A CRITICAL ANALYSIS OF HOW THE ACCESS TO JUSTICE FRAMEWORK HAS SUPPORTED THE ROLE OF WOMEN EMPOWERMENT IN THE INTERNATIONAL ARENA: CUSTOMARY LAW VIS A VIS INTERNATIONAL WOMEN’S HUMAN RIGHTS, A BRIEF ANALYSIS OF CEDAW, THE CASE OF ZIMBABWE AND INDIA.

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DEDICATION

I dedicate this research to my seven sisters being Cynthia, Jacqueline, Lucie-Anne, Patience, Gayle, Geraldine and Runyararo Kasere. I applaud you for being strong women despite the numerous challenges that you have jointly and severally all gone through and still managed to be such amazing souls. I am truly blessed to have you in my life May you continue shining bright and being beacons of hope for other women.
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The research sought to examine how women globally have been empowered economically, socially, academically and legally from the Access to Justice Framework seeing there at times exists a glaring contrast in customary law and International law, and also in brief assessing how the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) under the Access to justice Framework has, if at all alleviated the plight of women in all spheres of existence. Indeed women have been and still are a disadvantaged group, they own one percent of the world’s property and resources, perform sixty per cent of the labour, and are the majority of refugees, illiterate and poor persons.”

“While women represent half the global population and one third of the paid labour force and are responsible for two thirds of all working hours, they receive only a tenth of world income and own less than one percent of world property.” (Tickner 2006:276). More than half of the world population is women, but the presence of women on the International arena is still limited. Women without doubt have participated in all spheres in life, sometimes equally as compared to men, if not more, but their proper recognition remains elusive. Thus it is the crux of this research to see how International Law has advanced women’s cause. CEDAW is a treaty that has at its core values, the eradication and elimination of all forms of discrimination towards women. Member countries that have signed this treaty are bound by its objectives and have to ensure that their countries align the necessary laws to incorporate CEDAW into the respective member states domestic law thereby creating a binding effect on the latter. However compliance in full is yet to be realised as some countries hold their domestic customary law in high esteem. This research also focused on two countries being India and Zimbabwe and how women in these countries have accessed the justice framework if at all it is accessible. It is again important in this research to see how the justice machinery can be well oiled so that it is easily accessible to every woman regardless of their status in society and their location. The main objective of this research is to ensure that the domestic law of the said countries is aligned as per CEDAW’S provisions.
CHAPTER ONE

1.0 INTRODUCTION

Since time immemorial, men have always been assigned a superior status in Law. It is important to note that the ‘majority of women worldwide are marginalized from direct access to and control of material resources such as land and enabling resources such as education and skills” Stewart(2000:34). It is a known fact that the main reason behind that scenario is because women have for a long time been viewed as inferior compared to men and it is also true to note that some of these defects of gender inequality can indeed be effectively cured by the effective application of Law. Women indeed account for about two thirds of the 1.2 billion people living in abject poverty (British council vol70: 3). It is thus important to look at the role of law in regulating the position of women in the society. According to the human rights website www2.ohchr.org/english/bodie/cedaw/docs/ngo/ZCS_zimbabwe51.pdf in an ‘Access to Justice document” it states that “Women indeed have limited access to and ownership of judicial processes because of their marginalized status as compared to men in some societies. They are subsequently marginalized from the justice system and in the majority of cases ‘men are likely to mediate women’s access to state institutions due to unequal power relations in the home, at work or in the State’ (Charlesworth & Chinkin, 1994). In order to address the gender disparities it is important to look at the Access to Justice framework which affirms the importance of resources being allocated to resolve this marginalization and to improve women’s ability to access justice machinery. “It should be noted that even though more member states have signed the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) than any other UN Convention, gender inequalities and discrimination against women still persist in most parts of the world.”(www.zwala.co.zw)

The Convention on the Elimination of All Forms of Discrimination, which is also referred to as the Women’s Convention and the International Bill of Rights for Women was adopted by the UN General Assembly in 1979. This in actual fact happens to be the first, comprehensive, internationally binding document on women’s rights. As it stands 179 countries, which translates to 90 percent of the members of the UN are party to this Convention. It is the main objective of this Convention to create an enabling legal and policy environment and to devise appropriate means of support for women so they can equitably access the judicial system.
Access to Justice entails “taking a gender perspective on the rights of women themselves, as well as the assessment of access and obstacles to the enjoyment of these rights, and subsequently adopting gender sensitive strategies for protecting and promoting them” (www.newzimbabwe.com/blog). However, increasing women’s access to justice be it formal or informal, hinges on removing economic, political and social barriers to participation of women, as articulated by the gender justice agenda (UNIFEM). Indeed barriers that bar women from enjoying their rights should be removed. This can only be achieved through the effective application of Law.

This research is thus focused on the assessment of the Access to Justice Framework on Improving Women’s Human Rights in Zimbabwe and India. It seeks to assess the effects of the application of customary law vis a vis CEDAW. It basically aims to achieve four main outcomes, namely: an increase in skills and knowledge which then ensure CEDAW compliance. The development and monitoring of new and revised legislative frameworks for the administration of justice; increased awareness among formal and informal justice system actors of CEDAW commitments; and strengthened monitoring and accountability mechanisms for implementation of CEDAW commitments.

1.2 Background

I developed a keen interest in the research topic in 2008 whilst working for the Attorney General’s office, heading the sexual offences section. I worked on a project which entailed sensitizing the Judiciary on the newly enacted Domestic Violence Act. Effectively I worked with the Magistrates Courts to ensure that the adjudicators were well versed in this new piece of legislature.

As an Activist for women’s legal rights of women, one important observation that I have noted is that at times women do not always approach formal institutions to vindicate their rights. Instead they approach other power-wielding institutions such as the family, the church and the traditional Courts. “Women indeed face numerous challenges in accessing justice in formal Courts such as, being shunned upon especially in rape matters, the lack of gender sensitive adjudicators in sexually related matters, the cost of litigation, the intimidating
All these areas of interest stimulated this research on how women were faring within the formal and traditional settings, whether in the customary court settings instruments like CEDAW are taken into consideration by the adjudicators. I particularly took an interest in two countries namely India and Zimbabwe and their justice systems as these two countries have signed the Convention and these are two countries that hold their domestic customary law in high esteem often time clashing with the CEDAW mandate, and furthermore whose customary law further subjugates women’s rights. The main thrust is of this project is to look at how women have used the courts to have their rights affirmed as mandated by the Convention, if they have at all, and in cases where they haven’t what are the impediments and how they can be cured? My quest over the years has been to improve women’s lives with the goal of achieving equality between men and women using the justice system of the countries in question. The 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)” is the chief international instrument whose objective grew out of realisation that attainment of equality required affirmative action by governments to correct the historical and cultural imbalances that existed against women” (Hellum 2013:34). I will use this Convention as a point of reference to assess its effectiveness and whether the countries I have mentioned above have implemented and adopted CEDAW as its national law and to see how customary law has affected the implementation of the Convention and how the situation can best be redressed. The Fundamental principle behind the CEDAW is equality. The states which are party to this Convention are obliged to take all necessary steps to eliminate all forms of discrimination against women and ensure full participation of women in all spheres of human endeavours. “There has been support for the promotion of gender equality and women rights by most member countries; however, the implementation of CEDAW is lagging behind in most countries. One of primary impediments to achieving equality of women lies in the area of access to justice”. (www.en.wikipedia.org/w/index).There are still discriminatory laws and regulations ranging from laws affecting all areas of women’s lives such as their health, safety, their ability to participate in political and public life, equality in family and marriage, nationality, freedom of movement, employment, access and control over resources on equal
basis with men. Many of these laws explicitly discriminate against women on the basis of their sex. (ibid)

“Failure to address gender differences in law can accelerate gender inequality, inevitably this subsequently undermines the importance of supporting legal reform in compliance with the CEDAW norms which in effect requires reviewing existing laws, revoking discriminatory provisions and adopting laws that promote the achievement of substantive equality” (ibid).

Given the challenges and the impact of socio-cultural norms prevailing in India and Zimbabwe, women in the said countries often face challenges in accessing justice which are mainly caused in my view by customary law, numerous structural, institutional and socio-cultural obstacles.

1.3 Statement of the Problem

In this project of assessing the “Access to justice” framework, the focus is on the formal and the informal formal justice system namely traditional courts as they are the chief culprits in enforcing customary law. “Traditional systems are often seen as archaic, backward and having rigid practices that cannot be developed”. (Chirayath et.al 2005:67). In my opinion the systems of traditional courts are constant, effectively never changing to suit people’s needs.

Zimbabwe has got a pluralistic legal system which recognises the existence of multiple sources of law. Basically this means that there is an application of both customary law and general law. Pluralism gives rise to conflict due to different sources of law. Zimbabwean general law is derived from statutes which is recorded whilst customary is partly recorded and in other instances exists in the minds and behaviours of the people it governs (Stewart 1990:45). Customary law is difficult to ascertain as in most cases it is not written and is perceived to be irrelevant, although it may reflect and protect important social norms. “Justice is essentially delivered for many through traditional forums of dispute resolution, yet many do not treat these systems as critical to African legal development” (Tsanga 2011:58). In most cases in my observation as a court official one’s gender determines how one is going to be treated in some courts of law, and one thing for sure is one’s status in society inevitably affects which Courts they can access which in turn affects which law gets applied to them.

Indeed Customary law has failed to enjoy the same prestige as human rights even though inmost rural areas in Zimbabwe and India it is a popular form of law. The fact that the
majority of the Zimbabwean population lives in the country’s rural areas where customary law applies and perhaps the only avenue to access to justice is through the Traditional courts, is the reason why this structure has to be acknowledged for purposes of this project. Means and ways of improving women’s access to justice particularly within the traditional Court structures and the application of the CEDAW provisions in such courts should be examined.

1.4 Justification

Access to Justice looks at the various ways in which women and men enjoy unequal access to justice due to their gender. According to (www.ftp.org/agl/aglw/docs/wetlands) “There are certain factors that indeed inhibit women’s access to justice being a lack of adequate legal mechanisms and normative frameworks that protect women’s rights lack of resources or time to participate in justice processes, especially given the heavy burden of labour that women bear for their families. Fear of repercussions because, in many cases, the perpetrator or defendant knows the female victim or claimant. Lack of appropriately qualified female staff within justice institutions to receive and process women’s complaints. Under-funding of family and civil courts where divorce, custody and property disputes are adjudicated” Cultural or religious practices that discriminate against women and inhibit their access to either formal or informal justice mechanisms. (Nyamu-Musembi, 2005:53). Regardless of the particular reason, women’s inability to access justice mechanisms is a major cause for the gender disparities mentioned in the above areas. Therefore, if women are unable to equitably access justice mechanisms, they are not adequately protected from discrimination as mandated by CEDAW.

1.5 Objectives

1) The overall objectives are: to analyse the political, socio economic and other cultural factors that affect women’s access to justice in the above mentioned countries, to analyze the legal procedure in instituting judicial proceedings and to ascertain the impediments that women face in accessing justice, to assess the reality of women’s access to justice in the traditional Courts in this human rights era.
2) To promote the use of law as a tool of change for the empowerment of women in their struggle for justice and equality.

3) Specifically the project also aims to increase the capacity of adjudicators in the various courts in dealing with gender sensitive matters to use human rights concepts, as enshrined in CEDAW.

4) Most importantly a reformation of domestic laws so that they conform to the Convention to that promote the rights of women, especially of those belonging to rural, indigenous and other marginalized communities.

5) To facilitate the formulation of national strategies including measures to remove structural barriers that make it difficult for women to access justice

6) To foster an increased understanding of the forms of domestic application of international human rights, and in specific norms related to gender equality and women’s rights

7) Increased knowledge and skills for legal and judicial reform and implementation compliant with CEDAW norms

8) Increased capacity to pursue litigation strategies as a means to enforce state accountability to human rights, in particular the rights of rural, indigenous and migrant women; labor rights; reproductive and sexual rights; and the rights of women in conflict situations and victims of violence.

9) To come up with recommendations on how to improve women’s access to justice

1.6 Hypothesis

If women and girls in India, and Zimbabwe were treated as equal to men in rights, dignity and opportunity we would see political and economic progress in those countries.

1.7 Research questions

The main research questions under exploration are;

- What is the difference between customary, domestic and international law and how they are applied in the traditional courts and the highest courts in the different
countries?

- Are the countries parties to CEDAW? Are the obligations under that convention understood?
- Can the disparities between these various tenets of law being customary, domestic and international women human rights law be cured and if so, how?
- What does justice mean to women? And how many have used the justice system to their satisfaction that just indeed has been done?
- What is the right to access to justice? Has the justice system advanced this cause with regards to customary law and international women’s human rights?
- Are these rights is assured in these countries and if not then how can it be assured?
- What can be done to ensure the efficiency of the justice system, ensuring the women access the justice system equitably?
- Are the adjudicators in the various courts aware of women’s human rights and do they apply it?

1.8 Limitations

The following are some of the limitations found in the field when carrying out the research on coalition governments;

1. Inadequate sources about women’s access to justice and the lack of awareness of CEDAW and what its main objectives are

2. Withholding of information by women for fear of victimisation and further abuse. Some laws do not permit women to talk to other people about their marital experiences.

3. Polarised information obtained from both sides women and men leaving the researcher in a difficult situation to determine what true information is and what is false (blame game)

4. Lack of funds to carry out proper researches in countries like indeed, hence the research I based on information proffered by other authors.

5. Women generally were not aware of their rights and how to assert them

6. The adjudicators in the traditional courts have no appreciation of domestic law and international women’s human rights hence women are being short changed in accessing the justice system.

1.9 Methodology
The researcher used various research techniques.

1.9.1 Interviews

The interview method was used as it facilitates extraction of information from the interviewees. These interviews were structured on a paper so that important questions would not be omitted. The interviews were in depth and at times open end to give the respondent flexibility. Interviews are the most important source of extracting information because one can also see the facial demeanours of the respondents. One was able to ask whether the respondent what the justice system is. If they didn’t know I restructured my questions so that I get the proper answer I was looking for. Since it is at times difficult to collect information on customary laws, especially in the cases were they are not written, interviews of village heads, court officials, and other local decision makers provide a good source of information.

1.9.2 Document review

Getting the most up-to-date versions of constitutional provisions that relate to access to justice. One can figure out what framework regulates the specific substantive rights, duties, and interests you are examining. If the focus is on the formal justice system, then one will want to look at any relevant legislation, such as provisions from the civil, criminal, procedure codes.

Researching these laws will also help in thinking about what reforms could realistically be achieved and recommended later.

1.9.3 Secondary sources

Getting information on existing reports, assessments, projects, and reform efforts such as the CEDAW reports that party states are mandated to submit is one way to give you an idea of what has already been done, what has worked, and what has not worked relating to the issues you are considering. It can also help you identify the types of questions and data you want target later in your interviews and focus groups also case law and case studies of different countries.

1.9.4 Observation

Observations will be used to supplement the method of interviewing in analysing the
milestones that CEDAW has achieved in advancing the access to justice framework. The researcher will use participant observation in the Magistrates, High court, Constitutional courts and inevitably the chiefs courts that to understand the milestones achieved if any at all, to also view the demeanour and the attitude of the adjudicators in the said courts of law.

1. 9.5 Focus Groups Discussions

Another approach is to use focus groups to assess women how women have been served by the justice system. This entails rounding up a group of women, talk to them on various aspects of life and how law has influenced these aspects if at all it has

1.10 DELIMITATIONS

An access to justice assessment analyzes whether women are able to use justice institutions to solve their common justice problems effectively, what factors affect their not being able to do so. What reforms and programs could make justice institutions more responsive to women’s needs? There are a number of research techniques that can be used to assess access to justice. One approach is to use surveys or focus groups to ask women how well justice institutions serve their needs. Another method is to interview country experts to get their perspectives on the strengths and weaknesses of a justice system. Often the appropriate technique depends on the particular context of each country or region. This primer outlines the major obstacles and barriers women face in accessing justice and suggests strategies and interventions to overcome these challenges. Gender mainstreaming is not a goal in itself, but rather a strategy towards achieving equality between men and women. The majority of this primer focuses on women’s access to justice and the social relationships between men and women that disadvantage women and hamper this access.

From its title, it’s apparent that indeed the objective of the convention is the elimination of all forms of discrimination against women it is the prime objective in my view that convention seeks to ensure equality of women before the law. According to Anne Hellum CEDAW effectively guarantees women’s individual rights, it also gives social support to women and enhance social and cultural change. This research focuses on the access to justice framework which in effect ensures that women are fairly and equally represented in any scenario. According to Simone Cusack (124), the thirtieth anniversary of the adoption of the CEDAW IN 2009 provided an opportunity to revisit the contributions of this instrument to
CHAPTER TWO

2.0 LITERATURE REVIEW AND THEORETICAL FRAMEWORK

This section reviews already existing literature on CEDAW, feminism, International women’s human rights, women and access to justice, social transformational methodologies and experimental records which encompasses reports, and evaluation of case studies. I consulted the Constitution of Zimbabwe as it is the highest law making instrument. Again this study actually focuses on the different already existing literature on Access to justice for women and how CEDAW has been a catalyst for the advancement of women’s rights. The literature gives some background information to the issues already researched on. The study also discusses problems encountered in the research. These different perspectives, insights and viewpoints broadened my understanding and formulation of the issues to be researched upon.

2.1 CONCEPTS

According to Stewart and Chigerteri the CEDAW (2013:345) was a landmark Convention in the struggle for the human rights of women. The objective of this fight is that women are no longer to be viewed as victims of circumstances; in effect they should be recognised as people with rights and as people who can influence and change their communities. British council report70 (volume 1:34) proffers that the Convention lays down the principle that “states must guarantee the exercise and enjoyment of human rights, fundamental freedoms and substantive equality for the advancement of women in all fields the convention obliges states to take appropriate measures to eliminate the discrimination against women by an individual ,organisation”. According Stewart (2000:29), there are numerous reasons for women’s marginalisation from resources, but some of these problems could be solved by a more effective use of the law in addressing women’s depressed economic conditions. Substantive law in Zimbabwe has made progress in providing for equality between the sexes which in my view is indeed a significant move that should be applauded. The new constitution of Zimbabwe seems to have has addressed most of the gender disparities of long
back. According to Sibongile Sebethe the right to access to justice was not provided for in the former Constitution “but the right to access justice is provided for in s7 of the Legal Aid Act [Chapter 7:16] and in terms of the Act legal aid shall be granted subject to eligibility criteria set out in s8 of the Act. According to Simone Cusack (2009:124), the thirtieth anniversary of the adoption of the CEDAW in 2009 provided an opportunity to review the efficacy of this instrument in advancing women’s human rights. The first thirty years of the Convention’s life, has been a catalyst for policy and legal reform. It also proved to be an efficient tool in domestic litigation, advocacy and activism and an effective route of holding state parties accountable for violations of women’s human rights.

It is my respectable view that CEDAW is one of the few legal instruments that requires states to address gender stereotyping. It also is a very important instrument as its sets binding international legal standards against which the acts and omissions of states in relation to gender stereotyping can be measured (www.oau docab/leg/666.6)

2.2 LITERATURE REVIEW

The CEDAW instrument also provides for a provision of Access to Justice, it addresses the circumstances that affect women’s lives and their enjoyment of rights in a diverse world the Convention is slowly making its mark on the development of international and national law hence the text penned by Women’s Human rights lawyer Anne Hellum and Henriette Sinding Aasen, Hellum and Aasen (2007:12) This text sums up research done in several European and African countries to assess the effectiveness of CEDAW, and whether the provision of the Convention are being implemented by member countries.

Another text is written by Julie Stewart and Ellen Sithole, it is called “the shadow of law ‘women and justice,’” and it focuses on what adjudication and mediation options are available to women in Zimbabwe and whether women are able to use and effectively access these options. It also looks at the CEDAW, customary law and national law. This study gives new insights into the complexities of justice delivery system and exposes some of the ‘blind spots” that inhibit women’s access to justice.

The website www.undp.org, has a wealth of examples of research it has embarked upon in countries that have ratified the CEDAW, and specifically how the access to justice framework has been effective in improving the welfare of women. It also proffers
recommendations on what the various states should do to ensure that their domestic laws comply with CEDAW provisions.

There is also another text by Patricia Grimshaw and Marilynn Lake (2004), it is about women’s rights and human rights and the international Historical Perspectives it also highlights the women’s plight on the international scene, and how the conception of CEDAW has helped in the recognition of women’s rights.

The Zimbabwean constitution is a point of reference as it addresses the disparities between genders. The new constitution is the highest law making body in Zimbabwe, it also provides for equality of women and it also eradicates the discrimination of women by any institution or person.

Case law from India and Zimbabwe will also be significantly used to see how the courts have been deliberating on issues that affect the rights of women

2.3 CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN AND ACCESS TO JUSTICE

The main thrust of CEDAW is the elimination of discrimination against women in all its forms, and the attainment of the principle of equality through the law is one of the measures for the eradication of discrimination against women.

“This Convention lays down the principle that states must guarantee the exercise and enjoyment of human rights, fundamental freedoms and substantive equality for the advancement of women in all fields”.(www.un.org/womenwatch/daw/cedaw.htm. This Convention requires state parties to take the necessary measures in eliminating discrimination against women. The measures that the Convention prescribes to the member parties include taking appropriate legislative measures to ensure that equality between men and women is achieved. To establish competent tribunal for the protection of women against any form of discrimination. th member parties are also required to modify and abolish any law, custom or practice that is discriminatory towards women. Article 5 of CEDAW mandates states parties to modify or eradicate social and cultural patterns that prejudice women. Article 14 of CEDAW also mandates member parties to take into account the problems faced by rural women and the roles these women play in the economic empowerment of their families. Article 15 of CEDAW provides States Parties shall accord to women equality with men before the law. The Committee on the Elimination of All Forms of Discrimination against
Women has also given recommendations in respect of human rights issues in respect of equality of women. This research zooms in on the family setting because this is where International relations start. A woman whose rights are subjugated by her husband can only become what her husband allows her to be. It is therefore not surprising that there are a few women presidents worldwide in other words there are a few women in influential, key positions. This research thus sought ways in which International law in the form of CEDAW can change this situation to the advantage of women.

While it is encouraging to note the strong support for the promotion of gender equality and women’s rights, the implementation of CEDAW is not being realised in many countries. One of chief impediments to achieving equality of women lies in the area of access to justice. “There are still laws which are discriminatory laws that affect all areas of women’s lives such as their health, safety, their ability to participate in political and public life, equality in family and marriage, nationality, freedom of movement, employment, access and control over resources on equal basis with men”(www.zwala.org). The majority of these laws discriminate against women on the basis of their sex. Again many stakeholders believe that gender-neutral laws benefit women and men equally, while due to deeply rooted structural, social, and cultural barriers for women the opposite is often true. Indeed failure to consider these gender differences in laws and in the implementation of laws can accelerate gender inequality. In effect this undermines the importance of supporting legal reformation in order to comply with the CEDAW provisions and standards which require reviewing existing laws; eradication of discriminatory provisions and adopting laws that promote the achievement of gender equality. Taking into account these de jure challenges and the impact of socio-cultural norms prevailing in Zimbabwean and Indian societies women often face obstacles in accessing justice that are caused by such “There also is insufficient trained legal professionals who are well versed in the international obligations on women’s access to justice and/or are able to use the legal frameworks (both national and international) to protect women’s human rights cases in legal systems” (ibid).

As such, UN women which is an arm of the United Nations that exclusively deals with women’s rights “is currently providing support to the development of critical mass of legal
expertise worldwide to support further advancement of gender equality and women human rights globally and improve women’s access to justice”(www.UNIFEM.org).

### 2.3.1 Objective of UN Women Support

The main objective of UN women is to promote the use of law as a tool of change for the empowerment of women in their struggle for justice and equality. “The project thus aims to increase the capacity of legal professionals and gender advocates globally to use human rights concepts, as enshrined in CEDAW, other relevant human rights instruments and domestic laws to engage in legal and judicial reform, strategic litigation and bring impact cases that promote the rights of women, especially of those belonging to rural, indigenous and other marginalized communities.”(www.undp.org)

It is in summary the crux of the UN women to increase understanding of the forms of domestic application of international human rights norms, and the norms that are related to gender equality and women’s rights by legal personnel worldwide, the UN seeks to raise awareness in the forms of discrimination based on sex, ethnicity, class, religion that keep women, especially from marginalized communities, from being able to access their rights. It also seeks to sensitize the masses of the international conventions and legal precedent that promote and protect women’s human rights. The other objective of the UN is to enhance knowledge to use CEDAW and national mechanisms, to promote women’s human rights and challenge discriminatory laws and practices in their countries the last objective of this former is to foster knowledge and skills for legal and judicial reformation and implementation compliant with CEDAW (ibid).

Thus it is clear that there is a global wave being launched by the UN women using CEDAW to eradicate all forms of discrimination against women.
2.4 CASE STUDY: INDIA

According to Hellum (2013:35), Madhu Mehra is a founding member and Executive Director of Partners for Law in Development which happens to be a legal resource group in India dedicated to advancing women’s rights and social justice. She led a research team on the effectiveness of CEDAW, in particular the Access to Justice for Women framework. India signed CEDAW on 30th July 1980 and ratified it on the ninth of July 1993 though it did so with two declarations and one reservation. However, India’s declarations, seek to minimise its core obligations under Articles 5 (a), 16 (1) and 16(4). The two declarations read as follows:

With regard to articles 5(a) and 16(1) of the Convention on the elimination of all Discrimination against women, the Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

With regard to Article 16(2) of the CEDAW, the Government of the republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.

These declarations indeed limit India’s obligations in eliminating discriminatory, cultural stereotypes about women in promoting equality in marriage and family relations. The CEDAW committee has continuously raised concerns over these declarations urging them to be withdrawn. Indeed qualifications that violate the main purpose of a treaty are null and void. It is compulsory that a member country reports on the progress of the implementation of the CEDAW. Thus India has submitted its first report and then a second, third and an exceptional report requested by the committee, the fourth and fifth one are still being prepared (ibid). In the 1980’s, India’s constitution had a provision that provided for women’s equality before the law. Therefore one notes that there was no constitutional impediments that affected India’s ratification of this treaty (CEDAW). It’s also important to point out that India ratified the International Covenant on Economic, Social and cultural rights in 1979 which basically prohibited gender discrimination. This to some level shows India’s commitment to the eradication of discrimination against women.
The gap between the constitutional promise of equality and the statutory provisions was enormous in the 1980’s. There were penal provisions which related to violence against women in matrimonial homes that were introduced in the mid 1980s then also came the reform of the anti-rape law round about the same time.

These changes in the penal code came as a result of strong demonstrations that were done by women’s movements responding to the verdicts pronounced in courts of Law. These verdicts indeed proved “the apathy of the law concerning the systematic forms of violence against women. It was inevitable that legislative reforms in the 1980’s would be effected due to the continued campaigns against dowry deaths and custodial rape. In response to this unrest new offences were introduced to combat cruelty, these dowry deaths relating to women in the matrimonial home” (Mehra, 2013:345). The amendments were done considering the disproportionate power that was exercised by uniformed men in cases where women were held in custody and were subsequently raped by these police officers. A significant move that again should be mentioned is the change effected in discriminatory citizenship laws in 1986 and 1997; effectively it permitted citizenship to be transmitted by the mothers bringing them to be at par with the fathers. However it is my view that family laws in India continue in varying degrees to be discriminatory against women as they continue to value their domestic customary law over any other law. A significant move however should again be highlighted in 1992, a constitutional amendment that mandated a third of total seats in elected local governing bodies be reserved for women was done.

“The legal system in India is based on common law, where both judicial precedents as well as statutes comprise the legal framework, and these are expected to comply with the constitution which occupies the highest normative status in the country”. The verdicts that will be discussed are those from the Supreme Court of India, which basically is the final court of appeal, which also has the power of judicial review (www.indiankunamoon.org).

Family law is a body of laws which relates to and govern families and marriage. In India these are also known as the personal laws and are derived from religion, resulting in community-specific laws for Muslims, Christians, Parsis and Hindus. The greatest dilemma in India in my view is due to the codification of Hindu law. This position allows customs to override the other relevant gender sensitive codified law, and this has been the scenario for a while now. The tribal communities are different and as such they are governed by their
community specific unmodified customary laws. (Hellum 2013:345). Family law offers a platform for discrimination of women. This discrimination varies in different ways from one community to the other. Article 16(1) of the CEDAW creates an obligation for state parties to eliminate discrimination against women in every matter relating to marriage and family relations. Article 5 of the CEDAW obliges member countries to modify the social and cultural patterns of conduct of men and women. According to Madhu Mehra (2013:379) “The declarations by India are rooted in the politics of patriarchy, cultural identity and electoral gain, against women which is a norm that is truly embedded in India. It is indeed true that this religion based family law has become a tool for subjugating women’s rights.” The constitution view religion based family law only as an interim arrangement, envisaging the enactment of a uniform ‘civil code in due course as part of a nationalist vision of uniting all communities under one law rather than ensuring gender equality” (ibid). The hasty enactment of the Muslim Women’s (protection of rights and divorce) Act 1986 led to a revolt by women because it sought to undo the supreme court upholding Muslim’s women’s right to claim maintenance from the former husbands under a general law limiting the former husband’s obligation to support the divorced wife only for 3 months after the divorce( ibid).

The petition Maharshi Avadesh V Union of India “invoked Hindu right arguments in favour of a uniform civil code, combined with tangential concerns for Muslim women, pleading for the striking down of the 1986 law and the complete erasure of Muslim law” (ibid). In a similar case that followed, being that of Daniel Latifi and Another v union of India 2001(7) scc 740, this case again challenged the Constitutional validity of the 1986 Act. The court dealt with the constitutional validity of the aforementioned Act. The court held that the three months to be the period with which all payments and future maintenance was to be paid in full. Thus it commendable in this instance the court avoided being in conflict with the provisions of the Constitution. This case was mentioned in India’s CEDAW report as evidence of change within the community. Similarly in the case of Gita Hariharan and Anor v Reserve bank of India, the court addressed two separate petitions, of which both of them challenged the constitutional validity of section 6 of the Hindu Minority and Guardianship Act 1956, and section 19 of the Guardian and Wards Act1890, this Act placed the mother in an inferior position as far as the guardianship of a minor was concerned (Mehra 2013:397). In casu both of the petitioners were women who were personally affected by this law, one being a writer and the other being an environmental activist, challenged the law that awarded
guardianship to the mother only ‘after’ the father. It practically meant that guardianship would be assigned to the mother only after the death of the father. In this instance instead of striking down the provision deeming it to be discriminatory, the Court unanimously granted relief to the petitioners. They held that the word ‘after’ meant ‘in the absence of’, in effect extending guardianship to the mother while the father was living. The Court in their judgment actually cited the CEDAW, the Beijing declaration and the Constitution. It subsequently chose to read the law harmoniously with equality standards, to extend to mothers the right to guardianship of their child in more situations than the law ever intended. By actually acknowledging mothers as guardians in instances during the lifetime of the father, the court avoided altering the legal text that declares the father as the natural first guardian of the child. The same Court had earlier dismissed a petition in 1994, that sought a declaration for the mother to also be included as a natural guardian under Hindu guardianship, the court went further by terming it ‘luxury litigation’.

The court has in a clever and subtle way resisted calls to strike down these discriminatory family laws. The case of Ahmedabad, the women’s Action groups filed an application seeking a Declarateur that declared and struck down discriminatory provisions in various family laws (Hindu, Muslim and Christian) which offended the constitutional provisions of equality and non-discrimination. In observing that the petitions ‘wholly involved issues of state policies’ for which the relief which was being sought solely lay with the Parliament, the court rejected the application. In the case of Madhu kishwar v state of Bihar, the majority decision of the Supreme Court in turn concurred with the state-level Tribal Advisory Board. They held that discriminatory tribal customary laws of succession were indeed necessary to protect land from fragmentation and alienation, and also to preserve the tribal culture. The editor of a woman’s magazine had argued for women’s equal rights to succession to land tenancies, solely relying on the constitutional guarantee of equality. They had submitted that tribal women were rendered landless upon the demise, and as if that were not enough they were also rendered destitute as their livelihood was directly linked to land. The majority held that the imminent threat of destitution could be rectified through women’s right to use of land (without title) which could be asserted against a male successor. It basically offered tribal women survival instead of equality. The court in its judgement referred to Article 15 of CEDAW, along with the constitution and the protection of Human Rights Act 1993, the Court subsequently directed the State to take appropriate measures which included
amendment of legislation, modifying law and most importantly abolishing gender based discrimination in existing laws, regulations, customs, practices which constitute discrimination against women. Held that the principles of state policy and fundamental rights revisit the law as there was a need to overturn sex discrimination in the law of succession in view of the conditions that regulate land alienation. The Indian penal code has codified three offences which relate to sexual assault and harassment of women. It is a shocking observation that only the crime of rape is treated as serious in that prompt arrest of the perpetrator is required in dealing with such a matter, bail is granted to the accused person only with the permission of the court and the accused will have to be punished first before he is released. This undermines all the other forms of violence that can be executed against a woman. Effectively it means a woman can be fondled but this will not be regarded as a serious offence warranting swift response from the police. This also condones other forms of abuse against women which do not necessarily entail rape. In my view this is another limitation which the India as a member country of CEDAW has to redress. Another issue that urgently needs to be revised is that rape is narrowly defined to cover penile vaginal penetration; this definition leaves out other forms of penetrative sexual offences. The criminal law Amendment Bill 2010 critically falls short of incorporating all of these demands which really is a saddening fact. (Hellum and Aasen 2013:390)

In conclusion, the predominant use of CEDAW in judicial pronouncements has been interpretive, helping to engender constitutional rights to minimize discrimination. While CEDAW may not be an explicit source of reference in all cases that have tackled sex discrimination, the cases have indeed helped in fulfilling of treaty law.

It is also important to stress how customary law in India is held in high esteem so that the interpretation of the CEDAW is always narrowed so that it gels with Hindu law and Islamic law. The study undertaken by UNIFEM in assessing the women’s access to justice framework in Dalit, a region located in the country of India is also another point of reference. Although this report looks at the situation of Dalit women in India, the patterns of impunity for caste-based abuses against women are found in all countries affected by caste-based discrimination. In Dalit most Women and girls have been affected by the caste based discrimination. They in turn become susceptible to various other forms of sexual assault. These women are forced into prostitution, punitive and domestic violence, human trafficking. It is a sad scenario to comprehend and it is actually a tall order when the same women
approach the court in pursuit of justice for crimes committed against them. They are deliberately frustrated by the police officers and the official in the courts of law. Basically the justice machinery is not accessible to these women. In some cases they are further raped, hence a term “custodial rape was born”. (www.UNIFEM.org)

Violence and discrimination against women takes an interestingly, shockingly different form when it involves the caste system. The caste system has reportedly affected 260 million people worldwide. It basically states that Dalit women are impure and ‘untouchable’, which promotes social exclusion and exploitation towards these women. Violence against these women is often times used as a way of punishing and demonstrating power by the dominant castes. In this scenario it is a correct view that equality and access to justice is a pipeline dream for most Dalit women. When cases of violence against Dalit women are being considered, impunity which is permitted by the state in favour of the offender is the root problem. Police officers abuse these women further by denying these women their rights to seek legal help. Numerous reports are available of police personnel refusing to intervene or to even take their statements in cases where these women have reported the perpetrators. In many occasions even the judiciary has failed to enforce the laws that protect Dalit women from gender based violence. It is important to highlight that in 2006 in India, the conviction rates officially released in connection with these Dalit atrocities cases was just 5.3%. A recent number of really tragic cases have proved the brutal manner in which women are abused in India. Indeed women from various other social groups have also been the victims of rape but it is the Dalit women that are most vulnerable to such crimes. A profound example is found in the state of Haryana, seventeen cases of alleged rapes were reported in September 2012 alone. A research conducted by a Dalit rights organisation submitted that the majority of crimes perpetrated against these women are not reported because they fear the repercussions of such reports which are social ostracism and threats to life and personal safety. The Verma Committee committed to correct gender based imbalances, has highlighted a report that they recently submitted concerning these tragic gang rape cases in New Delhi. (ibid) “India’s police and judiciary have their work cut out for them, they need to ensure accountability of police, armed forces personnel for sexual violence, they also need to register every case of reported rape; and to ensure that those do not do so face serious repercussions” (UNIFEM 2013:34). CEDAW does address these issues but the problem lies with the state members that do not implement the provisions of CEDAW to the fullest.

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Several studies and submissions document the challenges facing Dalit women with regard to access to justice. Summing up the Indian situation, it is glaringly clear that India as a country is protective of its customary law; it is such customary views that women are inferior to men that have created this caste system. In looking only at the report by Medhu Mahra one would be tempted to say that India has progressed and is in fact implementing the provisions of the CEDAW whereas in reality the majority of women in the remote areas are facing gender based abuse day and night. It is correct to note that one’s financial disposition, and one’s status in society affects which court you approach for justice. In India if one is a woman, not really educated with no financial muscle, then it is true that sexual abuse, gender based violence is one’s portion.

2.5 ZIMBABWE AND CEDAW

The constitution and Legal position of women

According to Stewart (2013:494) the new constitution has to some extent managed to address some of the contested the rights of women in Zimbabwe. Since the colonisation of Zimbabwe by British in the late nineteenth Century, the formal legal and political status of the indigenous population, especially women, has been one of political and legal marginalization. Indeed full recognition was granted to all male Zimbabwean citizens at independence. It is a correct observation in my view that for all women equality with men on legal grounds remains incomplete, more so for indigenous women. The reason for this lies embedded in the colonial history of the country and in chronic case of serial cultural relativism (ibid).Despite the independence that came in 1980 the Lancaster house constitution did not provide for the rights of women. In other words there was nothing called “women’s rights”. On a happy note there has been a significant change over the years. Sixteen years after independence in 1996, gender is a further ground on which discrimination is not permitted. The Zimbabwe constitution in 1980 referred to as the Lancaster house Constitution was negotiated prior to independence between the Rhodesia Front Party, the British government, the Zanu(pf).The 1980 constitution had provisions on equality, in effect section 23 outlawed discrimination on the grounds of race, tribe, place of origin, political opinions ,colour or creed. It made no reference to sex or gender as grounds of unlawful discrimination. As with other Westminster export models post colonial constitutions
it effectively contained a provision, section 23 (3) that protected customary law and personal law from the application of non discrimination provisions. But because Zimbabwe now has a fully operational constitution precepts of the former Constitution will be discussed to show the evolution of International women’s human rights. It is also raises questions that even though Zimbabwe might enjoy a new constitution, are the rights for women provided for in this new Constitution being realised? The new Constitution obliges the state to ensure that all international Conventions, treaties and agreements to which Zimbabwe is a party and which address the gender issues are to be incorporated into domestic law. Zimbabwe has not signed or ratified the optional protocol to CEDAW which enables communications to be presented to the CEDAW committee, where individuals or groups perceive there have been violations of rights conferred by CEDAW. The only current external scrutiny of CEDAW compliance is periodic reporting to the CEDAW committee and to other human rights bodies. (ibid)

2.5.1 Legislative reform and judicial activism in Zimbabwe

In the period between 1980 -1991, the most significant piece of legislation to address discrimination after Independence in 1980 was the Legal Age of Majority Act (LAMA) which was enacted in 1982. Prior to these development African women were viewed to be minors. Indeed the outcome of the Katekwe case signalled the dawning of a new era for women’s rights. Accordingly in 1985 Zimbabwe amended the Matrimonial Causes Act which is (chapter 5:13) for it to provide for an equitable distribution of matrimonial property upon divorce. It is a known fact that wives contributions remain seriously undervalued because women tend to contribute by way of taking care of the family and seeing to its upkeep. Basically women are responsible for the household chores, they provide the food and cover general expenses. On the other hand men can then acquire their immovable and movable good in their own names. It thus is difficult to clearly establish the contributions of women as men normally have the title deeds and evidence of their expenses’ I believe that the CEDAW must in this respect take cognisance of this fact, and offer a quantification clause of some sort in circumstances such as the afore mentioned.(Stewart 2013:495)

In the era of 1991 -1999 there was significant legislative progress. In 1996 the legislature amended section 23 of the former Constitution to include gender as a ground of discrimination which could not be tolerated. Discrimination still presented itself in the form
of a claw back clause section 23 (3) that perpetuated and allowed discrimination where marriage, adoption, burial, devolution of property, death and personal law and customary law were concerned. Effectively translated it meant that discrimination was shunned in the public arena but it was licensed to operate in the private domain. Discrimination on the basis of gender posed as a threat to women’s rights and in this day and age it still does. This form of discrimination still poses as a reality to wives who were and still are in polygamous unions. These wives could inherit from a spouse who had died to the extent of a joint one-third share. The senior or rather first wife received two shares, also when a husband died the heir of that household would inherit the property, because generally women could not inherit. WLSA and other women’s rights organisations lobbied on the unfairness of these inheritance rights and the abuses further perpetrated by uncaring heirs in these customary unions. When these patriarchal arguments were presented in a make or break meeting with the potential of derailing the progress that was being made to reform these laws, Chief Mangwende who was the Head of the Chiefs Council at that time stated that ‘there was no estate until the surviving spouses died to the relief of most women.’ The Chiefs acceptance of this position led to the law being reformed and being passed successfully through Parliament. This progressive legislation came into effect on 1 November 1997.

However, a narrow interpretation of the claw back provision in Section 23 (93) of the Constitution in the case of Magaya VMagaya199 (1) Zlr 100 (s) led to an outcry by women’s groups. In this case the Zimbabwean Supreme Court was presented with a scenario in which a woman’s right to inherit from her father’s estate was questioned. The court held that the customary law was not subject to the operation of the equality provisions in section 23. This was held despite argument urging the application of non-discrimination principles derived from International Instruments including the CEDAW. This Magaya decision gave rise to a fervent invocation of the CEDAW in parliament in a debate on the 18th of May 1999, Ms Irene Zindi a member of Parliament, noted that indeed Zimbabwe had ratified the CEDAW and adopted the African Charter on Human and Peoples Rights (AU charter). She drew the Parliament’s attention to Articles 1, 2,3,5,13,15 and 16 of the CEDAW and commented as follows “Zimbabwe has a duty to ensure and end to discrimination against women in all areas including law, culture and family” (Stewart, 2013:500) .She also observed that the Magaya decision was in total contrast of the aforementioned International Treaties. Unfortunately those Treaties cannot be part of the Zimbabwean Law until a specific Act is passed to
incorporate the provisions of those treaties in to our domestic Law in terms of the new Constitution. Ms Zindi especially noted that Parliament had passed (LAMA). Surprisingly after the Katekwe case, the Supreme Court continued to reduce the rights of female children to inherit from their deceased fathers under Customary Law. This is apparent in the case of Chihowa v Mangwende 1987 (1) ZLR 228(s), in which relying on the Legal Age of Majority Act, a daughter’s right to inherit from her father’s interstate estate under customary law was established by Justice Dumbutshena.

All in all these are the texts that are available on women’s access to justice. It is apparent that the one enemy of women’s access to justice and CEDAW is customary law. The law is now crafted in such a way that one would think there is progress concerning this aspect and yet in fact there has not been.

2.5.2 The Former Constitution

The new Constitution of Zimbabwe is a breadth of fresh air as it now highlights certain aspects of women’s rights. It also mandates the state to incorporate the international treaties it is a party to into domestic law which is a significant move, whether that will be done, only time will tell, but before we discuss the new constitution, it is important to look at the former constitution, to see how women’s rights have evolved. The new constitution came into being in March 2013, so up until now February 2014 the effects of the former Constitution are still being felt since the new one and its provisions are yet to be fully implemented

The Constitution of Zimbabwe has been declared by law to be the supreme law of the land. The former Zimbabwean Constitution provided for non-discrimination of women in certain cases but unfortunately it has a claw back clause that actually allows discrimination in matters which pertain to customary and personal law. It also had a clause that provided for non-discrimination in terms of section 23(1) (a) which stated as follows:

subject to the provisions of this section no law shall make any provision that is discriminatory either of itself or in its effect;’ and again Section 23(1) (b) provided as follows: ‘no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.’

Section 23(2) provided yet again that:
…a law shall be regarded as making provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner, if as a result of
the law or treatment persons of a particular opinion, colour, creed, sex, gender, marital status or physical disability are prejudiced:
(a) by being subjected to a condition, restriction or disability to which other persons of another descriptions are not made subject to or
(b) by according to persons of another such description of a privilege or advantage which is not accorded to persons of the first mentioned description…’

The infamous claw back clause that was in the non discriminatory clause under Section 23(3) (a) (b) (f) of the Constitution in fact allowed discrimination in matters which pertained to customary law and personal law. It provided as such:

Section 23(3) Nothing contained in any law shall be held to be in contravention of subsection (1) (a) to the extent that the law in question relates to any of the following matters:
(a) personal law;
(b) the application of customary law in any cases involving Africans or an African…
(f) The according to tribe people to the exclusion of others rights or privileges relating to communal land.

It is true to observe and conclude that most women have been oppressed and discriminated against by certain provisions of customary law and personal law. Customary law normally favours sons as opposed to daughter and such preference and inclination is always exhibited towards the boy child, this is still the scenario even up till now in modern and rural homes. Indeed women suffered discrimination in every aspect of life, be it at home, in the workplace, under family law and the main catalyst in this discrimination in my view is customary law. Customary law is basically founded in patriarchy. This is especially visible in inheritance issues. In my honest opinion I believe that there has been a slow transformation where women’s rights are concerned, there is still the need for a legislative framework to comprehensively cater for gender equality and non discrimination.

2.5.3 CEDAW and The new Constitution

This women’s Convention mandates that there be equality in how women and men are treated, it also provides that there be equality between marriage partners. Therefore it is commendable that the new Constitution has made some positive progress in advocating the CEDAW provisions

S80 Part 3 of the new Constitution deals with the rights of women. It provides:

1) Every woman has full and equal dignity of the person with men and includes equal opportunities in political, economic and social activities.
2) Women have the same rights as men regarding the custody and guardianship of children, but an Act of Parliament may regulate how those rights are to be exercised.

3) All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this constitution are void to the extent of the infringement.

This new constitution also provides for a gender commission to be formed, this will hold institutions accountable for the application of the gender favourable laws. The Constitution also obliges the state to adopt the treaties that it has signed into domestic law. By way of comparison the South African Constitution acknowledges cultural rights but permits them to the extent that they are consistent with the Bill of Right in section21. This has not always been the case. South Africa like Zimbabwe also enjoyed a period were customary law took precedence over the law, and yet again women being the weakest links suffered discrimination. Most African countries have enjoyed and still enjoy a culture in which the boy child is favoured over the girl child. An example is how 10 year old girls from India are being married off contrary to international law provisions that protect children. An Interim Constitution was subsequently adopted in1994 which eventually led to the adoption of the final Constitution in 1996. It is clear that the constitution of South Africa has birthed commissions like the Commission Gender equality that monitors compliance of international conventions like CEDAW and this Commissions subsequently reports its findings to Parliament

2.6 Case Law

In the case of Shilubana and Others v Nwamitwa (2007)22, in South Africa the issue was also about the application of the customary law rule of male primogeniture. The Court held that the controversial Constitution, authentic or not, guaranteed the continued use of customary law within the country though it further subjected its use and operation to the provisions of fundamental rights imbedded in the South African constitution. This subsequently led to a judgement in Mrs Shilubanas favour as the rule of male primogeniture was declared inconsistent with the concept of gender equality. This shows that the Constitution of South Africa is in tandem with the CEDAW provisions.

2.7 LESSONS DRAWN

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Therefore, the review of the experiences drawn from other countries has documented some important lessons that should be taken note of if CEDAW provisions are to be implemented effectively.

**2.8 THEORETICAL FRAMEWORK**

Theoretical framework refers to a theory and the subsequent analysis of what nature the research proceeded. The first one to be looked at is the Women’s law theory.

**2.8.1 Women’s law theory.**

Basically this theory is based on women. It analyses the law pertaining to women, considering that women all over the world had limited rights. It therefore seeks to redress this by establishing law which is binding and can be applied. Women’s law also evaluates the law from a feminist viewpoint. The biggest challenge encountered was customary law, which is contrary to CEDAW. Maboreke M (wlsa 1994:1) states that “the women’s law methodology can be justified on the grounds of socio-economic realities and patriarchal ideologies rampant in our community which blocks the translation of abstract rights into real rights”. The women’s law approach involves noting women’s lived experiences and realities in using the legal route as a tool for their emancipation as the starting point of gathering data and acquiring knowledge. The primary sources for information for purposes of this research are women in the rural areas, women in the judiciary, and women in women’s organisations.

Because the scope of my study involved looking into gender based differences and mapping the way forward towards a gender sensitive justice system using CEDAW it is the crux of this study to explore the utilisation of law to address women’s discrimination and oppression. To sum it up this research assesses how the law legitimates the patriarchy system where women are viewed as subordinates to men. I used the Women’s Law Approach to see how women were faring in terms of accessing justice in the traditional courts and in the higher courts (magistrates and the Higher Courts.

STANG Dahl(1199:34) proffers that:

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

2.8.2 Actors and structures approach

The continuous engagement with the women’s law approach led me to use actors and structures approach within the Courts system. The Chiefs, who are the general custodians of customary law were the important actors who adjudicate cases brought by women before their Courts. I was keen on finding out how they administer customary law in their Courts and whether it offered women any appropriate remedies in today’s modern world and whether there was at all any acknowledgement of international women, human rights. The focus was on women because their ability to access justice is different from that of the men, and also because they are regarded as the most inferior between the two genders. Also significant to the research was the identification of the local Magistrates’ Court, Higher courts within the area where the Chiefs’ Court was located. It was important to see how the Magistrates’ Court and High court interacts with the Chiefs’ Courts.

2.8.3 Legal Pluralism

The concept of legal pluralism is based on the fact that there are many regulatory and normative frameworks outside the formal legal system. This approach helped me acknowledge the existence of different sources of law that exist within a community (Bentzon AW. Et al: 1998:41). In the context of this study legal pluralism takes in to cognisance all other laws such as (customary law, statutes, and human rights) and other norms that have been generated by the society in particular gender based norms. In this research I found that cultural myths also affect the efficient utility of the Law. It is subsequently essential to look at social realities posed culture and other normative frameworks and how they impede the application of the international law in the form of CEDAW.

The researcher also looked at the interaction of the dualistic system that is the application of general law and customary law within the legal Chiefs’ Court, the High court’s and the highest court in the land being the Constitutional court. This framework enabled me to find possible areas of conflict of the application of general law as well the areas of possible co-existence in a manner that gives women the ability to enjoy and enforce their rights. This approach inevitably led me to use simultaneously the;
2.8.4 Human rights framework

Focus was on the human rights standards that spoke of the right to culture and the right to Access justice within the formal and traditional legal systems as highlighted in the previous paragraphs at the national, regional , international level provide a yardstick against which women’s rights can be measured. Women’s legal rights are based on the notion of equality between men and women. The Human rights perspective provides a standard for the protection of important human entitlements. According to Charles worth H:

“While the acquisition of rights is by no means the only solution for the worldwide domination of women by men, it is an important tactic in the international arena. Because women in most societies operate from such a disadvantaged position, rights discourse offers a recognized vocabulary to frame political and social wrongs’.

I used the already existing and regional human rights principles done by Zimbabwe Women Lawyers Association( ZWLA) being women’s equal access to the law and justice human rights are standards as also expressed in different treaties and conventions also form a source of law. Zimbabwe is a signatory to a number of international treaties and conventions that guarantee the right to equal access to justice. In Article 7 of the SADC Protocol on Gender and Development, its states that:

State parties shall put in place legislative and other measures which promote and ensure the practical realization of equality for women. These measures shall ensure:
   Equality in the treatment of women in judicial and quasi judicial proceedings, or similar proceedings, including customary and traditional Court, and national reconciliation processes; That women should have equitable representation on and participation in all Courts including traditional Courts, alternative dispute resolution mechanisms and local community Courts.

The question to be addressed is if Zimbabwe  and India being signatories’ to human rights instruments such as CEDAW and the SADC Protocol on Gender and Development that speak of equality how is this realised in women’s lives in a pluralistic society like ours? Can women enjoy some of these rights in the Chiefs’ Courts and the higher courts?

2.8.5 The feminist approach.

Hoffman, (2001:63) argues that “International relations will remain a prime example of patriarchy, in both its practice and accomplishments.” Indeed, international relations is frequently referred to as the last bastion of the social sciences, indicating how rigid it remains
in reconsidering itself through the gender lenses. As with many theories, feminist theory reflects a wide range of perspectives generating many internal debates concerning how it should be represented. Thorburn (2000:15) notes “there can never be a truly singular voice of feminist foreign policy simply because of the diversity of views within feminism itself.” However, a brief look at some relevant facets of the discipline can be seen through Lorraine Codes’ summary of two salient areas within feminist international relations theory, standpoint feminism and radical feminism.

This theory considers how the gendered construction of knowledge helps to understand traditional topics in international relations and is alerting us to the idea that gender may be structuring how we think in the international context. Griffiths (1999:5), classifies feminist scholar J. Ann Tickner as a standpoint feminist. Before even addressing existing international relations theory, Griffiths first argues that the purpose and definition of theory is in itself male-cantered, because it is “oppressing normative rather than conjectural and analytic.” In this case the standpoint theory lacks female perspective because it is not objectively sought at the onset of formulating ideas.

2.8.6 Grounded Theory
This approach is described as an interactive process which leads to constant engaging with the research design and a theory developed throughout the research process (Bentzon et al) (1998:32). Through this approach I was able to constantly review what I wanted to find out. This approach helped me to go on a fact finding mission of establishing how women were faring in the Court system. The research became about the existence of an emerging model which accommodated the Chiefs’ Courts, Magistrates’ Courts, and High court. The research started showing how women in the Chief’s Court were better placed to access justice as opposed to the Magistrates court and the Constitutional court.

2.8.7 The Empowerment and Participatory Approach
An empowerment approach involves making extensive use of legal education as a research Method (Becker, Heinz 1996:238). It is also known as the participatory approach because there are interchangeable roles of being the researcher and also participating in the research to
I had not initially planned to conduct any legal education but I found myself conducting a mini legal aid clinic when I went to the courts. Having been introduced in the Court as a Law officer, women approached me after Court sessions with legal problems seeking legal advice. Inevitably during the research I was helped women make informed decisions in their lives after sensitizing them of their rights. It is commendable that even within the Chief’s Court the women were able to articulate their rights and the Court in turn would ensure that it gave judgements that upheld their rights.
CHAPTER THREE: METHODOLOGIES

3.0 COURT SIT INS
My first start was to conduct Court monitoring that is to actually sit in Court sessions and assess how the courts sessions were being conducted especially since women are frequent users of the Court system. This also enabled me to trace through interviews with the female litigants how they actually felt about the Court process and the Court judgements handed down. My first Court visit to Mutare in Chief Mutasa’s Court, I dressed appropriately and carried a traditional cloth to wrap around my lower body. I also put on a head scarf because women are traditionally required to cover their heads on. As I had done a courtesy call to the Chief called first to give the Court’s notice of my arrival, I was welcomed by the clerk of Court who performs similar duties to the clerk of Court in the Magistrates Courts, he determines which cases came before the Court through a vetting system. In the traditional courts there were elderly men sitting on chairs. In this court people addressed by their totems. Women sit on floor mats whilst men sit on the benches.

3.1 FOCUS GROUPS
I talked to a group of women randomly picked outside the courts mainly, those who are clients of the legal aid. The main objective was to find out from them their experiences in accessing justice in various Courts. I went about talking to the female litigants who had their cases before the various courts, from the chiefs’ courts to the high court and constitutional Courts so as to better understand how they fared in these Courts. They were asked whether they were satisfied by the process at all. I had the opportunity to conduct a focus group discussion at a legal education workshop organised by Zimbabwe women Lawyers Association in Mutare. In the magistrates’ court, most women seemed aggrieved by the court process, especially the ones who had lodged maintenance claims from their male counterparts. Unsubstantiated allegations of male magistrates receiving bribes were a common complaint amongst female litigants. In the higher courts most women were content and satisfied by the adjudication process. The Constitutional court is working efficiently to advocate certain laws to align themselves with the new constitution. I’m happy to note that Parliament of Zimbabwe has attained the number of women parliamentarians as mandated by CEDAW.
3.2 INTERVIEWS WITH KEY INFORMANTS

A key informant interview is a method of gathering information from selected people involving experts or professionals with particular knowledge and understanding. These can provide insight on the nature of problems and give recommendations for solution (Holstein, 1995: 54). Even though information from the key informants can be extracted through telephone interviews as well, this study implemented face to face interviews format was chosen for this study because it provides a free exchange of ideas and led itself to asking more complex questions and getting more detailed responses than telephone interviews (Brooks, 1998). In documenting interviewee responses, the method of note – taking was adopted ahead of tape recording.

The technique of key informant interviews by its nature necessitates the implementation of non probability sampling. Non probability sampling is any sampling method where some elements of a population have no chance of selection and it involves the selection of elements based on assumptions regarding the population of interest, which forms the criteria for selection (Alexei:2002:61). Under non probability sampling, the research made use of purposive sampling, whereby the researcher chooses the sample based on who they think would be appropriate for the study and it is used primarily when there is a limited number of people that have expertise in the area being researched (Holstein, 1995). In the research at the various courts the key informant to the study were magistrates, the judges, women lawyers as these were the ones who had in-depth information required by the study, and had the capacity to discuss sensitive areas, in comparison to the female litigants.

Key informant interview technique complemented the research by providing qualitative data. Qualitative research, according to Alexei (2002: 168), employs symbols and words to indicate the presence or absence of phenomena. In addition, qualitative research can supply a greater depth of information about the nature of communication processes in a particular research setting. Through conversation with the chiefs, magistrates, Judges during the interviews, the researcher managed to acquire qualitative data through capturing notes as the interview progressed.
The data collection method of key informant interviews has quite a number of advantages. Some of the advantages include the fact that detailed and rich data can be gathered in relatively easy and expensive way. The method also allows the interviewer to establish rapport with the respondents clarifying questions. It provides an opportunity to build and strengthen relationships with informants. In addition, key informant interviews can also raise the awareness, interest, and enthusiasm around an issue. Key informant interviews, also in the form of face to face interviews yield higher response rate in survey research (Brooks, 1998). However, the method of key informant interviews has its own drawbacks. According to Brooks (1998:59), it is more difficult to conduct key informant interviews, because it is challenging to reach and schedule interviews with busy or hard to- reach- respondents such as these in top positions such as the judges, the Chief Justice. In addition, selecting the “right” key informants may be difficult. Further, according to Brooks (1998:63), if informants prefer anonymity, the researcher must ensure confidentiality and this will make referencing of information difficult.

3.3 A QUESTIONNAIRES

Questionnaire is a research instrument consisting of a series of questions and other prompts for the purpose of gathering information from respondents (Holstein, 1995). Questionnaires allow for the exploration of patterns and trends which help to describe what is happening in the learning context and provide a measure of response, opinion, attitudes, feelings and perceptions about issues of particular concern to the researcher (ibid, 1995). I used questionnaire as they allowed women to describe their court appearances without the fear of being identified.

While executing the data collection technique of questionnaires, the researcher implemented probability sampling. Probability sampling is a sampling technique in which every element in a population has an equal chance of being selected in a sample. In the case of going to the courts, each female litigant had an equal chance of being selected in the issuing out of questionnaires, but since there were only fifty questionnaires, the study had to employ another sampling technique, which is simple random sampling. Simple random sampling technique chooses respondents in a given population irrespective of any pattern or regular interval. Thus, the researcher simply dispatched the questionnaires to the female accused persons and witness without any pattern.
The technique of survey questionnaires enriched the study by providing quantitative data. Quantitative research, according to Alexei (2002:59), employs numerical indicators to ascertain the relative size of a particular communication phenomenon. Qualitative data is very important to a research as it provides a high level of measurement precision and statistical power. In this research of women’s access to justice, quantitative data was collected, for instance, how many women felt confident in the justice system, how many knew about the new constitution and CEDAW. The need for further training and development of the adjudicators and the need of compliance of domestic law with the CEDAW, could be gathered using the questionnaire technique as a research instrument.

Advantages of using questionnaires to collect information include the fact that responses are gathered in a standardized way, so questionnaires are more objective, certainly more than interviews (Borgdan, 2003:35). In addition, potential information can be collected from a large number of people. For instance, this research sent fifty questionnaires to female litigants, thus, this enables the researcher to gather more information. Moreover, it is generally relatively quick to collect information using a questionnaire. Furthermore, through questionnaires feedback is generally anonymous. This encourages openness and honesty from respondents, which is important particularly while responding to controversial or sensitive issues. This was important to the research as the study managed to acquire in-depth information on the Accessibility of the justice system to women. However, the use of questionnaires as a data collection technique in the study of the accessibility of justice to women had its own drawbacks. During the research, the majority of women who received the questionnaires did not return them immediately as anticipated. In addition, some respondents left some areas unanswered thus, justifying that even though potentially questionnaires can collect information from a large portion, this potential was not realized as the returns were low. Also, even though generally questionnaires are a relatively quick method, they can take a long time not only to design, but also to apply and analyze. Further, questionnaires have the drawback that they can be interpreted differently by respondents. This was seen as some respondents responded in a weird way to certain questions. This situation necessitated probing, which cannot be effected using the survey questionnaire technique.
Nevertheless, the data collection technique of questionnaires proved significant to the study. In spite of the limitations noted above, questionnaires allowed for the collection of information from a larger pool of respondents. Questionnaires too were relatively quicker to execute and the fact that they uphold anonymity permitted the researcher to explore controversial and sensitive areas, which were satisfactorily responded.

3.4 EXPERIENTIAL DATA
The researcher relied on experiential data as a result of working as a law officer at the Attorney general’s office. The researcher’s duties included providing legal assistance to indigent women. She was then able to share with the adjudicators in the various courts as they engaged at the end of Court session dialogues, experiences of how women find the Magistrates’ Court process complex.

3.5 IN DEPTH INTERVIEWS
I interviewed women and men from different backgrounds. Whilst some were interviewed as the opportunity presented itself at church, at the hair salon. What I hoped to achieve was that the respondents give objective insights, and maybe talk about their experiences. In depth interviewing is advantageous because it allows the interviewer to probe further, also being observant to demeanour and facial expressions.

3.6 ANALYSIS OF THE DATA
The departure point for me in terms of collecting and analysing the data was about how to Harness the positive changes already occurring within the various Courts and how to encourage such changes to occur in all Court systems. (Nnaemeka 2003:12). The concept of the indigenous is aptly captured in the following comment:

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

This comment meant an investigation to find out whether or not women are accessing Justice in traditional Court systems and also the other formal courts. How best the justice system can
be used to eradicate women’s oppression creating awareness of instruments such as the CEDAW. ‘It was also about identifying locally appropriate plural sources of regulatory norms and engaging them with human rights law, which may move the various beyond the abstract rhetoric and negation that is referred to as western style law versus custom and religion’ (Hellum et al 2007:345). How can our own local Court systems use customary law which is about our African identity whilst taking heed of human rights principles such as equality? There is a need for us to identify social and political opportunities within cultures and practices and philosophies that could influence the development of law, institutions and appropriate practices for the benefit of women.(Kaulenu 2011:32). This means customary law must be analysed within the context of social (Becker & Heinz 1996:356), where change is influenced by issues of human rights and customary law is in itself adapting to the current ways of living of the people. Similarly so should the Chiefs Courts adjudicate over disputes in a manner that draws from human rights concepts. Deconstructing the Chiefs Courts in a manner that we are able to identify the way in which there are positive values that support women’s rights

3.6.1 Content Analysis or Documentary Search

Content analysis is a methodology in the social sciences for studying the content of communication. According to Carter (1990), it is “the study of recorded human communications, such as books, websites, paintings and laws”. Content analysis or documentary search as a data collection method has been utilized in the study through the use of textbooks, print media (newspapers), as well as electronic media (internet). Content analysis offers several advantages to researchers and has been indispensable to this study as it offers both the qualitative and quantitative operations as it provides insight into complex models of human thought and language use (USAID, 1996:1). According to Borgdan (2003:21), content analysis also has the advantage that it provides valuable historical cultural insights over time through the analysis of texts, and allows closeness to text which alternate between specific categories and relationships, and also statistically analyses the coded form of the text, and when done well, is considered as a relatively “exact” research method. In the study of women’s access to justice in India, content analysis in the form of books, newspapers and the internet was fundamental in generating reliable and replicable facts. Furthermore, content analysis enhanced the research by providing adequate data for
comparative analysis. For instance, the study enabled to compare the justice machinery of countries like South Africa and India. Content analysis also enabled the study to acquire in depth information of the caste system in India. However, content analysis as a data collection technique has its own shortcomings too. According to Aberbach & Gurium (1995), content analysis is often criticized for being too descriptive, and this is a weakness to which the beginner researcher is vulnerable. Content analysis has also been criticized for being extremely time consuming, and tends too often to simply consist of word counts, thus can be difficult to automate or computerize, (Aberbach & Gurium, 1995).

Nonetheless, when used properly, content analysis is a powerful data collection technique. The technique greatly enhanced the study of examining the justice systems of two countries, and a power comparison was also established.

### 3.6.2 Triangulation

The methodology of the study has implemented the data collection techniques above, that is,. Key informant interviews, in depth interview, court sit ins, focus groups provided qualitative information, survey questionnaires provided largely quantitative information and content analysis provided both quantitative and qualitative information. Thus, all these methods had their strengths and weaknesses as outlined above, hence, need to triangulate them. Triangulation, according to Brooks (1998; 77), is a method of using different techniques to collect information to produce results .Therefore, the qualitative complimented the quantitative in data analysis. In conclusion, these different methods of data collection have been used to gather information indispensable to the study to enable the research to provide rich and accurate results that will recommend possible solutions that enhance the justice system in implementing the provisions of the CEDAW.
CHAPTER FOUR: MAJOR FINDINGS

4.0: THE QUEST FOR EQUALITY AND NON DISCRIMINATION

Most women living in the rural areas basically live under customary law, and statistics show that the majority of women in Zimbabwe are in these rural areas. These women are disadvantaged by limited financial resources, distance from the formal courts, traditional views and stereotypes about women’s illiteracy (Dube 2014:32). In the wake of the new Constitution, a public awareness seminar was held by ZWLA during which the topic of women’s access to justice was discussed. A certain woman narrated her ordeal she was the victim of physical abuse by her husband because she had failed to put the back part of the chicken on his plate (back part is traditionally reserved for men in the Zimbabwean culture). she took the case to the nearest court that she could access being the village court. The court was presided over by the chief (a male). When this chief heard the story he was enraged by the woman’s conduct. The woman was asked who had raised her when she was growing up and it turned out to be her grandmother, the grandmother was summoned to court and was subsequently fined a goat. It is plain to see that in this instance justice was not observed at all, the issue here was abuse, but it turned out that this woman was punished for being abused. Rural dwelling women also have the disadvantage of legal illiteracy and illiteracy. From this brief overview, it is plain to see that customary law remain a challenge to international law namely women’s rights. If CEDAW provisions are to be implemented effectively, one has to start with the family level, slowly doing away with customary law substituting it with provisions from the treaty.

The cost of legal advice, administrative fees and other collateral costs are also a factor that hinder the effective administration of justice, they don’t have the finances for them to seek redress in the formal courts as the local courts are usually a distance away from villages, so their immediate port of call are these village chief’s courts. I also found that lack of access to information and lack of legal recognition are harder to identify, it has been my observation that women encountering the criminal justice system are deprived of the means to challenge the conditions of their arrest, remand, trial, conviction, detention and release on bail. Women being the home makers usually don’t have access to the finances of the household; therefore they often do not know and are not informed of the right to such representation. In civil and administrative matter where legal aid is not available, women in the rural areas are often
denied access to justice in matters involving property, welfare, payments, housing and evictions and family matters such as inheritance.(ibid)

Access to justice has also been defined as follows: Access to justice is more than improving an individual’s access to courts or guaranteeing legal representation. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards. There is no access to justice where women fear the system, see it as alien, and do not access it.

Access to justice by women is again hampered by a gender insensitive environment. For example, nursing mothers have no place at the courts where they nurse their babies, they also cannot testify whilst holding their babies, they have to leave the babies with someone else. effectively this will affect the nature of the evidence they will give in court as they will be worried about their babies. This is an important part of international law because according to Cynthia Enloe it is important to look at the family level, then national level then international level. So if there are unequal practices in the home, they affect how women in that home will affect the domestic arena and the international arena. Few women have made it in the international system because of the subjugation of women’s rights by the patriarchy system.

The new constitution is the supreme law of Zimbabwe it provides that any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency. Part 3 s80 (3) of the new Constitution states that:

All laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement. For women it means all laws that contributed to them being disadvantaged, an opportunity has been created to ensure that all such laws conform to the Constitution

Part 2 s327 (2) states that :an international treaty which has been concluded or executed by the President does not(a) bind Zimbabwe until it has been approved by Parliament and( b) does not bind Zimbabwe unless it has been incorporated into the law through an Act of Parliament”. This effectively means that CEDAW cannot be used in the domestic courts unless it has been passed as a law in Parliament.

S 327(6) states that:

When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with any international convention, which is binding on Zimbabwe”. Some of these have progressive clauses on access to justice, for instance the SADC Protocol on Gender and development states in Article 7 that there should be equality in access to justice.
The constitution recognizes the status and role of traditional leaders. Traditional leaders in their role as custodians of culture are now expected to resolve disputes amongst people in their communities in accordance with customary law. Traditional leaders have jurisdiction to handle cases that are determined by customary law. However, women have been at the receiving end in traditional courts and in a few instances, justice has not been observed in these courts.

According to A Tsanga (2000:12):

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

(Tsanga 2011:34) It is important that the Zimbabwean traditional formal judicial systems are transformed into a model that ensures many more women, especially rural women, access justice equitably and that the norms of CEDAW be applied where appropriate. Customary norms have a long way to go before they can be compatible with human rights norms contained in domestic laws and international laws (Ndula 2011:83). The focus of my findings is to assess the role the discriminatory nature of customary law and also to present findings of how some of the Chiefs, magistrates, high courts are executing their adjudication role in a way that fosters women’s access to justice according to the CEDAW convention. To revisit the application of customary law in the Chiefs Courts means showing how some Chiefs courts are adopting human rights sensitive approaches in their Courts. This research found that most of the rural women frequently use the Traditional Courts, reasons mainly because it’s readily accessible by way of the chiefs’ courts. These Traditional courts deal with family law issue, domestic violence cases. Women are found at various instances are the complainants or defendants and witnesses. On a positive note, Chief Samanga in Rusape and the local Magistrate has developed a working relationship. This working relationship enabled cross-learning to occur between the two Courts strengthening the idea of how the two Courts could co-exist in a non-complementary manner for the benefit of the women. It remains to be seen whether these two courts will begin to acquaint themselves with the provisions of CEDAW.
In Chief Makoni Courts the women were able to represent themselves however this is different in Chief Seke’s court as female litigants have to be represented by male representatives from their families. This means that women need a male representative to be deemed able to acquire full litigation status and status in general. ZWALA has been holding workshops with these traditional leaders on different aspects of the law such the Domestic Violence Act mainly through training sessions. Other strategies of engagement have been through platforms such as the Annual Chiefs Conference where the Chiefs gather to strategise about the work they do and the role they play within society.

Whilst I was conducting the research I was also given an opportunity to engage aspects of the law as the Court sessions in the various courts progressed. One of the important aspects of the Chiefs Court is how accessible it is to the community. As I sat through the Magistrates ,High courts, I noticed that female adjudicators are indeed inclined to the female litigants ,though there is no mention of international law, namely the CEDAW, whereas male magistrates are a bit hostile to the female litigants especially in rape matters. Similarly in the higher courts, female judges normally are patient and respectful towards women lawyers and litigants; the opposite is true in respect of the male judges.

The nature of the traditional Courts structure enables easier access to rural women considering that cases in the Chiefs’ Courts are normally dealt with in two sessions, especially if all the relevant parties to the proceedings are present in Court. When summons are issued they warn parties involved to bring their witnesses and any other evidence on the Court date however In the Magistrates Court the process sure takes longer. In simple matters one issues summons and waits for 14 days for the other party’s response then the parties file written submissions to prosecute or to defend their case. In some cases one then has to apply for a trial date, this in my view creates further delays and this further encourages women to use the traditional courts since the proceeding are not time consuming

Women pick and chose from traditional law and modern law creating their own version of Hybrid laws that meets their immediate needs. (Armstrong 2000:25). I found that women use both the Chief’s Court and the higher’ Courts to ensure that their problems are solved. Relational feminists’ proffer that women view themselves in relation to others as such they
tend to prioritise dispute resolution in the form of reconciliation than any other means of dispute resolution.

4.1 POLITICS, CULTURAL AND INTERNATIONAL WOMEN’S HUMAN RIGHTS

Whilst conducting this research also noticed that the state report states that the welfare of women living in rural areas in Zimbabwe is addressed by policies rather than legislative pronouncements and I don’t entirely agree with that assertion. The law of Zimbabwe has to equally be applied to all citizens regardless of various locations and. The State in my view has not actively taken the responsibility to raise awareness on the available laws be they domestic laws or international laws so that rural women have access to this information and can make choices regarding which court to approach.

Thus one sees that Zimbabwe even though it has a new constitution, the majority of women live under customary laws, the hope of the CEDAW obligations to be realised are dim. Whilst doing my research on India as a country that is affected by the Caste system I also observed that the CEDAW obliges the affected governments to eliminate such discrimination against women. They are mandated to adopt policies to eliminate discrimination against women and to pursue effective measures that guarantee equality for women in connection to all the substantive rights to which women are entitled. I observed that India as a country does acknowledge the CEDAW.

I have also found that rural women in India like those in Zimbabwe still are governed by customary law. India’s customary law subjugates the rights of women in an appalling manner and this has to be redressed. India being a domestic customary law country has to some extent acknowledged CEDAW as seen by the judgements referred to in chapter 2. The truth is very little is being done to ameliorate the situation of the majority of women. A look at the Dalit women bolsters that assertion the new Constitution of Zimbabwe is a breadth of fresh air but its implementation is yet to be seen. Another view point is that though discrimination is defined in section 56 of the new Constitution ,this definition falls short of the definition provided for in Article 1 of CEDAW in that It does not prohibit discrimination on a comprehensive set of grounds which have an impact on women, such as economic status,
culture, pregnancy and age also, “Subsection 5 of section 56 is a claw back clause which allows laws which are discriminatory to be passed in the area of personal law and also in the application of African customary law.” (ZWALAvol 3, 2013:45). Zimbabwe does follow a dualist approach where international law and in municipal law is concerned. It has not domesticated the CEDAW nor signed Optional Protocol to CEDAW. Furthermore there is inadequate justice machinery for the protection of women’s rights. The institutional arrangements in place such as the Ministry responsible for women affairs have been ineffective seeing that women continue to face discrimination through administrative measures affected by the office of the Registrar General and the Zimbabwe Republic Police. In conclusion Affirmative action is catered for under section 23 of the Constitution but it is not mandatory. The discretionary nature of the provision has rendered it largely ineffective. “The government has not implemented affirmative action policies in areas where the most difference could have been made for women, such as in access to land and indigenisation”. (ibid)

Women’s challenges from the former constitution were marginalization and unequal participation, limited prevention of violations of rights, limited protection of rights and minimal promotion of women’s rights. It is clear from the new constitution that there is provision of a legal framework for the protection and promotion of women’s fundamental rights and freedoms. It also makes provision for women’s participation in the political and other developmental processes of the country whilst providing for prevention of violation of rights. It is comparatively better than the current constitution. The new constitution has many positive aspects that address historical gender imbalances, including laws and policies that discriminate against women and girls. Since time immemorial women have had to cope with discriminatory laws, policies and practices in this country and these were not addressed in the former Constitution (Lancaster House). For this reason, one applauds the anti-discriminatory clauses in the new constitution and the equality principle. With a framework in place, we are expectant that attitudes and practices that discriminate against women will become a thing of the past. Some of the positive aspects we are celebrating in the draft constitution are to do with the provision for a wide range of socio-economic rights, which will ensure women’s participation, respect, promotion and protection of women’s rights. Some of these rights include the rights of women in the area of employment, right to education, health including reproductive health, social welfare, property rights and land rights. One issue that should be
commended is that women will be protected from harmful cultural practices such as pledging for appeasement of avenging spirits (kuripa ngozi). Whilst these practices have been outlawed by the Domestic Violence Act (Chapter 5:16), they were not been outlawed by the former Constitution and this had in the past disproportionately impacted on women’s socio-economic and cultural development. The new constitution also provides for bodily integrity and security of women thus clearly protecting women from all forms of violence such as domestic violence, public violence and sexual violence. As affirmative action seeks to correct past imbalances and ensure that men and women have equal access to opportunities and resources it is catered for in the new constitution and this indeed is a positive step. A specific Gender Commission is created to have oversight on gender equality issues. These are some of the developments that will go a long way in improving women’s socio-economic status as well as respect, protection and promotion of their political, cultural and socio-economic rights and fundamental freedoms.

The above advancements are placed within a progressive governance framework that provides for separation of powers and checks and balances that will facilitate enforcement and implementation of the constitutional guarantees making these a reality for the women of Zimbabwe.
CHAPTER 5
5.0 DISCUSSION AND RECOMMENDATIONS

These are the recommendations that I proffer to ensure the obligations of the CEDAW are implemented thus promoting an effective access to justice program for women in India and Zimbabwe. I recommend that the government of Zimbabwe formulate a clear policy of affirmative action in collaboration with the women themselves. They should subsequently enact laws which bind the state to deal effectively with these obligations. In proposing ways that improve the access to justice for women integrating customary law and international law, namely CEDAW, I will recommend a combination of different strategies taking into account these evolutionary trend. These recommendations I give basically refer to the Indian and Zimbabwean Governments.

5.1 THE NEW CONSTITUTION

In the light of the new Constitution. The non-discrimination clause clearly puts all legislation and all forms of law, including customary law under scrutiny to determine and reform if the need arises so as to bring about equality. There is a need for a thorough review of all legislation that merely refers to ‘he’ and accelerates the notion that male implies the female needs to be undertaken so that there is no confusion by those who read the law that it refers only to males. Every piece of law should to be interpreted through a broad gender lens and subsequently all the discriminatory provisions erased.

The categories of potential victims of discrimination should be specific and be as broad as possible, men and women must be deemed as equals for all purposes. A possible such clause should read: All persons are equal before the law in all spheres of economic, political, cultural and social life and shall enjoy equal protection from the law. CEDAW again must be incorporated into Zimbabwean law through the appropriate legislation, Zimbabwe also has to immediately sign and ratify the Optional Protocol to the CEDAW into domestic law which will make it binding on every citizen of Zimbabwe. The legislation formally establishing the
Human Rights and Gender Equality Commission must also be passed without further delay. There needs to be a countrywide gender sensitization of all public officials, including police officers and I suggest that the training be structured this was: initial training and refresher follow up trainings regularly carried out to access and reinforce the provisions mandated by CEDAW. Positive measures that empower women economically, legally and socially must adopted. Monitoring bodies, such as the Human Rights Commission, must be established and charged with monitoring the implementation and protection of non discrimination legislation for the benefit of women and also ensure the observation of Constitutional provisions mandating gender equality. The government must also set aside funds for research on women’s needs in establishing an equitable access to justice platform.

The state must ensure that the Affirmative action clause in the new Constitution that compensates for women’s previous exclusion must be accompanied by measures that obliges the state to act accordingly within a specific time frame. As previously noted in chapter one, women are limited to the traditional courts or other make shift justice systems such as “family talks” because of finances. They fail to access justice because they in most cases are home makers and don’t earn a salary. Thus the government should put in place measures to see women benefitting in resources as well. Indigenisation measures that pursue distributive justice must consider women as equal citizens who have been disadvantaged in terms of benefitting from the country’s resources. Affirmative action measures in this regard need to be more robust by ensuring that women have access to financial means to participate in the economy, unless action is taken to ensure effective affirmative action measures, women will remain at the periphery of the economy and of the law. The State must also play a more proactive role in changing mindsets by paving way for gender sensitization programs that focus on the provisions of CEDAW the Access to justice framework. A pluralistic framework in both countries contributes significantly to continued gender inequality therefore the State must be guided by the CEDAW that it is a signatory in reformulating national laws so that they address the disparities that existed between sexes. The common law position which states that when property is registered in the name of one spouse, the other spouse does not have a real right in that property must also be addressed as it discriminates women since men are normally the bread winners and are the holders of the ‘family purse’ A matrimonial property regime which recognises the indirect contributions of the wife must be established.
There is also a need to establish and enhance working Relationships between the Formal and Traditional Courts. A model that engages the Magistrates’ Court, High court and the traditional Courts should be adopted effectively there should be Cross-learning between these different Court structures. Rural women are marginalised when it comes to resources and services since they are in urban areas, therefore to ameliorate the plight of rural women, the state must pursue a policy of decentralisation so as to offer a participatory approach to decision making.

There must be constant capacity building workshops and information dissemination on the awareness of CEDAW and its obligations by the state. If information is made available it can help to dispel gender based stereotypes. Such an exercise will make it possible to sift through customary law in order to annihilate harmful practices that affect women in seeking justice.

The formal Courts can also start to incorporate simplified Court processes, improve by widening their geographical coverage. Because women mostly suffer and experience the worst kind of discrimination and customary family law, the establishment of a formalised Family Court system which adopts the domesticated CEDAW is recommended. Access to justice for women would be greatly enhanced if such a structure included Chiefs Courts, Magistrates Court and High Court.

5.2 RECOMMENDATION ON PROMOTION OF RIGHTS DALIT INDIAN WOMEN

The CEDAW obliges the affected governments to eliminate discrimination by pursuing policies that eliminate discrimination against women affected by the caste system. State parties must in my opinion enact and implement laws that protect women from caste-based crimes.” The measures they can adopt include judicial and police training, they should also offer legal assistance for the prosecution of such crimes, strengthening laws against domestic violence and other forms of violence against women, awareness campaigns to help prevent exploitation, and investing resources into education for women and girls affected by caste-based discrimination” (www.undp.org.)

State parties must ensure participation of women affected at all levels of political in decision-making structures. There must also be proportional representation of affected women elected into parliaments, legislatures. Gender discrimination within caste-affected communities can be tackle through programmes of dialogue and sensitisation of men. State parties should publicly provide data on the situation of women affected by caste discrimination.
States must also form specialized agencies to prevent and monitor cases of discrimination and violence against women, and should empower these agencies with powers, funds and infrastructure to investigate into complaints of abuse of women. States should ensure that the agents who form the criminal justice system are sensitized to address the issue of caste and gender based discrimination against women in accordance with international human rights law namely CEDAW and the officials who neglect their duty to protect the rights of these women must be punished with enhanced criminal measures.

The CEDAW commission needs to tighten its influence in the member countries, it must effectively bind Member countries to the treaty it signed and failure to comply with the CEDAW provisions should call on severe measures. I recommend that like the International Criminal Court and the International Court of Justice, CEDAW must establish court that will see member countries being arraigned for failure to abide by CEDAW provisions. Also head of states should be arraigned in the personal capacities for not implementing CEDAW norms. The CEDAW commission also has to embark on a worldwide sensitization program in which it visits each country worldwide, even those countries which are have not signed the treaty educating the states, the stake holders being the women. It should also launch CEDAW clubs in elementary schools, High schools and in university to create awareness of it existence and its objectives. The commission should also use the avenues of embassies and civil societies to advance its cause. As it has been with gays and lesbians, funding to poor countries should be on the basis that the country in question has aligned its domestic laws with CEDAW provisions.
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**Media Releases and other On-line materials**
27. The Herald, Monday 5 September 2011
APPENDIX

In Depth Interviews Guide

My name is Candice kasere studying Maters of Science Degree in International Relations with the University of Zimbabwe (UZ) Department of Political and Administrative Studies. In fulfilment of my studies I’m carrying out a research on the topic, how the women’s access to justice framework supported women empowerment: customary law vis a vis international law, a brief analysis of CEDAW

Sample of Interview Questions carried in the research

Q1. Where do you live?
Q2. how far is the nearest court from where you reside?
Q3. In what capacity are you attending court?
Q4. Which level of education did you reach?
Q5. What was your experience like? if you are an accused person, witness or complainant please tell us what transpired from the time when you were informed of this offence?
Q6. Do you have confidence in this court system you are accessing? If no please state why beneath
Q7. What are the challenges as a woman did you face in accessing justice?
Q8. Do you know of women’s rights? If yes please mention two
Q9. Are you aware of CEDAW or international human rights? If yes, can you at least outline two objectives that this instrument provides for? and what do you think it means for you as a woman?

Q10. In the event of domestic violence occurring in your household which justice machinery are you likely to approach for recourse

Q11. Do you think the law is favourable towards women worldwide? If no then what would you like to see changing?

Q12. Your recommendations on how women’s access to justice could be improved in your country and worldwide.

Q13. Your recommendations on how CEDAW could be effectively adopted to benefit women fully.

**Key** - Q = Question.