and Bulawayo. This usually involves many rural residents having to travel long distances for assistance in, for instance, divorce cases.

**Table A: A table illustrating some of the compensatory orders for selected cases in the Chiefs Court <sup>47</sup> (Legal Resources Foundation).**

Type of offence (wrong )	Fine or compensation
Murder	Herd of cattle not exceeding 7
Incest	Beast slaughtered for consumption by the community and occasionally a goat for the Chief
Rape	A beast
Assault (involving loss of an eye, crippling a leg or arm )	A cow and a goat
Striking with fist	A goat
Adultery	A cow
Seduction	A cow
Harm to property	Replacement of the estimated loss by the same type of property e.g. farm produce

The perception that exists is that the Chief's Court is cheaper when it comes to litigation particularly in the view of women. They may believe this to be the case because they find it easier to comply with awards of damages made in the form of livestock that they already have in their possession (i.e., cows, chicken and goats), rather than having to raise hard cash. It was found that men as well as women believe that Chiefs' Courts were more economically accessible than Magistrates Courts.

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<sup>47</sup> These costs might vary from Chief's Court to Chief's Court.

## CHAPTER 5

### 5.0 THE SOCIAL VALUE OF CHIEFS' COURTS

#### 5.1 Women use both the traditional and formal Court System

Women pick and chose from traditional law and modern law creating their own version of hybrid laws that meets their immediate needs. (Armstrong 2000). I found that women engage with both the Chief's Court and the Magistrates' Court in a bid to ensure that their problems are solved. At time considerations made by the women are about maintaining their family relations as well as getting a solution to the problem. As noted by relational feminists women view themselves in relation to others as such they tend to prioritise dispute resolution in the form of reconciliation. One woman during a focus group discussion in Mutoko said:

I have been to both the Magistrate's Court and the Chief's Court with my maintenance case. I started at the Chief's Court who the referred me to the Magistrates Court to apply for maintenance. When I went to the Chief's Court I wanted my husband to stop abusing me and maintain his children. After getting the maintenance order from the Magistrate's Court I still went back to the Chief as I wanted him to caution my husband.

This issue of using the Chiefs' Court as a place of sanction to effect behavioural change was a common trend amongst the women. The Chief's Court becomes an important structure that offers such an approach as their emphasis is on reconciliation and restoration. Chiefs' Courts are often criticised for being outdated. The reality is that these Courts have the women's support because they value their ability to encourage social and behavioural change.

This very fact is drawn to the attention of the litigants in Chief Makoni's Court. Before every case the litigants are called into Court and the Chief addresses everyone emphasising the great value the Court places on its function to bring about reconciliation and restorative justice in civil cases. In criminal cases in the formal Courts, however, it is more about punishing the offender and sending a warning to the community not to commit any criminal offence. One Chief aptly put it:

The Court is not about *kusungisana* (i.e., getting each other arrested) but we emphasise on domestic harmony. We need to build homes so as (to) build communities and then the nation.

## 5.2 The 'Kuchenurwa' Process

The women also seemed to value the Chiefs' Court for its ability to offer the *kuchenurwa*<sup>48</sup> process. Women in the rural areas suffer the great risk of being accused of witchcraft with the risk increasing as one grows older. There are general stereotypes about women and witchcraft, as evidenced by common sayings and idioms, such as, *mukadzi mutsuku akasaroya anoba*<sup>49</sup>. For most women this process presents them with an opportunity to clear their smeared name and subsequently gives them an opportunity to regain their status in their community. A documentary called, "*The Witches of Gabaga*"<sup>50</sup> explores and demonstrates how issues of witchcraft allegations are mostly synonymous with women and once such allegations are made women are treated as outcasts by their community and are actually chased out of their villages in Ghana. Similarly, in Zimbabwe such allegations ensure that women lose respect in their communities, are blamed for every misfortune that befalls their families and increases their vulnerability to succumb to physical violence. The Magistrates Court does not offer this traditional remedy; it only has jurisdiction to deal with the allegation of witchcraft as a crime<sup>51</sup>.

In one case that came before Chief Makoni's Court, the complainant was a young female widow aged 30 years and the defendant was her uncle (brother to her late husband). There was an altercation that occurred in the family during which the defendant shouted at his daughter-in-law saying that she was a witch. The defendant also broke the complainant's door to her hut as he wanted her chased out of the family compound as he believed she was a witch. In the family there were general problems such as ill health, deaths and unwarranted

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<sup>48</sup> A process in which a spiritual group is consulted after witchcraft allegations are made to determine whether a person is a witch or not.

<sup>49</sup> Meaning, "*a fair skinned woman is always either a witch or thief.*"

<sup>50</sup> A documentary by Yaba Badoe 2010.

<sup>51</sup> Section 97 of the Criminal Law (Codification and Reform Act ) states: any person who engages in any practice, knowing that it is commonly associated with witchcraft, shall be guilty of engaging in a practice commonly associated with witchcraft if, having intended thereby to cause harm to any person, such practice inspires in the person against whom it was directed a real fear or belief that harm will occur to that person or any member of his or her family, and shall be liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.

dismissal from work so there was a general belief that there was witchcraft in the family. The complainant then consulted a *n'anga* (traditional doctor) to whom she paid four cows in a bid to establish what the problem was. She was told the family that the traditional doctor had said it had nothing to do with her but a problem existing in her family because some family members had swindled their late grandmother of her cows (*mombe dzehumai*)<sup>52</sup>.

The complainant wanted damages for the false accusations that she was a witch, for her to go to the local spiritual group in the area for it to be clear to her family she is not a witch and for her door to be fixed. The Court ordered that the defendant was to fix the door as that was malicious damage to property and to do the *kuchenurwa* process where the complainant would go with her in-law's family, her family and a Court official to the local ZINATHA group where it would be determined and declared whether the defendant was indeed a witch or not. Based on the outcome the Court would then make its decision.

Whilst interviewing her, this woman shared her sentiments, which many other women shared, saying:

I use the Chief's Court because we know the Chief well and he also deals with witchcraft cases which are not dealt with by the Magistrate's Court. I am happy to go through the process (*kuchenurwa*) to establish the truth that I am not a witch so that I can live properly and acceptably in my late husband's homestead.

The ability of this Court to send women to the ZINATHA group was enough for this woman to approach this Court. This begs the question: if the issue is just about getting your name cleared by the spiritual group, why not just have the process done at family level? This shows how the Chief's Court is viewed by some people in the community and offering this referral process and option to claim compensatory damages as opposed to dealing with the criminal elements as done by the Magistrate's Court. It also demonstrates the authoritative nature of the Chief's Court.

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<sup>52</sup> Cows given to the mother during the customary process when her daughter is getting married.

### 5.3 Lobola Claims

This is a contentious issue with many feminists viewing the practise of *lobola* payment as a harmful cultural practise. Many international human rights instruments also call for the eradication of this practice as it perpetuates discrimination against women and girls. According to the South African Law Commission's Discussion paper on customary marriages, there was ambivalence around the purpose and effect of bridewealth. While certain people saw it as degrading to women because it in effect amounted to a husband buying his wife, other people saw it as signifying respect for the spouses' ancestors and claimed that it "*dignifies the wife*". The current CEDAW Committee concluding observations stated that:

*The committee is concerned with persistence of harmful norms, practises and traditions which include polygamy, bride price (lobola) and virginity testing.*

The reality that I found was that people require *lobola* payments to be made. In terms of claiming *lobola* payments the Chief's Court remains a critical structure that the people use within the community. The three Chiefs (Makoni, Seke and Chimoyo) all emphasise the need for basic *lobola* payments to be done. This occurs when the parties make known their intentions of getting married or when they have already started staying as husband and wife without having done the necessary process of *lobola* payment.

In one case where the father-in-law was claiming his *lobola* from his son-in-law (the defendant), the defendant had been staying with his wife for some time without having paid any *lobola*. The wife fell pregnant and upon delivery the baby she was sent to her parents under the guise of honouring customary practices<sup>53</sup>. The defendant never returned to collect his wife neither did he send any groceries or money as maintenance for his family during their stay at his wife's parents' home. This prompted the father-in-law to report the case. The

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<sup>53</sup> When a woman gives birth she is supposed to go to her maternal home to receive care and support whilst she is recovering from the childbirth process. The timeframe of the duration of her stay varies from place to place but it is usually a minimum of one month. After this period the husband comes to collect his wife and conducts a process of *masungiro* where he gives his wife goats as a token of thanks.



defendant in his defence stated that after the *kuperekwa*<sup>54</sup> process the wife refused to have any sexual relations with him for some time. He attempted to go with her to see a doctor but she refused as did not believe in hospitals since she was from an apostolic church sect.

The problem was believed to be spiritually related to avenging spirits that prevented this woman from being unable to sleep with her husband. Upon being asked by the Court whether they would like to go to ZINATHA to establish whether indeed there were avenging spirits harassing this woman, both the woman and her father refused citing religious grounds. The Court's judgement was that the son-in-law should pay *lobola* that is the three cows and any other extras the parties might agree on. In passing judgment, the Chief pronounced that: "*lobola was important as it touches on a person's well being*". The Chief's Court emphasised that *lobola* was important as it was about uniting the two families. What they defined as payment of *lobola* was the payment of the cows: One cow for the father (*mombe yedanga*), the other cow for the mother (*mombe yeumai*) and another cow for the children (*mombe yematyorwa*).

Another case of *lobola* involved a case of a woman divorcee who had lived together with her husband for two years after he then said he no longer loved her. The parties had no children together. The father-in-law was now claiming his *lobola*, whilst the defendant denied liability, saying he never promised to marry her but was just cohabiting with her. The Court emphasised the need to uphold morals saying:

If you sleep or stay with someone's daughter without getting the daughter from the father you are committing an offence and it is not allowed in Rusape district. *Mwana we munhu mwana wemunhhu*. (Someone's child is someone's child and, thus, should be respected).

There is a need for an in-depth study on the question of *lobola* to determine whether it is a harmful cultural practice. But based on my findings women would use the Chief's Court as an authoritative platform that has authority to order the payment of *lobola*. For some women it gave the sense of belonging and respect to their family.

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<sup>54</sup> After the traditional marriage ceremony has occurred, the girl is taken by her aunts and presented before her husband and his family. At times they leave her in her husband's bedroom to signify the start of sexual relations between the two.

In view of the fact that human rights instruments say that this practice is a harmful cultural practice and that the women in Rusape, Seke and Mutoko view it as an important issue of identity, there is a need to identify the positive aspects of this cultural practice and to discard the negative ones, especially with manner in which it is ruthlessly commercialised.

#### **5.4 Emerging issue - Witchcraft**

At the start of the research I did not anticipate that the issue of witchcraft would be such a central issue in so many cases that go through the Chiefs Courts. One of the key issues of jurisdiction of the paramount Chief is handling issues of witchcraft which the local Chiefs do not handle. For some people, the introduction of Christianity has seen many rituals and beliefs being abandoned or transformed. (Rwezaura 1995). The reality is that although modernisation and Christianity came and transformed the cultural beliefs of people, a great majority still practise some of these cultural rituals and believe in the existence of witchcraft.

The cases that came through the Chiefs' Courts would usually find their way into witchcraft allegations which the Court would have to handle. Chief Makoni's Court referred all cases of witchcraft to the ZINATHA group that was found locally as a way of managing this issue. The cases before the Court would be suspended pending the outcome of the findings of the ZINATHA as regards to witchcraft. The judgements of the cases were affected by the outcome of ZINATHA.

Whilst I was sharing with the Chiefs that adjudicate in Chief Makoni's Court, my findings were that the Court handles the issue of witchcraft differently from the Magistrate's Court. Chief Makoni said:

Witchcraft or the allegations thereof have existed for a long time since the time of Moses in the Bible when people would not listen to Moses and the wizards were called to perform their acts, until Moses was the final victor when he threw his rod down. What we do now is managing the issue of witchcraft within the community to ensure there is harmony but judgement day will come when God will judge the good and the evil.

The process that is performed by ZINATHA is deemed to be a process of consultation with the spirit mediums to find out if someone is indeed a witch. In one case before Chief Makoni, a man and his wife were accused of taking their neighbours underwear for witchcraft purposes. The man was having an affair with his neighbours' wife. His wife then sent someone to steal this woman's underwear for witchcraft purposes. Whilst in Court the man refuted the allegations of taking the underwear. A witness was called who testified that she had been sent to steal the neighbours' underwear. The neighbour confessed to having an affair with this man but now was in fear of her life and wanted her underwear back. The Court sent the parties, by consent, to the ZINATHA group to establish if indeed there was witchcraft. The parties went there and it was found that where the woman had taken the other's underwear but had not used it for witchcraft purposes as yet. The case still had to continue to deal with the other aspects like adultery and theft of underwear.

In another case, the father-in-law of a woman (the complainant) had died and the family went *kugata*<sup>55</sup>. But since the family was a Christian one, they consulted a *muporofita* (spiritual healer). The issue was raised that the complainant was the one who had bewitched and killed her father-in-law. The mother-in-law then told the complainant that she had to leave. The complainant's husband then told her that he no longer loved her and could not stay with her any more due to the allegations. The parties were referred to ZINATHA and the results that came back were that the complainant was not a witch. The Court then proceeded to ask where the parties stood now that the allegations against the complainant were not upheld. The woman said that she still loved her husband and was prepared to reconcile with him. The husband then said the wife also disrespected and called him names saying he was not a man. The issue then became one involving the sexual relations between husband and wife, as the wife confirmed that she had only said what she had because her husband was experiencing erection problems. The *muporofita* (spiritual healer) was fined for practising without approval in the area<sup>56</sup>. She was ordered to pay a cow and a goat. The cow was to be given to the complainant as damages and the goat to the Court as a fine for her misdemeanours for working without having notified the authorities. The Chief also acted as an advisor. He advised the complainant that she should not tell her husband that he is not a man. If there

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<sup>55</sup> A customary process where after the death of someone if the family suspects a mysterious death they consult a *n'anga* (traditional doctor) to establish the cause of death.

<sup>56</sup> To practise in an area, a spiritual doctor has to be registered with ZINATHA and needs to have the Chief's approval.

were problems, the parties should talk about them because “*name calling does not achieve anything*”. The husband was advised that he should not just act based on assumptions and things he hears from the rumour mill in the family because she is his wife and it is his life that will be destroyed. The mother was warned not to interfere in the life of her son but to let him make his own decisions. The Chief gave appropriate advice to each person involved in the case. Opinion leaders in Court concurred with the Chief and highlighted how the Chief was building the community; the parties were to reconcile and apologise to each other if the husband was still interested in doing so. Even the *muporofita* was told to adhere to her core business of bringing people to salvation, because, after all, God loves everyone.

In another case the complainant was a 65 year old widow who lived with her children and grand children at her rural home. Her four children died of alleged unexplainable illnesses and, as such, there was a general belief in the family that there was some witchcraft within the family. Her grandchildren accused her of being a witch who bewitched their late parents. When I spoke to the women she said :

I am happy to come to the Chief’s Court for me have my name cleared of these witchcraft allegations. I am also not knowledgeable about what happens at the Magistrates’ Court and I don’t even know the Magistrate yet I know the Chief.

The case was postponed pending the woman getting her family relatives both from her maternal side and her in-laws as well as her grandchildren to go to ZINATHA.

The Chief also sent witchcraft cases to a local culture group that was similar to ZINATHA in order to determine allegations of witchcraft. Unlike Chief Makoni, Chief Seke would overturn the local culture group findings. In one case where a woman was accused of witchcraft and the local culture group found that the woman was not a witch, the Chief was not convinced. He then said he would consult his own guiding spirits of the area to establish whether this woman was a witch. Whilst the case was pending for the Chief to consult, the Chief showed that he had already reached his verdict that this woman was a witch. Based on what you wonder? The issue of witchcraft is also contentious and its existence is about one’s belief system.

## **CHAPTER 6**

### **6.0 DISCUSSION AND RECOMMENDATIONS**

#### **6.1 Where do we go from here?**

The general criticism levelled at any research that takes a positive view of any aspect of traditional justice is that it romanticises the past (Stevens 2000). But one should not ignore the fact that traditional justice *fora* are constantly evolving as the social, cultural, political and economic circumstances in which they operate change. I was able to see some of these changes as I conducted the research. In proposing ways to improve traditional justice *fora* and their interaction with and integration into the formal justice system (such as, Magistrates Courts), I will invoke a combination of different strategies that will take into account these progressive evolutionary trends.

#### **6.2 Recommendations**

##### **6.2.1 *Constitutional Law Reform***

The starting point is the Constitution-making process in the country which provides an opportunity for the current Constitutional provisions that allow discrimination in matters of customary and personal law to change. As the process is nearing its end we anticipate the issue of the notorious section 23(3) having been dealt with. There is a need for NGOs and other stakeholders to firstly disseminate the draft Constitution when it comes out to the women to ensure they are aware of its contents. There is also need for NGOs to mobilise women to ensure they are ready to vote during the Referendum process. In the event that people vote against the draft Constitution there would be a need for NGOs to continue lobbying the Government through its relevant ministries to ensure that s23(3) remains an issue on the agenda to ensure law reform occurs.

### ***6.2.2 Establishing and enhancing existing working Relationships between the Formal and Traditional Courts***

As seen from the cases that have been examined it would be prudent to adopt a model that encourages engagement between the Magistrates' Court and the traditional Courts in a manner that is complementary to each other. Cross-learning should happen between these Court structures. This can be done by using the emerging model from Chief Makoni and Chief Chimoyo's Court. As there are many Chiefs and headmen, initial attention could be concentrated upon with the Chiefs and their Councillors and paramount Chiefs, of whom there are about forty. NGOs such as ZWLA who already have existing relationships with the Chiefs Council could undertake a project of using the working model as a stimulus to effect change for other more traditional Chiefs such as Chief Seke. If the paramount Chiefs sit in Council with other Chiefs as was the case in Chief Makoni's Court the learning and sharing will be enhanced amongst the tradition leaders.

The model will also involve encouraging a working relationship between the Magistrates and Chiefs. The Judicial Services Commission and NGOs could partner in order to ensure these relationships are nurtured. This could see the establishment of a committee that has the Chiefs Magistrates and NGOs to ensure cross-learning between the formal and traditional Courts. The fact that a committee is established will help curtail the vacuum that is created when the Magistrates are shuffled and sent to new stations as was the case in Rusape.

There is also need for strengthening of the traditional structures which should be spearheaded by the Ministry of Justice working together the Judicial Services Commission and with non-governmental organisations complimenting these efforts. This can be achieved through constant capacity building workshops and information dissemination.

Fundamentally there should be the ability to see the Chiefs Court development into a Court of record. This will help in creating an information base that captures the development of customary law as it occurs within the Courts. At the moment it is difficult to trace any such developments as there is no paper trail. However there is a need to strike a balance between the recording and the Courts ability to maintain its simplicity in terms of procedures. This should be done wry of the fact of creating archaic recorded customary law but to try keep up with the changes as they happen This will help in the creation of a body of literature that can

be referred to. This will also help to discipline unscrupulous Chiefs who do not adjudicate matters reasonably, logically or justly.

### ***6.2.3 Continuous grounded Engagement of NGOs with the Chiefs Courts***

The NGOs can also compliment efforts of the government through continuous engagement the Chiefs in the areas they are already working in. The tendency has been with different organisations targeting conducting periodic trainings with the traditional leaders at time even on the same content. My proposal is concentrated work focusing in areas where each organisation is working in providing a more sustainable and committed long-term approach. For instance, ZWLA could send lawyers or paralegals to the Courts of Chiefs with whom they regularly work.

### ***6.2.4 Research and Documentation***

There is a need for more research and documentation into the adjudication process of the Chiefs' Courts and publications of their findings. Further research has to be done into the interface between Chiefs Courts and ZINATHA and how this relationship affects the Courts' adjudication process. If information is made available it can help to dispel stereotypes that exist around the traditional Court structure. Such an exercise should seek to make it possible to sift through customary law in order to terminate its bad and harmful practices and invoke and improve its positive aspects.

### ***6.2.5 Publishing progressive Traditional Court Judgments***

The traditional leaders should also be proactive in profiling their cases. Nothing beats distilling myths and stereotypes than by publishing evidence of progressive Court judgements. The reverse is also true as non-progressive judgments reinforce stereotypes of the inability of these Courts to remain relevant in the human rights discourse.

**6.2.6 *Simplifying Formal Court Processes and establishing a well-integrated Family Court Structure which includes Traditional and Formal Courts***

The formal Courts can also start to incorporate simplified Court processes, improve by widening their geographical coverage and emphasise the issue of reconciliation in family law disputes. The establishment of a formalised Family Court system is also to be recommended. Access to justice for all the country's diverse communities would be greatly enhanced if such a structure included Chiefs Courts, Magistrates Court and High Court.



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