
**A CRITICAL EXAMINATION OF THE USE OF MEDIATION AS A TOOL FOR
THE REALISATION OF WOMEN'S ACCESS TO JUSTICE IN PROPERTY CASES
IN THE LEGAL AID SECTOR, ZIMBABWE**

BY

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Abstract

This dissertation examines the use of mediation as an alternative dispute resolution (ADR) method in property cases in the provision of legal aid. Mediation is employed as a counter strategy to expensive litigation for ordinary people. The challenges that women face in accessing justice when utilising the court processes are highlighted. The linkages between the right to legal aid and access to justice are also explored. ADR provides an opportunity for women to access justice in a system where the provision of legal aid is inadequate. The limitations that are found in litigation pose barriers to women's access to justice which makes alternative means of resolving disputes attractive to them. The cultural perceptions of the mediators as well as those of the parties influence the effectiveness of the mediation process. The weaknesses that are inherent in the use of ADR where parties seek binding solutions to their disputes are also discussed. The gender-focused methodologies that were used in the research highlighted the impact of the mediation on the women's lives. This study seeks to give a feminist and human rights analysis of the use of mediation as an intervention in the provision of legal services for the poor. There is, therefore, the need to explore the potential found in using mediation and tap into its advantages.

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Declaration

I, Florence Chagadama, do hereby declare that this dissertation is my original work. It is an honest and true effort of my personal research. I certify that the work has not been presented anywhere else before for any other thesis.

Signed.....

Date.....

This dissertation is submitted to the supervision of Rosalie K. Katsande, Southern and Eastern Regional Centre for Women's Law, University of Zimbabwe, for her examination with my approval.

Signed.....

Date.....

Dedication

To my two angels, Charleen and Charnelle, with love.

You are the light in my dark life.

You are the pillars of my strength,

The reason I live.

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Acronyms

ADR	Alternative Dispute Resolution
ACHPR	African Charter on Human and People's Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
LRF	Legal Resources Foundation
NGP	National Gender Policy
UDHR	Universal Declaration of Human Rights
ZWLA	Zimbabwean Women Lawyers Association

List of human rights instruments

African Charter on Human and People's Rights

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic Social and Cultural Rights (1976)

Universal Declaration of Human Rights (1948)

List of legislation

Zimbabwe

Arbitration Act [Chapter 7:15]

Constitution of Zimbabwe Amendment (No. 20), 2013

Customary Marriages Act [Chapter 5:07]

Legal Aid Act [Chapter 7:16]

Marriages Act [Chapter 5:11]

Matrimonial Causes Act [Chapter 5:13]

Ghana

Alternative Dispute Resolution Act 2010 (Act 798) of Republic Ghana

Courts Act 1993(Act 453) of the Republic of Ghana

List of policies

Zimbabwe

The National Gender Policy of Zimbabwe (2013)

List of cases

Mandava v Chasweka Unreported Harare High Court Judgment No HH-42-2008

Feremba v Matika Unreported Harare High Court Judgment No HH-33-2007

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Executive summary

This paper examines the strengths and weaknesses of the mediation processes that are conducted done within the legal aid organisations. It concludes that, despite the challenges that are faced, the intervention enhances access to justice for the poor and disadvantaged women. The paper is the result of practical research which sought to establish how the use of mediation as an alternative means of disputes resolution is impacting on the lives of the women. This was done through a comparative analysis of the experiences of the women who benefited through mediation sessions and those that adopted the court route for resolution of their disputes. It assisted in establishing the strengths and weaknesses of the two dispute resolution methods. This research was inspired by my experience of working in the justice delivery system and is premised on the assumption that it is failing women in accessing their right to access to justice, hence, calls for the adoption of alternative dispute resolution methods to counter the limitations faced when using litigation. It is argued that the inadequate provision of legal aid is contributing to the failure by women to access their rights. The research shows that the experiences of the ordinary women in accessing justice reveal that the formal justice delivery system is not the most relevant option as it falls short in certain circumstances.

The paper is divided into five sections. The first part gives a background of the research. In this chapter the research questions, assumptions, scope of study as well as limitations are discussed. The formulation of the assumptions was influenced by my experiential data which was gained from my work within the legal aid sector. Having witnessed the problems that the women face I had views and possible explanations about why the women are sometimes forced to abandon their cases. Some of the assumptions were confirmed and others partially held up during the research.

The second section of the paper gave some conceptual clarity to the terms that were part of the research. Alternative Dispute Resolution (ADR) was given its contextual meaning and the commonly used method of mediation defined. The definition was then linked to the approaches that are employed on the ground in the resolution of dispute proceedings. The link between the provision of legal aid and the right of access to justice was analysed and discussed in the context of Zimbabwe. The legal framework on the use of the ADR in Zimbabwe was compared with other jurisdictions that have regulated the mechanism. The

property rights of women that are married under unregistered unions were analysed in the context of their being able to access justice in the formal justice system.

The third part of the paper outlines and discusses the methodological approaches and methods that were employed during the research. Gender-focused methodologies were used in investigating the situations of women when they adopted their dispute resolution methods. The Women's Law Approach was the overarching methodology that enabled me to explore the women's lived experiences, relating them to the laws and the feminists' thoughts. The human rights approach was used in assessing the extent to which the state was fulfilling its obligations of guaranteeing women's access to justice in property disputes. The cultural norms that affect women's choices and the interplay of relationships were also analysed. An assessment of the effects of these relationships and norms on the women's choices and their decision making in adopting the disputes resolution methods was made.

This is followed by a discussion of the findings of the research that are analysed through a feminists' lens. The research findings could be discerned from the women's voices and their lived realities. The fifth chapter gives a theoretical and human rights analysis of the findings. It connects the findings with the law and measures these against human rights standards. The paper then concludes with an interpretation of the conclusions that were arrived at. It concludes that the use of ADR has the potential to realise women's access to justice in property cases but there are certain aspects that need to be improved. Both short- and long-term interventions are proposed. The short-term interventions relate to the improvement of the use of mediation in legal aid provision with a view of improving the impact on women's lives. The long-term recommendations related to issues of policy and law reform in an effort to adequately accommodate the use of ADR within the justice system and improve access to justice.

CHAPTER 1

1.0 INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

I have worked in the legal aid sector as a projects lawyer for the Legal Resources Foundation (LRF), and NGO, for eight years and in 2011 I was approached by a woman who had received legal assistance at one of its rural advice centres. She had separated from her husband in 2006. She was assisted through mediation that resulted in her sharing the jointly acquired matrimonial property with her husband. It was agreed at the mediation session that she was to get a house in Harare and the husband would get the rural home. The agreement was reduced to writing. When she came to my office she was facing harassment from her former husband who was collecting the rentals from the house that was awarded to her. They had a registered customary marriage and her husband had left her for a second wife. She came with this agreement that was now almost five years old. For all the years since the signing of the agreement at the legal advice centre she had failed to enforce the agreement. The municipality could not change ownership of the house as it insisted that there be a court order to that effect or that the husband should come and sign the cession papers. The husband just became evasive and refused to comply with the agreement.

This was a woman who had worked so hard with her husband through farming and her cross-border trading to build a rural home and an urban house. Efforts to enforce the agreement through the courts failed. Despite the agreement, there was quite a protracted legal battle and due to legal technicalities the woman ended up losing the urban house and is now homeless. This case got me thinking about the usefulness or otherwise of the mediation processes that we offer women who approach our organisation for help.

Mediation is one of the interventions and strategies that are employed by legal aid organisations to assist indigent women in helping women to access justice in a less costly way. In most circumstances, it is used as the first option for women to assert and enforce their rights. Oftentimes I asked myself what really went wrong in the above case. The woman was armed with an out of court settlement agreement but ended up losing everything that she had worked for all her life. Was it the process? Was it the agreement? Was she poorly advised or

were there other factors that were working against the woman's choices in asserting her rights? Most importantly, does mediation work as a strategy for women?

The provision of legal aid is a human right which the state is obliged to guarantee to its citizens. The right of access to justice by the poor is intertwined with their right to access adequate and effective legal aid. A number of people generally fail to access justice due to numerous challenges inherent in the formal court systems. This research seeks to critically examine whether the use of mediation in the provision of legal aid enhances women's access to justice in property cases. Alternative Dispute Resolution (ADR) is used in the provision of legal services as a counter strategy to avert the limitations and challenges that women face when they use litigation as an option for resolving their disputes. However, the employment of that strategy has not been adequately analysed from a human rights and women's angle. This study, therefore, seeks to examine the impact of using mediation as a means of dispute resolution on women's lives, particularly in property cases. The aim is to establish whether there is potential in using other dispute resolution mechanisms other than litigation in legal aid centres.

1.2 Background to the study

My work involves working with women that cannot afford the fees charged for the services of private lawyers. In my work as a legal aid lawyer I have witnessed women abandoning their cases for various reasons despite their being in receipt of legal aid services. The challenges that the women face in asserting their rights has prompted our organisation to strategically use and prefer alternative dispute resolution methods to litigation in order to assist the clients. This research focuses on the out-of-court settlements that are conducted within the LRF and compares these with those done by other legal aid organisations, such as Zimbabwe Women Lawyers Association (ZWLA). These organisations offer legal aid services to women and they employ alternative dispute resolution methods at varying and different stages of the disputes for women. The provision of mediation as a means of solving disputes is done with the aim of providing legal aid and as a strategy for enhancing their access to justice.

The LRF was established in 1984 as a legal aid organisation that offers free legal assistance to the poor who cannot afford private lawyers. The organisation is a registered trust that

operates through twenty-five (25) legal advice centres that are manned by trained paralegals whose work is monitored by lawyers. It has several programmes that are geared toward providing legal awareness and services to the poor. Although the LRF assists both men and women, the majority of beneficiaries of the legal education and legal services are women. The paralegals are the primary point of reference for LRF's clients and the lawyers only assist in complex cases that require legal representation. It is one of the organisational policies that alternative means of resolving disputes should be adopted whenever it is appropriate and necessary. This strategic intervention was prompted by the realisation that most of its clients face challenges in ensuring that their cases reach finality. ZWLA is an organisation that was established in 1992 by a group of lawyers to provide legal assistance to women. It has offices in Harare and Bulawayo. It offers women legal representation. The interventions that are employed by these two organisations are meant to compliment the state's obligation to provide legal aid for its poor citizens.

The research focuses on services rendered at ZWLA's Harare offices and the LRF's Harare office. The ZWLA cases are received from women from different parts of Zimbabwe and are not limited to those residing in Harare. The LRF Harare office receives cases from Harare urban, Chitungwiza and Mutoko and four other centres that were not part of this study. The clients from Chitungwiza have both an urban and semi-urban background. The Mutoko clients have a rural background. Most of the LRF's clients from the Mutoko legal advice centre come from the surrounding rural areas, resettlement areas, farms and Mutoko centre. It is in the rural legal advice centres that most ADR methods are used for women and the influences of culture or customs are most prominent.

1.3 Why the topic?

Family law disputes are expressly excluded from the application of Zimbabwe's Arbitration Act¹ which applies only to commercial disputes. This is not the case in Ghana where the law has been progressive and allowed the application of mediation to family law issues and arbitration in customary disputes.² Zimbabwean women are forced to resort to litigation which has its challenges. There are direct and indirect costs involved when women resolve

¹ Section 4(2)(d) of the Arbitration Act [Chapter 7:16] excludes determination of matrimonial disputes through arbitration unless leave is granted by the High Court.

² See the Alternative Dispute Resolution Act (2010) of Ghana Part Two and Three of the Act provides for mediation of disputes and customary arbitration. This means that matrimonial disputes may be resolved without resorting to litigation within regulated guidelines.

their cases through litigation. Litigation is costly in terms of time and money. In most cases, there are delays within the formal justice system which means that the women have to travel to and from the courts over long periods of time without their cases being resolved. In addition, the women walk long distances to the nearest Magistrate's Court if the value of the property falls within its monetary jurisdiction. If the value then exceeds the monetary jurisdiction the matter must be heard in the High Court which is only found in Harare and Bulawayo. The multiple roles that are played by women in society are not fully considered as the woman spends most of her time pursuing the matter. In the circumstances, mediation becomes an attractive dispute resolution method for the women.

Most of the clients that approach the legal advice offices for resolution of their disputes are in unregistered customary law marriages. Access to justice for the women in these relationships is limited as there is poor provision of adequate and effective legal aid by the state. The marriages laws in Zimbabwe provide for customary and civil marriages.³ These marital arrangements are not recognised as marriages despite the fact that most women stay in these relationships for years. It is the majority of such cases that are dealt with through mediation at the legal advice centres within LRF. Mediation is used within the LRF as an intervention to assist women in solving their property disputes, but there is little evaluation of its impact on the lives of women. This research, therefore, seeks to critically examine the use of mediation processes in property cases and assess how it is changing the lives of the women concerned. The hope is that this will add value to the provision of legal services to poor women and assist the organisation in the implementation of its strategies. The research may also be useful for policy makers in law reform.

1.4 Objectives of the research

The purpose of the study was to review the strengths and weaknesses involved in the use of mediation as a form of ADR in the LRF and assess how this enhances women's access to justice in property cases and to make recommendations. This was accomplished through the guidance and use of the following set of assumptions and research questions.

³ Marriages Act [Chapter 5:11] and the Customary Marriages Act [Chapter 5:07].

1.4.1 Research assumptions

The following are the assumptions that informed the research. They were formulated based on the experiential data gained from my experience in providing legal aid to the poor.

1. ADR has the potential to realise women's access to justice in a way that is less expensive than formal court process.
2. Women prefer ADR as a means of dispute resolution to litigation.
3. Women are more empowered through the use of ADR than when engaging with formal court processes.
4. The integration of religious and customary norms with human rights and state law by legal officers contributes to the success of ADR cases.
5. The lack of standard guidelines on the use of ADR in the legal system contributes to inconsistencies in the application of ADR as a tool for dispute resolution.

1.4.2 Research questions

These are the research questions that formed the basis of the study.

1. Does ADR have the potential to realise women's access to justice in a way that is less expensive than formal court process?
2. Do women prefer ADR to litigation as a means of dispute resolution?
3. Are women more empowered through the use of ADR than when engaging with formal court processes?
4. Does the integration of religious and customary norms with human rights and state law by legal officers contribute to the success of ADR cases?
5. Does the lack of standard guidelines on the use of ADR contribute to the inconsistencies in the application of ADR as a tool for dispute resolution?

1.5 Scope of the study

The study is limited to the cases that involved the use of mediation in LRF and ZWLA. These included cases that were pending before the courts and cases in which mediation was the only strategy adopted to resolve disputes. These included cases where the mediation was done as part of the judicial proceedings. This was done to compare the experiences of the women who adopt the two different methods of dispute resolution. The research focused on property

disputes arising out of the dissolution of marriages either by divorce or death. The cases included those in which the parties had attempted the mediation route but had failed to achieve a solution to their legal problems.

The cases were chosen from LRF's Legal Advice Centres in Mutoko, Harare City Centre, Highfields, Chitungwiza and ZWLA. The geographical locations were meant to provide the research with a diverse background of cases. The rationale was that women in these different localities are bound to face different challenges and that their situations affect their choices. In the premises, the challenges that are faced in the implementation of ADR methods are influenced by different factors.

1.6 Conclusion

This introductory chapter has outlined the motivation behind the research; the background to the study; the research objectives and questions and the scope of the study. This was the foundation of the whole research process. The following chapter will give a conceptual framework of the study giving a literature review on the subject and issues under discussion. It also elaborates the concepts from a human rights angle as well as giving them some feminist thoughts. Chapter 3 provides the methodological journey and choices that were adopted and assisted in reaching the findings. This explains how the different methodologies and methods that were utilised during the research influenced the data collected. Chapter 4 presents a discussion of the findings. The findings are analysed from the women's lived experiences and standpoints with regard to the dispute resolution methods they adopted. This reveals the strengths and weaknesses of litigation and ADR as methods of solving their legal problems. Chapter 5 gives a theoretical and human rights analysis of the findings. It weaves the findings into the legal and human rights standards and measures the state's compliance against these norms. Chapter 6 is the concluding chapter which highlights the conclusions reached and the suggested recommendations. The findings informed the conclusions reached and the recommendations emanate from the research findings.

CHAPTER 2

2.0 CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter gives conceptual clarity to the subject under research. There are various concepts that are required to be defined and elaborated to give them their full contextual meaning. The research covers aspects of the provision of legal aid, access to justice and matrimonial property rights. These concepts require clarification as they underpin the research. These are conceptualised in relation to the human rights elements as well as feminist perspectives. The rationale is to give a conceptual analysis of the terms and aspects of the research in relation to the existing literature. Since the notions of ADR and women's access to justice are areas that have been widely researched, a literature review is relevant to provide a conceptual background of the issues. The analysis of the concepts through literature, the laws and human rights mapped the research and kept it focused.

2.2 Alternative dispute resolution (ADR) in context

The general perception within and without the legal fraternity is that there has to be a healthier way of resolving disputes than resorting to time-consuming and unaffordable litigation procedures. The divisiveness of litigation has been recognised as a cost on its own (Gumbiner, 2000). Alternative dispute resolution (ADR) refers to mechanisms that are used to resolve disputes outside the court and judicial systems. These include negotiation, arbitration, neutral fact finding and mediation. In this research mediation was the popular alternative dispute resolution method employed. The term ADR is loosely used within the LRF to refer to mediation which, in essence, refers to any dispute resolution that is done by its lawyers and paralegals outside the court system. It is a facilitative and evaluative process that is conducted in a very informal manner.

Hence, it is crucial to define and understand the method of resolution of disputes that is widely used in property-related cases within the provision of legal aid to the women. Mediation is a highly facilitative negotiation process. It is a form of dispute settlement that entails the intervention of an impartial third party invited by the parties and its outcome is a mutual agreement between the parties (Greenhouse, 1985) . It has a high rate of success in reaching durable voluntary settlement agreements. The mediators need to be trained in

negotiation and facilitation techniques. In the context of LRF, its paralegals are trained in negotiation and facilitation skills and techniques. In essence, using mediation involves a psychological analysis of the process in order to appreciate why cases and people settle (Gumbiner, 2000). Such an analysis involves an appreciation of the variables and dynamics that are involved in dispute resolution. This analysis will assist in appreciating the factors that affect the women in choosing this form of dispute resolution.

An understanding of the procedures involved in mediation is very important. It enables a critical understanding of how the process is likely to influence the outcome and whether the basic principles of conducting such processes are adhered to. A typical mediation session should start with the parties and the mediator being introduced to one another and the process. In most cases, the differences between mediation and other dispute resolution methods like litigation are explained. This is done in order for the parties to appreciate the advantages of the process and thereby encourage them to see it as the best way of resolving their differences. It is very important for the parties to be informed of the voluntary nature of the process and the neutrality of the mediator. The mediator should not have any power or aspiration to force a settlement, i.e., she or he should be not be biased in any way. It follows that any settlement that is reached should be the result of an agreement by both parties that the negotiated outcome is the best and most ideal way of ending the dispute. The mediator has to listen to both sides of the story and should encourage the parties to listen to each other. The research then seeks to establish how the process is actually conducted in practice and whether it achieves the intended result of assisting women to access justice.

The literature and prior studies done on the use of ADR have concentrated on the use of the ADR in customary courts, criminal matters and commercial disputes. There is little literature on the use of ADR in the resolution of civil matters and family disputes in which the matrimonial rights to property are normally prominent. This research seeks to add value to the literature on the use of ADR in the provision of legal aid. The use of ADR has to be viewed from the beneficiary's point of view. There is also the need to investigate how it benefits women and explore whether it has the potential to bring about change and improvement to their lives. One of the benefits of mediation is that the result is not strictly cast in the precepts of the rules of law (Gumbiner, 2000). The flexibility and informality that is involved gives it an advantage over court process. If the process is properly done it has the effect of producing durable and binding agreements. It makes mediation more appropriate

even to cases where no law suits have been initiated. The traditional preference of litigation was premised on the desire for a binding solution to legal problems. There is now a need to critically analyse the potential and advantages of employing mediation as a dispute resolution method in such circumstances where no law suits have been initiated.

Ideally, ADR usage and implementation should be regulated and dealt with by some legal instrument or some set guidelines. In Zimbabwe, the Arbitration Act [Chapter 7:15] deals only with commercial disputes and expressly excludes application to family law issues.⁴ The fact is that the Arbitration Act is the most appropriate statute to provide for the use of alternative means of dispute resolution to family law disputes. The civil procedures of the courts encourage the parties to attempt to settle issues out of court. However, they are limited to the settling of the issues before a trial and the curtailment of trial procedures. They do not encourage, however, the parties to attempt to resolve their disputes through means other than litigation.

Similar legislation in other jurisdictions has tried to incorporate alternative dispute resolution mechanisms in the resolution of customary and family law disputes.⁵ This is a progressive way of incorporating ADR into the legal system and acknowledges the traditional and local ways used by the people in resolving disputes (Adjabeng, 2012). However, this approach is not without its flaws as it risks the rigid application of procedures that comes with the regulation of an issue. In other words, the regulation of ADR may have a negative effect which comes from the rigid application of the guidelines thus rendering the process more complex. Litigation, as an option for dispute resolution, has limitations for litigants who are in continuous and interdependent relationships that are characteristic of matrimonial property disputes. In the premises, the legal system should find ways to appropriately provide for the use of ADR thereby acknowledging that there are other mechanisms capable of resolving disputes.

⁴ Section 4(2)(d) of the Arbitration Act excludes the application of the Act from matrimonial causes disputes unless leave for that is granted by the High Court.

⁵ The Alternative Dispute Resolution Act 2010 (Act 798) of Ghana provides for mediation and arbitration in customary issues. Section 72 of the Courts Act 1993(Act 453) of Ghana encourages preference for mediation.

2.3 Provision of legal aid and access to justice – a nexus

The provision of legal aid is a human rights issue. There is a need to understand what legal aid is and how it is linked to the right to access to justice. States have an obligation to guarantee individuals access to justice as a human right. It is a right that should be non-derogable and, therefore, it should not be subjected to limitations.⁶ These concepts underpin this research and need to be explained in the context of accepted human rights norms. Inadequate provision of legal aid is a barrier to access to justice. The basic principles on the role of legal practitioners require the state to have efficient procedures and mechanisms that are responsive to the need for access to legal representation by the poor and marginalised people (UNDP, 2004). The provision of legal aid acknowledges the fact that all people need to have access to the judicial systems and remedies to their disputes.

The situation is even more vital for women who suffer several oppressions and intersectionalities. Women invest in relationships that may lead to mutual dependency and, in certain cases, power imbalances that affect their ability to access justice (Barendrecht & DeLangen, 2009). The subordination of women through customs and male dominance works against women's capacity to access justice. The economic power exerted by men over women leaves women in dependency relationships. This dependency often translates into issues of decision-making power and the ability to make choices. The fact that women find themselves wanting to conform to customs and dictated gender roles affects their assertion of their rights in a meaningful way. Interdependency causes conflict, making it hard to reach reasonable solutions for those involved in such relationships (Barendrecht & DeLangen, 2009). This calls for mechanisms that ensure a fair termination of such relationships. Women generally invest more in terms of time and effort in their families as compared with their male counterparts. Such investment is lost at the break-up of their relationships and that contributes to the difficulty of bringing them to an end. Ultimately, women are left in a situation of vulnerability and exploitation.

The phrase 'access to justice' has evolved over the years and has acquired a broader meaning. Access to justice is therefore linked to the socio-economic situation of a particular place and time (Hurter, 2011). This evolvement is associated with the complexities of our society giving rise to matching complex needs. Access to justice entails people's ability to use the

⁶ The right is enshrined in several human rights instruments, e.g., see Articles 8 of UDHR, 7(1) of the ACHPR and 2(3) of ICCPR.

justice institutions to get solutions to their general legal problems (American Bar Association Rule of law Initiative, 2012). Over time, huge social imbalances have emerged that have given birth to the marginalisation and exclusion of groups, especially women, from the just determination of their rights. The justice system, therefore, has to play a crucial role in realising social justice due to the social dimension that is inherent in legal problems (Hurter, 2011). The definition of access to justice has to include and promote issues of social inclusion so that the meaning of justice is extended to those found outside the so-called 'magic social circles'. In other words, the justice system should meet the needs of the most marginalised and disadvantaged of the society. There should be meaningful access to the institutions within the justice system, even in civil cases. However, the meaning of access to justice should not be restricted to access to the formal legal systems but should also recognise the obtaining of just solutions that ensure personal security and the protection of property (UNDP, 2004).

An 'access to justice' assessment involves an analysis of whether people are able to use the justice system for the resolution of the common legal issues; the factors affecting their ability to do so and the reforms and programs necessary for the justice system to be responsive to the people's needs (American Bar Association Rule of law Initiative, 2012). The key elements that require to be analysed include the legal framework, provision of legal advice and representation, levels of legal knowledge, access to the justice institutions, the fairness of the procedure and the enforceability of the solution. It, therefore, follows that each element is measured against its presence in the system and the factors affecting it.

The Legal Aid Act establishes the Legal Aid Directorate is mandated to provide legal aid to the poor. However, this government department is under-resourced and does not have the capacity to provide legal aid to its poor citizens. It is also currently short-staffed, with only seventeen (17) who are expected to cover the whole of Zimbabwe. The department is located in the two major cities of Zimbabwe, Harare and Bulawayo. It is within this context that the legal aid organisations, such as LRF and ZWALA, enter the picture in order to compliment the work of the state in providing legal aid services to those who cannot afford private lawyers. This background shows that the right of access to justice for the poor in Zimbabwe remains a dream. This is worsened by the fact that the out-of-pocket costs of litigation are very expensive for ordinary people and all the more so for women. This has made ADR attractive for most disputants. ADR is a response to the excessive formalism and inhibitive costs of ordinary justice (Francioni, 2007). Connecting the use of ADR with human rights

standards establishes linkages between the social and economic circumstances of women to the legal system. The economic standing of an individual influences their choices and capacities and, in turn, affects their enjoyment and access to their rights and entitlements.

In Zimbabwe, the provision of legal aid as a right has recently been reinforced by the new Constitution. The recognition of rights in a Constitution may ensure their realisation and enjoyment. Section 31 of the Constitution of Zimbabwe in its national objectives provides for the right to representation under the right to legal aid. This applies to both civil and criminal cases but is subject to the availability of resources. The fact that this is enshrined in the Constitution is in itself very progressive. However, the enforceability of the Constitutional provision couched purely as a national objective may be problematic as arguments on the justiciability of the right are likely to arise. The issue of availability of resources may also prove a challenge but the international human rights jurisprudence shows that states need to take practical measures to ensure that such rights are realised by women on the ground.

Various international human rights instruments provide for the right of equality before the law which encompasses the right of access to justice.⁷ Article 8(a) of CEDAW provides for access to judicial and legal services. Any examination of the experiences of the poor which includes the impact of ADR should be rights-oriented. It follows that interventions and initiatives should work towards improving the quality of the dispute resolution and ensuring that they adhere to certain human rights based principles (Wojkowsska, 2006). An analysis of the procedural aspects of mediation sessions should also focus on the how women express themselves as well as the voluntariness of the process. People should not be compelled to use the method and, therefore, it should be acceptable to the beneficiaries. This entails that the processes should be subject to some regulation and review to ensure some accountability.

2.4 Rights to property in unregistered customary law unions

The majority of the respondents who were the subject of this research had unregistered customary law unions. The mediation sessions that were researched on dealt with the sharing of property in these unions. The property rights of the women in these marriages need, therefore, to be elaborated on in context of the marriage laws of Zimbabwe. A number of High Court judgments have lamented the anomaly that exists between the registered and

⁷ Article 8 of CEDAW, Article 7(1) of the UDHR.

unregistered customary law unions.⁸ This is very relevant to the research due to the fact that there are circumstances when the mediation fails to resolve the issues of distribution of property in those unions, thus, forcing the women to resort to the courts for enforcement of their rights. It means that the women encounter the various challenges related to the court process. This is made worse by the fact that these unions are not recognised as marriages when it comes to the issue of sharing of the properties acquired during the subsistence of the union. The courts have always relegated the rectification of the socio-legal problems arising from the distribution of properties in these unions to the legislature.

The Matrimonial Causes Act [Chapter 5:13] does not recognise unregistered customary unions as marriages. Consequently, the distribution of property jointly acquired during the subsistence of these unions is not governed by the divorce laws. Although the parties in such unions may approach the courts for relief, they will be faced with a difficult task that does not affect their counterparts in registered marriages. Women in unregistered customary law unions need to make a choice of law decision and are required to plead a recognisable cause of action under general law. An appraisal of the law in this respect is very important in this research.

The new Constitution of Zimbabwe protects the property rights of spouses upon divorce and death. It provides in section 26(d) for the protection of spouses in the event of the dissolution of a marriage. It may be argued that this protection extends to women in unregistered customary law unions. The different treatment of the women by the law amounts to discrimination on the grounds of marital status and this anomaly has to be rectified. The continuation of this situation means that the marriages laws fail to take cognisance of the realities on the ground. The fact that there are so many unregistered unions calls for the law to be realistic and to recognise the practices of the people.

Various international human rights instruments protect the rights of women in the family, particularly, their right to property.⁹ CEDAW protects women in marriage and family relations in their enjoyment of rights during and at the dissolution of marriage. If the human rights norms provide for women's equality in the benefit of the law, this should be extended

⁸ The plight of women is illustrated by judgments, such as *Mandava v Chasweka* Unreported Harare High Court No HH-42-2008 and *Feremba v Matika* Unreported Harare High Court No HH-33-2007.

⁹ Article 16 of CEDAW. This should be read with the non-discrimination clauses that prohibit distinction and discrimination on the grounds of marital status.

to all spheres of life. The current situation of women that are married under unregistered customary law unions perpetuates a distinction on the basis of marital status. Discrimination is not limited to the differences of opportunities between men and women but also between women and women. This approach recognises the fact that class and marital status have the effect of differentiating women, resulting in unfair practices on the ground. The current scenario means that women married under registered marriages benefit more from the law than those in unregistered customary law unions.

The situation of women in unregistered customary unions reflects the patriarchal and male dominance over women. The women in these relationships do not have power over the property that they acquired during the union due to the cultural perceptions of the role of the woman in the family. According to Catherine MacKinnon, this subordination of women is institutionalised and shapes the women's access to resources, membership in community, speech and power (MacKinnon, 1996). MacKinnon's dominance theory is a theory of power and its unequal distribution. In relation to mediation, it can be seen in the choices that are made by women, the fear of instituting proceedings and the lack of autonomy. The social construction of the woman as 'the other' (DeBeauvoir, 1989) impedes women in the expression of her rights and power to negotiate in the mediation sessions. This conception of 'the otherness' of women impacts on the dispute resolution methods that women choose for the resolution of their legal issues. This may influence the women's participation and expression in the mediation meetings. The woman would have learnt to act and perform as the woman is expected to act and tries by all means to conform to the script of life and any deviation from that known script is deemed dishonourable.

2.5 Conclusion

This chapter sought to elaborate the concepts that underpin this research. ADR was given a contextual meaning. Mediation, being a common method used by paralegals, was defined and its principles were outlined. The link between the provision of legal aid and access to justice was established and explained in the context of Zimbabwe's legal framework. The clarification of the concepts was analysed with reference to the human rights standards as well as from a feminist perspective. This conceptual clarity was very important as the understanding of these concepts heavily influenced the course of the research.

CHAPTER 3

3.0 METHODOLOGICAL JOURNEY AND CHOICES

3.1 Introduction

I conducted the research within a purposeful methodological framework that would clearly bring to light the issues the study sought to reveal (Leedy & Ormrod, 2010). The research methods used had an effect on and were dependent on the information to be collected. I crafted a plan of the research methodology and methods to be used for each category of respondent. This was guided by the overall objective of the study which sought to examine the impact of mediation processes on women.

The principles gleaned from the literature review were very important in my assessment of the way the sessions were conducted and what an ideal mediation outcome should seek to achieve. The field research helped me to bring to light the challenges and weaknesses of the mediation processes. The methods used revealed the challenges that women are facing in accessing justice. In this chapter, I seek to outline how I used the gender-focused methodologies to highlight the strengths and weaknesses found in using mediation as well as the challenges encountered in litigation. I further describe how the methods that were employed were effective and useful during the research process. I will conclude by giving the limitations and challenges that I encountered in conducting the study.

3.2 Research design

This research was based on my participation in the field and focused on two legal aid organisation, namely, LRF and ZWLA. It sought to investigate how the women assisted through mediation dealt with their issues and interacted with the wider community. When I embarked on the study I thought the research would be limited to the Highfields, Harare City Centre and Chitungwiza offices. I added another rural centre to add diversity, after realising that mediation sessions involving property cases were more prominent in rural centres. The research started with a perusal of LRF records and case audits and then moved on to the general public through outreaches which focused on their perceptions of the dispute resolution methods that they preferred and the challenges they generally face when using the court system.

It then narrowed down to the specific and individual women that benefited or were being assisted using mediation. The general picture that emerged from the outreach discussions was, therefore, given a lived reality and 'face'. It was a very important part of the research to understand from the women who were assisted through mediation what their life was like before they came for assistance and their experiences after making contact with the advice centre. The constraints, challenges and intersectionalities came out during the individual interviews or from observing the mediation sessions. The power struggles, male perceptions on women's emancipation and the effect of plural laws and semi-autonomous fields were exposed.

The research was, therefore, designed as outlined in the activities below:-

- Desk research involved perusing LRF case records, files, case audits, proposals and policies to obtain a general picture on the use of ADR in LRF.
- Outreaches with women and men to discover their general perception about dispute resolution, the methods they were using, the challenges they were facing and possible solutions to them.
- Interviews with the paralegals and lawyers that were conducting the mediation on the procedures adopted, their experiences in conducting the mediation, their perceived impact on the women and the challenges faced in using mediation and possible solutions to these challenges.
- Direct observation of live mediation sessions involving property distribution and property disputes. In this regard, the environment in which the mediation was conducted was assessed, the conduct of the parties and mediators during the mediation was observed and inferences were made based on actions and statements.
- Interviews with other agencies that the women had approached before they came to the organisation for assistance and the court officials who, in most circumstances, end up referring of handling disputes arising from the

mediation processes. This plan helped me appreciate the constraints faced in the use of mediation on women's lives.

3.3 Engaging with the women's law approach

In order to assess the impact of the mediation sessions and their outcomes on women's lives I engaged with a research methodology that would appropriately bring that out. The women's law approach enabled me to understand the women's lived experiences before and after the mediation processes. The women narrated their experiences, the challenges they faced in pursuing their cases in courts, how the community shunned them for reporting their husbands and how they fought for the property which, in other people's eyes, was irrelevant, yet, to them, was their lifeline. This approach helped me discover how the women felt about the mediation procedures which, in certain circumstances, failed to capture their actual needs. It also assisted in exposing and appreciating the challenges the women face when mediation fails as a means of dispute resolution; when they are forced to abandon their matters; when they sell their livestock to raise court fees and messengers of court fees, yet their access to justice remains a dream. This is a methodology that relies on the collection of empirical data with a focus on the women's lived realities and experiences analysing their interaction with the law and society (Bentzon & etal, 1998).

In the interviews of both the women and the mediators I was analysing the situations they described through a women's lens. The men's attitudes and voices, particularly those concerned with the observed mediation session, shed light on men's perceptions on women's access to matrimonial property. Beyond the palpable anger contained in men's statements, it emerged that men generally felt that there were some properties that women were not entitled to and some they could readily give away. In this respect, the women's law approach, as a grounded and interactive methodology, brought out the interrelation between the data, feminist theories and the women's actual experiences. The power struggles and the male dominance that influenced women's choices were exposed through engaging this approach. The male dominance was revealed when women still felt dependant for survival on the men that they sought to sue. A vivid example of this was the case of a woman who failed to raise money to pay the required court fees to sue her husband and later had to approach him to beg for bags of maize in order to survive.

Engaging with the approach enabled me to constantly reflect on my assumptions. One of my assumptions was that women come out of the mediation process empowered women. This was partially confirmed but was qualified during the research since it emerged that sometimes, although a woman emerged more legally knowledgeable about the relevant law in her case, her actual needs were not fully addressed through mediation. Using the approach also helped me to discover emerging issues, such as the existence of other agencies that women approach for mediation assistance. This could only be revealed through the lived experiences of the women themselves.

3.4 Relationships influencing choices

As my research focused on how women accessed property rights in their marital unions through the use of mediation, it was imperative for me to analyse the gendered outcomes of the interplay of norms in dispute resolution (Bentzon & etal, 1998). The interviews with women sought to understand how these married women related to other women, men and society in general and how these relationships affected their options and choices. This revealed the normative structures that operate in women's lives that influenced how they asserted their rights.

In this regard, the social, religious, family and economic structures in which the women operated influenced how they resolved their disputes. Most of the women interviewed found it difficult to approach the courts and the legal advice centres before they attempted to resolve the disputes within the families. This revealed that women invested in certain relationships that lead to power imbalances and interdependencies (Barendrecht & DeLangen, 2009). Some would seek the approval of their in-laws before instituting proceedings. Sometimes they would be castigated for instigating legal action against their family and husband. In other cases, pressure from religious quarters would not allow them to persist with a court action against their husband. While I was interviewing these women I sought to understand how these structures influenced their conduct in pursuing their matters or asserting their rights to the full. In this regard, I would probe on the reactions of the people they interacted with in connection with their cases.

3.5 Human rights based approach

ADR is being used as a strategy to counter the limitations and challenges of litigation. This brings to light the issues of access to justice by the poor in civil matters and more particularly their property rights. A human rights based approach helped me to understand how women were accessing the right to access to justice. In linking the right to legal aid and the right to access to justice, the fact that women are rights holders and the state is a duty bearer was established. The human rights based approach analyses the situation from a human rights perspective and correlates it with the state's obligations as duty bearers in accordance to international human rights norms (Hellum, 2001).

The challenges that the women face on the ground in asserting their rights in customary law unions indicated how the legal structures and system are failing the women. This was more evident in cases where the mediations had failed and the women had to resort to the courts systems to enforce their rights. It was found that the high cost of court fees and messenger of court fees were unaffordable for the women and when on that account they failed to pursue their matters to finality proved a definite barrier to their access to justice.

This approach also assisted me in probing the full extent of the difficult situation in which women married under unregistered customary law unions find themselves at the dissolution of their marriages. The right to an equitable share of the matrimonial property is not fully realised for these women due to the challenges they face and also due to the partial recognition of their unions as valid marriages. It then follows that the women married under such unregistered unions are treated differently by the law.

When utilising the human rights approach I was able to expose the cultural and traditional patterns that constrain women's choices. For example, while the law allows women to remarry and continue enjoying the property they acquired with their husband upon his death, it emerged that, in certain cases, there are cultural beliefs that actively prevent women from asserting their rights. It is cultural patterns and practices such as these that inhibit women's enjoyment of their rights which the state is obliged to eradicate through awareness.

3.6 RESEARCH METHODS

3.6.1 *Desk research*

In order to obtain a broad, general picture of the use of ADR by the LRF, I perused case records, policies, case audits, reports and proposals to donors. Such research informed me of the basis of the use of the intervention within the organisation. The information I extracted from this influenced the way that the research was conducted. Through this method I was able to demarcate the types of cases that the study was to focus on. An analysis of the cases from the case audits gave a wide range of cases that could involve property issues and, therefore, I then limited the property cases to those involving matrimonial property in unregistered customary law unions. This criterion also extended to my perusal of LRF files of cases that were resolved through mediation. This became helpful as I was able to assess the impact of the mediation sessions from the records. I found it most useful in those cases whose clients I failed to locate and the information on how they were assisted could only be gleaned from their case files. This applied particularly to those cases whose women were difficult to trace and follow-up on and an assessment of how the mediation impacted their lives was made possible through a perusal of their files.

3.6.2 *Observations*

I observed the mediators in action through some live mediations sessions that were conducted at LRF and ZWLA. The observations were very helpful as they gave me first hand information on the dynamics that are involved in mediation sessions. During these sessions I was taking notes and closely observing the women's participation, the mediators' conduct and listening to the factors that influenced the proceedings and their outcomes. Through this method I was able to examine how the principles of justice were put into practice. The observations helped me in making an assessment about how the mediation sessions were conducted. This was then linked to the outcome of the mediation sessions and I sought to find out how the process influenced the outcomes. As I was observing the sessions I took note of the external factors that were at play in the mediation sessions, how they influenced the mediators' views during the mediation proceedings and how such factors affected the outcomes. The way the mediators addressed the parties revealed the normative and cultural issues that influenced them as they encouraged the parties to come to agreed outcomes.

Table 1: Mediation observations

Organisation	Number	Total
LRF	1	1
ZWALA	3	3
Grand Total	4	4

The observation of the mediation sessions was dependent on the receipt of the relevant cases. The four meetings that were observed were very instructive and brought out the relevant issues that the research sought to analyse. What was gleaned from the sessions was corroborated by interviews with both the mediators and the women.

3.6.3 Interviews

3.6.3.1 In-depth interviews with key informants

The key informants were the mediators within the LRF and ZWLA being the paralegals and the lawyers. They dealt directly with the cases that were the subject of study. I sought to discern from them the rationale behind the use of ADR as a strategy and more importantly whether it was working for the people. The interviews also revealed individual attitudes and persuasions that affected the outcome. The key informants also helped in the triangulation of the data that I found from the women respondents that I was interviewing and also clarified some aspects that were emerging from the research. Interviewing the paralegals resulted in my understanding the silent issues that came out in the interviews with the women. There was cross-triangulation of information between the mediators and the beneficiaries. The information that emerged from the mediators was confirmed by the women and vice versa. In order to ensure that all the issues I wanted discussed were captured I devised guiding questions for the respondents. This was not a questionnaire but was a list of questions that helped to keep the interviews focused so it operated like a check list. In order to capture everything that was discussed in the interviews I audio-recorded the interviews. This recording assisted me in concentrating on the discussions as taking notes during the interviews was bound to be distracting.

Table 2: Interviews of key informants

Interviewees	Female	Male	Total
Lawyers	7	0	7
Paralegals	2	4	6
Ward coordinators	0	1	1
Police Officers	1	1	2
Grand Total	8	6	16

3.6.3.2 Individual interviews

The focus of the study was to examine how the use of ADR improves women's access to justice which meant that I had to interview the women that were assisted through ADR. The clients were selected from the LRF case files based on the nature of dispute involved. These were women who had unregistered customary law unions who had approached the organisations seeking assistance on the matter of property distribution at death or dissolution. The deceased estates cases mainly involved clashes between culture and the legal rights of the women. There were situations in which the women were being chased away by relatives upon the death of their husbands.

The cases of women who had civil marriages where mediation was adopted as a means of settlement were also interviewed for comparative purposes. These were mainly the women who had divorce proceedings pending at the High Court and the ADR was employed as part of the court proceedings. The men who were also involved in the mediation processes were also interviewed to get the male perspective on the disputes involved. The male voices also confirmed some views that were emerging from the interviews with women on the different values attached to the properties and society's rejection of the idea of women taking men to court. The individual interviews were conducted in more of a conversation fashion to allow the women to relax and open up. Though the interviews were controlled to some extent, the women were allowed to narrate their experiences with mediation processes or their contact with the court system.

Table 3: Individual interviews

Legal advice centre	Female	Male	Total
LRF Mutoko	5	1	6
LRF Highfields	1	0	1
LRF Harare City Centre	2	0	2
LRF Chitungwiza	1	0	1
ZWALA	2	0	2
Total	11	1	12

3.6.4 Outreaches

The outreaches focused on the women who were recipients of LRF legal education services. The purpose of the outreaches was to extract from the community the common disputes in the communities and how they were resolved. The discussions in these meetings brought out the challenges women faced when they adopted court procedures for resolution of their matters. The information gained from the discussions was of a general nature but was confirmed by the individual interviews of the women. The women who had the actual experiences with the courts confirmed the challenges that they faced in using the court system. In these outreaches the participants also narrated their personal experiences with the courts. The barriers to access to justice were then discussed and possible solutions to the problem were proffered. The dominant view that emerged was the use of other mechanisms within the family set-ups and localities that the women preferred before they brought their disputes into the public domain.

Table 4: Outreach participants

Location	Female	Male	Total
Chembira Hall- Glen Norah	38	0	38
Chitungwiza Unit L Community Hall	39	4	43
Chitungwiza Unit D Hall	63	0	63
Grand total	144	4	148

The table above shows that there was an overwhelming turn out of women. The audio recording of the meetings helped me to effectively interact with participants and enabled me to control the discussion. It would have been difficult for me simultaneously to take notes and facilitate the discussion. The large numbers of the groups did not affect the outcome as the goal was to get the general perceptions of the people of the dispute resolution methods that were available to them. They actually added to the diversity of the views expressed and made the sessions lively. The turnout of men was on the low side as they were otherwise engaged during the particular times that the discussions were held. The few men that did participate gave a male perspective on the issues that were discussed.

3.6.5 Experiential data

My experience as a legal aid lawyer and working within the LRF was very useful in the research. It afforded me access to certain privileged information within LRF through the perusal of records and documents. Most of the key informants were my workmates and it facilitated the interviews. In addition, my networking experience made my penetration into ZWLA easier. It was at ZWLA that I had the opportunity to observe mediation sessions in action. Another advantage of having worked in legal aid was the ability to appreciate and relate to some of the issues that emerged in the research.

Separating the research from my work was also important as I had to constantly inform the respondents as to the purpose of the interviews and the research. I had to draw a line between the research and my work and ensure that my experience would not cloud my judgment of the emerging issues. I, therefore, endeavoured to be as neutral and objective as possible. There were instances when, after conducting the research, I felt compelled to provide legal advice on some of the issues that the women had raised in the interview. This made me feel like as though I was reaching out to and helping the respondents and not just taking away from them.

3.6.6 *Library and internet research*

The library and internet research assisted in discovering the general principles on the use of ADR and general literature on the previous research that had been done on the subject. The clarity that was gained helped in my conceptualisation and demarcation of the issues that the research intended to focus on. Prior work and research done on the subject helped me to formulate points of departure. Past research on the subject has tended to focus more on the use of ADR in commercial disputes and less on its use in the provision of legal aid and in family disputes. This research is specifically directed at the use of ADR in matrimonial property disputes of women married in unregistered customary law unions.

3.6.7 *Limitations*

The research was not immune to challenges. The major constraint that I encountered was the fact that I was not familiar with the Mutoko area whence hailed most of my women respondents. My unfamiliarity with the area limited my mobility in the area. I failed in certain circumstances to pursue interesting cases and to interview potential respondents whom I thought would give more insight into some issues that were raised by the women in the interviews. One example was when I wanted to interview one of the village heads who was involved in a case where a woman was being chased away from her matrimonial homestead because she had had an affair. It was considered culturally unacceptable and dishonourable for the women to continue staying at the husband's homestead. It revealed the clashes between culture and state laws.

The failure to reach out to potential respondents was made worse by the fact that some of the cases that I perused only had the names of the villages which I was not too familiar with and this made it difficult to trace the respondents. I was actually at a loss as to where to start in locating the respondents. I tried as much as possible to solicit the co-operation of the paralegals that worked in the area but, unfortunately, I still failed to make any head way in most cases. I then had to limit myself to cases that had contact numbers provided in the files. Although this worked well for me as I managed to secure a substantial number of interviewees using this method, there were still cases that I felt were very interesting after having perused their files but I failed to get in touch with the women involved. Poor communication network services resulted in my failing to contact potential respondents for my research and I was thrown back on the hope that clients would come back to me with

feedback so that appointments could then be made. The other challenge that I faced when wanting to observe the mediations sessions was that the parties failed to turn up on the scheduled date. This trend emerged as in most circumstances the parties tended to settle the matter before the return date.

In order to triangulate some of my findings I needed to interview some police officers from the community relations departments and the victim friendly units. These police departments deal with women who come with their disputes for resolution and at times the police act as mediators. They also referred some cases that they failed to resolve to the advice centres. I applied for authority to conduct my research but such authority was denied. I intended to particularly interview the police who were working closely with the advice centres. As I was applying for the authority I discussed some of the aspects with the contact persons in the police thus giving insights into the relevant issues.

The authority to interview the Clerks of the Magistrates Courts and Magistrates in the selected areas of research was granted but came too late to conduct the necessary interviews with the respective officials. I could not just interview any court official as I wanted those court officials who were working closely with the advice centres. I was of the view that these could relate better on the use of ADR at the advice centres. I had noted that there were some cross-referrals that were occurring between the advice centres and the courts. That relationship needed to be explored in relation to the out of court settlement agreements that ended up being enforced through the courts.

3.7 Conclusion

This chapter described and explained the methodologies and methods that were adopted in the research. It sought to illustrate how they influenced the research and its findings. It also highlighted the constraints that were faced in conducting the research. The next chapter will discuss the findings of the research and seek to analyse them in line with the human rights and feminist perspectives. These findings are closely related to the assumptions and the research questions that formed the basis of this research.

CHAPTER 4

4.0 DISCUSSION AND ANALYSIS OF RESEARCH FINDINGS

4.1 Introduction

The data collected from the field was systematically categorised and analysed in line with the research objectives, assumptions and questions. The research sought to examine how using ADR in property disputes is enhancing women's access to justice. The chapter shows the challenges that the women experience through the use of litigation. The potential for using mediation in property cases was assessed with a view of establishing its advantages through the lived experiences of women. The weaknesses of the mediation process are also highlighted through the lived realities and the experiences of the women who benefited from the use of mediation as a means of dispute resolution. The factors and normative orders that influenced the mediation outcomes are also explained, illustrating how these affected the choices made by the women.

4.2 ADR versus litigation

The first objective of the research was to establish whether it is cheaper for women to go through the process of ADR rather than litigation. It emerged during the research that the mediation sessions are primarily adopted as a counter-strategy to litigation. All the LRF reports emphasised that ADR was found to be most convenient for women as most of them failed to raise the court fees and the messenger of court fees to pursue their matters.

As a way of countering these effects (i.e., unaffordable court costs), mediation and negotiation were used wherever appropriate and feasible to resolve people's cases, thereby relieving the poor litigants of having to meet the high cost of litigation and achieving justice more speedily and with less acrimony.

It emerged that using the ADR in legal aid was very strategic in that it also served to attract donors. The mere outlining of the advantages of mediation for ordinary women was used to attract funding. This issue of attracting funding does not take away the fact that in reality ADR was working for the women.

This issue of high and prohibitive costs of instituting proceedings came out in the group discussions when some participants felt that litigation was for the rich. This was also confirmed by the experiences of the women who had adopted litigation to resolve their disputes. The fact that most of the clients that are assisted with legal aid are not sophisticated increases the chances of the women failing to enjoy their rights due to complexities that are involved in litigation. They even alluded to the fact most men would institute court proceedings knowing very well that it would be costly for their female opponents who would not be able to raise the legal fees that are charged for representation. With the current inadequate levels of legal aid for women, their access to justice is denied as they fail to defend their cases or even understand the proceedings.

The women who had adopted the court route to resolve their disputes were struggling or failing to raise the required court fees. One of the respondents narrated how she had to sell a cow and three goats to raise the required monies. For her summons commencing action to be served on her husband she had paid a total of US\$324 (in 3 instalments of US\$104, US\$160 and US\$60). After spending all this money she still failed to pursue the matter to finality. Her situation is representative of the plight of many other women as she expressed the challenges she faced as follows:

‘Kwakashaiwa munhu anoendesa mapepa nemari yacho yaidiwa. Ndakabva ndagara hangu kumba ndikati rega ndisiyane nazvo.’ (Translation: ‘I could not raise the money for the person who was supposed to serve the papers. I decided to stay home and gave up on the case.’)

This was a woman who was just claiming a few roofing sheets, three cows and five goats. The woman eventually realised that she was spending more than what she would get in the end. She even tried to obtain the services of the police but her husband complained to the Messenger of Court and she was advised that she was serving the papers incorrectly. For those that saw the matters being heard in court and judgment being passed the Messenger of Court was demanding not less than US\$400 for execution of the judgment. Even those women who struggle to pursue their claims through to finality acknowledged that raising money to pay for such high costs a challenge. One woman lamented:

‘Zveshuwa kana mari dzacho dzemapepa dzinondinetsa.’ (Translation: ‘Truly the money for the papers is even difficult for me.’)

One woman who pursued the matter in courts after mediation had failed was required to pay US\$500 for execution and even after paying that amount she did not get the property as the Messenger of Court was said to have demanded another US\$300 from the defendant before he would attach the property. The paralegals also indicated the issue of costs as the major challenge that thwarts the realisation of the women's access to justice. The problem is that the Messenger of Court requires the money in advance and does not accept part payment to allow the women to proceed with their cases. A woman who is assisted through mediation, however, would only require to raise money to pay for transport to come and report the matter to the legal advice centre and then to come back later for the mediation session. Of all the respondents that I interviewed I calculated that it would never cost any woman more than US\$2 to travel to the nearest legal advice centre which means that for her to make two return journeys to such centres would cost her less than US\$10. One of the paralegals explained that offering mediation for their clients results in the immediate realisation of their claims. He had this to say:

'Kuno kwakanakira kuti kune handover hakuna zveexecution.' (Translation: 'Here, it's good as it's mere hand over and not execution.')

He was pointing to the challenges that the women face when they try to enforce their court judgments which is contrasted with the situation when the parties use mediation and the matter is resolved amicably. In the latter case, there is a simple handing over of the property to the other party as the parties are in agreement. However, this will only occur if the parties fulfil the agreements. The non-binding effect of the agreements reached through mediation was highlighted as one of the problems women faced. The paralegals try to mitigate this challenge inserting into the written agreements a clause to the effect that the parties consent to the jurisdiction of the Magistrate's Courts for the purpose of resolving in latter disputes. The use of ADR is completely dependent on the willingness of the parties.

The legal services that are offered by the LRF do not cover the court fees and the messenger of court fees that are involved in the institution of court proceedings. The clients bear the costs charged by the courts for the issuing of process and execution of judgments. In addition, there are other indirect costs involved that the clients incur when they travel for their cases. There used to be a revolving fund within the LRF that would cater for such costs but it has just collapsed over the years as it was not sustainable. The resuscitation of the fund has not

proved feasible given the type of cases that are dealt with and the indigent nature of the clients. In the execution of his duties, the Messenger of Court treats and charges all litigants the same. He does not distinguish between those who are assisted by legal aid and those who are fee-paying clients of private lawyers. This has the effect of undermining the effectiveness of providing legal aid to the poor. It reflects that there is piecemeal provision of legal services for the poor which ultimately denies them solutions to their problems.

The situation of the women is made worse as they are dependent for their survival on the very men they are suing. Women's subservience to the economic dominance of the men over the women at home and, consequently, women's poor bargaining power put them in an unenviable position. In most cases, husbands are very bitter that their wives have taken them to court. This same bitterness and anger was also aimed at women who had done nothing more than approach the legal advice centres for advice. One of the women I interviewed even had to go back to her husband and beg him for some bags of maize after realising that she could not continue with the court case.

This dependency on the men was not limited to financial matters only but extended also to the power to make decisions. It was found that women would still seek the authority of the male members of their families on whether to approach the legal centres or the courts for assistance. This element was well covered in the group discussions when the women pointed out that one cannot just approach the courts without first consulting the family. Their issue was that due to the antagonistic nature of resolving disputes in the courts, it would be difficult for a woman to continue to relate well with the family if she just decided to sue the family or her husband. ADR was viewed as an approach that allows for reconciliation and encourages the mending of relationships. Cultural norms exerted some social pressure on women against pursuing their rights as it is viewed as dishonourable for a woman to sue her husband or in-laws.

ADR was seen as a fast way of resolving the disputes. The women in the group discussions pointed this out and the cases that I came across confirmed this. The women complained of the protracted periods that a case takes to be resolved in the courts. They stretch on for years without being finalised. The cases that were examined showed that the women spent most of their time travelling to and from the courts to pursue their cases, whereas the matters of those who were assisted through mediation were resolved immediately after the parties attended the

mediation sessions. One woman had instituted her matter in September 2013 but in December the matter had not yet been heard by the court. ADR offered clients an instant resolution of their disputes.

The majority of the respondents, including the mediators, were of the belief that mediation offers a certain flexibility and informality that is lacking in the court system. The flexibility was explained as being the fact that ADR allows for discussion of some issues that would normally be considered non-issues by the courts. This in a way helps to tackle the root cause of the problem amicably. This was also observed in the mediation sessions. The fact that the parties were allowed to discuss some of the issues that they deeply felt about helped to tackle and solve the root cause of the problem. That could not be done in the courts as they are very strict when it comes to the admissibility of evidence, procedures and time.

In spite of the advantages that ADR offers to women, it has to be realised that the process is largely dependent on the willingness of the parties involved. This is illustrated by cases where the parties go through the mediation process but the agreement that is entered into is not complied with. Although the paralegals indicated that those instances were rare, when that did occur the women were faced with the very same challenges that they sought to avoid in the first instance. In other words, it turns into a repeating, unending cycle. Most of the mediators indicated that when they encountered a problem with enforcement they recalled the parties to persuade them to comply and they normally succeeded. There were times, however, when they found that there was a reasonable excuse for not enforcing an agreement which could then be discussed by the parties. They only referred the parties to the courts for enforcement of an agreement when their efforts to encourage compliance had failed.

The challenges that are faced by the women when they adopt litigation as a means of dispute resolution are summarised in the figure below.



Figure 1: Challenges faced by women litigants

The challenges mean that ADR then becomes a convenient alternative for women to assert their rights.

4.3 Courts as the last resort

One of the recurring issues throughout the study was the reluctance of the women to approach the courts. It was found out that the women prefer other dispute resolution mechanisms found in their localities and it is only when those have failed that they take the court route. This aspect was more fully brought out in the group discussions done with the women and could be discerned from the individual cases that were part of this research. It was apparent from the discussions held that the women value and invest in their relationships. They always consider the implications of their actions on their children and their standing with their in-laws. They were of the view that if one rushes to the courts, these relationships are bound to be damaged and that it will be difficult for a woman to come back to her family in future. This loss of this investment in such relationships was costly for women who opted for the court route.

Even though the women acknowledged that the traditional ways of resolving disputes were no longer feasible in modern life, they thought that there should still be mechanisms within the community to which they should be allowed to take their matters for resolution before approaching the courts. This attitude was also discerned from the men who were of the opinion that a woman taking matters outside the home is indicative of destructive tendencies. This is an example of the advice that men give women who want to enforce their rights:

‘Madii mangozvisiya?’ (‘Why don’t you just leave it?’)

The society is more worried about the effect of the woman’s actions on the family so the men encourage her to abandon the matter. This reveals the relational tendencies of women and that same tendency is also expected of them by the men and the community at large. It also explains why the women who had gone to the legal advice centres or the courts without their families’ approval faced reproach. It seems unacceptable to the society for a woman to sue her husband and this was supported by religious doctrines or customary expectations. During the group discussion, the women revealed that there were some religions that prohibited the women from continuing to sue their husbands. This was viewed as dishonourable and disrespectful. What this means is that this semi-autonomous fields affected the women’s choices and autonomy.

Their reluctance was not out of choice but was done in order to continue belonging to the community that still oppressed them. What was also interesting about the women who got the approval from their relatives was the fact that those relatives somehow wanted to benefit from the woman. This then qualifies the approval as it depended on the economic power of the woman. There was an example of a woman who instituted proceedings at the Magistrate’s Court against her husband to share property and she had to consult with her in-laws on every step in the case that she took. She would ensure that she consulted her in-laws before each and every step that she took. It shows how women try by all means to be seen as good and respectful to their family. Upon further discussion with the woman it emerged that her in-laws actually depended on her for survival and that would explain their purported support. The women who depended on the men for survival were condemned. This also illustrates the way in which women strategically negotiate their way through their sensitive relational spaces so that can assert their rights without provoking reproach. One woman had this to say:

‘Nokuti ndakamusungisa. Zviri nani nekuti ndakatombowana pekutangira.’
(Translation: ‘Because I had reported him but it’s much better I now have a starting point.’)

The women acknowledged the condemnation but they appreciated the fact that they could leave the marriage with some property. The male and patriarchal dominance experienced by the women inhibited their capacity to make decisions.

4.4 Empowerment and capturing women’s actual needs

The advisory nature of the way in which the mediation sessions were conducted resulted in the women being legally empowered. The mediation sessions that were observed showed that the mediators would go a long way in advising the parties on the legal implications of their decisions. The women that were interviewed said that they understood their legal rights and in some cases had gone on to advise their friends on similar issues. The argument that the giving of evidence coerced the parties to agree can be countered by the fact that it allowed them to make informed decisions about their disputes. It further shows that the employment of ADR strategies is a matter of individual creativity and imagination. This does not in way compromise the neutrality of the mediator.

Despite this obvious empowerment I also discovered that most of the women still felt that their issues were not fully addressed. This made me question whether there was a divergence in understanding between what the women really wanted and what the paralegals and lawyers thought was good for them. The women may have been awarded all the household goods and even more than what the man had been awarded but they still had some outstanding issues that were not addressed by the mediation. An example is that of a woman who was married to her deceased husband for over 27 years and through their joint efforts improved their farm. Upon the death of her husband her in-laws chased her away because she had had no child with the deceased. She went away with a substantial amount of property and, on the face of it, materially gained from the decision. She ought, therefore, to have been satisfied. However, when I interviewed her, she still felt that the mediation session did not consider her substantial contribution to the farm and kept asking whether there was any other way that she could be compensated for the work that she had done on the farm. She insisted:

‘Ndichisvika papurazi pakanga pasina chiripo...’ (Translation: ‘When I came to stay at the farm there was nothing...’)

She was pointing to her contribution to the farm and felt that because of that she needed to be compensated, as the people who are now using the farm are benefiting from her work. This is why she felt that she could not be awarded a share equal to that of the children of the deceased. She went on to say:

‘Pakandibata ndepikuti ndakapiwa equal share nevana.’ (Translation: ‘What concerned me was the fact that I shared (the cattle) equally with the children.’)

This reveals that although there were some women who gained materially from the mediation sessions, there were some issues that they felt were left unaddressed and which they felt should have been dealt with.

4.5 Persuasions and perspectives influencing ADR sessions

The factors that influenced the mediation sessions and their outcomes could be analysed on two fronts: Firstly, how the mediators integrated their cultural beliefs and other social perspectives in conducting the mediation sessions; and secondly, how the parties’ backgrounds, beliefs and customs affected the mediation outcomes. Although they used a human rights approach to the dispute resolution process, the mediators always referred to the relevant customary or religious beliefs of the parties and that made the parties relate more to the issues that were discussed. The argument is that such inclusion influenced the outcomes of the mediation sessions.

The cases that were dealt with involved situations in which customary practices and beliefs resulted in the infringement of women’s rights. This was confirmed by the paralegals who were interviewed and said that there were certain imbedded beliefs that were working against the women’s assertion of their property rights. In other words, while there are indeed laws to protect the rights of the women, there are certain beliefs and practices on the ground which act against women realising their rights. In response to this, the women approach the legal advice centres to assert their rights. This is more fully explained by the deceased estate cases where the widows are still chased away from their matrimonial homes by their relatives and also on the distribution of properties after dissolution. Said one paralegal:

‘It is (the beliefs) still in the people but people are now aware that the widow stays.’

The paralegal here was pointing to the attitudes of the people that negatively affected the women’s enjoyment of her rights. There were a number of cases where the attitudes of the people were not in conformity with the laws and the women, assisted through the mediation, were able to assert their rights and the perpetrators were advised on the illegality of their actions. This was more pronounced in cases where the widow decided to remarry whilst staying in her deceased husband’s matrimonial home. This was unacceptable for the husband’s family and community and the law came to the women’s rescue.

All the mediators interviewed and observed appeared to be persuaded by some customary or social views in conducting their sessions. This was done in a more positive manner as the mediator in certain circumstances would emphasise the importance of the family unit and family respect and reputation. It also assisted in the maintenance of relationships which made the use of ADR more attractive for the women.

The above shows that in some cases the use of religious and cultural perspectives in the mediation sessions did not yield negative results but in fact helped to gain the confidence of the parties involved. This could also be discerned from the parties themselves. An interview with a male party in one case revealed that in terms of the customary laws and practices the woman is entitled to leave with certain properties as part of the divorce settlement. A close analysis of the property that she is so entitled showed that the women leave with substantial amounts of property if the customary way of sharing is followed. In that case, what the women ended up getting upon reporting their cases to the legal advice centre was less than what the parties had negotiated as a family. The man seemed to be bitter that the woman had taken the matter outside the home and so was now vindictively reducing the woman’s share at the legal advice centre. He now wanted to enforce strict compliance with the law by insisting that she have an equal share of the property acquired during their union (and nothing more) simply because the woman had indicated that she wanted to make use of the protection of the law by approaching the legal advice centre.

In other cases, however, the issue of culture and customs also had negative effects on the outcomes of the mediation sessions. The fact that there are certain ways the woman should

conduct herself in the community limited, in certain cases, the assertion of her rights. In most cases, the women were more concerned with what their parents said about the matter and they were forced to accept less property. This in a way obscured the women rights to the property as they would cite that the customs and practices prohibited them from suing their husbands or claiming valuable items upon distribution.

Related to the above was the role played by the fear of witchcraft and bad omens. Fear of the unknown was seen to influence some women's decisions. In one case, a woman could have used the law to her advantage to gain ownership of a farm as surviving spouse. She was very reluctant to pursue that. She was very aware of her entitlements, rights and the injustices. However, she seemed to be afraid that if she pursued her rights she would die due to witchcraft. She had this to say:

'Ah unofa..... ah chivanhu chinonetsa.... Ndichigara nevanhu ivavo.'
(Translation: 'You die... custom is difficult... me staying with those people?').

The men were also reluctant to keep certain properties after the separation from their wives. They believed that if they kept the property and then decide to remarry it would bring bad luck to their family. This explained why the women seemed to go away with all the household goods as they are believed to be the woman's property. The women in the group discussions raised this as the reason why the women always seem to go away with all the household property:

'Anotya ngozi. Mukadzi anouya haade kuuya achishandisa mudziyo yeumwe mukadzi.' (Translation: '(He) will be afraid of avenging spirits. The wife that comes after wouldn't want to use the property that belongs to another woman.')

A man in one mediation session illustrated this point by pointing out that as a matter of custom, he was not expected to leave with the household goods as they customarily belong to the woman.

There were instances when the women would get quite substantial amounts of property but she would not accept the properties offered. These are the cases in which some of the mediators felt that the women refuse to accept a good offer because they want to cling to their

marriages in order to stop it from dissolving. This was attributed to the general condemnation of divorce by the society. One mediator aptly described it as follows:

‘They fear that society can talk about them and ridicule them.’

This then affects the success of the mediation sessions as the whole process is premised on the willingness of the parties. It then means that if the woman is influenced by such a factor she may refuse to go through the mediation process thinking that she may save the marriage. These cultural and social persuasions ultimately affected the outcome of the mediation session.

4.6 Lack of uniformity in conducting sessions

The fifth assumption was to the effect that the lack of standard guidelines contributes to the success or failure of the mediation sessions. This assumption was partially confirmed in that within the LRF the paralegals are actually trained to deal with mediation and negotiation but the lawyers are not so trained. The lawyers only use their own experiences from dealing with the negotiation of the out of court settlements gained over the years. However, despite the training there were some discrepancies that were noted in the way that the mediation sessions are conducted. This came out through in the interviews with the women when I asked them about the reaction of the other party in the meeting when they insisted on their claims. That is when they highlighted that they were not given the chance to be in the same room with the other party.

One of the aims of the paralegal training is to produce community based paralegal workers capable of assisting individuals and communities to solve their problems. Adopting the ADR mechanism is one such way. From the training manual, the training involves equipping them with the skills and knowledge on the principles, steps and roles of negotiators or mediators. Ideally, the mediation sessions should be conducted in such a way that all parties involved in the matter participate and negotiate. It, therefore, means that the approach of seeing the parties separately was bound to be problematic. The interviews held with the mediators indicated that this was the wrong way of conducting the sessions. In order to verify this I made sure that the mediators would explain in brief how they conducted the meetings and the discrepancies were confirmed.

It means that the woman was not given the chance to explain her position to the relatives or seek clarification from them on why they were chasing her away. One such woman who was assisted using that approach attributed the failure to address some of her issues to the approach that denied her the opportunity to question the other party and seek clarification. For her the question was more about why she was treated that way and how her contribution to the development of the family was to be compensated. The mediation session only dealt with the sharing of the property but failed to go deeper into the issues that the woman really wanted to discuss. In the group discussions the women felt that ADR allows the parties to go to the root of the problem. It then follows that if the women in the mediation sessions are not given the chance to air their views directly in the mediation session it fails to address the women's needs.

In addition, as the lawyers are not trained in mediation and negotiation skills, it means that the process depends on the experience of the mediator involved. In the observed sessions, one could sense that lack of skill to contain the parties. Though the parties should be left to express themselves in the meeting there is a need for control and order. I observed some sessions that were abandoned and others where agreements were not arrived due to the lack of control. Although in some meetings the mediators would set out the ground rules to allow for participation, in other sessions those rules were never spelt out. In some cases, this resulted in the men involved in the disputes domineering the sessions and in some cases undermining the women's participation during the sessions. In one session that I observed, I could feel that the woman was scared of going back home as the husband was lashing out at her. She actually said during the session:

'Izvozvi kumba uku handinorari.' (Translation: 'Now, I won't sleep at home.)

She was pointing to the fact that because the husband had become agitated in the meeting there would, consequently, be fighting at home and no peace. And the husband retorted:

'Uchanogara kumapurisa nokuti ndiko kune varume vako.' (Translation: 'You will stay at the police because that's where your boyfriends are.')

The husband took the opportunity to degrade the woman and it negatively affected the way the women expressed her issues in the meeting. This was one of the meetings in which I had initially wondered why the woman could not express herself. The way the proceedings were

controlled affected the outcomes of the sessions. In the cases where there was lack of control of the meetings the sessions were either abandoned or nothing tangible came out of them.

4.7 Human rights and theoretical analysis of findings

The international human rights law provides a normative order for justice. State parties are obliged to guarantee their citizens access to justice. Article 6 of the Universal Declaration of Human Rights (UDHR)¹⁰ provides for the protection of rights that are to be recognized by the law.¹¹ The recognition that everyone is equal before the law is a universal concept that has been part of the legal system. Article 7 of the UDHR reinforces this and this has been adopted in the national legislation of Zimbabwe. It reflects, however, the neutrality of the law which may not be in touch with the lived realities of the people. It is imperative to note that both the international laws and the national laws put more emphasis on access to justice in criminal matters. The findings outlined in the preceding chapter have highlighted the challenges that are encountered by the women in accessing the formal justice system in civil matters. These challenges impede their access to the full enjoyment of their rights and, as a result, they resort to ADR mechanisms. It has been noted that the protection of other fundamental freedoms and all human rights requires that all people should have access to legal services and the justice system.¹² The current situation of the women in unregistered customary law unions amounts to a breach of these obligations under international human rights law.

4.8 Women's access to justice and legal aid

This research has shown that women face multiple challenges ranging from high litigation costs, delays, distance to the courts, complex proceedings, social pressures and lack of knowledge of the court process when they adopt litigation as a means of resolving their disputes. These barriers are far from being neutral in the way they affect people. They affect men and women differently and the rich and the poor differently. Women being vulnerable and marginalized are less able to overcome these barriers to access justice as the research showed that they have fewer resources to pursue their matters. The Committee on Economic Social and Cultural Rights (CESCR) urged the government of Zimbabwe in its concluding

¹⁰ Universal Declaration of Human Rights, G.A. Res.217 A at 71, UN GAOR, 3rd Session, 1st Plen. Mtg, UN Doc A/810 (Dec 12, 1948).

¹¹ Article 14 of ICCPR provides for equality before the law in determining rights and obligations in any suit of law.

¹² UN Basic Principles on the Roles of Lawyers, Adopted by the 8th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

remarks on the country's initial report to provide appropriate access to the courts in order to uphold the rights protected in the International Covenant for Economic Social and Cultural Rights (ICESCR).¹³ What this entails is that the state has the obligation to minimize the challenges that hinder effective access to justice. The situation for the women is worsened by their economic status which is exacerbated by cultural pressures. The women fail to raise the required court fees and charges required for them to pursue their matters to finality. The poor provision of legal aid in the country aggravates the plight of the poor. The state has the obligation of administering justice and the provision of legal aid falls within the scope of its duty to secure internal justice for its poor people.

Section 31 of the new Constitution provides for the right to legal aid in the form of legal representation in both civil and criminal matters cases for people who cannot afford private legal practitioners. This is very progressive for the women as it departs from the emphasis that has been placed on such right in criminal cases. It then entails that the Legal Aid Act has to conform to the provisions of the Constitution and ensure that the people realize this right. This has opened the doors for the women to seek accountability from government in respect to the challenges and the limitations that they are facing in accessing the courts. In terms of section 85 of the new Constitution any person that believes that his or her rights have been infringed is free to approach the Constitutional Court for a remedy. It includes the right to legal aid that is enshrined in the Constitution. The fact that there is a link between poverty and people's ability to afford justice calls for a responsive legal aid system that is not biased towards the criminal law. The bias towards the criminal law subordinates civil claims, yet it is in their civil claims that the women's means of livelihood are determined.

The patriarchal nature of the Zimbabwean society reflects a male dominance over women that may act to impede women's in the exercise of their rights. The subordination of women and their fear of deviating from expected gender behaviour influence women's choices on the dispute resolution method they adopt. There is also the risk of the suppression of the women's voices even when they manage to wriggle out of the social webs as evidenced by the failure by some women to fully express themselves in the mediation sessions which saw the men domineer the proceedings. It reflects the male dominance and the socialisation of women which holds that challenging men is dishonourable. It is also revealed in the way

¹³ The CESCR's concluding observations adopted on 15 May 1997, 25th Mtg, 16th Session, Doc.EC12/1/Add12 in respect of the initial report submitted by Zimbabwe E/1990/5/Add28.

some women negotiated themselves by seeking the approval of the male members of their family before initiating legal proceedings. States are urged to eliminate all these obstacles that emanate from culture and customs through making people aware of their rights under international as well as national laws. This analysis of the power relations is not confined to the family set-ups alone but also extends to the justice system itself. The women in the outreaches talked of the courts being the privilege of the rich and referred to corruption as being one of the factors that has caused them to lose trust in the justice delivery system. A deeper analysis of this aspect points to deeper power imbalances within the court system and such corruption can only perpetuate the injustice of the inaccessibility of justice for the have-nots.

4.9 Matrimonial property rights upon dissolution of marriages

The majority of the clients that were assisted through the mediation sessions within LRF were married under unregistered customary law unions. There are several factors that resulted in their being assisted through mediation that include the challenges in litigating their cases and the type of their cases. Despite the widely shared principle expressed in Article 7 of the UDHR, the reality is that discrimination persists against women in accessing justice. This brings in the argument of *de jure* versus *de facto* discrimination. The experiences of the women who are married in unregistered customary law unions highlight that they suffer from discrimination on the grounds of marital status. The judiciary has confirmed the unenviable situation of these women but the laws have remained silent on their plight. The new National Gender Policy (NGP) has outlined a strategy to review the laws that are not in line with the principles of gender equality and the new Constitution.¹⁴ The disharmony between the different marriage laws needs attention from the policy and law makers. Whatever form and or concept of family is recognized by the state, the legal system, traditions, religion, custom and the treatment of women at law and in the private sphere should accord with the internationally recognized norms and principles. The CEDAW Committee in General Recommendation 21 in relation to Article 16 (1) (c)¹⁵ stated that women living in the *de facto*

¹⁴ The thematic area of gender, constitutional and legal rights articulates various strategies that should be adopted to ensure that all the laws are gender-audited and reviewed to conform with the new Constitution that enshrines principles of gender balance and equality.

¹⁵ This Article covers the equal rights of the spouses in marriage and upon its dissolution. Even when the women assert their rights in court, the practical ability of the women to enforce those rights may be restricted by customs and legal precedent.

unions should be accorded the same rights and opportunities with men in the family and their sharing of properties should be protected by the law.

In the response to the overwhelming challenges that the women face when they adopt litigation as the method for resolving their disputes, the women are resorting to the informal disputes resolution methods. In the concluding remarks of the CEDAW Committee¹⁶ against Zimbabwe, the state was urged to eliminate the deep-rooted patriarchal attitudes and stereotypes in relation to the identities of women in all spheres of life. The customs enhance the discrimination against women which is normally reflected in the unequal status and disadvantages that the women encounter. The CEDAW Committee further lamented the persistence of customs and practices in marriages and its dissolution, in property rights and in inheritance. The majority of the women that are being assisted through mediation are governed by the laws governing unregistered unions and such unions are given a lower status than registered marriages. It follows that the women in these unions face difficulties in accessing justice through the formal system. The CEDAW Committee then recommended that these discriminatory practices and provisions in the sphere of the family, marriages and the divorce should conform to CEDAW. The women in unregistered unions suffer multiple challenges at divorce and upon inheritance. In relation to the dissolution of these unions, it is more as a result of the regulations and the principles on the sharing of the matrimonial property that are applied by the court that result in the women being discriminated against in relation to their counterparts in registered marriages. The property that was accumulated in these *de facto* relationships is not treated in the same way as property acquired during registered marriages.

Upon the death of their spouses, it is more as a result of the customary practices and beliefs that cause the women to be chased away and dispossessed of her husband's property. The laws of inheritance protect the women¹⁷ but the practices on the ground have not changed, as indicated by the cases of the widows being chased away by their children, their in-laws or the village heads. It is customarily unacceptable for a widow who remarries or engages in a love affair to continue staying at her deceased's homestead. The issue then is about the deep-seated customary beliefs and attitudes that persist despite legislative changes. The resultant

¹⁶ CEDAW concluding remarks on the Zimbabwe's report 51st session held from 13 February – 2 March 2012, GE12-41413.

¹⁷ Section 68 of the Administration of Estates Act [Chapter 6:01].

combination of the customary beliefs and the high costs of litigation compound the situation of women on the ground. It is a combination of these factors that then force women to resort to other forms of resolving their disputes. ADR then becomes attractive for the women, but it is not properly regulated. These salient issues also affect the women's autonomy and choices and their overall decision to act. The above discussion affirms that there is a need to guarantee equality of rights of women in society and the family. This has been recognized by section 26 of the new Constitution which recognizes the principle of equality in marriages and upon dissolution. It follows that the laws governing family relations, marriages and their dissolution need to conform to the new Constitution. Under the new Constitution the rights of the women in unregistered marriages are protected and it provides a platform for them to demand that the State substantively ensure that their rights are enjoyed.

4.10 The incorporation of the law, customs and human rights in mediation sessions

The research has shown that when conducting the mediation sessions the mediators mix the positive customs with human rights principles to persuade parties to come to agreement. This practice confirms that not all customary or religious beliefs are harmful for women. The mediators are facilitating women's access to justice by integrating principles borrowed from customs with the laws. There were instances when the mediators used some customary beliefs such as *ngozi*, *kutanda botso* to persuade the parties to reach an amicable solution. These were not used to intimidate the parties but they (the parties) themselves would confirm that their actions were contrary to the customary way of relating to each during the mediation sessions. This is peculiar in that employing such a strategy helped to cement relationships, thus contributing to the strengths of the using ADR. I am arguing here that this strategy can be tapped into but it also needs to be treated with caution as there are certain customary beliefs that negate women's rights to property. Using a mixture of customs and human rights did to some extent enhance the women's access to justice.

4.11 The current law of ADR

The Arbitration Act is the appropriate legislative instrument which should govern and regulate the use of mediation. Currently, the Act has limited its application to commercial disputes. It has been noted that section 4 of the Arbitration Act specifically excludes family law and matrimonial issues from its application. In the light of the challenges outlined above

and the general preference of the women for the alternative means of resolution of their disputes and the fact that the Arbitration Act does not accommodate disputes that are common to women is a failure to adapt to the realities on the ground. The situation on the ground demands a review and modification of the law in this regard. The Act is lagging behind in this respect, as other jurisdictions, such as Ghana,¹⁸ have recognised the use of ADR in customary law disputes and the use of mediation in family issues. Such a progressive move provides the women with a range of options and may improve the enforceability of the settlement agreements. The fact that the mediators will be forced to work in accordance with set guidelines which regulates their interaction with their clients improves the utilization of ADR as a means of resolving disputes and lends it a greater sense of legitimacy.

It is argued that the procedural inconsistencies that were unearthed by the research may be avoided if the use of mediation is properly regulated. I acknowledge that the arguments against the regulation which are premised on the fear of losing the informality and flexibility inherent in ADR. I, however, posit that providing standard guidelines on the use of mediation will not be that detrimental, as it will help eradicate some weak points that have been revealed by the research. I also consider that following guidelines will not deviate from international human rights as principles of justice can still be incorporated and be observed. The research has actually revealed that the mediators borrow from the laws and human rights principles in conducting their sessions. Requiring the mediators to work within set guidelines will improve the mediation process because it will introduce into it both accountability and a greater element of certainty. It is risky for the process to remain so unregulated, especially as the women are expressing their increased support for ADR in seeking solutions to their legal problems.

4.12 Conclusions

This chapter gave an analysis of the research findings. This was looked at from a women's point of view. The constraints faced by the women with the courts and their experiences with mediation processes were highlighted. This chapter gave a theoretical and human rights analysis of the findings. It linked the concepts analysed in chapter 2 with chapter 4 of the findings. It highlighted where the state is falling short in failing to improve the lives of the women, particularly, its failure to remove *de facto* discrimination that is perpetuated by

¹⁸ Alternative Dispute Resolution Act of Ghana, 2010.

customs and practices. It argues that the challenges that the women are facing in accessing justice amounts to the infringement of their rights and the state's failure to comply with international human rights standards. The following chapter gives an overview of the conclusions made and recommendations emanating from the research. The recommendations involve both short and long term interventions.

CHAPTER 5

5.0 CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

This chapter will outline the conclusions that were reached as a result of the research and the possible interventions that can be made. Drawing conclusions and interpretations is the ultimate essence of any research (Leedy & Ormrod, 2010). The findings from this study have shown that women face challenges when accessing justice through the courts system, hence, the use of alternative dispute resolution (ADR) has become attractive. However, it also emerged that if ADR is to be used as a means for women to access justice, it needs to be improved and be done in a more systematic way in order to improve the lives of women. The suggested interventions are both short term and long term recommendations on how the use of ADR may be improved. The research is as summarised in the figure below:

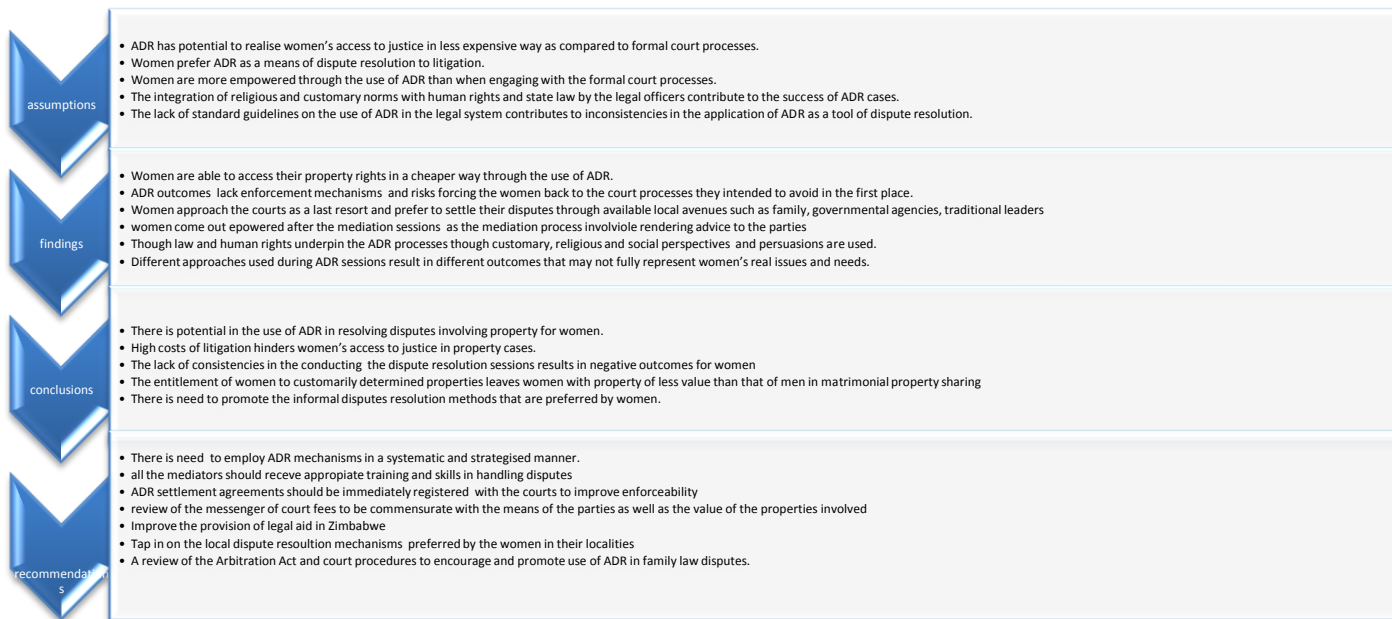


Figure 2: Overview of the research

5.2 Research conclusion

The conclusions arrived at flow from the research objectives outlined in the first chapter. It emerged in the study that the women who go through the litigation process face numerous challenges. These challenges are so great that they literally cause the justice system to crash for these women. They are limited not only to the financial aspects of litigation but also to the time delays involved. Women end up spending a great deal of time litigating their cases and still losing them. The research has shown that ADR is a less costly and more advantageous option for women.

The constraints that the women face when they choose litigation as a means of dispute resolution has made them turn to the other mechanisms that are available in their localities such as the family, traditional leaders, governmental agencies and legal aid organisations. However, the voluntary and non-binding nature of these mediation settlements also presents problems for the women. For example, these mechanisms often fail as they have no binding effect. Even when the paralegals testified that the courts recognise the settlement agreements that emanate from the ADR process these reveals the major weakness of using mediation processes.

It should be noted that not all cases qualify for mediation or the use of ADR. Sometimes there are cases in which litigation is unavoidable and the attempt to use mediation proves futile and detrimental to women. Although the research focused on property in matrimonial unions, it was discovered that paralegals attempt to use mediation in some cases where it is difficult to guarantee women a permanent and final resolution of the matter. This was witnessed in some maintenance cases that were resolved through mediation which would mean that the women would still depend on the willingness of the men to pay the maintenance offer. This placed the women at the mercy of men. This view is not meant to undermine the good intentions and in some cases the circumstances of the women that may have prompted the maintenance claim to be dealt with through mediation.

The integration of social and customary perspectives impacted on the success of the mediation sessions. In other words, that it was not only the law or the human right elements that influenced the sessions but the social and cultural orientation of both the parties and the mediators. Such an integrated approach is bound to bring a holistic solution to the problem and give the parties a sense of ownership of the process. It is argued that this approach would not be so foreign to the parties and it would help to tap into the local practices that may be beneficial to the women. This recognises that not all of the customary practices and beliefs are harmful to the enjoyment of women's rights and presents an opportunity to discard negative aspects of culture.

The research also showed that there were some inconsistencies in the way the mediation sessions were conducted. Although there were principles and guidelines on how the mediation sessions are conducted there were some discrepancies. The different approaches in conducting the mediation sessions influenced the outcomes of the mediation sessions. Evidence of such inconsistencies necessarily calls into question whether the women are truly represented in their issues. It can be argued that the fact that there were some women who felt that their issues were not fully addressed emanated from the process of the mediation sessions which did not give the parties the right to control the process and the outcomes.

5.3 Recommendations

The research has shown that the use of ADR has been adopted as a counter-strategy to help solve the challenges that the women face when they opt for litigation in the resolution of

matrimonial property disputes. This intervention should be enhanced within the organisation as it has the potential to increase access to justice for the poor. A clear strategy needs to be clearly stated as to exactly what types of cases qualify for such an intervention. In other words, a policy on the use of ADR should be outlined clearly within the organisation spelling out the types of cases, principles and procedures for selecting and treating such cases. This will ensure that the mediations are done in more systematic and accountable manner. It emerged during the research that there were no clear evaluation mechanisms within the organisation to assess the impact of the mediation on the women. The paralegals rely on the woman's feedback that may never materialise.

It therefore means that the training that is done on handling the mediation sessions should not be limited to the paralegals but should also be extended also to the lawyers. If the lawyers are also empowered to conduct mediation sessions it would help to improve the outcomes of the meetings. It was discovered during the research that some of the sessions fail to come up with tangible results due to the lack of negotiation skills of the mediators. The mediators relied on their experiences which may be helpful but this is not sufficient. The lack of control of the mediation sessions could be addressed by the proper training of the mediators.

The major challenge that is faced on the use of ADR relates to the enforceability of the settlement agreements that are entered at the advice centres. The cases pending before the courts are better placed than those that had adopted ADR as the first option. The problem arises when a party reneges on the settlement agreement. Though it came out of the research that mediators are encouraged to immediately register the agreement with the nearest courts this is not done. It seems that both the parties and the mediators only come alive to this issue when the other party defaults. It is recommended that as a matter of policy the agreements that are entered into are not only reduced to writing but should be registered at the nearest court immediately after the conclusion of the meeting. One may argue that it defies the whole purpose of it being an alternative option to litigation but it serves as a guarantee for the women that the agreement they have entered into is both binding and enforceable. It also instils in the parties a sense of obligation to comply with the agreement and it lends legitimacy to the whole process.

The court fees and messenger of court fees need to be reviewed as they prevent women from accessing justice. These fees are too exorbitant for the women who are forced to abandon

their cases due to poverty. If the fees are reduced to figures that are affordable by the poor then women will be able to access justice in cases where mediation has failed or cannot be applied. The high cost of litigation has been a stumbling block for women in most cases. There is a need to consider the value of the property that is the subject of a claim when the Messenger of Court charges his fees. Most women are forced to abandon their cases as they fail to raise the required fees and it becomes meaningless for them to pursue the matter given the value of the property involved.

The whole essence of ADR being used as a counter mechanism revolves around the state's failure to afford accessible justice. The service is provided within the ambit of offering legal aid to poor. The current Constitution recognises the right to legal aid and equality before the law. Practical measures should be taken to ensure that the rights enshrined in the Constitution are realised by women on the ground. A comprehensive strategy should be employed for the right to access justice to be fully realised. What is happening on the ground is that the law requires the state to provide legal aid to the poor but it fails to ensure that the right is enjoyed to its fullest. It is illogical for the law to provide legal aid for the poor but for it to fail to consider the costs that are related to the realisation of that right. This calls for a multi-sectoral approach to the plight that is faced by women in accessing justice and enjoyment of their rights in full.

The research has also shown that there are traditional and local forums that the women prefer for the resolution of their disputes. These local mechanisms can be promoted as long as they promote justice for women. The women interviewed and the discussions held revealed this preference by women to utilise other mechanism before they approach the legal advice centres or the court. These informal dispute resolution mechanisms need to be promoted. The women proposed that some institution within their locality be created to become their first point of call when disputes arise within the family. The establishment and operation of such an institution requires the appropriate training of the mediators. There are already governmental departments that are offering mediation services to the women. These could be built up to handle more of these cases at a more local level. This would be convenient for the women as they would be located within their communities. Since the research revealed that there are such agencies that are already offering such services to the people it means that this can be a workable solution to the women who are reluctant to take their matters to the courts for resolution. Though there were some women who used the family to resolve their disputes

most of the people acknowledged that this is no longer feasible due to modernisation and the disintegration of families. In that light they preferred a neutral party who is not related to the parties but who comes from their communities.

It has been noted that the courts refer the parties for out of court settlements but this is normally done in preparation of the trial and the curtailment of court proceedings. The courts may be encouraged to refer cases for amicable resolution where this is appropriate. Zimbabwe could follow other jurisdictions (such as Ghana) in this respect. This would require the Arbitration Act to be amended to extend its application to the resolution of family matters and customary issues. With the ushering in of the Family Law Court this could be a helpful provision as it recognises the importance of other dispute resolution bodies and mechanisms that people already employ inside their own communities.

5.4 Conclusion

This chapter gave a summation of the conclusions that were reached in this research and sought to provide some recommendations related to the subject of study. The conclusions are closely linked to the research findings. The recommendations encompassed both long term and short term interventions that can be employed in an effort to improve the lives of women.

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