

## 4 An Analysis of Traditional Leadership, Customary Law and Access to Justice in Zimbabwe's Constitutional Framework

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### 1 Introduction

Zimbabwe adopted a new Constitution in 2013,<sup>1</sup> which, among other things, recognises the role of traditional leadership institutions which operate alongside modern politics and judicial authority. The new Constitution draws the line for the traditional leaders with regards to the scope and extent of their duties. In a number of ways there exists a conflict between traditional forms of judicial authority and modern forms of judicial authority, and this contributes considerably to the significance of traditional leadership institutions and customary law towards the realisation of the right to access to justice. As such, this chapter is hinged on the role traditional leadership institutions and customary law play with regards to access of justice in Zimbabwe. Structurally, the paper is divided into four parts. The first part dwells on the contextual background, whilst the second part focuses on the right to access to justice. The third part interrogates the recognition of traditional leadership and customary law within the Zimbabwean Constitution. Finally, the fourth part discusses recommendations suggested by chiefs for the improvement of access to justice.

### 2 Contextual Background

The institution of traditional leadership has always been central to the governance of communities in Zimbabwe. For example, the structures and systems of the institution of leadership in Ndebele, Shona, Kalanga, Tonga and Venda ethnic communities have some remarkable differences even though they also depict certain similarities. Currently and generally, the institution of traditional leadership comprises of chiefs, headmen and village heads in order of hierarchy. Traditional leaders are the closest to the people and therefore interact more with the citizens in the rural areas. Prior to the colonisation of Zimbabwe, the institution of traditional leadership was the sole governing body with legitimacy to govern derived from tradition and culture.

Traditional leaders had fused 'governmental' powers and authority, that is, judicial, administrative and political powers, which is not the case with the modern state constitutional framework where there is strict adherence to the principle of separation of powers. Soon after colonisation in 1890, the colonial government dismantled, and in some places replaced, traditional governance structures with 'modern' state institutions.<sup>2</sup> It embarked on a number of measures that corrupted and eroded the institution of traditional leadership.<sup>3</sup> Some of the powers of traditional leaders, such as the power to allocate land, were usurped by the European moguls.<sup>4</sup> Chiefs became salaried government officials accountable to the colonial government. Thereafter, the role of the institution was under constant redefinition by the successive

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<sup>1</sup> Constitution of Zimbabwe Amendment No. 20 Act 2013.

<sup>2</sup> See T. Chigwata, 'The Role of Traditional Leaders in Zimbabwe: Are They Still Relevant?', 20 *Law, Democracy and Development* (2016).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

governments in the colonial period.<sup>5</sup> Due to the constantly changing role of traditional chiefs, the chiefs themselves have perceived their role as dispute resolution personnel from a community and institutional perspective.

### 3 Access to Justice

The traditional role of chiefs in the dispute resolution framework can be appropriately understood from an access to justice perspective. The term ‘access to justice’ implies availability of the means of implementing the laws provided in the statutes of a given area (a state in this case) for purposes of promoting justice. According to the United States Institute of Peace (USIP):

[A]ccess to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards ... [T]here is no access to justice where citizens (especially marginalised groups) fear the system, see it as alien and do not access it, where the judicial system is financially inaccessible; where individuals have no lawyers, where they do not have information or knowledge of rights; or where there is a weak justice delivery system.<sup>6</sup>

In the Zimbabwean context, access to justice entails the ability for people to seek and obtain judicial remedies regardless of where they are as long as it is within the country. This is enshrined in Section 85(1) of the Constitution which is to the effect that everyone has the right to approach the courts alleging violation of fundamental rights. Section 85(3)(b) further makes directions to the limitation of formalities and procedures which might compromise individual access to courts. The availability of such remedies determines the effectiveness of the human rights standards set out in various conventions and statutes. Furthermore it seems access to justice encompasses the whole system which in turn involves the rules of evidence and the entire procedures. One may find out that the rules of procedure may be very prejudicial to a particular group of people, on particular issues. This is also stated in a Gender and Access to Justice Conference Report, wherein it was stated that “the rules of evidence also go against women, judges always ask for proof when women complain of having been beaten by their husbands, a medical certificate is the proof that they are expected to provide. Health centres most often refuse to provide them for fear that they would have to be witnesses.”<sup>7</sup> From the above, it is safe to infer that the impact of inaccessibility of justice has gender-based negative results, among other adverse consequences. By virtue of women constituting the greater part of the rural populace, they are bound to suffer more in terms of injustice. As stated in the aforementioned report, “the grossly inadequate infrastructure for legal and judicial services entails costs that the poor rural populations and especially women can ill afford”.

In Zimbabwe, a number of laws have been promulgated in a bid to make justice accessible, for instance the Domestic Violence Act [Chapter 5:16]. The Act makes provision for the protection and relief of victims of domestic violence and provides for matters connected with or incidental to the foregoing. This Act is also a good example of such law that has been promulgated in an attempt to facilitate access to justice. It is unfortunate that these laws have been met up with an attitude that challenges effective implementation. The Domestic Violence Act has been regarded as a gendered piece of law and has been negated by marginalised women and viewed as unacceptably compromising with regards to access to justice, particularly for women.

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<sup>5</sup> *Ibid.*

<sup>6</sup> United States Institute of Peace (USIP), Necessary conditions, Access to Justice, <[usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice](http://usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law/access-justice)> (accessed 25 October 2016).

<sup>7</sup> See Royal Tropical Institute, *Gender and Access to Justice in Sub-Saharan Africa, Conference Report*, <[bibalex.org/Search4Dev/files/305435/135298.pdf](http://bibalex.org/Search4Dev/files/305435/135298.pdf)> (accessed 25 October 2016).

In the case of *Deria Mupapa v. George Mandaya*<sup>8</sup> Tsanga, J. averred thus:

The State's role of promoting access to justice through widespread dissemination so as to create at the very least, knowledge of the law for accessing the courts remains minimal. Non-Governmental Organisations which often play this role more directly are equally hampered by financial constraints in terms of their geographical reach.

It is, hence, not enough for the state to merely promulgate laws. What is needed is the promotion of dissemination so as to facilitate a platform upon which the ordinary citizens can get to appreciate the fact that the courts are meant to be accessed by just anyone and that recourse can be sought without intimidation and a misinformed idea that courts are reserved for a chosen few. It is quite unfortunate that the state is less active in fulfilling the obligations it assumed in assenting to treaties like the Universal Declaration of Human Rights (UDHR) and the African Charter on Human and Peoples' Rights (ACHPR). Article 8 of the UDHR is to the effect that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution and the law. It thus remains the state's duty to facilitate the exercise of this right.

From an international perspective, the ACHPR states that every individual shall have the right to have his cause heard<sup>9</sup>. This comprises of:

- a) The right to an appeal to competent rational organs in respect to violations of fundamental rights as recognised and guaranteed by conventions, law, regulations and customs in force, and
- b) the right to be presumed innocent until proven guilty by a competent court of law.

Furthermore, Article 8 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa echoes the same sentiments.<sup>10</sup>

Section 31 of the Zimbabwean Constitution enjoins the state to take all practical measures within the limits of the resources available to it to provide legal representation in civil and criminal matters.<sup>11</sup> This provision creates an impression of the existence of legal aid and the assumed reality that people can get representation even in instances where they cannot afford it. The assumption could not be so far away from the truth because the lived reality reflects otherwise. Access to justice by ordinary citizens is either delayed, which in turn may render it ineffective as was reflected in the *Mildred Mapingure* case, or inaccessible, thus crippling the justice delivery system as a whole.<sup>12</sup>

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<sup>8</sup> HH-443-14.

<sup>9</sup> See Article 7(1). The African Charter on Human and Peoples' Rights (also known as the Banjul Charter) is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent. Oversight and interpretation of the Charter is the task of the African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created. The Protocol came into effect on 25 January 2005.

<sup>10</sup> The Article states thus: "Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure: effective access by women to judicial and legal services, including legal aid; support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid; the establishment of adequate educational and other appropriate structures with particular attention to women and to sensitise everyone to the rights of women; that law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights; that women are represented equally in the judiciary and law enforcement organs; reform of existing discriminatory laws and practices in order to promote and protect the rights of women."

#### 4 Recognition of Customary Law in the Zimbabwean Constitution

There is significant recognition of customary law in the Constitution of Zimbabwe. Anything that has something to do with customs, culture, traditions, traditional leadership and chiefs is partly linked to customary law. Therefore those aspects will be of great importance in trying to find out the extent of recognition of customary law in Zimbabwe as stipulated in the Constitution. Firstly, the preamble of the Constitution acknowledges and celebrates the vibrancy of our traditions and cultures. This is an important confirmation of traditional institutions and the legitimacy of various cultural contexts in which such institutions can be understood.

It is important to mention that the supremacy of the Constitution<sup>11</sup> dictates that any customs, norms and traditions that are inconsistent and not reflective of the values and the principles that inform the Constitution are to be constitutionally invalid.<sup>12</sup> In as much as cultural values are to be protected and respected, which enhances the dignity, wellbeing and equality of Zimbabweans,<sup>13</sup> they need to be in line with the dictates of the Constitution lest they become inconsistent. The Constitution also recognises the use of customary law, but the customs and traditions will be valid only to the extent of their consistency with the Constitution.

Chapter 15 of the Constitution specifically deals with traditional leaders and their functions. This Chapter further reiterates the fact that traditional leadership institutions which are the custodians of customary law are also a part of our constitutional system and command the same respect that any other judicial institution should command, albeit theoretically. There is further the recognition of traditional leaders in the equitable allocation of national resources and the participation of local communities in the determination of development priorities within their areas, and the Constitution directs that there be devolution of power and responsibilities to lower tiers of government in Zimbabwe.<sup>14</sup> In general, this shows that the chiefs are bestowed with other powers since they are considered to be important and they also play an indispensable role within the justice system. The recognition of traditional leadership in Chapter 15 of the Constitution is a clear manifestation of how customary law is upheld in the local communities. The institution of traditional leadership is regulated and monitored within the parameters of the Constitution. The decisions which are to be passed by chiefs must be in accordance with the stipulations of the Constitution, and this is to safeguard the rights of individuals. Therefore there is now transparency within the application of customary law. The case of *Tsvangirai v. Nyikadzino*<sup>15</sup> bears testimony to this, where it was held that traditional leaders should conduct themselves in the manner that is reflective of the decorum of the justice system, any action contrary to that would be an insult on the dignity of justice and everything else that the justice system represents.

The Constitution also recognises the use of customary law especially in section 46(1) which states that when interpreting the enactment and when developing common law and customary law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter. This section is of much importance because it recognises the

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<sup>11</sup> Section 2 of the Constitution.

<sup>12</sup> L. Madhuku, *An Introduction to Zimbabwean Law* (2010).

<sup>13</sup> Section 16.

<sup>14</sup> Section 264(1) of the Zimbabwean Constitution provides that “[w]henver appropriate, governmental powers and responsibilities must be devolved to provincial and metropolitan councils and local authorities which are competent to carry out those responsibilities efficiently and effectively”.

<sup>15</sup> 2012 (1) ZLR 405.

existence of customary law, but calls for its judicial development, not destruction. The Constitution also retains powers of the chiefs, and it ensures that there is a balanced representation of chiefs from all provinces in the Senate House of Parliament.<sup>16</sup>

The 2013 Constitution also creates a hierarchical judicial system.<sup>17</sup> The customary courts are also included, and this shows the recognition of the existence of customary law. However the customary courts are stuck near the bottom, and this must not be wrongly interpreted as to mean that customary law has less importance because most of the Zimbabwean population lives in rural areas and are mainly guided by customary law. In resolving disputes, chiefs are enjoined to do so in accordance with customary law.<sup>18</sup> There are some assemblies which are meant to ensure that justice prevails, for example, the National Council and Provincial Chiefs Council which represent all chiefs in Zimbabwe.<sup>19</sup> This was done to ensure that customs or other cultural practices which are evil or contrary to the Constitution do not penetrate into the system. There is now the supremacy of the Constitution and no one is above the law. The appointment of the chief president as well as the deputy is outlined in section 284(4). This was also an effort to ensure that the practice of customary law is properly regulated.

The duties of the chiefs are also outlined in the Constitution in section 280(2). This is to ensure that they do not overstep their duties and infringe on human rights. Section 281 further provides boundaries for what chiefs are permitted to do and what they are not. Since the chiefs are the guardians of customary law, it is to be expected that in the event that their conduct violates human rights, they will be held liable and accountable for that pursuant to the rule of law principle which is to the effect that no one is above the law. This ensures the maintenance of justice in customary law courts according to section 281(9).

#### ***4.1 Constitutional Provisions on Traditional Leadership: A Case Study of Chief Charumbira's Court***

The institutions, status and role of traditional leaders are recognised under customary law. Traditional leaders are responsible for performing the cultural, customary and traditional functions of a chief, headperson or village head in their communities. The regulatory framework for traditional leaders in Zimbabwe is provided for by various Acts of Parliament, namely, the Traditional Leaders Act of 1998, the Customary Law and Local Courts Act and the national Constitution. In the Constitution of Zimbabwe Amendment (No. 20), (2013), section 282, traditional leaders have the following functions: to promote and uphold cultural values of their communities, and in particular to cement extended family relations, to take measures to preserve the cultural traditions, history and heritage of their community's sacred shrines. It is also the duty of traditional institutions to facilitate development in accordance with an Act of Parliament to administer land and protect the environment. Chiefs are also meant to resolve

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<sup>16</sup> Section 120(1) of the Constitution which deals with composition of Senate states that the Senate consists of 80 senators, of whom "(b) sixteen are Chiefs, of whom two are elected by the provincial assembly of Chiefs from each of the provinces, other than the metropolitan provinces, into which Zimbabwe is divided; (c) the President and Deputy President of the National Council of Chiefs."

<sup>17</sup> Judicial authority derives from the people of Zimbabwe and is vested in the courts, which comprise – (a) the Constitutional Court; (b) the Supreme Court; (c) the High Court (d) the Labour Court; (e) the Administrative Court (f) the magistrates courts; (g) the customary law courts; and (h) other courts established by or under an Act of Parliament. *See* section 162(a)–(h).

<sup>18</sup> *See* section 5 of the Traditional Leaders Act and section 3 of the Customary Law and Local Courts Act Chapter 5:07.

<sup>19</sup> Chief Charumbira is at the time of writing the current president of the National Council of Chiefs.

disputes amongst people in their communities according to government laws and exercise other functions imposed on them by an Act of Parliament.

Traditional leaders positively perceive their role as judicial organs as they employ a number of mechanisms including the well-known *Dare* among the Shona people, and *Inkundla* among the Ndebele people. The *Dare/Inkundla*<sup>20</sup> system is administered by traditional leaders with the assistance of a council of elders and members of the community in question as noted by Chigwata.<sup>21</sup> Clark views African traditional institutions as effective as they ensure equal participation of all members of the communities in decision making and peace processes.<sup>24</sup> In the *Dare/Inkundla* the village head, headman or chief is only there as a presiding officer but the decision is determined by the community and the verdict by the council of elders. Mutisi also notes that the *Dare/Inkundla* can refer to a superior court case that they may deem beyond their jurisdiction as provided for by the Constitution of Zimbabwe. Due to this system the traditional leaders see themselves as more superior than the exogenous courts because they are closely linked to people and live with the people in their communities.

Customary law prioritises restorative justice in that it seeks to restore harmony within conflicting parties more than it seeks to punish wrongdoers. Traditional leaders have their own approach to solving conflicts such as negotiation at all levels, village to national, from family to the village court (*Dare*),<sup>22</sup> from the *Dare* to the chief's court (*Dare ramambo*).<sup>23</sup> From there the exogenous methods can now come in, starting from the magistrate's court to the High Court then to the Supreme Court. This clearly shows that traditional methods need not be left out as they focus more on restoring relationships through negotiation, forgiveness and compensation if need be. Therefore this illuminates the point that chiefs perceive their role as the protectors of peace and security in the country as they are expected by the spirit of the Constitution.

In addition, traditional courts are more accessible and economical to rural communities than modern courts. When trying cases or resolving disputes, traditional leaders are assisted by advisors who are usually from the family of the ruling tribe, for example, the Venda tribe.<sup>24</sup> The chiefs do not solely rely on their personal knowledge but rather acquire some advice from the senior and older persons in the village because they are believed to be wiser as they have lived longer. These elders are described as sages by Mosima.<sup>25</sup> They tend to emphasise reconciliation rather than retribution to ensure harmony among neighbours, relatives and communities in rural areas. This is partially the reason why rural communities prefer traditional to modern courts. Because of this role, the traditional leaders see themselves as playing a crucially active role in deciding matters unlike the common law courts that rely on written laws. In other words, customary law upholds the doctrine of natural law unlike common law which adheres to legal positivism. Chiefs believe that they base their knowledge on the natural issues considering the day-to-day-lives of people and their decisions are stemmed from the roots of the matter.

Traditional leaders have tried to retain their powers through the way they conduct their meetings at their local courts. For example, at Chief Charumbira's court,<sup>26</sup> his entrance triggers ululations from the women and whistles from the men as a sign of respect and to praise the Chief. Chiefs

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<sup>20</sup> A group of elders presiding over a case in assistance of a chief or headman.

<sup>21</sup> See T. Chigwata 'The Role of Traditional Leaders in Zimbabwe: Are they Still Relevant?' 20 *Law, Democracy and Development* (2016).

<sup>22</sup> 'Dare' is a Shona term which refers to a body of elders employed with the sole task of presiding over disputes.

<sup>23</sup> M. F. C. Bourdillon, *The Shona Peoples: Ethnography of the Contemporary Shona with Special Reference to Their Religion* (Mambo Press, Gweru, 1998).

<sup>24</sup> Venda is a Zimbabwean tribe found in the Matebeleland South Province.

<sup>25</sup> See P. M. P. Mosima, *Philosophic Sagacity and Intercultural Philosophy: Beyond Henry Odera Oruka*, African Studies Collection, vol. 62, African Studies Centre, Leiden.

<sup>26</sup> The court of the president of traditional leaders, located in Charumbira Village, Masvingo Province, Zimbabwe.

see themselves as commanding respect and having power in the village. During or after the court session, usually people are offered food to eat which is rather mandatory at some chief's courts, for example, the late Chief Nyakunhuwa. They believe that food brings people closer and they accompany this by the Shona saying, "*ukama igasva hunozadzi swa nekudya*".<sup>27</sup>

At the chiefs' courts one may find that the courts are decorated with animal skins (*matehwe*). These skins are usually leopard skins, cattle skins and zebra skins. The skins usually symbolise the power a chief possesses. The type of skins show how powerful a chief is and the more skins of bigger and scarier animals in the court, the more respected the chief is. A number of villagers praise their chief as a sign of respect and an acknowledgment of the chief's supremacy, for example Chief Charumbira,<sup>28</sup> Chief Nematombo in Hurungwe<sup>29</sup> as well as Chief Ngezi in Mhondoro.<sup>30</sup> The subjects would praise the chief through poems (*kudetemba*), in which they will be reciting the chief's totem and the chief's family lineage. The recitation of the totems and the lineages gets the chief into a good mood (*manyemwe*).<sup>31</sup> In illustration, Chief Charumbira is referred to by his subjects as *Shumbahuru* (big lion).<sup>32</sup>

The Customary Law and Local Courts Act<sup>33</sup> enacted under the previous constitutional order assigns judicial powers to traditional courts. The jurisdiction of these courts is limited to civil cases involving parties who reside within the area of the court's authority, and the content of the case has to be suited to trial by customary law. Thus traditional courts do not have the power to adjudicate on cases of a criminal nature, such as murder or rape. However, and flowing from tradition, in some cases traditional leaders do resolve disputes involving criminal matters of less serious natures such as theft and assault. Serious cases of a criminal nature are referred to the police for investigation. Despite this position, chiefs believe that they have the power to solve criminal cases such as theft of livestock although this type of crime is a criminal offence inscribed in the Criminal Code.

Village headman Bhilisa Dude, cited in *Lighting Our Way*,<sup>34</sup> commended the late Chief Masuku from Matabeleland for the manner the late Chief used to effectively reprimand wrongdoers. He surprised all by keeping aloof and yet he was close to the people he led. He had no friends but loved everybody. He always worked with respected kraal heads and headmen who formed his chieftaincy committee, yet this was the very committee that always stood against his excesses and always ensured that he acted within the bounds of sanity. The perceived role of the chief in this process of community-based decision making was to "reflect and discuss the opinions expressed in the village assembly and ultimately to suggest and publicly approve a decision of consensus, considering different opinions and interests of involved persons".<sup>35</sup> He was quite free to dismiss the council's ruling if it exhibited negative implications and could act as he thought best. However, this was only in theory, as acting against the advice given by the council could lead to his downfall. Therefore, it is plausible to argue that, in general, chiefs perceive their role as representing a democratic society whose communal aspirations and values are collectively expressed. Chiefs have a sense of what can be termed as 'grassroots democracy.'

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<sup>27</sup> This is a Shona idiom which means relationships are hardly complete unless you partake of a meal together.

<sup>28</sup> See *supra* note 26.

<sup>29</sup> A rural district in Zimbabwe.

<sup>30</sup> A rural district in Zimbabwe.

<sup>31</sup> Shona meaning for zeal.

<sup>32</sup> A Shona totem.

<sup>33</sup> Customary Law and Local Courts Act.

<sup>34</sup> B. Dude, *Lighting Our Way* (African Community Publishing and Development Trust, 2008).

<sup>35</sup> S. Dusing, *Traditional Leadership and Democratisation in Southern Africa: A Comparative Study of Botswana, Namibia and South Africa* (Transaction Publishers, London, 2001).

The Constitution further provides that, “except as provided in an Act of Parliament, traditional leaders have authority, jurisdiction and control over the communal land or other areas for which they have been appointed, and over persons within those communal lands or areas”.<sup>36</sup> The Traditional Leaders Act also assigns to chiefs the responsibility to: supervise headmen and village heads; oversee the collection of levies, taxes, rates and charges payable to rural local; and conserve the environment and natural resources. Further, chiefs have the responsibility to: notify local rural governments about the occurrence of natural disasters and the outbreak of epidemic diseases; publish public orders, directives or notices; protect public property; and promote the maintenance of good standards of health and education. Pursuant to the power vested in the chiefs by the government, the chiefs have upheld their role as protectors of the rights of people by ruling in line with the spirit of the Constitution of Zimbabwe which is enshrined within the Declaration of Rights in Chapter 4.

This role, however, is slowly being questioned in the light of a number of factors, including unethical and criminal conduct by some traditional leaders. In *S v. Manenji & Another*,<sup>37</sup> a village head was found guilty of murder with actual intent following a land ownership dispute that culminated in the death of a woman at the hands of this particular village head. This case indicates that some traditional leaders are involved in some grave acts of criminal conduct. The low educational levels of most traditional leaders and their inability to apply a consistent doctrine of precedent have also raised doubts about their competence and credibility as judicial officials. A study carried out by Rukuni<sup>38</sup> and others also revealed that some traditional leaders are failing to exercise impartiality when adjudicating cases, particularly with respect to politically sensitive matters and in cases where they have an interest, such as, boundary disputes or where relatives are involved.<sup>39</sup> However, it still remains a fact that traditional leaders play an important role as a dispute resolution mechanism in rural areas, thereby complementing the modern judicial system given its limited reach.

In a nutshell, traditional leaders see themselves (with reason) as more superior to the modern court officials because they have a closer attachment to the people. To maintain their power as judicial organs and guardians of human rights, they have tried very much to make their local courts accessible to people, even the most indigent of their communities. This is seen through praises from their subjects in the form of *kudetemba*, animal skins and the way they conduct their court proceedings, which is different from the modern courts as it encompasses everyone.

#### ***4.2 How Chiefs and Traditional Leaders Perceive Their Role as Judicial Organs and Protectors of Constitutional Rights***

The institution of traditional leadership has always been central to the governance of communities in Africa in general and Zimbabwe in particular. It must be established beforehand that there may be differences in the manner disputes are resolved depending on each tribe. However, it is worth mentioning that despite these tribal differences, the traditional ‘dispute resolution’ system as well as the justice system is basically the same with only a few trivial differences.<sup>40</sup> The institution of traditional leadership comprises of chiefs, headmen and village

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<sup>36</sup> Section 282(2) of the Constitution.

<sup>37</sup> 13-HB-03.

<sup>38</sup> T. Rukuni *et al.*, *The Role of Traditional Leadership in Conflict Resolution and Peace Building in Zimbabwean Rural Communities: The Case of Bikita District* (2015).

<sup>39</sup> See the *Tsvangirai v. Nyikadzino* case, *supra* note 15.

<sup>40</sup> M. Ramose, *African Philosophy through Ubuntu* (Mond Books, Harare, 1999).



heads, who are vested with ‘traditional’ judiciary authority. Village heads usually comprise of the minor courts called ‘*zunde raSabhuku*’, while the chiefs comprise of the community court to which appeals from the minor courts are forwarded. Since the advent of the colonial era, the recognition and appeal of traditional courts and chiefs has deteriorated. Subsequently, these legal bodies lost much of the influence and power that they previously had. For instance the Customary Law and Local Courts Act grants traditional chiefs limited jurisdiction in civil matters and none in criminal matters.<sup>44</sup> According to Chief Charumbira, the president of the Zimbabwe Council of Chiefs, this directly compromises the issue of access to justice in the sense that it limits the courts to merely deal with human rights violations that arise in civil matters, and they should not involve themselves at all with human rights violations that have to do with criminal law. This poses a great threat to the contribution of traditional courts in providing justice in the Zimbabwean society. At the same time this means the remedies available for the greater part of the rural populace in terms of criminal offences become less accessible thereby compromising access to justice and human rights.

It becomes imperative for one to notice that access to justice is gendered, and the implications are felt more on women than men. To begin with, according to a recent census there is an estimate of 13 million people in Zimbabwe.<sup>41</sup> Further, according to the World Bank estimation 10,551,204 of the people live in the rural areas.<sup>42</sup> This entails that traditional chiefs have jurisdiction over almost 75 per cent of the Zimbabwean population, as such limiting the jurisdiction of these traditional chiefs excessively (as is the position in Zimbabwe) compromises access to justice to 10,551,204 of the Zimbabwean population. In this respect, one would recommend that these traditional authorities be given adequate jurisdiction to give meaning to the right to access to justice for the majority of Zimbabweans. This means that even extension of their jurisdiction to criminal matters should be considered. Contrary to the traditional approach, the chiefs are required to be apolitical, as is required of any judicial officer;<sup>43</sup> such provisions are aimed at making access to justice impartial and available to anyone despite certain political affiliations. However according to Chief Munyikwa of Gutu Masvingo, despite the constitutional provision that enjoins chiefs to be apolitical, the greatest obstacle to access to justice is discrimination based on political differences, meaning that even though there are provisions to give meaning to access to justice, the reality on the ground is quite different as authorities might behave in a way that is contrary to what is expected of them.

## **5 Characteristics of the Traditional Legal System in Relation to Access to Justice**

### ***5.1 Location of the Courts***

Traditional courts are found in all rural communities. This makes justice easily accessible as there are basically no transport costs. Nhlapo recognises the effect of social status on justice accessibility in courts.<sup>44</sup> Since the people who preside over cases in traditional courts (the chief and the assessors) are usually from the same tribes or clan, and their norms and values are the same, it is easy for one to feel that justice has been executed, regardless of whether s/he has lost or not in court. The importance of the location of traditional leaders and their courts is best supported by Madhuku when he says that it is not easy to define what justice is because what

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<sup>41</sup> ‘13m in Zimbabwe, census reveals’, *The Herald*, December 2013, <[www.herald.co.zw/13m-in-zimbabwe-census-reveals](http://www.herald.co.zw/13m-in-zimbabwe-census-reveals)> (accessed 23 November 2016).

<sup>42</sup> See <[data.worldbank.org/indicators/SP.RURTOTL](http://data.worldbank.org/indicators/SP.RURTOTL)>

<sup>43</sup> Section 163(f) as read together with section 165(4) of the Constitution of Zimbabwe.

<sup>44</sup> See T. Nhlapo, ‘Customary Law in Post-Apartheid South Africa: Constitutional Confrontations in Culture, Gender and “Living Law”’, 33:1 *South African Journal on Human Rights* (2017).

is just for one person may not be just for the other person obviously because of social, political and economic differences.<sup>45</sup> With the plaintiff and defendant or accused and the complainant coming from the same area and sharing common backgrounds, it is much probable that they are satisfied with whatever outcome of the court's ruling. In Madhuku's words, to say that the law must serve the ends of justice is to promote the view of justice shared by those whose perceptions dominate a given society.<sup>46</sup> The location of the traditional leaders' courts is thus an important factor as far as access to justice is concerned.

## **5.2 Costs**

There is no need for people to travel long distances to magistrates' courts, which require transport costs, to access justice. Even if a villager does not stay near his chief's court, the transport cost is usually cheaper than that of travelling to district headquarters where magistrate courts are located. Besides transport costs, court levies in traditional courts are cheaper as they usually range around USD 20 which is also negotiable as one can pay in kind, for example, goats or chickens as levy fee. This is different from modern courts where one has to pay legal practitioners who charge huge fees to represent a person, and because of the complex and intimidating nature of the court process, it is highly probable that in most cases an unrepresented person loses the case. Even though there are legal aid forums, not every poor person gets access to them because of many reasons, one of them being ignorance of their existence. From this, it can be seen that justice is more accessible in traditional courts as they accommodate every person regardless of their economic background.

## **5.3 Flexible Procedural Standards**

The procedure in traditional courts is flexible and simple. At Chief Charumbira's and Chief Sigola's courts, the plaintiff and the defendant each narrate to the court his/her version of what transpired up to the time the plaintiff reported the matter to the chief's court.<sup>51</sup> After that, the witnesses from both sides are called to testify, provided they have first-hand information, and there is no hearsay. Later, the plaintiff and the defendant are given the chance to respond to what the witnesses would have said. After that, the floor is given to the *Dare* (the people who would be in court) to give their views concerning the matter. This is the standard procedure that gives both parties to a dispute an equal chance to be heard. Most people believe that in traditional courts there is no presumption of innocence but it is actually there. Traditional, community and customary justice systems have been described as informal, non-state, non-official or non-formal justice systems. For a long time, they have however operated at the periphery of the formal justice system. The informality makes these courts user-friendly for both the accused and plaintiff; for example, in Chief Thandi's and Chief Nyakunhuwa's courts the presiding officer does not persecute the accused even if it is clear that he is guilty like most people think traditional leaders do. The kind of questioning is not accusatorial in nature as followed in formal courts, but it is simple questioning which gets the defendant or accused to realise and appreciate his wrong doing.

## **5.4 Communication**

Communication in traditional courts is easier compared to any other formal court communication. This is so because the language used is the same one the people involved use in their daily lives; this implies that the communication process is simple and less prone to

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<sup>45</sup> Madhuku, *supra* note 12.

<sup>46</sup> *Ibid.*

ambiguity or misinterpretation. What the receiver understands is correlated with his own experience, and his language proficiency would influence the acceptance of the message, as stated by Dobra and Popescu.<sup>47</sup> The language used in traditional courts is local and understood by everyone, unlike in regular courts where the jargon used is usually technical and some words are Latin and only understood by legal practitioners and the judges. There is thus no need for an interpreter in traditional courts as s/he can distort the information such that justice would not be properly executed. The environment itself is also not a communication barrier as it is friendly. Though chiefs are the head of communities, they have time to interact with their people. This lead to the lower rank people not feeling intimidated by their chief, and the social status difference would not distort effective communication in courts.

### **5.5 The Law Used**

Traditional courts use customary law principles, customs and customary practices in dispute resolution. However, traditional courts, like regular courts, are also making efforts to accommodate general law. In traditional courts some chiefs like Chief Charumbira recognise the Constitution and also use the Traditional Leaders Act in their courts. The traditional courts, unlike before, are now empowering women and giving them leadership posts in their villages. In Chief Charumbira's area, there are 21 female heads of villages (*sabhuku*). In this Chief's court, women also have a say in the proceedings of the court as assessors. They also play an advisory role to the Chief and their views are as important as those given by men.<sup>48</sup>

However, not all traditional leaders recognise human rights as some chiefs are not aware of them. Local adjudicators and community members involved in alternative dispute resolution are often not aware of some human rights standards. A practical example is Chief Charumbira who is one of the chiefs who recognises the existence of the Constitution and Acts of law, but he concurred that applying human rights in some issues was controversial and a big challenge as it would lead to injustice. For example, he presided over a case which involved a 16 year old girl who had sexual intercourse with her boyfriend who was 20 years of age. Chief Charumbira acknowledged that he knows and respects the legal age of majority and the age of consent but the people he rules have a different view about the age of consent. In Shona customs, as long as a girl is not yet married, she has no right to consent to sexual intercourse or else the man would have to pay for seduction damages despite the age of the girl. In this case, the Chief made the 'boy' who was having sexual intercourse with the girl to pay for seduction damages to the girl's father despite the fact that the Zimbabwean Constitution stipulates that when a girl is 16 years old, she has the right to consent to sex.<sup>49</sup>

## **6 Recommendations from Chiefs on Improving Access to Justice**

The chiefs have suggested that a number of measures be implemented in order for them and other traditional leaders to be able to properly execute their constitutional mandate. Firstly, in as far as the enforcement of judgments is concerned, Chief Nyamande suggests that chief's messengers be entrusted with the authority to arrest those who do not obey judgments. He further suggests that chief's messengers be given some form of identification. Secondly, according to Chief Chiwara, the higher courts should be encouraged to respect judgments made by chiefs. He maintains that failure to do that would lead to further underestimation of traditional courts and their dispute resolution mechanisms. Another chief, Chief Chitsa,

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<sup>47</sup> A. Dobra and A. Popescu, *Barriers in Verbal Communication* (2008).

<sup>48</sup> In Zimbabwe there are at the time of writing three female chiefs.

<sup>49</sup> See section 70(3) of the Criminal Law (Codification and Reform) Act [Chapter 9:23].

believes that judgments derived from their courts should not be assessed by the magistrates' courts, especially on the issue of *makunakuna* (incest). Chiefs further suggest that they be allowed to give final decisions as new judges and magistrates are not knowledgeable in traditional issues.

## 7 Conclusion

It has been made clear that traditional institutions that enforce and implement customary law play a critical role in the justice administration system in Zimbabwe. The fact that Zimbabwe's population is mainly rural necessitates the prominence of a judicial system that is accessible to all. Further, the added fact that customary law is active and affects daily lives of the rural population makes customary law important in dispute resolution in rural communities. A lot needs to be done in order to enhance the effectiveness of the customary justice system and ensure that it keeps pace with the rapid social, economic and political developments of the time.

In addition, the value of participation in customary law courts implies that people should not be the passive recipients of decisions affecting them, whether by power-wielders, bureaucrats or experts, however well intentioned. Indeed, the administration of law scrupulously, without arbitrariness and according to rules and consequences that are known or can reasonably be known to the subjects of the law correspond to the most basic notions of justice.<sup>50</sup> In conclusion, the mentoring, strengthening and capacity building of chiefs and headmen is central to the realisation of the right to access to justice in Zimbabwe, especially for women and children often affected by patriarchal cultural values.

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<sup>50</sup> See N. Rodley, 'Civil and Political Rights, in C. Krause and M. Scheinin (eds.), *International Protection of Human Rights: A Textbook* (Abo Akademi University Institute for Human Rights, 2012).