
**TOWARDS A HOLISTIC APPROACH TO THE LEGAL AID SYSTEM IN
ZIMBABWE: CHALLENGES INDIGENT WOMEN FACE IN INSTITUTING
PROCEEDINGS AND ENFORCING JUDGMENTS IN CIVIL MATTERS**

BY

Fungai CHIWARE

Supervisor: Ms Rosalie Katsande

**A Dissertation submitted in partial fulfilment of the requirements for a Masters Degree
in Women's Law, Southern and Eastern African Regional Centre for Women's Law,
University of Zimbabwe**

2014

Abstract

This research, carried out by a legal aid lawyer with the government's Legal Aid Directorate, seeks to highlight the various challenges which are faced by indigent women as they access justice through the legal aid system. The main focus is on the Legal Aid Directorate as the main legal services provider since it is the task of the government to provide its citizens with legal aid services. The Directorate falls under the Ministry of Justice, Legal and Parliamentary Affairs. This study was conducted using four methodologies, namely, the women's law approach, grounded theory, human rights approach and the sex and gender approach. Each methodology assisted in revealing the full context of the barriers which prevent indigent women from accessing justice and they also revealed the effectiveness of the current legal aid services offered by both the government and NGOs. The human rights based approach was useful in measuring the extent of the state's compliance with international instruments. The right to legal aid is fundamental in promoting and advancing women's access to justice. Although the Zimbabwean Constitution provides for legal aid as a national objective under section 31, women are finding legal aid inaccessible and unaffordable because they fail to meet the legal expenses involved in obtaining legal aid services. There is a need to exempt indigent women from paying any court fees or costs related to the issuing and service of legal process as these costs defeat the whole purpose of offering legal aid services to indigent women. Current laws on legal aid have to be monitored and evaluated so that existing legislation is properly implemented. This will result in women benefiting from a legal aid system which should offer effective solutions to their problems. The concept of having a revolving fund is a welcome development as this will offer financial assistance to indigent clients.

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Declaration

I, Fungai Chiware 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.....

ROSALIE K. KATSANDE

Lecturer at the Southern and Eastern African Regional Centre for Women’s Law, University of Zimbabwe

Date.....Signed.....

Dedication

*This work is dedicated to my daughters, Tana and Tessa,
I hope one day this piece of work will inspire you and push you to excel at whatever you set
your minds to,
And to my loving parents and siblings, the Lord has done it again!*

Acknowledgments

First and foremost I wish to thank the Almighty, for finding favour with me and making me part of the 2013-2014 Master's Students at SEARCWL and for making possible that which I thought was impossible.

My profound appreciation goes to the following:

NORAD, for funding my programme;

Ms Rosalie K. Katsande, my supervisor, for all your guidance throughout the writing process;

Prof J.E Stewart and the then Dr. Tsanga for the foundational courses of this programme, you brought me into a new dimension of looking at women's issues;

To all the visiting lecturers, I appreciate all the information you imparted on me;

To the SEARCWL staff Blessing, Rudo, Sese, Primrose, Johnson, Cecilie, Shingi and Washy, you guys are just awesome;

To my friends Mello, Lungile and Teckie, thanks for encouraging me to soldier on as the going got tougher.

To Teckie again, thank you for sacrificing your time to go through my dissertation, that was sweet of you.

To all the respondents who sacrificed their time for me, thank you for your valuable information.

To my husband, thank you for your moral support.

Last, but not least, to all my classmates, thank you for being the best group of people I have ever come across.

Acronyms

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
JSC	Judicial Service Commission
LAD	Legal Aid Directorate
LRF	Legal Resources Foundation
MWAGCD	Ministry Of Women Affairs Gender And Community Development
UN	United Nations
ZimAsset	Zimbabwe Agenda for Sustainable Socio Economic Transformation
ZWLA	Zimbabwe Women Lawyers Association

List of human rights instruments

African Charter on Human and Peoples Rights, 1981

Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW), 1979

Covenant on Civil and Political Rights, 1966

Kyiv Declaration on the Right to Legal Aid, 2007

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ('The African Protocol on Women's Rights'), 1998

SADC Protocol on Gender and Development, 2008

Universal Declaration of Human Rights, 1948

UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012

List of national legislation

Constitution of Zimbabwe

High Court Act, Chapter 7:06

High Court Civil Rules, 1971

Legal Aid Act, Chapter 7:16

Magistrate Court Rules Civil, 1980

Magistrates Court Act, Chapter 7:10

Marriage Act

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Executive summary

Access to justice is a fundamental human right and every democratic state has to ensure that all its citizens enjoy this basic right. The best way to make sure that this right is accessible is by making sure that justice is not only accessed by the rich but even by the underprivileged members of the society. The question which then arises is; how best can we guarantee access to justice to the indigent? This can be done by providing legal aid which is very affordable, accessible and effective. It is Zimbabwe's national objective to make sure that those people who cannot afford legal fees are provided with legal aid, subject to availability of resources. This research is therefore looking at the affordability, accessibility and effectiveness of the legal aid system of Zimbabwe. Emphasis is on the work being done by the Legal Aid Directorate which is run under the Ministry of Justice Legal and Parliamentary Affairs in providing legal aid services to the indigent members of the society. The research seeks to highlight the financial burden that is experienced by indigent clients when instituting legal proceedings in courts and enforcing judgments. The research extends its scope to three non-governmental organisations which offer legal aid services to indigent clients.

Various methodological approaches have been useful in exploring the challenges faced by indigent clients both men and women as they access justice through the various legal aid service providers. The women's law approach was used to investigate the gaps in the system which result from what the law on legal aid provides for and what indigent women are indeed experiencing on the ground. This approach highlighted that besides the law providing for recourse to indigent clients who do not afford any costs related to accessing legal aid,¹ indigent clients have never benefitted from this facility. The grounded theory as an approach was used to gather empirical data on the various challenges women experience in accessing legal aid. This approach assisted me on deciding which data to collect and how to interpret it. The human rights based approach was used to investigate whether or not Zimbabwe as a signatory to some human rights instruments which focus on access to justice and the provision of legal aid is complying with the requirements set out in those international instruments. International instruments provide a benchmark which can be used to unearth the shortfalls which exist in the Zimbabwean legal aid system. The Actors and Structures approach assisted me to identify who to interview and which office to follow up on so as to

¹ Section 14(4)(b) of the Legal Aid Act.

get the information pertinent to this study. The sex and gender analysis was used to highlight the differences in the challenges faced by both men and women as they access legal aid services.

SCOPE OF WORK DONE BY THE LAD

The LAD assists both men and women by offering legal aid services either for free or upon payment of a nominal contribution. The services include giving legal advice, legal representation and drafting of legal documents. The Legal Aid Act which administers how the department works provides for a Legal Aid Fund which has to be used to meet the costs and expenses incurred by indigent persons in accessing legal aid. However, this provision is just on paper because ever since the formation of the department in 1996, the fund has never benefited any one. Underfunding is the problem which has hindered the Directorate from utilising this fund. The Directorate therefore assists indigent clients with legal assistance and there is no financial assistance which is extended to them.

AFFORDABILITY OF LEGAL AID SERVICES

Litigants are required to pay for services of the sheriff or the messenger of court and this applies to everyone whether indigent or not. The law provides for certain court processes which have to be served by the sheriff for example summons for divorce and the sheriff has to be paid for these services. It is also a requirement by the law that all notices of set down either for pre-trial conference or for trial have to be served by the sheriff and this applies to everyone whether one is accessing justice through the legal aid service providers or private lawyers. When instituting legal proceedings and enforcing judgments in civil matters, indigent women are made to pay court fees which come in the form of revenue stamps which cost \$5.00 to have any court process issued by the requisite court. When it comes to enforcement of judgements the sheriff or messenger of court's fees range from \$450-00 to \$800-00 and this is beyond the reach of indigent clients whom the majority are women. As a result of these exorbitant fees access to justice ends up being denied to the indigent women.

ACCESSIBILITY OF THE HIGH COURT AND THE LEGAL AID DIRECTORATE

Of the ten provinces in the country only two have access to the High Court and the Legal Aid Directorate. Both offices are found in Harare and Bulawayo which are the first and second largest cities respectively. This therefore means that in other provinces which do not have the

High Court one has to make a choice on which of the two is closer or has jurisdiction to handle the intended litigation.

MAPPING THE WAY FORWARD

Having identified that financial challenges act as a barrier for indigent women who want to access justice through legal aid service providers, there should be a way of exempting such women from paying fees or costs related to the legal process. This reverses the whole objective of having legal aid services as a way of promoting access to justice. There is need for constant monitoring and evaluation of current laws on legal aid so that there is proper implementation of existing legislation. The concept of having a revolving fund is a welcome development as this will offer financial assistance to indigent clients. There is need to decentralise both the High Court and the Legal Aid Directorate so as to facilitate accessibility and affordability of legal aid services.

CHAPTER 1

1.0 SO NEAR YET SO FAR AWAY – ‘DELIVERING LEGAL AID’ TO THE INDIGENT

1.1 Introduction

A World Bank survey of 2011 showed that 72.3% of the people in Zimbabwe lived in poverty.² According to the national census which was conducted in Zimbabwe in 2012, the population stood at 13.72 million. Although there are no current statistics available on the prevalence of poverty, I am certain that there has been no downward change to this percentage. On the contrary, the percentage might have even increased as a lot of people still continue to wallow in dire poverty. The national poverty rate refers to the percentage of the population living below the national poverty line.³ The poverty line is the threshold below which families or individuals are considered to be lacking the resources to meet the basic needs for healthy living, in other words, having insufficient income to provide the food, shelter and clothing needed to preserve health.

The general populace of Zimbabwe is comprised of civil servants, commercial farm labourers and subsistence farmers who of late have been faced with recurrent droughts that have persistently hit the country year after year. The majority of civil servants earn monthly salaries which are below the poverty datum line which increased from US\$505 in December 2013 to US\$511 in January 2014.⁴ The meagre salaries leave them with no disposable income after meeting the basics of life and some are even failing to afford these basic necessities. Talking of the expensive legal route to someone in such dire situations results in a mere insult to his or her poverty.

It is against this background that I sought to find out the extent to which the majority of people in Zimbabwe who cannot afford to have the basics in life can pay for expenses incurred in bringing their cases to courts of law through the government initiated legal aid programme. The idea by the government to provide legal aid to its poor citizens who cannot afford private lawyers is noble but there are challenges which result in its poor citizens failing to access justice through the legal aid system. This research is, therefore, centred on

² <http://data.worldbank.org/country/zimbabwe>.

³ <http://data.worldbank.org/country/zimbabwe>.

⁴ <http://www.zncc.co.zw/2014/02/poverty-datum-line-up/>.

unearthing the various challenges which are faced by women who form the majority of clients who seek legal aid service in both the government and non-governmental sectors.

Being a legal aid lawyer with the government's Legal Aid Directorate for quite a lengthy period has presented me with an opportunity to appreciate that a lot still has to be done in the whole legal aid system so that the poor citizens of the society access justice. The current legal aid system leaves a client almost three quarters of the way short of the targeted results after instituting proceedings in the courts and those in a precarious financial situation even end up abandoning their cases due to their failure to pay fees to file and serve court papers.

1.2 Background to the research

My research topic has been influenced by my experiences during the 8 years I have worked as a lawyer with the Government of Zimbabwe's Legal Aid Directorate. I have encountered countless numbers of cases of indigent women who come through our offices hoping to get legal assistance but end up having their hopes shattered due to the gap which exists in the whole legal aid system. The legal aid system can only go as far as guaranteeing an indigent woman with obtaining a civil judgment but when it comes to its enforcement through the Messenger of Court (for the Magistrates Courts) or the Sheriff (for the High and certain other courts) this is left entirely to the woman who has to grapple with the exorbitant fees charged for execution. This means that a poor woman will be considered 'indigent' as far as the legal aid providers assisting her are concerned but when she approaches the Messenger of Court and the Sheriff she will cease to be indigent and will be treated just like all litigants who must pay cash in advance of any services rendered by their offices.

The Legal Aid Directorate started off as a sub-department of Policy and Legal Research which is a department that falls under the Ministry of Justice, Legal and Parliamentary Affairs and later grew to become a standalone department in 1996. The department was only operating in Harare, Zimbabwe's capital, until some time in 2011 when it opened its doors to the people of Bulawayo, the second largest city in Zimbabwe. The Harare office is currently manned by twelve (12) lawyers and the Bulawayo office has four (4) lawyers and this means that a total of sixteen (16) lawyers are supposed to meet the needs of all indigent Zimbabweans who come from all four parts of the country and this is highly impractical.

In the past, legal aid was provided for by lawyers as a form of charity as they had no obligation to do so. With time, legal aid became an integral part of the administration of justice and any democratic state was obliged to offer this right to legal aid. Therefore, the state as a key duty bearer to respect, protect, promote and fulfil human rights of citizens, is expected to provide legal aid to those who are unable to afford paid legal services so that they may seek legal redress. Legal aid was first offered to accused persons charged with criminal offences and with time this service was extended to indigents involved in civil litigation. In 1996, South Africa made it a constitutional obligation to provide all indigent persons free legal representation. In Zimbabwe, the Legal Assistance and Representation Act only provided legal aid to indigent persons charged with criminal offences and when it was repealed, the Legal Aid Act was enacted and it mandates the Legal Aid Directorate to offer its services to indigent clients involved in both criminal and civil matters.

1.3 Problem statement

The current legal aid system suffers a lot of gaps which make access to justice a challenge. Some of these gaps emanate from the failure by the system to have special provisions which specifically facilitate access to legal aid by women and the non-implementation of some legal provisions.

Although Constitution, the supreme law of the country, now enshrines legal aid provision as a national objective under Section 31, it is left to lawyers and judges to give an interpretation which will serve to promote the letter and spirit of the intention of the Legislature in having such a clause in the Constitution. A narrow interpretation of the clause limits its application to issues of legal representation of indigent persons only, whereas a wider interpretation will embrace all the factors which come into play and fully realise the right of an indigent person to access legal aid. Although it is mandatory for the state to provide legal aid to those who cannot afford private lawyers, this exercise is subject to availability of resources and this, in my opinion, is an open defence for the state to justify non-compliance with such a provision.

Section 14 of the Legal Aid Act provides for five different sources from which the Legal Aid Fund shall be drawn and these include, the budget set aside by Parliament, contributions from clients, deductions made from moneys or damages awarded to an aided person in court, levies collected from legal practitioners in private practice and any other monies that may accrue to

the Legal Aid Fund. From these five sources the fund is only being sustained from the nominal contributions paid by indigent clients. There has never been a budgetary allocation from Parliament ever since the Directorate became operational in 1996. This creates a gap in the financial support system of the Legal Aid Directorate.

Although Section 14 makes it an obligation for the state as the duty bearer in providing legal aid to proffer financial assistance to structures set up to offer legal aid, the state has failed to honour its obligation. Limited funding impacts women more than on men due to the fact that the majority of women are not as economically empowered as men. Women spend much time doing care giving work which is unpaid and undervalued, while men are more likely to be involved in income-generating work.

Legal aid offices are only found in Harare and Bulawayo and this is inadequate since eight provinces are left with no option except to access these two offices and regard must be had to the distance one is from either Harare or Bulawayo. For legal aid to be accessible to everyone there is a need for the decentralisation of the Legal Aid offices and for an increase in the number lawyers serving the larger cities. The whole of Harare is currently being served by twelve lawyers and Bulawayo has four lawyers. One is left wondering what the lawyer - client ratio is like given such situations. We cannot talk of a holistic approach to legal aid when eight out of ten provinces have no readily accessible legal aid office.

When offering legal aid every indigent person should be represented in court by a legal practitioner in all cases. Due to the limited numbers of legal aid lawyers, however, some clients appear in court as self actors after being assisted with the drafting of court papers only and only those clients with complicated cases are offered legal representation. Self actors, especially women, find it very difficult to present their cases properly in court. They find the court room uncomfortable and unfamiliar as opposed to their male counterparts who appear quicker to adapt to any situation presented before them. Therefore, by making sure every indigent person is represented in court this gap will be addressed.

The current legal aid system results in indirect discrimination against women because there are no special provisions relating to them on rendering legal aid. There is a need to consider that a society is not a homogenous group as there are gender differences which exist which make access to justice different between men and women. Merely providing access to legal

aid to everyone is not enough as this only serves to guarantee formal equality between men and women. The government has done nothing in addressing issues of access to justice by different people including men, women, children and even those people living with disabilities. The failure to appreciate the differences between men and women in their different abilities to mobilise resources results in indirect discrimination against women and this is an affront to the principle of access to justice as a whole. The government has to include affirmative action in the Legal Aid Act which is aimed at accelerating access to legal aid by women.

1.4 Objectives of the research

1. To establish whether the legal aid system provides a by which women can access justice.
2. To examine the shortfalls which exist in the legal aid system which result in it being inadequate.
3. To find out from the women who access legal aid if they are facing any challenges in instituting civil proceedings.
4. To investigate the challenges women face in enforcing judgments due to their failure to pay fees to the Messenger of Court or the Sheriff.
5. To highlight how the gap in the legal aid system infringes on the right of indigent women to access justice.

1.5 Research assumptions

1. The legal aid system provides a means by which indigent women can access justice.
2. The legal aid system is inadequate because it fails to offer wholesome (meaningful or substantial) justice to indigent women.
3. Some indigent women fail to institute civil proceedings due to their inability to pay fees to the Messenger of Court or the Sheriff.
4. Some indigent women fail to enforce judgments due to their failure to pay fees to the Messenger of Court or the Sheriff.
5. The gap in the provision of legal aid to indigent women results in the infringement of their right to access justice.

1.6 Research questions

1. Does the legal aid system provide a means by which women can access justice?
2. Is the legal aid system offering wholesome (meaningful or substantial) justice to indigent women?
3. Are some indigent women failing to institute civil proceedings due to their failure to pay fees to the Messenger of Court or the Sheriff?
4. Do some indigent women fail to enforce judgments due to their failure to pay fees to the Messenger of Court or the Sheriff?
5. Is the gap in the provision of legal aid to indigent women resulting in the infringement of their right to access justice?

1.7 Demarcation of the research

This research was conducted in Harare which is the capital city of Zimbabwe and respondents were drawn from the various suburbs which are served by the Legal Aid Directorate. Bearing in mind that the majority of women stay in the rural areas although there are no readily available legal aid services for them, I decided to find out how the rural women were coping with accessing justice through the local courts which are presided over by the Chiefs so the research was extended to Domboshava which is located in the Mashonaland Central Province. Although this research's main focus was on the role being played by the Legal Aid Directorate in providing access to justice to the poor, I also extended the research area to cover non-governmental organisations (NGOs) which offer legal aid in a bid to complement the government's efforts and these are Zimbabwe Women Lawyers Association (ZWLA), Legal Resources Foundation (LRF) and the Msasa Project. My research targeted respondents involved in cases of custody, maintenance, access to minor children, the sharing of property and divorce. Reference was also made to some labour cases to provide a comparative analysis of the different reactions between men and women as they access justice through the various legal aid service providers.

1.8 Limitation of the study

As I was interviewing the respondents some were of the mistaken belief that I had come with a financial solution to their problem of failure to access justice due to financial constraints. In some instances, phone calls were made to clients who had obtained judgments but failed to execute them due to poverty or limited resources. Such clients were bound to think that the

reason for the call is that some financial assistance had been secured for them. To overcome this challenge I had to explain from the outset the purpose of my research and clarify that the information I was getting was strictly for academic purposes. If at all in the future there would be a redress in the legal aid system then it will be a positive development. The gap created by this challenge is that the respondents might have exaggerated facts about their poverty to the extent that the situation will be pathetic with a view that resources could be mobilised for their cause.

For one to appreciate the magnitude of the problem of access to justice which results in indigent persons failing to institute legal proceedings or enforce judgments there is need for statistical backup to substantiate the problem as a cause for concern. However my research was faced with the limitation of non-availability of statistics on the extent of the problems faced by indigent persons. At the time this research was conducted the Legal Aid Directorate had not compiled or consolidated any statistics of those clients who have failed to institute legal proceedings and enforce judgments due to their failure to pay the fees of the Sheriff or the Messenger of Court.

CHAPTER 2

2.0 LITERATURE REVIEW AND CONCEPTUAL FRAMEWORK

2.1 Indigent persons

A discussion of the problem of provision of legal services or access to justice to the underprivileged classes is not possible without first defining those people who make up the underprivileged classes and what is involved in giving them access to justice (Zemans, 1979). The Legal Aid Act provides in the preamble that the mandate of the Legal Aid Directorate is to provide legal aid to indigent persons but it does not define what it means to be indigent. Therefore, this poses problems as to what it means to be indigent and how far an indigent client can be assisted in terms of legal aid.

In South Africa the Legal Aid Act also does not define the word indigent but the courts have defined the word in *Smith v Mutual & Federal Insurance Co. Ltd* 1998 (4) SA 626(C) at 632 D-E as follows:

‘To be indigent means to be in extreme need or want whereas to be poor means having few things or nothing.’

From the above definition it is clear that when offering legal aid to indigent clients there should be no point when they are made to incur financial expenses to institute civil proceedings or to enforce their judgments. The Legal Aid Guide also defines an indigent person as a natural person who qualifies for legal aid in terms of the Guide. So legal aid has to be offered up to the point when an indigent person realises the intended results of instituting proceedings in courts of law. In Zimbabwe all court processes are served by the Messenger of Court the Deputy Sheriff depending on the court which one is using and when one has obtained a judgment, execution is left in the hands of these officers of the courts who charge for their services. This implies that indigent women have to be in a position to fund the services of the Messenger of Court or the Sheriff despite having been previously regarded as people of no means. Franaszek (1985) argues that if the costs of using the court system exceed the value to (or gain obtained by) the litigants, people will find other ways to resolve their disputes or leave them unresolved, and the wrongs will go uncorrected.

Bindra and Ben-Cohen (2003) write on the right to counsel for indigent civil defendants and their emphasis is on defendants and not plaintiffs in civil suits. The reason for not including indigent civil plaintiffs is that a plaintiff has more legal options than a defendant, hence, counsel should be provide to indigent civil defendants. However, the article does not offer a definition of an indigent civil defendant nor does it investigate what it means to be indigent. There is a need to account for citizens who are living below the poverty datum line as they obviously fall into the category of indigent persons since they cannot afford to hire a private lawyer.

2.2 Access to justice

Justice refers to standards of rights set or defined by substantive and procedural law and enforced by justice delivery institutions with the state bearing primary responsibility (Obura, 2004). Therefore, access to justice denotes a situation in which there must be effective solutions available to people whose rights have been violated and they are in need of help. This is recognised as a human right and this means that it also applies to women by virtue of them being human beings. The question to be borne in mind is whether or not individuals, groups and communities are realising their rights from the enforcement of substantive law by the justice delivery system. In most countries it is the rich who can access justice and the poor and marginalised are more often than not denied the chance to seek remedies in any justice system, yet such an inalienable right ought to be enjoyed by everyone, regardless of class. Hence, there is a need to promote effective, affordable and accessible justice systems. My research managed to unearth some barriers which women face in their quest to access justice in Harare, which is the capital city of Zimbabwe.

2.2.1 Barriers to accessing justice

There are a lot of barriers which end up preventing women from accessing justice and these include physical barriers, psychological barriers and last but not least financial barriers which form the crux of this research (Zemans, 1979). Some of these barriers result from the economic subordination of women which is a result of the unequal distribution of resources. Women end up failing to exercise fully their right to access justice due to financial constraints as the justice system expects them at some point to pay money to institute proceedings and enforce judgments which more often than not they cannot afford. This results in some women abandoning their cases and for those who would have managed to

institute civil proceedings, they might end up sitting on their judgments as they fail to raise the fees to enforce them.

Physical barriers to access to justice are the most noticeable and present the first barrier which must be overcome. The location of the Legal Directorate Offices presents a physical obstacle for those who live in outlying areas or sparsely populated rural areas. If a person is forced to travel a journey of some distance in order to consult with a lawyer, she must make arrangements on who shall remain with the children while she is away and if there is nobody to stand in for her she might end up abandoning the litigation process as pursuing it will present her with too many difficulties. For most indigent persons they might regard litigation as a luxury that they cannot afford. More often than not these difficulties do prove insurmountable and result in leaving a large segment of the society without access to legal services.

Psychological obstacles to access justice exist in most countries which are still developing and those that are under-developed. These include every feeling that prevents a person from seeking legal services and they pose a sense of fear, hopelessness and lack of information, ignorance and unfamiliarity (Zemans, 1979). All these are a common phenomenon with the poor. Psychological obstacles are created by gender inequality, cultural norms, religious beliefs and social-economic settings which result in poverty. The fact that most legal aid service providers are concentrated in the capital city means that for those women living in peripheral locations end up being deprived of access to justice and for some women who are willing to travel long distances to access legal aid service providers they might not even know where to go if they were in need of these services. Lack of information is a major form of a psychological barrier in that for a person who is unaware of his or her legal rights and has no knowledge of the services available to him or her, that person is in no better position than he or she would have been in if there were no such rights and services. On the contrary, even when there exists knowledge about where to find legal aid when one is in need, the legal process is unfamiliar to the majority of the people and for the poor this is quite detrimental as it pushes them further away from accessing justice. It is a fact that unfamiliarity breeds fear and it is this fear that prevents the underprivileged from accessing justice.

Financial barriers are readily identified and they hinder the poor from making claims to assert their rights in the event that there is an infringement of their legal rights or if they are forced

to defend their claims when sued in courts of law. When a person is poor it means there might be no disposable income to talk of. Disposable income is that portion of income that is not spent on buying the necessities of life and when there is no such portion left it means one is incapable of paying for legal services or any expenses that might accompany these services. Court fees are expensive and no country has yet socialised the legal profession to the extent that money proves no obstacle (Zemans, 1979).

2.3 Right to legal aid

Legal aid should be viewed as an important part of the administration of justice rather than a privilege which is granted to an indigent person as a form of charity. The latter means that no one can be put to task in the event that this service is not offered to indigent persons as charity is not mandatory. In terms of the Kyiv Declaration⁵ the provision of legal aid will, therefore, be seen as a privilege rather than a right. Viewing legal aid as a basic tenet for the administration of justice confers the recipient of legal aid with some sort of entitlement and not a favour. The European Council in Legal Aid Affairs Resolution 78 resolved that the provision of legal aid should no longer be regarded as a charity to the indigent but an obligation of the community. The state of Zimbabwe through the Ministry of Justice, Legal and Parliamentary Affairs runs a department which offers legal aid to indigent persons. The government is not alone in this initiative as there are various non-governmental organisations manned by both lawyers and paralegals who compliment government's efforts to deliver justice to poor people. The location and accessibility of these legal service providers, however, is a subject which will be discussed later in this paper as evidenced by the findings made in this research.

Murinda (2008) analysed the services offered by the government through the Legal Aid Directorate and this was general in nature. The point of departure is that the current research is looking at the gaps which exist in the legal aid system due to the fact that there is no provision of financial services to indigent clients to cushion them from the high costs of

⁵ The Kyiv Declaration on the Right to Legal Aid (2007) outlines comprehensive ways of providing legal aid to deserving clients. This document was authored by 115 delegates from 25 countries who met in Ukraine to come up with best practices for the provision of legal aid. The delegates drew on experiences from Africa, Eastern Europe and Asia. The composition of the delegates included the following: Government representatives, legal aid practitioners, academics, and representatives from human rights, legal advocacy, and legal and justice sector reform organizations who met in Kyiv, Ukraine, between 27-30 March, 2007, to discuss and identify best practices in the protection and promotion of human rights through the provision of legal services. The delegates adopted the Declaration by consensus.

instituting civil proceedings or enforcing judgments or an arrangement which results in their being exempted from paying for these services and this means that indigent clients, the majority of whom are women, end up being short-changed by the justice system. Gross (1976) has written on the South African criminal justice system and his main focus was on formulating a managerial charter for the system which results in the rapid development of legal aid in criminal matters. This is mainly because the legal aid department of South Africa mainly assists indigent clients in criminal matters as it is constitutional requirement that no indigent person shall appear in any court of law unrepresented. The department handles very few civil cases as witnessed by the Zimbabwean legal aid lawyers that once visited the Legal Aid Board of South Africa in 2012.

Legal aid is central in providing access to justice by ensuring that clients enjoy a number of rights associated with the concept of equality before the law, such as the right to legal representation and the right to a fair trial. Article 8(a) of the African Protocol on Women's Rights provides for effective access by women to judicial and legal services including legal aid. This provision is critical to this research as it provides the cornerstone of the fundamental right to legal aid. It clearly spells out that not only should women have access to judicial and legal services but that the access must be effective. It is against this background that I am investigating whether women have effective access to legal aid.

Article 7(g) of the Protocol on Gender and Development provides for accessible and affordable legal services for women. When I was formulating my objectives and assumptions I took cognisance of this provision hence the objectives and assumptions are premised on the accessibility and affordability of legal services for women. To find out whether there is compliance to this provision the fundamental questions to ask ourselves are the following:

- How accessible are legal aid service providers?
- Are legal services as a whole affordable to women?

Legal aid is a way of promoting access to justice and it comes in two forms. Are the litigants who are coming through the legal aid system getting effective solutions to their legal problems? This is the big question which was at the back of my mind as I was conducting my research and it lays the foundation of what legal aid should entail. Returning home, there has

been a development in the new Constitution of Zimbabwe in terms of considering the right to legal aid which has been incorporated under the National Objectives under section 31 and it also forms part of one of the key result areas of the ZimAsset cluster on social service delivery. It would have been better if the right to legal aid had been provided for under the Bill of Rights which would have made it justiciable. However, they say half a loaf is better than nothing and so this initial move provides a starting point for enforcement purposes. Another drawback is the inclusion of the limitation clause which subjects the provision of legal aid to availability of resources. The limitation clause becomes an excuse for the government whenever it is put to task about failing to fulfil this provision. This constitutional right is available in both civil and criminal cases and it specifies that the aid would be in form of legal representation only.

Zimbabwe adopted a national policy known as the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) in October 2013 and its set to stretch to December 2018. Improved access to justice by indigent persons is included as a key result area for social service delivery and the Ministry of Justice and Legal Affairs is tasked to decentralise legal aid services to all provinces in Zimbabwe. This policy is a welcome development as it is geared towards the progressive realisation of the right to access justice by indigent persons by December 2018.

2.3.1 Rationale for having a legal aid system

According to Friedland (1975), there are five reasons which provide the rationale for having a legal aid system and these include the following:

1. Effective legal aid services to indigent people are essential for the proper functioning and integrity of the machinery of justice. This is done by making sure that the wheels of justice are indeed oiled to allow for the smooth running of all the players involved in dispensing legal aid services.
2. A legal aid system that is affordable and accessible to everyone guarantees all citizens equal access to information about the legal aid system available in a given society. It is at this point that we can safely say at least we are all equal before the law since there will be access to justice for everyone regardless of class.

3. Provision of legal aid to the indigent contributes to the creation of a unified national legal system, one that captures the experiences of people from all four corners of the country and also from all walks of life. If one is to conduct research into the national legal system of a country normally the voices of the poor will not be captured and this means that only the voices of those who can both access and afford the legal system due to their affluence will be the focus of the study. It therefore goes without saying that providing legal aid to the indigent is a move towards a holistic national legal system which captures the views and voices of both the underprivileged members of the society and the rich.
4. An efficient legal aid system makes room for the effective implementation of existing social welfare and regulatory legislation which is intended to benefit the poor. This works by addressing the financial barriers which result in the poor failing to access the courts of law. Our current Social Welfare Assistance Act falls short in addressing provision of financial assistance for one to cover legal costs if a woman finds herself embroiled in the litigation process. This is a clear indication that access to justice as a right for the underprivileged members of the society was not even at the back of the minds of the members of the Legislature when this Act was enacted.
5. Greater public accountability and public participation in the governmental process is also achieved through the provision of legal aid services to the poor and this in the long run strengthens the legal profession as a whole.

2.4 Equality before the law

Articles 6 and 7 of Universal Declaration of Human Rights enshrine the right to equality before the law. Although this is not legally binding, it provides the basis upon which women cease to be recognised as perpetual minors. This resulted in women having the powers to enter into any contract (just like their male counterparts) and it also gave women audience in court as they now had the legal capacity to stand and represent themselves before the courts of law. Article 15 of CEDAW, to which Zimbabwe is a party, also provides for equality before the law by granting women legal capacity. The Kyiv Declaration of 2007 provides for the best practices to be engaged when providing legal aid. The Declaration states that the provision of legal aid services must be delivered to all indigent persons without

discrimination with special attention being placed upon women and other vulnerable classes. It is therefore mandatory that states should work towards ensuring that women and other vulnerable classes are not discriminated against either directly or indirectly.

Section 56 of the Constitution is in line with this internationally recognised right but it introduces the debate on formal and substantive equality. Although men and women are deemed to be equal before the law the fact is that women do not access legal aid in the same way as men considering the relational nature of the cases which women bring to court. Whereas, men mostly bring to court labour-related cases and are usually able to raise the required fees since they stand to gain economically from the labour cases, women tend to fight for the rights of children through custody, maintenance and access cases as they put their children at the centre of their lives. At times women abandon their cases because they find legal expenses less important than feeding for their children. A woman may consider using US\$450 to pay fees and expenses to enforce a judgment a luxury because she is more likely to consider it better spent on satisfying the recurring survival needs of her children, often her first priority. This flies in the face the assertion made by Moorhead (1998) who described the aim of legal aid as that of ensuring that an indigent person is able to obtain legal assistance without having to pay for the costs. This includes even the services for the Messenger of Court or the Sheriff which costs result in poor people failing to access justice.

Formal equality does nothing more than laying the groundwork for those provisions which actually operate to provide equality. Declaring a right on a paper is not a guarantee that it will operate nor does any amount of repetition of the statement that all men are equal ensure equality before the court if one person can afford the requisite fees to cover legal costs and another cannot. Although we have specific legislation which deals with legal aid on the ground, the less privileged members of our society are partially benefiting while some are not even benefitting from the legal aid system itself as they end up abandoning their cases due to a lack of finances to pay legal costs. Procedural guarantees function to equalise the situation where it can be equalised and this is done by providing a right to have a lawyer for free if a person cannot afford a private one. According to the Kyiv Declaration we cannot talk of equality before the law when in court one party has a lawyer and the other party is a self actor. Already these two parties will be on an unequal footing hence every indigent person should be represented by a legal practitioner. Although this might sound utopian, considering

the current situation in a Zimbabwe this can be progressively implemented so as to move towards the ultimate realisation of justice for all.

Access to justice can only be achieved when no person is deterred by financial, psychological or physical barriers from seeking a legal solution for the assertion of one's right, making a claim or for defending a civil claim or criminal charge. A good legal aid system should address the barrier of poverty in accessing the law so that the law is not seen as serving the interests of the rich only. It is only after this has been addressed that we can start speaking of access to justice for all because currently the rich are the ones who are effectively accessing justice and the litigation route bears fruits for them as they are able to institute legal proceedings and execute their judgments in the end. The current legal aid system from both the government and the non-governmental sector offers fragmented services to the underprivileged members of our society. There is a need for wholesome (meaningful or substantial) justice to be delivered so as to promote access to justice for the indigent persons.

CHAPTER 3

3.0 RESEARCH METHODOLOGY

3.1 Hearing it from the horse's mouth

In order for me to explore more about the actual experiences of women who come for legal assistance at the legal aid service providers I could not run away from having the indigent women as a starting point for this research. As a result I had to engage with the women's law approach as a methodology which assisted me in unearthing the gaps between what the laws provide and what the indigent women are indeed experiencing on the ground. Rather than just sitting in my office and reviewing what the law and literature says about women and the legal aid system, I had to mix and mingle with these women so as to capture their voices as they eagerly narrated their stories. This approach entails that the starting point is women's lived experiences. The purpose of women's law is to describe, explain and understand the legal position of women with the specific aim of improving the position of women in law and society (Dahl, 1987).

The purpose of this research is to highlight the gaps in the laws which govern the legal aid system which result in women getting inadequate assistance from the legal aid providers. This approach helped me in assessing whether the laws as they are on paper are effectively implemented in the women's lives. Using this approach I managed to unearth the discrepancies that exist between theory and practice. Through the women's law approach I identified that the Legal Aid Directorate does not cover all the expenses which are incurred by indigent clients despite there being a provision in the Legal Aid Act⁶ that allows for aided persons to have their costs and expenses covered by the Legal Aid Fund.

The women's law approach made me explore more about the available legislation which governs the issues of paupers (*in forma pauperis*) who also form part of indigent women as they access legal aid through private lawyers. Again through this approach I managed to expose the gaps which exist in the implementation of the law. The Magistrate Court Civil

⁶ Section 14(4) (b) states that 'the Legal Fund shall be applied to costs and expenses necessarily incurred in the provision of legal aid in terms of this Act'.

Rules⁷ provide for those people suing or defending claims as paupers to be exempted from paying court fees or the fees of the Messenger of Court but in reality these paupers end up abandoning their cases and some even sit on their judgments due to their failure to raise these requisite fees. The fact that these laws were just there on paper and not being implemented on the ground greatly affects indigent women in their quest to exercise their right to legal aid.

This approach is useful to the policy and law makers as it involves building up legal and social science knowledge which encompasses the practices and perceptions of women and men (Bentzon *et al.*, 1998). While my assumptions were focusing on the financial barriers to accessing justice which results from the requirement to pay the fees charged by the Sheriff and the Messenger of Court, it also came out that the issue of transport costs was also a major concern for indigent women. These perceptions of women could have been overlooked had I not used the women's law approach. The effective use of this approach gives the researcher an open mind when conducting research and prevents their becoming blinkered about the parameters of the assumptions. As a result, the research will be comprehensive when it comes to the nature of findings which will be made at the end.

3.2 Locating indigent women

For me to explore the different experiences of women whom I believe are short-changed by the legal aid system and also to know what coping mechanisms, if any, they have developed as an alternative to paying the unaffordable fees for the Messenger of Court or Sheriff, I also used the grounded theory approach. Grounded theory is an iterative process which facilitates continuous dialogue between legal concepts, theoretical generalizations as well as assumptions and an ever-growing data base of empirical knowledge obtained from women and men's lived realities on gender relations, local practices, norms and procedures as explained by Bentzon *et al.* (1998:18). I used this method to follow up on new leads which emerged as I was conducting my research to find out what prevails on the ground rather than simply relying on desk research.

As I was collecting information which was pertinent to my research area I came across so many aspects which I had not envisaged initially when I was designing my research. For example, I never thought that the police would be that useful to my research but as I was

⁷ Order 5(3) as read with Rule 318 of High Court Civil Rules, Order 39.

interviewing indigent women I discovered that a lot of them women who were bringing family related cases to court were being assisted in the service of their court papers by police officers who were doing it free of charge. I then decided to interview the police officers in order to find out their lived experiences when they assisted indigent women. This brought in a new dimension to my research as I discovered that the police could only go as far as assisting indigent women during the initial stages of the legal proceedings, that is by serving court papers either for custody, maintenance, the sharing of property and access cases. When it comes to the enforcement of judgments, they could only assist women if they had authority to do so by the court. This was especially the case for maintenance matters in which they serve warrants of arrests on those who have defaulted in the payment of maintenance. All these aspects could not have been unearthed without the use of this methodology.

When I started this research I did not focus on any particular cases which women were bringing to court for assistance and as a result I ended up with a pool of cases ranging from labour related cases to family related cases. Later in the research my supervisor advised me to reduce them to a specific category of cases being those involving custody, maintenance, sharing of property, access and divorce. Then I wondered what I was going to do with the data I had collected relating to labour cases and cases to do with non payment of debts. I did not know that these cases were going to come in handy when analysing my findings. I managed to make a comparison as to the type of cases which were brought by men and women and I came to a conclusion that men mainly bring to court cases which are labour related and women file cases which are family related. Had I relied on desk research I could have missed on these differences. The process of sifting data to see which data to keep and for what purpose was critical in unearthing the discussed aspects and this assisted in my deeper exploration of my research area.

3.3 Compliance or non-compliance?

Zimbabwe does not live in isolation as it is bound not just by its national legislation but also international instruments which promote the development of human rights. Zimbabwe has ratified a lot of human rights instruments that apply to the concept of access to justice. First and foremost it should be noted that there are no guidelines which are set by the United Nations which apply to civil cases. The only available guidelines refer to the criminal justice system and these were adopted recently in 2012 (UN Principles and Guidelines on Access to

legal Aid in Criminal Justice Systems). This shows how the concept of legal aid mainly focuses on criminal law as opposed to civil law. At the UN level most regulations and guidelines which have been set apply to the rights of the accused persons in criminal cases and civil cases have been sidelined.

As I was formulating my research questions my last but obviously not least question was informed by the human rights based approach. Research question 5 reads:

- Is the gap in the provision of legal aid to indigent women resulting in the infringement of their right to access justice?

The human rights approach was used to provide me with the starting point in considering the right of access to justice as an internationally recognised human right and this assisted me to further unpack what the right entails. From this point I view I found out that we cannot talk of legal aid as a system of enhancing access to justice without assessing how affordable and accessible the legal aid system is as a whole. By analysing provisions enshrined in various human rights instruments which refer to the concept of access to justice and legal aid I managed to investigate how the right to legal aid developed.

The Universal Declaration of Human Rights,⁸ though not legally binding, can fit well into our legal system since it is consistent with our law.⁹ It laid the foundation for accessing justice by the women. Women were no longer regarded as perpetual minors and the reason indigent women are able to file their civil suits or defend civil claims is because they now have the legal capacity to stand before courts of law. This right to equality before the law was further reiterated in human rights instruments which came later like, for example, the International Covenant on Civil and Political Rights¹⁰ and the Banjul Charter.¹¹ I am of the view that all these instruments were not adequate as their mere presence failed to guarantee women access to justice. Men continued to have the upper hand over women as they had the financial resources to hire lawyers of their choice, while the poor women were not sufficiently financially privileged to afford a private lawyer. In view of this gap it was a welcome development for women when human rights instruments which are specific to women were

⁸ Articles 6 and 7 refer to equality before the law.

⁹ Section 326 of the Constitution says that international customary law is part of the Zimbabwean Law.

¹⁰ Articles 14 and 16 provide for the treatment of individuals by the judicial process itself.

¹¹ Article 3 is on equality before the law.

concluded. These instruments managed to highlight the financial challenges which women were facing in accessing justice. Due to the fact that the majority of women are not economically independent, it meant that there had to be an introduction of a system that would see the financial barrier faced by women in accessing justice being challenged. At this time we start seeing human rights instruments which are specific to women now encompassing legal aid as a system to access justice.

Although the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) has been referred to as the international Bill of Rights for Women, it is not very specific to the issue of legal aid and only calls for the equal treatment of men and women before the courts of law. However, the instruments which followed later were very direct on the issue of legal aid. For example, the African Protocol on Women's Rights¹² contains a clause which forms the basis why I adopted the human rights based approach to explore more about my research area. This instrument places an obligation on the state to make sure women have effective access to legal services, including legal aid. Having analysed the concept of access to justice from the human rights perspective it was for me to find out whether or not Zimbabwe as a signatory to these discussed instruments was indeed complying with the provisions set out therein. I was able to critically assess whether indigent women were having effective access to legal services, including legal aid. I found this methodological tool quite useful to my research and if I had not adopted this approach my research would have been incomplete due to my failure to put a benchmark on the level of compliance by the state since I would have judged its compliance against national legislation only.

3.4 Together we can make legal aid accessible and effective

When I was working on my research design we were asked to list the sources of data to our specific research topics. When I was listing these sources of data I found myself putting down all those officials and individuals who were crucial in providing me with the pertinent information which I needed to conduct my research. I also discovered that all the actors and structures which exist in the legal aid system can provide effective access to the indigent women if there is an integrated approach in dispensing legal aid. When I got into the field this exercise helped me focus on specific informants who were key to my research and this was

¹² Article 8 (a) and (b) of the Women's Protocol.

made easy just because I had identified them earlier before embarking on the research. Since I was using methodologies which allowed flexibility in the event that I encountered issues that I had not thought of while designing my research, I managed to add more sources of data like the police officers who came up as a new lead. Had I not followed up this lead I would have failed to appreciate the important role the police are playing in offering to serve the court papers of indigent women for free on defendants or respondents in family-related cases.

The actors and structures approach assisted me in locating the relevant officials involved in serving of court papers and in the execution of judgments and they are the Messenger of Court or the Sheriff. From these officials I discovered that they do not have a facility of accommodating indigent women who would have passed through the legal aid system. My perception was that they could have an arrangement of assisting indigent women free of charge. The Director of Legal Aid as an important actor in this research and he helped me to find out about the background of the Legal Aid Directorate and also the experiences he has had with indigent women who come back to the office hoping to get financial assistance to meet legal costs. I also targeted some NGOs which offer legal aid to women and these are the Legal Resources Foundation, Zimbabwe Women Lawyers Association and the Msasa Project as these organisations are playing a crucial role in complementing the government's efforts to provide legal aid to the underprivileged members of our society.

I became aware of the other challenge which women face in accessing justice and centres on transport money. It is not enough for legal aid lawyers to just draft court papers and then give them to clients without making sure that these indigent women will be able to attend court on the day of hearing. Without offering legal aid clients transport money our job as legal aid lawyers will be futile. It is just as futile as the inability of indigent women to raise money for instituting legal proceedings or enforcing judgments renders legal aid work fruitless. It was important for me to use the actors and structures approach because it enabled me to start with women's experiences in accessing legal aid and then looking at the official actors and structures that impinge on their daily lives. This approach helped me to locate the indigent women who are the subject matter of this research and their insights were an eye-opener as will be fully highlighted in Chapter 4 which deals with findings.

No research on women can be complete without discussing what the parent ministry on women's issues is doing to address access to justice for indigent women. I interviewed the

Administrator within the Ministry of Women's Affairs Gender and Community Development (MWAGCD). It however came as a surprise to me when I discovered that the Ministry only works as a referral point so that when women come to them with their legal problems, they are sent to various legal aid service providers within the government and in the non-governmental sector.

It also emerged that the Sheriff's office was no longer a private institution as it is now run by the Judicial Service Commission (JSC) and so it became mandatory for me to follow up on the JSC as a structure playing a pivotal role in the justice system. I also wanted to find out the motive and effect of changing the sheriff's office from a private to a public institution. All this information will be covered in the chapter on the research findings. The Magistrates were key to this research area because they preside over the majority of cases which I was focussing on.

The majority of women in Zimbabwe stay in the rural areas and the local courts emerged as an important structure in exploring access to justice for indigent women. It was also necessary for me to interview the Chiefs who preside over these local courts and also the women who access these courts so as to find out if they face any challenges when they bring their cases or defend claims brought before Chiefs for their adjudication.

3.5 Are we both indigent?

The Legal Aid Directorate offers legal assistance to both men and women involved in litigation. NGOs like Msasa Project and ZWLA only assist women and the former is not into litigation per se but the latter is. The Legal Resources Foundation assists both men and women and it is into litigation although currently the organisation is adopting alternative dispute resolution as an alternative to the litigation route which is costly. I found it necessary utilise the sex and gender approach to investigate the differences in the way men and women were coping with the challenges in the legal aid system.

Sex is used to describe physical differences between a man and a woman. Gender is described as socially constructed. I used this methodology to assess whether the issue of high fees for the Messenger of Court and the Sheriff affects women and men in the same manner. The majority of clients who come for legal aid are women and due to their economic

dependence on men they end up being affected more than men. This approach focuses on the differences between women and men with a view to establishing and understanding how laws and policies may have different a impact on men and women or that laws and policies affect men and women differently.

Men and women are different in the way they access resources and this can be traced back to the historical imbalances which resulted in women being economically dependent on men and this is the reason why the majority of men bring labour-related cases before courts of law because they have access to the public sphere while women who are always in the private sphere file cases which are family related because their problems emanate from the home. Women have been socialised to be child bearers and child rearers and because they tend to put the family first, even before themselves, they come to legal aid service providers to apply for help in custody, access or maintenance matters when the rights of their children have been infringed upon. Men who bring labour related matters to court can run around and secure US\$450 for the Sheriff's or Messenger of Court's fees to execute their judgments because they know they stand to gain economically from the legal proceedings.

Therefore there is need to categorise indigent clients in terms of the cases most commonly associated with them so as to effectively deal with their needs. There is a need to exempt all indigent women who bring to court cases which are family-related from paying both court fees in the form of revenue stamps and fees for the Messenger of Court or Sheriff especially when enforcing judgements as this falls outside the scope of what police officers do. They normally help women to serve their initial process except those for maintenance cases.

3.6 Sampling methods

3.6.1 Purposive sampling

Purposive sampling as a method of collecting data helped me to identify the indigent women who were very critical for supplying me stories of their lived realities. When I first went to my work place to conduct this research, I told all my colleagues whom I work with about my research and what sort of information I intended to gather .This made my job easier because all those clients who met the objectives of my study were referred to me by my colleagues. Although I started off the research looking at any type of civil cases which involved indigent clients both men and women I ended up narrowing my research to specific cases. These

include cases involving custody, maintenance, access, sharing of property and divorce. By reducing my focus to these specific cases I was able to explore more about the research topic rather than just be forced to generalise.

3.7 Data collection methods

3.7.1 In-depth interviews with key informants

Table 1: Key informants who were interviewed during the research

Interviewees (key informants)	Female	Male	Total
Sheriff - High Court	0	1	1
Messenger of Court	0	1	1
Chief Registrar -JSC	0	1	1
Director-LAD	0	1	1
Magistrates	1	1	2
Police officers	1	1	2
Private lawyers	1	1	2
Lawyers in NGOs	3	0	3
Chiefs	0	1	
Indigent clients	13	5	18
Administrator MWAGCD	1	0	1
Lawyers-LAD	4	2	6
TOTAL	24	15	39

In-depth interviews as a method of data collection were used to explore more information on a one on one basis with the interviewee. In obtaining the crucial information with the key informants I conducted in-depth interviews. Key informants I interviewed include the Sheriff, the Messenger of Court, the Chief Registrar of the Superior Courts, the Director of Legal Aid, the police, magistrates, the programme officers from various non-governmental organisations and last but not least the men and women who form the subject matter of this research. Interview is a mode of communication between a researcher and the interviewee. The aim of the research is to obtain certain vital information about the research topic. I used this method when I interviewed the Director of the Legal Aid Directorate. Through the interview I managed to obtain information pertaining to numerous instances when the Director has been approached by women who have failed to raise requisite fees for either instituting proceedings or enforcing judgments.

In conducting these in-depth interviews I would make appointments with the various key informants and at times when I would come at the scheduled time and would be told by the key informants to come on another date because some important unplanned meeting had just cropped up. Given this a scenario I was flexible enough to postpone the appointment to some other time since I had to fit into the key informant's schedule. This approach was quite useful as I managed to get the undivided attention of the interviewees as they would clear their schedules to accommodate me. However, the only problem arose when I was interviewing women as they thought that I had finally brought the solution to their plight of failing to raise requisite fees for either instituting proceedings or enforcing judgments. After explaining to my respondents that I did not have any form of financial assistance to offer them they felt as if I was just taking advantage of them by using them for research purposes only without really doing anything to address their financial challenges. The very first day of the research week was set aside for making appointments with the different government officials and some non-governmental organisations.

There are some clients who were not comfortable with having me conducting my interviews from their homes and neither were they prepared to come for a meeting to a neutral venue. In such circumstances I found telephone interviews to be the only viable alternative. Interviews allow for flexibility in the way data is collected. For example at times I would even contact my respondents by phone while analysing data to ask for clarification about on some issues.

3.6.2 Perusal of records

As I mentioned above my workmates played a pivotal role in assisting me to locate the respondents who were crucial to the research area. Sometimes I was referred to files which had since been closed. So by perusing these files I was able to get the facts of the matter which had been brought before the court, the contact details of the clients and the status of the matter, whether it was pending or closed. Some of the files would indicate that the lawyer had finished doing his or her job but the file will not have been closed simply because the client would have failed to raise monies for the Sheriff to execute the judgment. After obtaining contact details I would then make phone calls to these clients and for those who would have agreed to be interviewed an appointment for the date for the interview was made. This method of data collection was very effective as it made me locate those respondents whom I would have missed had I waited for walk-in clients only. I managed to interview men and

women who had passed through the legal aid system and these assisted me in coming up with suggestions and recommendations which, if some of them are adopted, will bring about a useful change in the system as a whole.

3.6.3 Observations

When I was conducting my research I was under the impression that the courts shun returns of service from the police preferring those from the Sheriff or the Messenger of Court. However, this turned out to be incorrect because when I was attending court hearings I discovered that Magistrates accept returns of service from the police as valid service for cases relating to custody, maintenance, access to minor children and the sharing of property. When I was at my workplace I would sometimes just sit in the office that was vetting¹³ clients and observe how many clients would be turned away after indicating that they could not afford fees for the Messenger or the Sheriff. Due to limited offices space at our work place the majority of lawyers share offices and clients have a right to insist on privacy when one feels he or she needs privacy and the other lawyer will have to excuse the two so that privacy is maintained. Observations are an effective tool for collecting data in that information is collected directly rather than through other sources of data and this makes it more reliable. It also enabled me to triangulate my data to verify its accuracy.

¹³ Vetting is the process of consulting with a client to see whether the client's case is worth taking or not. It applies to all walk-in clients.

CHAPTER 4

4.0 RESEARCH FINDINGS, DISCUSSIONS AND ANALYSIS

4.1 Scope and nature of services offered by the Legal Aid Directorate

Applicants for legal aid have to satisfy two major tests which are the means test and the merits test. The means test will determine whether indigent persons get legal aid entirely free or whether they will be entitled to legal aid on payment of a nominal contribution. Legal aid clients are assisted in both criminal and civil cases. The Legal Aid Directorate has encountered many cases in which clients the majority of whom are women have come to the offices to compel the Directorate to negotiate with the Messenger of Court or the Sheriff to offer their services for free, especially when executing judgments because their charges are beyond the reach of many. Women from various spheres of life (including those who are unemployed, the elderly those who are widowed and also those women who are working but earning meagre salaries which make it difficult for them to afford fees for the Messenger or the Sheriff) have approached the Directorate.

Although on paper through section 14(4)(b) of the Legal Aid Act the Directorate can assist clients financially (that is, by covering clients costs and expenses incurred in obtaining legal aid), the reality on the ground is that its lack of resources and finances prevents the Directorate's exercise of this function and it is against this backdrop that the quest to deliver wholesome (meaningful or substantial) justice to indigent men and women who are financially disadvantaged is sought.

The Directorate manages a fund which is provided for in terms of section 14(2)(a) of the Legal Aid Act and this fund became operational sometime in 2006 but ever since then Parliament has never made a budget allocation grant towards this fund. This fund is supposed to receive statutory grants, but due to financial constraints or lack of political will, the fund is never given any priority. This shows a lack of prioritization of the legal aid system and also a lack of political will by the members of the Legislature who may be of the opinion that issues to do with legal aid are less important than health issues since such matters are a matter of life or death. The need for the government to fund the Legal Aid Directorate is

established in terms of Article 11 of the Kyiv Declaration on the Right to Legal Aid which states:

‘Governments should make appropriate fiscal, budgetary and operational arrangements for a sustainable legal aid program, including for the provision of a broad range of legal aid services, establishment of infrastructure, an independent, cost-effective, professional and quality driven case management system, and with the ability to satisfy the needs of the community in the long term.’

The non-availability of government financial support implies that the Legal Aid Fund is, therefore, sustained by the few funds which are obtained from contributions made by certain clients who have some source of income and are made to pay a contribution towards the assistance they receive. For those who do not have a source of income the Directorate assists them on a *pro amico* basis. The purpose of the fund is to advance the provision of Legal Aid through the buying of stationery, computers and all other necessities which render the smooth running of the Directorate. As a result, the fund does not realize a lot of money to assist client’s clients who cannot afford fees for the Messenger of Court or Sheriff. This flies in the face of the letter and spirit of the basic tenet of the right to access justice.

After noticing that the majority of indigent clients were failing to raise fees for the Messenger of Court and the Sheriff, the Directorate decided to seek an audience with the Messenger of Court so that they could map a way forward. But this meeting failed to yield any positive results as the Messenger indicated that there was no way he would be able to offer free services due to the nature in which he operates.

The Directorate recommended that, resources permitting, a revolving fund could be set up so that when the Directorate comes across situations in which clients fail to raise fees to either institute proceedings or to enforce judgments, the fund could be used to cover these costs. It would be possible to deduct the amount of those costs from the proceeds of the sale in execution of a judgment and that money could then be paid back into the fund so that the fund could be available to assist others in need. The fact that this fund will be revolving means that the fund would never run out if it were managed in good faith. This might ease or fill the gap in the provision of Legal Aid to indigent clients.

The Ministry of Justice, Legal and Parliamentary Affairs appoints the Messenger of Court¹⁴ and this means that a compromise might be reached between the government and the Messenger so that, e.g., the government could pay the Messenger of Court, who is a private entity, subsidies in order to protect his office from unnecessary losses. I also had a chance to interview six lawyers at the Legal Aid Directorate and they expressed concern over the increasing number of cases which are still pending due to the fact that the clients had failed to raise the requisite fees for the Messenger of Court or the Sheriff. One lawyer had this to say:

‘Most of our clients cannot afford to pay fees for enforcing judgments and it is pathetic as we would have done our job as lawyers only to realize at the end that your client will just sit on his or her judgment because the fees for enforcing judgments are just beyond their reach.’

When I was carrying out my research I failed to obtain the relevant statistics as to the number of clients who fail to institute legal proceedings and those who fail to enforce judgments due to their failure to raise the fees for the Sheriff or Messenger of Court as these statistics have never been compiled. It was only after I had interviewed the Directorate that efforts to have these statistics compiled were initiated. However, these statistics were not availed to me at the time of writing this dissertation. Of the eighteen (18) indigent clients I interviewed, only three (3) men had managed to raise the US\$450 needed by the Sheriff to execute judgments which involved labours matter and the rest had either abandoned their cases or failed to enforce their judgments.

4.2 How affordable is legal aid? Serving court process through officers of the court

When I commenced my research I was of the view that all the players involved in the legal system were not being considerate of the plight of indigent clients. I thought that since the Messenger of Court and the Sheriff are not exposed to indigent persons on a daily basis they do not appreciate the challenges which men and women face in accessing justice, especially as a result of the failure to afford money to pay for the requisite fees for instituting proceedings and enforcing judgments.

¹⁴ Section 10(1) of the Magistrates Court Act.

The Messenger of Court's office is directly responsible for the service of court process and execution of judgments which emanate from the Magistrates Court. The office is an independent office which is created in terms of section 10 of the Magistrates Court Act and he is appointed to office by the Minister of Justice, Legal and Parliamentary Affairs. The current Messenger of Court came into office in 2000.

According to the Messenger of Court his office is not funded by the government. His fees are set out in the Statutory Instrument 110 Of 2012 which is the Magistrates Court (Civil)(Amendment)Rules, 2012 No 57 and in addition to these the Messenger also charges for the cost incurred in hiring vehicles for use when carrying out executions, paying for the locksmith, fuel etc. The Messenger also acknowledged the fact that a lot of clients who come from the Legal Aid Directorate always complain that the fees charged are exorbitant and they fail to raise the required fees which can go as high up as US\$550 or more but it is just unfortunate that he cannot offer free services as he is in business and, therefore, operates on a cash in advance basis. The Messenger of Court had this to say:

‘In as much as I might want to come in and assist these clients for free, my services include hiring staff and the qualified personnel to conduct processes like ejectment so these services have to be paid for. So who will meet these costs and how if I start offering free services?’

After I enquired from him whether they had any way of accommodating those clients who cannot afford to raise the required fees, I was informed that since the Messenger of Court is independent and the business has to sustain itself, they cannot offer free services. He narrated how, at one point, a certain government Minister once tried to use his office and convince the Messenger to carry out an execution for his relative for free as he could not afford the fees and the Messenger refused to comply, citing the issues of running expenses which were not subsidised by the government in anyway.

He mentioned that at one point he was even approached the Director Legal Aid who had received complaints from a number of clients that they could not afford the fees charged by the Messenger of Court as they were beyond the reach of the majority of indigent clients but, as the Messenger of Court, he could not reduce the fees as he had justified them when they were gazetted.

The Messenger of Court narrated that prior to 1956 all court processes were served by the police and that posed challenges because this was not the core mandate of the police, hence, there were a lot of delays in the service process and the whole justice system ended up being affected. What was happening was that the police were only attending to serve court papers after they had carried out all their usual police work. Because of these flaws and delays arising from using the police the Messenger of Court was appointed as an independent office in order to promote efficiency and accountability. Although this move was ideal the needs of the poor were not taken into consideration. While the earlier system of serving court processes through the police was inefficient, it rendered justice accessible even to the indigent persons as no money was paid for such services. Even if the introduction of the Messenger of Court's office was a good idea, it was the beginning of a phase whose gradual development started presenting financial obstacles to the less privileged members of the society who could not afford the Messenger's fees and, hence, fail to access justice. Necessary measures could have been made to spare indigent clients from paying for his services.

The Messenger of Court indicated that he has developed some coping strategies to cater for those clients (e.g., former employees) who are suing companies which have certain assets which, when attached, could be sold by public auction in order to recover a judgment debt (e.g., damages for unlawful dismissal, etc.). To prevent a judgment creditor (the former employee) from having to raise the entire sum of US\$450, the Messenger allows payment of less US\$200 which pays for his simply serving a Notice of Intention to Remove certain listed property on the judgment debtor company. The hope is that will force the company to pay the monies owed to former employees. If this happens it means the client will have been saved the inconvenience of having to raise US\$450 for the execution of a judgment. However, most indigent women do not bring to court cases of such a nature. Therefore, this coping strategy only benefits men who normally sue their former employers for damages for unlawful dismissal and they stand to benefit economically once execution is processed. This goes to show the historical imbalances that result from the patriarchal nature of African societies in which more men are able to access and exploit resources through employment, while women traditionally stay at home rearing and bearing children. This is why indigent women bring to court cases which are family related like custody, access and maintenance cases, while their male counterparts bring labour-related matters.

When I began my research I was of the view that the Sheriff's office was still an independent office just like that of the Messenger of Court but this was not the position. The Sheriff's office does exactly the same work as the Messenger of Court except that the Sheriff is attached to the High Court, Supreme Court and the Administrative and Labour Courts. The Judicial Service Commission is now responsible for the operations of the Sheriff. I, therefore, figured out the need for a comparative analysis between the Messenger of Court and the Sheriff since the former is a private institution and the latter is now a public institution. I sought to explore the impact, if any, of such a development.

The Sheriff's office came into operation on 1 April 2013 and prior to this there was the Deputy Sheriff who was tasked with serving High Court processes and conducting executions of judgments and during the Deputy Sheriff's time the Sheriff was a private institution just like the Messenger of Court. When the Sheriff was appointed and replaced the Deputy Sheriff the office was placed under the Judicial Service Commission and it now operates like any other government department and it also receives its budget from the Commission. The funds generated by the Sheriff's office are exchequers money and, therefore, subject to auditing, hence, it is difficult for the Sheriff to offer free services when the rest pay for the same services. The Sheriff had this to say:

‘If I start offering free services people are bound to say that I am engaging in corrupt services as they would think that I might have received payment and then pocketed it for own use then assist that person for free. There are many people who fail to raise his fees for execution which range from US\$450 to US\$800 depending on the nature of the items to be attached.’

He indicated that when he encounters situations in which a person fails to raise the requisite fees for either serving processes or executing judgment he has no other way to assist as he operates on a cash in advance basis. The Sheriff's office also engages services of private contractors, like Ruby Auctions, which is responsible for the auctioning of attached goods which are sold in execution of judgments obtained from the High Court. The fees charged are gazetted and at the moment the fees charged are in terms of the High Court (Fees and Allowances) (Amendment) Rules, 2012 (No 20).

As thought the current fees for service and execution of process were not enough, the Sheriff is now tasked with service of all notices of set down with effect from 1 February 2014 as

highlighted by Practice Direction 1 of 2014 entitled 'Standard Directions for Service of Notices of Set Down'. This development has increased the expenses which one has to incur to have the matter set down either for pre-trial conference or court hearing and it is clearly stipulated that failure to comply with these provisions will result in a matter being dismissed or being deemed abandoned. Prior to this lawyers and self actors could serve notices of set down and then prepare certificate of services if service is effected by lawyers and where service is effected by self actors an affidavit of service will be prepared. When I formulated my assumptions I had not envisaged this extra expense but still it goes on to confirm the already existing assumptions. The charge for serving notices of set down within 5km from the registry where process is supposed to be lodged or filed and when it exceeds 5km the charge is \$100-00. This further deters indigent women from accessing justice.

This research would have been incomplete had not interviewed an official from the Judicial Service Commission (JSC) to find out the motives and intentions behind making the office of the Sheriff a public institution. The JSC highlighted that the Sheriff's office is now a service-oriented venture as opposed to a profit-making institution. According to the Registrar, the move to de-privatise the Sheriff's office was to cut down on extra expenses which litigants incurred which were unjustified. This will impact positively on litigants who will no longer be expected to pay what the Deputy Sheriff used to charge as security costs for attachments. Now the Sheriff only charges actual costs aimed at recovering one's expenses. However, the office does not offer free services. When I inquired, I was told that clients who are referred by the Registrar of the High Court to private lawyers for assistance on an *in forma pauperis* are exempted from paying for the revenue stamp or charges for the Sheriff. This is not what I found practised on the ground. Everyone without exception who lodges his or her papers in the High Court pays the US\$5 for the revenue stamp and all the Sheriff's charges. The Practice Directions which were recently published apply to everyone and there is no one who is specifically exempted from paying the Sheriff to have his/ her notice of set down served. When I informed the Chief Registrar that there is no one who is exempted from paying for the revenue stamp or the Sheriff's charges he indicated that there could be a gap in the system then.

The Judicial Service Commission funds the Sheriff's office. Since the office does not have its own auctioneers, the office engages the services of private contractors when it comes to the execution of charges and this is where I think there is a gap in the system and this gap leads

to litigants incurring extra expenses which could be minimized if there were no private contractors involved in this process. Private contractors like Ruby and KM Auctioneers, which are profit-making businesses are the ones which are sub-contracted by the Sheriff to conduct the auction process. These are both agents of the Sheriff and they have large storage premises to accommodate attached property. The longer such property stays on these premises before being sold the higher the charges relating to them accrue. When the property is finally sold the proceeds realized are normally not enough to cover/satisfy the judgment debt and this means that the judgment creditor will not recover his or her debt, let alone recover the costs charged by the Sheriff. So proceeding to have the judgment debtor's property attached might not be a solution given this scenario.

4.2.1 Legal aid through the lenses of private lawyers

Having appreciated that not all indigent persons are assisted by legal aid service providers and that some are referred to private lawyers for assistance free of charge, I decided to interview private lawyers who have handled *in forma pauperis* cases in order to find out how they deal with such cases. I interviewed lawyer X, who preferred to remain anonymous. She indicated that normally, when the Registrar of the High Court refers a client to her to be assisted for free (for example, in a divorce case), she first enquires from the client whether the client has the means to pay the Sheriff's fees. If the client does not, the lawyer does not assist the client because, she said, that it would be pointless embarking on a case which could not be finalised. She had this to say:

‘Most clients referred to us for assistance for free normally fail to raise the fees for service of papers and as private lawyers there is no way we can assist these clients with the fees for either service of court processes or execution of judgments. *In forma pauperis* clients are not exempted from paying requisite fees for legal proceedings.’

This, however, is contrary to the provisions of Order 5 Rule 3(a) of the Magistrates Court Civil Rules, 1980 which clearly exempts a client suing as a pauper from paying court fees and Messenger of Court's charges. This shows that although we have good laws and provisions on paper a great deal still has to be done when it comes to their implementation and making them a reality. The Sheriff and the Messenger of Court have insisted that they operate on a cash in advance basis and they do not offer free services, yet the law clearly stipulates clearly that when dealing with paupers, i.e., *in forma pauperis* clients, they should

not pay certain costs and fees. This approach should also apply to indigent clients as there is no basis for expecting someone who is underprivileged to pay fees and costs which are incidental to the institution of legal proceedings. To further confirm this assertion she added that:

‘Some clients who are referred to us are real paupers and they cannot even afford the US\$5 for the revenue stamp, let alone the US \$450 for execution of judgment. In the event that such a scenario arises and it coincides with the fact that the case which the client wants to institute proceedings against does not sound in money then there is nothing we can do and that will be the end of it all.’

She indicated that the scenario might be different where a case has been allocated on an *in forma pauperis* basis and it sounds in money and there are high prospects that the case might be won in court. In that case the law firm may take the risk and pay for all the expenses for the Messenger of Court or the Sheriff in the hope of recovering these expenses the moment the debt is recovered.

Another private lawyer, whom I shall refer to as Mr Sam (not his real name), also highlighted the fact that when it comes to the service of court processes the Messenger of Court is more expensive than the Sheriff and the Messenger of Court is also more effective and efficient than the Sheriff and he attributed this to the fact that private players are usually more effective than public players.

He also recommended that the fees charged by both the Messenger of Court or the Sheriff for executing judgments be made user friendly as the fees are beyond the reach of many and that if only the indigent clients could be exempted from paying these fees, this would go a long way in addressing the plight of indigent clients since they at times end up being denied their rights to access justice due to their failure to raise these fees. He also suggested that the justice system should have its own way of serving proceedings or executing judgments which is cheaper and more affordable to everyone rather than forcing private players to carry the cost of serving court process and executing judgments.

4.3 Aren't you forgetting I am indigent! Enforcing judgments through officers of the court

More often than not indigent persons institute legal proceedings in courts of law, then spend months going through each and every stage as required by the rules of courts, then at the last minute when the judgment is finally granted in their favour, they fail to execute that judgment. People are reluctant to comply with directives given by judges or magistrates and litigant A cannot seek to hold litigant B in contempt of court for neglecting to comply with an order of court when litigant A has not themselves complied with the judgment. This very dilemma was faced by one respondent I interviewed. This is what happened to her:

She was a plaintiff being assisted in having her civil marriage dissolved by the High Court. Throughout the divorce proceedings and in accordance with the Rules of the High Court she had to serve several pieces of court process on her husband through the Deputy Sheriff. These included the summons, the notice to plead and the notice of set down. All these papers are served for a fee by the Deputy Sheriff whose fees are based on the distance from his offices in town to the place where the Defendant stays and in this case her husband was still living with her in Budiroso so she was paying almost US\$30 for each piece of court process to be served. She had had to part with almost a US\$100 for service of these papers. She was quite unfortunate as the Deputy Sheriff failed to effect personal service (as required at law) of the summons upon the defendant at his first attempt as her husband was not at home and according to the Deputy Sheriff this was not his concern and she had to pay another US\$30 for another attempt to be made.

She managed to raise the money to pay for all the fees for service but when the judgment came out and she was awarded full ownership of the house in which they were staying, she failed to secure the US\$450 to evict her husband who actually refused to leave on his own as he wanted to be evicted by the law (that is, the Messenger of Court). Mrs. Rashai ended up having to live with a man she had divorced for another two months after the court had granted her the divorce until her own relatives helped her to raise the required amount to get him evicted. They helped her because it was becoming impossible for her to continue living under the same roof as the man she had succeeded in divorcing. She had this to say:

'Mari yacho inodikwa nasheriff ndega handaikwanisa kuiwana nekuti kwandinoshanda pamwedzi wese hauiwane asi sheriff vanoida yese kamwe

chete saka zviripachena kuti justice ndeye vane mari. Dai pasina hama dzangu handizivikuti baba ava ndaivabudisa mumba mangu sei?’

(Translation: ‘The money which the Sheriff wanted was beyond my reach since my month’s salary was just not enough yet the Sheriff expects you to raise that amount at once. So it is very clear that justice is accessible by the rich ones only. If my relatives had not assisted me with the money I do not know how I would have secured the eviction of this man from my house.’)

Despite facing financial challenges the plaintiff in this case ended up suffering the emotional abuse of having been forced to continue staying with a man she had long divorced.

I also interviewed an indigent woman who, due to a failure to enforce a judgment in time, ended up losing the movable property which had been awarded to her after she had applied for a distribution of property in the Magistrates Court. She struggled to raise the required S\$450 and this took her about five months and when she finally engaged the services of the Messenger of Court she found the place where her ex-husband used to stay abandoned since it was rented accommodation and his whereabouts were unknown. All the property she was claiming had been moved to a place unknown and she was left with not even her kitchen utensils. The situation was made worse by the fact that her husband was from Malawi and she had never visited Malawi during the subsistence of her union with him. She was robbed of all her property which she had worked hard to acquire and this also affected her emotionally as she felt that somebody had been unjustly enriched.

4.4 Community assistance as a way of helping indigent women

The Zimbabwe Republic Police is playing an important role in making sure justice is easily accessible. Having realised that a lot of women were approaching various police stations with court papers which had to be served, the police came up with a way of assisting the community by offering to serve for no charge court papers in connection with cases involving custody, maintenance, access to minor children and the sharing of property. I managed to interview two police officers who provided me with information on how the police assist women to access justice through their serving these court papers for free.

The respondent indicated that they offer a community service to people by serving their summons in cases involving maintenance, sharing of property, custody or access. Maintenance forms, in particular, authorize police officers to effect service of the summons

for maintenance. They serve these pieces of process for free provided the date of hearing mentioned in the process does not occur not within seven days of the service. This means that there is no provision for urgent service. If one requires urgent service the Messenger of Court and the Sheriff charges special, higher rates. The police officers endorse the back of the client's papers with the name, rank, force number of the police officer who effected service, the person served signs the process and the client witnesses the service. This constitutes a valid return of service which can be produced in court in the event that the person served with the court papers fails to appear on the date of the hearing. However, there are other court processes which the police are not supposed to serve, especially High Court processes which only the Sheriff may serve.

Since police officers are officers of the courts they act upon instructions from the courts. The only time they are only involved in the enforcement of judgments is when there is a directive by the court to arrest a person for failing to pay maintenance and a warrant of arrest is issued by the court. In such instances the police will simply act upon the warrant and cause the arrest of the defaulter and in this case they are acting in terms of section 14 of the Maintenance Court. They also act when there is an order for contempt of court which calls upon the police to arrest a person who has defied a court order, e.g., to hand over property which has been awarded by the court. For example, a husband may have been ordered to surrender some property to his wife but he hides it instead. The husband may be called upon to comply within a number of days and if he fails to do so he will be liable to imprisonment for a period of time. A court may also grant what is termed 'supervised access' and that is when a non-custodian parent is allowed to exercise his or her access rights in the presence of a police officer. The police are required to enforce such judgments.

Police officers are always present when the Messenger of Court conduct executions of judgments but they only act as witnesses and security agents in the event of a mishap. They are supposed to be present whenever the Messenger of Court and the Sheriff are carrying out evictions and attachments of property or executing any form of judgment. Police officers are not authorized to carry out executions; they can only do so where the court has officially instructed them.

4.5 Accessing legal aid from remote areas - A non-starter

Accessibility of both the High Court and the Legal Directorate offices is a cause for concern as it presents a barrier to accessing justice. The High Court is only found in Harare and Bulawayo and the same applies to the Legal Aid Directorate offices. The moment clients are forced to travel long distances to have court papers drafted by legal aid lawyers and then have these papers filed at the High Court in either Harare or Bulawayo means that justice is simply inaccessible. Distance is a major barrier as people are not able to travel long distances to access courts. When I was doing this research I interviewed one respondent who shared her rather sad story with me. This is what happened to her:

In 2011 Mrs. Makuvaza wanted to file for divorce against her husband in the High Court of Harare using the assistance of the Legal Aid Directorate. The reasons for the divorce were that her husband was involved in adulterous affairs despite being married in terms of the Marriages Act, Chapter 5:11 which authorises and protects monogamous marriages. This woman resided in Bikita which is in Masvingo Province and since this marriage could only be dissolved by the High Court, she had to travel all the way to the Harare High Court and this was financially demanding as she relied on subsistence farming.

When she finally raised some money for bus fare she travelled to Harare and she thought the divorce process could be easily concluded by the High Court. She was surprised when she was told that she needed to hire the services of a lawyer as the process was complicated and could not be done and understood by a layman. When she indicated to the Clerk of the High Court that she could not afford the fees charged by lawyers she was then referred to Legal Aid Directorate.

She came to our offices and upon assessing her means of income she was assisted for free on a *pro amico* basis. The whole divorce process was explained to her. Since she resided in Bikita and had to travel to Harare to have her papers drafted by the legal aid lawyer in Harare. Then she had to go back to Masvingo to have the papers served by the Messenger of Court, Masvingo (who was mandated to cover the Bikita area). Then she had to travel back home to Bikita. The cost of the process became too expensive and too involved for her. She simply abandoned her claim for divorce as the process had proved to be costly. This forced

her to go and stay again with this violent abusive and adulterous husband as efforts to have the marriage dissolved had proved fruitless.

When I heard about this case I decided to contact Mrs. Makuvaza just to inquire from her whether the situation had improved and whether she still wanted to pursue her case. I was touched to note that this woman had ended up being infected with the HIV virus due to the adulterous behaviour of her husband and she lamented that this was all the result of her being unable to process her divorce. She said that she was certain that she could have avoided being infected with the virus had she managed to process her divorce in time. She also stated that now that she was infected it would be pointless for her to pursue her divorce as she could not go back home to her own parents for fear of burdening them when she falls sick. She had this to say:

'Dai ndakaziva ndisina kuchata hangu nekuti chipepa chemuchato chandipinza mumatambudziko eurwere nekuti muchato hausi nyore kudambura.'

(Translation: 'If I had known I would not have wedded as I am now encountering difficulties to have this marriage dissolved.')

Having been advised by my supervisor to extend my research to rural women since they constitute the majority of the population of women in Zimbabwe, I decided to interview Chief Chinamhora who is in charge of Domboshava Area located in the Mashonaland Central Province.

The Chief's court is composed of two assessors, one of whom is a woman, and the Chief presides over the court. Domboshava has 3 headmen who work under Chief Chinamhora. The monetary jurisdiction of the Chief's court is US\$1000 and the headmen preside over cases which do not exceed US\$500. The Chief handles cases involving the sharing of property, disputes over land ownership, maintenance, custody and access, among others. The Chief's court is assisted by the Zimbabwe Republic Police who support the Chief's messenger who is often overwhelmed by work. The Chief's messenger's fees are lower than those of the Messenger of Court attached to the Magistrates Court but they still remain beyond the reach of most rural women who live on subsistence farming. To execute a judgment which might be for the delivery of property in a sharing of property case, for instance, one has to pay

US\$5 for the summons and US\$20 for the Messenger's fees which amount will also include the charges for hiring a vehicle to carry and deliver the goods to the claimant.

The Chief narrated how their system is completely home grown and effective and this was proved by the way they execute judgments handed down by these local courts. For example, in maintenance cases the Chief might order payment of a certain amount of money to the woman even if the respondent, who in most cases is male, might not be formally employed but could be involved in some small scale farming. In such a scenario, the Chief will order that when the farm produce, like tomatoes, are ready for harvesting for sale in Harare, which offers a ready market to farmers in Domboshava, the two parties, that is the applicant and respondent, should take their produce to the market together and after selling the tomatoes, the respondent is ordered to give the applicant the amount stated by the Chief.

People living in Domboshava have the option of using the Goromonzi Court which is 60km from Domboshava but, due to the affordability and accessibility of the Chief's court, the majority of people opt to have their matters heard by the Chief. So the Chief's court is providing a coping mechanism for women who in most cases are economically dependent on their male counterparts and find the Goromonzi Court to far to travel.

4.6 Bridging the gap

NGOs, like ZWLA, the LRF and the Msasa Project, are complementing the government's efforts to provide access to justice to the people. An assessment of the role played by these NGOs involved in the provision of legal aid to ease the financial burden posed by litigation was done in this research. I discovered that while the government through the LAD is only offering legal assistance to its clients, the NGOs are going a step further in offering limited financial assistance to their clients. It is limited in the sense that some NGOs can only go as far as meeting transport expenses for the client and paying US\$5 for the revenue stamps (to issue summons). Due to the economic meltdown experienced by the country (which reached its climax in about 2009), revolving funds which used to benefit indigent clients are no longer operational.

4.6.1 Alternative dispute resolution: The way out!

I reject the argument that law is the only means of achieving social justice or that it has a central role to play. Sometimes it is necessary to use extra-legal means in seeking social justice (Sithole, 1991).

When I interviewed the Program Officer from LRF I discovered that the organization has now shifted from having litigation as the solution to legal problems. This was necessitated by the fact that the litigation route is now beyond the reach of most indigent clients. The Legal Resources Foundation assists both men and women by offering free legal aid and it became operational in 1984. At the moment this organization assists juveniles with bail deposits and this applies in criminal cases only. The Foundation does not offer any financial assistance to its clients involved in civil cases either to institute proceedings or to execute judgments. However, there was once a revolving fund which dwindled in the late 1990s due to the economic meltdown which the country faced due to inflation and it affected the viability of the fund.

It has become a policy of the organization that before they decide to assist a client they inquire from him or her whether he or she will be able to afford the fees for having the court processes served on the other party or to execute the judgment. This helps them to decide which route to take, either the legal or the alternative dispute resolution route.

I also had a chance to interview a representative from the Msasa Project which is a non-governmental organization which assists victims and survivors of gender based violence. Although the main thrust is to assist with emergency needs like transport, clothing, food and medical treatment to victims and survivors of domestic violence, they also assist with direct legal fees for victims to be able to institute legal proceedings against the perpetrators of gender based violence. The Msasa Project gives clients financial assistance to facilitate the provision of legal aid to poor women as they discovered that if other needs of clients are not met, one will simply forego instituting legal proceedings and rather use the money (which is supposed to be for the revenue stamp or Messengers Fees) for other urgent personal needs.

The majority of cases they deal with are domestic violence cases, maintenance and custody. When they come across divorce cases they refer to Zimbabwe Women Lawyers Association since they do not represent clients in court. In the event that a client is referred to ZWLA

from the Msasa project, the organization will also assist with the fees for the Sheriff (if the client cannot afford them) and this will be for instituting proceedings and these fees do not exceed US\$50. However, the organization has never assisted women enforcing judgments where normally the fees are a little higher, ranging from US\$450 to US\$800.

An assessment of the services done by Zimbabwe Women Lawyers Association which is a non-governmental organization which assists women with legal aid was done. This was necessary because this organization assists women only and they are highly involved in litigation. The organization once had a Legal Assistance Fund which was very useful during the late 1990s and early 2000s before the dollarization of the economy (in 2009). This was attributed to the fact that only a small component of their clients could not afford the Messenger/Sheriff's fees and the fund was therefore adequate. When the United States dollar was introduced into our economy (in 2009) the Fund dwindled as most donors moved away from funding legal aid, preferring to fund projects to do with law reform or policy making. Normally the funds they receive for legal assistance are not enough to last even a year and for the fund to assist as many clients as possible they end up stream lining among those indigent clients whom they assist and those in worse situations than the others are assisted. This assistance does not cover the costs for executing judgments since if they were to assist clients with say US\$450 for the execution of judgment the fund would end up benefiting only a few people since the execution charges are just too high.

The organization usually gets US\$5000 for the Legal Assistance Fund and this is meant to cover transport costs and monies for the revenue stamp which is usually US\$5 and also the money for serving court processes which is usually less than US\$50. This fund is also used to buy stationary and pay for practising certificates for the lawyers to get audience in court. Of the 30 to 50 clients they assist per day half of them are not able to meet the costs of the Messenger of Court or the Sheriff. The Fund is not enough to last the whole year and it usually gets exhausted in the first 3 or 4 months of the year.

The respondent recommended that indigent clients be exempted from paying fees for the Messenger of Court or the Sheriff. She also indicated that at times it takes 3 or more months for one to raise say US\$450 for one to execute her judgment and they always tell their clients that they have to try by all means to raise these fees since the organization does not offer financial assistance to those who want to execute their judgments.

4.7 Mountain-top perspective - Putting the Constitution to the test

The Constitution is regarded as the supreme law of the country.¹⁵ There has been a development in Zimbabwe regarding the right to legal aid for the less privileged members of our society. Prior to the promulgation of the 2013 Constitution there was no constitutional provision on the right to legal aid. Section 13(2) of the old Constitution specifically stated that any arrested person had the right to have his or her own legal practitioner at their own expense. This position was somehow different from the South African position. Section 32(2)(c) of the South African Constitution of 1996 offers a different perspective as it makes it a State responsibility to provide an arrested person or any sentenced prisoner with a legal practitioner at the state's expense.

The new Constitution of Zimbabwe which came into operation on 22 May 2013 has been hailed by many people as a great step towards the realisation and promotion of women's rights. The state realised the need to provide legal aid for both criminal and civil cases and this is comprehensive as all cases are covered. There has been a development when it comes to issues of promoting access to justice in that the government of Zimbabwe has voluntarily imposed on itself an obligation to provide legal aid to people who cannot afford private lawyers. Chapter 2 of the Constitution provides for various national objectives which include, *inter alia*, legal aid provision. Section 31 states:

‘The State *must* take all practical measures, *within the limits of the resources available to it*, to *provide legal representation in civil and criminal cases* for people who need it and are unable to afford legal practitioners of their choice.’
(My emphasis)

It is one thing to have an impressive list of objectives in the Constitution and quite another to actually comply with the objectives. The state of Zimbabwe has mandated all institutions and agencies of government (courts included) to use the national objectives when interpreting and applying constitutional rights and any other law.¹⁶ This will provide checks and balances for all arms of government when implementing the provisions of the Constitution. It is also commendable to note that the clause makes it a mandate for the state to provide legal aid to all the people who cannot afford private lawyers. The fact that the word ‘may’ was not used

¹⁵ Section 2 of the Constitution.

¹⁶ Section 8(2) of the Constitution.

means that this national objective cannot be exercised as a matter of discretion. The fact that the national objective to provide legal aid is in the Constitution means that the state can be sued for its non-fulfilment of the objective.

The use of the word 'must' places an obligation on the state to meet its objectives. Although this is a welcome development this is diluted by the inclusion of the limitation clause. This limits the State's obligation to provide legal aid to the availability of resources. This means that whenever the state is brought to court for non-compliance with this provision this limitation clause will be used as an escape route. The economy of Zimbabwe has not yet stabilised to the point at which issues of legal aid can be made a priority so, as a result it will take time to have resources made available for the promotion of legal aid. To address this a time frame could be put in place in which the state says that by such and such a date everyone who cannot afford a private lawyer should be able to access a legal aid lawyer. The progressive realisation of rights places a burden on the state which has to work towards a target to make sure the provision of legal aid is made possible within a certain period of time.

4.8 Operationalising the Constitution

Whenever a new Constitution comes into operation a lot of people are eager to see how certain provisions will be implemented. Section 31, I believe, falls among those sections one would want to see the state being taken to the Constitutional Court which is provided for under section 166 of the Constitution. This is because the majority of citizens in Zimbabwe, as previously discussed at length, cannot afford private lawyers and the state at the moment cannot afford to provide legal aid lawyers to the people in need. There is therefore a need to put this provision to the test by launching a constitutional challenge in the courts and this will give the judiciary a chance to place their interpretation upon it.

Any legal provision has to be interpreted in a way that fulfils the intention of the Legislature when that provision was enacted. The interpretation of the clause may work towards or against the promotion of the provision of legal aid. A narrow interpretation of the clause will result in a lot of challenges which emerged from the research being overlooked and a lot of women will fail to access justice due to the financial barrier which comes with litigation. Some lawyers have argued that section 31 specifically relates to legal representation of indigent people but not to services rendered by third parties, such as the Messenger of Court

or the Sheriff. This narrow application of this legal provision is blind to the issues of fees for the Messenger of Court or the Sheriff which are beyond the reach of many indigent clients. Indigent persons will be left to foot their own bills when it comes to court fees or fees for the Messenger of Court or the Sheriff to either serve court processes or execute or enforce judgments. This will not improve the situation of indigent women at all.

There is a need to adopt a broader interpretation of section 31 if access to justice is ever to be realised at all. The broad interpretation considers all the processes which are involved in the legal aid system. All the players who operate in the justice system will have to work towards promoting the letter and spirit of section 31. Once this broad interpretation is adopted challenges which indigent women face in accessing justice will be addressed. The fact that the provision of legal aid is now enshrined in the Constitution is a great leap towards the promotion of the right to access justice by the poor. Underprivileged members of our society cannot enjoy this right if the state offers piecemeal services to them. Therefore, there is a need for wholesome (meaningful or substantial) justice to be administered to them.

Some jurisdictions that offer legal aid exempt indigent persons from paying any court fees or any subsequent legal costs. These indigent clients are absolved from paying fees, for service of court process and execution of judgments. In Australia the Federal Court and Federal Circuit Regulation 2012 (S21 No 280) exempts a body or a person that has been granted legal aid either from the State Legal Aid Office or any approved legal aid scheme from paying costs incidental to the litigation process.¹⁷ This results in many poor people being able to access justice at no cost. This approach once adopted by the Zimbabwean legal aid system will result in major barriers to access justice being removed allowing both rich and poor to enjoy the right to access justice in the same manner.

The inclusion of legal aid provision in the Constitution is a welcome move as this will allow indigent women to use the Constitution as a tool to enforce the right to legal aid. This constitutional provision will result in the effective implementation of the parent Act on legal aid provision which is the Legal Aid Act. However, it is yet to be seen how this Constitution is going to be implemented given that it is still in its infancy.

¹⁷ www.fedcourt.gov.au/forms-andfees/court-fees.

CHAPTER 5

5.0 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

It is my hope that the current deliberations between the Ministry of Justice Legal and Parliamentary Affairs represented by the Legal Aid Directorate and the Messenger of Court office which were sparked by this research will definitely yield positive results which will see a change in the current dispensation of legal aid. The research resulted in the realisation of procedural flaws which exist in the current legal aid system which will be discussed below.

The Legal Aid Directorate assists both men and women with the provision of legal aid but women form the majority of clients assisted. These women receive legal assistance in cases like custody, access, maintenance, divorce, sharing of property and inheritance issues. The Directorate is only found in Harare and Bulawayo and lawyers manning these offices are too few for the size of the areas they are supposed to cover. The lawyer-client ratio is unrealistic, hence, a lot of indigent women appear in court as self actors so there is a need to address the current justice system so that it becomes more user-friendly for self actors.

Women who are assisted by the Legal Aid Directorate are able to get legal advice, have their court papers prepared by its lawyers and in some cases they are represented by the lawyers in court while in other cases they just have court papers drafted and they appear in court as self actors. However, this is as far as legal aid can go. Direct financial assistance to pay for court fees and fees for the Messenger of Court or the Sheriff is left to the indigent women. Indigent women end up abandoning cases and sitting on judgments because of their failure to raise fees for the Sheriff or the Messenger of Court. There are no statistics recorded to show the number of clients who have failed to institute legal proceedings or enforce judgments due to their inability to raise fees for the Messenger of court or the Sheriff.

Indigent women from remote areas are finding it difficult to access both the High Court and the Legal Aid Offices because the two can only be found in Harare and Bulawayo. The geographical location of these two offices results in justice being inaccessible and unaffordable to the less privileged members of the society.

The local courts play an important role in providing access to justice to rural women. Since the majority of women stay in the rural areas there is a need for these women to have readily accessible legal aid.

5.2 Recommendations

The provision of legal services and access to justice presents a problem with no single solution because the problem varies with the socio-economic make up of a society so this means that the solutions have to be tailored to the individual needs of the society. Ineffective legal services constitute a serious obstacle to economic development. Societies should strive to make the promise of equality a reality. The following are recommendations made to address the challenges faced by indigent women in accessing justice:

5.2.1 Exemption as the way forward

There is a need to exempt all indigent persons from paying fees for the Sheriff or the Messenger of Court or even costs for the revenue stamp. I am of the view that this will go a long way in allowing access to justice by the underprivileged members of our society as an immediate solution rather than to continue depriving them of their right to access justice. This means that there is a need to set up an efficient system which recognises all players offering legal aid so that the system will not be open to abuse by those clients who can afford to pay private lawyers. In the event that exemption is not sustainable due to the fact that some players in the justice system are private institutions like the Messenger of Court then the following (5.2.2) will be an option.

5.2.2 Prioritisation of legal aid in national budgets

Since the Legal Aid Directorate is doing a laudable job in promoting and ensuring that women have access to justice there is need to boost the Department both human resource wise and financially. This means that the Legal Aid Fund has to be financed adequately so that indigent clients will benefit from these funds once availed by Parliament during the national budget. Adequate funding will allow for the decentralisation of offices to all provinces and recruitment of many lawyers to work in the established stations. Decentralisation of the Legal Aid Directorate into the other eight remaining provinces will result in the majority of women no longer having to travel long distances to consult legal aid lawyers. There is a need for the government to bring to fruition the decentralisation process

of legal aid to the remaining eight Provinces of Zimbabwe by December 2018 as stipulated in the ZimAsset cluster on social service delivery. An increase in the number of lawyers who work for this department will help to make the lawyer-client ratio manageable.

5.2.3 The need for administrative reforms

5.2.3.1 There should be a move from the adversarial to an inquisitorial system of adjudication in our system to allow for judges and magistrates to descend into the arena and provide practical solutions to problems presented before the courts by the poor women. This will cut down on the costs needed when enforcing judgments through the Messenger of Court or the Sheriff as it opens the possibility of conciliation in court.

5.2.3.2 There is a need to enhance the use of arbitration and mediation techniques as alternatives to dispute resolution where possible in order to avoid as much as possible the highly expensive litigation process. This can be achieved through the setting up of informal tribunals manned by arbitrators who provide a conciliation method that involves fewer barriers that make access to the justice system difficult for the indigent women.

5.2.3.3 The Messenger of Court and the Sheriff could adopt a similar method of payment to that used by private lawyers who receive fees on a contingency basis so that they move away from their cash in advance approach that results in preventing many indigent women from accessing justice.

5.2.4 Monitoring the implementation of existing laws and policies

There is a need to address the gaps between theory and reality that is in terms of implementation of the laws, for example, section 14(4)(b) of the Legal Aid Act which provides for indigent persons to get financial assistance to cover expenses incidental to the litigation process. Clients suing as paupers should be exempted from paying court fees and fees for the Messenger of Court or the Sheriff as laid down in the Rules of Court.

There is need to monitor the implementation of the ZimAsset so that by the end of December 2018 the nation would have achieved all the key result areas set which include the promotion

of access justice through the promulgation of compliant legislation and decentralisation of legal aid services to all provinces in Zimbabwe.

5.2.5 The need for law reform

There is a need to have the Legal Aid Act amended to include a working definition of an indigent person so that the parameters of the extent of legal aid offered to such persons will be clearly demarcated. At the moment the Legal Aid Act is silent about what it means to be indigent and this results in the underprivileged members being short changed by the legal aid system as there is a point when they cease to be indigent and are expected and forced to pay excessive amounts towards the service and execution of court process. The Constitutional provision on legal aid must be interpreted broadly to include all processes involved in the provision of legal aid and not be limited to legal representation only. This view will result in the promotion of access to justice by indigent women since issues concerning fees for the Messenger of Court or the Sheriff will be addressed.

5.2.6 The decentralisation of the High Court

The High Court ought to be decentralised also so that an indigent woman who wants to sue for divorce and is situated in Masvingo Province will not be forced to go to the Harare or Bulawayo High Court just to apply for a decree of divorce. Alternatively, the Magistrates' Courts may be authorised to handle divorce cases since these small courts are available in almost each and every province.

5.2.7 Training of paralegals

There is a need for the extensive training of paralegals to handle out of court settlements in an effective and efficient manner. Since the majority of women in Zimbabwe live in the rural areas there is a need to empower the Chief's courts by providing paralegals equipped with conciliatory and investigatory powers so that women have ready and affordable legal services in the remote areas of the country.

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