

ENHANCING ACCESS TO JUSTICE IN ZIMBABWE: AN EMPIRICAL EXPLORATION  
OF INTEGRATING SOCIALLY APPROPRIATE DISPUTE RESOLUTION TO  
OVERCOME BARRIERS WITHIN THE FORMAL JUSTICE SYSTEM

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## DECLARATION

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WESLEY MARAIRE

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DATE

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## ABSTRACT

Colonialism introduced common law in Rhodesia (now Zimbabwe). The colonial regime subsequently relegated indigenous laws, rules, and epistemologies to the status of informality, except for those that did not offend European notions of justice and morality. Despite colonial onslaught, relegated ways of life continued guiding the majority Black population, albeit informally. This established Zimbabwe as a plural legal country.

Against this background, this study explores factors impeding citizens from accessing the formal justice system, preventing them from obtaining outcomes they consider fair. Semi-structured interviews with diverse legal professionals revealed a range of barriers preventing citizens from obtaining effective access to justice. Research participants identified the colonial common law system, with its emphasis on general law courts and litigation as a significant barrier to access to justice for the majority Black African population, whose traditional approaches to dispute resolution contrast with this adversarial system. Consequently, most citizens rely on non-state dispute resolution platforms that lack the force of law.

This thesis also explores various ways of enhancing access to justice for citizens, including the poor and small businesses in Zimbabwe. The data revealed that the most significant solution is embracing normative conceptions of law, justice, and institutionalising socially appropriate dispute resolution processes that are culturally and geographically close to the people.

Throughout the thesis, case studies, primarily from Australia and South Africa provide a comparative lens for analysing the empirical data. These countries share a history of British colonial rule and have set a path to extend access to justice to Indigenous populations, which provides a blueprint for Zimbabwe. This thesis concludes by drawing together empirical data and process theory to develop a justice system that overcomes Zimbabwe's current access to justice challenges.

## PFUPISO

Hutongi hwevadzvanyiriri hwakaunza mutemo wekutongwa kwenyaya mumatare edzimhosva muRhodesia (yave kunzi Zimbabwe iye zvino). Hutongi hwevadzvanyiriri hwakadzikisira mitemo yechivanhu, mirawo neruzivo rwavatemala ndokuzvitora sezvisiri pamutemo, kunze kweizvo zvavaiona sezvisingapokani kana kuzvidza mhiko nemirairo yekuEurope yekuenzaniswa nekurarama kwakanaka. Zvisinei nekudzvanyirirwa nekumbunyikidzwa nevapambepfumi, mararamiro echivanhu akange aderedzwa achitorwa seasina basa aya akaenderera mberi achitungamirira ruzhinji rwevatemala, kunyangwe zvazvo aitorwa seasiri pamutemo nevapambepfumi. Izvi zvakaita kuti Zimbabwe ive nyika ine mhando yemitemo yakawanda; kusanganisira mitemo mitsva yekumbunyikidza yevapambepfumi yekuEurope, neyevatemala yakanga isisiri pamutemo kunyangwe ruzhinji rwaiishandisa kugadzirisana, kuyanana, uye nekutonga mhosva.

Kubudikidza nenhorondo iyi, tsvakurudzo ino iri kuongorora zvipingaidzo zvinodzivirira zvizvarwa zveZimbabwe kuti zviyanane, kuyanana, kuenzaniswa, kana kutongwa zviri pamutemo wenyika, nekuvatadzisa kuwana zvavanofunga kuti ndizvo zvakaenzanirana pakugadzirisa magakava. Hurukuro nevashandi vezvemutemo vakasiyanasiyana yakafumura huwandu hwezvimhingamipinyi zvinotadzisa zvizvarwa kuwana mikana yakanaka yekuwana kuenzaniswa kana kutongwa zviri pamutemo wenyika. Magweta akapinda mutsvakurudzo ino akanongedzera mitemo yehutongi hwevadzvanyiriri iyo inoshandiswa zviri pamutemo wenyika, nekukoshesa kwayo matare edzimhosva nevapambepfumi sezvimhingamipinyi zvikuru pakugadzirisa nekupedza magakava kuruzhinji rwevatemala muAfrica. Ruzhinji urwu rwune tsika dzechinyakare dzekugadzirisa magakava, uye tsika idzi dzakasiyana nehurongwa hwekutongwa kwenyaya pakati pemumhan'ari nemumhan'arirwi mumatare edzimhosva hunotevedzera mitemo yevapambepfumi. Nekuda kweizvozvo, zvizvarwa zvizhinji zvinovimba nenzira dzekugadzirisa magakava dzinoenderana netsika nemagariro evatemala,

dzisinei uye dzakasiyana nemitemo yevapambepfumi iyo yavakambunyikidzwa kugashira nekushandisa.

Chinyorwa chino chinoongorora zvakare nzira dzakasiyanasiyana dzekuvandudza kuwanika kwekuenzaniswa zviri pamutemo wenyika kwezvizvarwa zvemuZimbabwe, kusanganisira varombo nevemabhizimisi madiki. Tsvakurudzo ino yakabuditsa pachena kuti mupedzanhano chaiwo uri mukugamuchira nekutevedzera gwara remitemo nemaitirwo ezvinhu zvinoenderana netsika nemagariro evatema. Zvakarewo chimwe chinodiwa kuenzaniswa, uye kushandisa zviri pamutemo matanho akakodzera anoenderana nemagariro evanhu pakugadzirisa magakava anogamuchirwa mutsika uye munharaunda nevanhu.

Chinyorwa chino chinoshandisa zvimwe zvinyorwa nezvakawanikwa mutsvakurudzo kune nyika dzakasiyanasiyana kusanganisira South Africa neAustralia. Tsvakurudzo ino inoshandisa zvakabuda mutsvakurudzo dzemunyika idzi kupenengura zvakabuda mutsvakurudzo ino. Nyika idzi dzine nhoroondo yakafanana neZimbabwe yekutonga kwehudzvaniriri hwemaBritish. Nyika idzi dzakagadzira gwara rekuvandudza kugadzirisa nekupedza kukakavadzana pakati pezvizvarwa zvemo, kusanganisira mabhizimisi kubudikidza nekuyananiwa, kuenzaniswa nekutongwa zviri pamutemo wenyika. Gwara rakashandiswa munyika idzi rinogona kutevedzwawo neZimbabwe. Chinyorwa chino chinopedzisira nekubatanidza humbowo hwechokwadi hwakabva mutsvakurudzo pamwe chete nepfungwa dzemaitirwo ezvinhu pakugadzira nzira dzekuenzaniswa kana kutongwa dzinobvisa kana kupedza zvimhingamipinyi zviri muZimbabwe pari zvino pakuwana nzira dzekugadzirisa kana kupedza magakava zvinoenderana netsika nemagariro evatema.

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## LIST OF ABBREVIATIONS

**Term**

AG	Attorney General
ADR	Alternative/Appropriate Dispute Resolution
AIMA	Africa Institute of Mediation and Arbitration
CAC	Commercial Arbitration Centre
CCMA	Commission for Conciliation, Mediation and Arbitration
JSC	Judicial Services Commission
LA	Legal Aid
LAD	Legal Aid Directorate
NADRAC	National Alternative Dispute Resolution Advisory Council
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
RAU	Research Advocacy Unit
RIA	Regulatory Impact Assessment
SALC	South African Law Commission
SI	Statutory Instrument
TADR	Traditional African Dispute Resolution
“the Constitution”	Constitution of Zimbabwe Amendment (No. 20) Act, 2013
UNCITRAL	United Nations Commission on International Trade Law

UNDP	United Nations Development Programme
ZHRC	Zimbabwe Human Rights Commission
ZIMRA	Zimbabwe Revenue Authority
ZimStat	Zimbabwe National Statistics Agency
ZLHR	Zimbabwe Lawyers for Human Rights
ZRP	Zimbabwe Republic Police

## CHAPTER ONE

### ZIMBABWE IN CONTEXT: DISPUTE RESOLUTION AS A RESEARCH SUBJECT

#### 1.1. Introduction

Zimbabwe is a landlocked southern African country with a population of 15 million.<sup>1</sup> It was formerly known as Southern Rhodesia, Rhodesia, and Zimbabwe-Rhodesia. Approximately 70 per cent<sup>2</sup> of the population lives in rural areas along clan lines, widely spread out, unlike urban dwellings with high population density. Zimbabwe has a centralised government<sup>3</sup> and plural legal system, including common law, legislation, and customary law. The Constitution of the Republic of Zimbabwe Amendment (No. 20) Act, 2013,<sup>4</sup> recognises and upholds the right of access to justice, a human right.<sup>5</sup> However, the extent to which this right is accessible to the poor and small businesses is highly contested because the formal justice system is perceived as expensive, geographically inaccessible, slow, and socially and culturally inappropriate.<sup>6</sup>

This study aims to address critical gaps in understanding the challenges citizens face when interacting with the formal justice system. Specifically, the aims and objectives are as follows:

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<sup>1</sup> Zimbabwe National Statistics Agency (ZimStat) '2022 population and housing census - preliminary report' available at [https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022\\_PHC\\_Functioning.pdf](https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022_PHC_Functioning.pdf), accessed on 23 August 2022. This is a preliminary report, so for previous census data, see ZimStat '2012 census report' available at <http://www.zimstat.co.zw/wp-content/uploads/publications/Population/population/census-2012-national-report.pdf>, accessed on 11 May 2018.

<sup>2</sup> Ibid.

<sup>3</sup> There are 8 provinces in Zimbabwe, consisting of Harare, Bulawayo, Masvingo, Mashonaland Central, Mashonaland West, Mashonaland East, Manicaland, Matebeleland North, Matebeleland South, Midlands. These are further subdivided into 63 districts and 1 200 wards.

<sup>4</sup> Constitution of Zimbabwe Amendment (No. 20) Act, 2013 (hereinafter "the Constitution).

<sup>5</sup> Constitution, s 69(3).

<sup>6</sup> Chitsike 'The role of women in Zimbabwe's transition' in Murithi and Mawadza (eds) *Zimbabwe in Transition: A View from Within* (2011) 160-163. United Kingdom Department for International Development 'Safety, security, and accessible justice: Putting policy into practice' (2002) outlines how justice systems that are remote, unaffordable, slow, and incomprehensible to the public, deny citizens access to justice. See generally Stewart, Sithole and Ncube (eds) *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (2000).

1. **Empirical Identification of Barriers:** Through rigorous empirical analysis, the study aims to identify and comprehensively examine the barriers citizens encounter when entering and navigating the formal justice system. By investigating real-world scenarios, the study seeks to uncover the multifaceted obstacles that hinder access to justice in Zimbabwe.
2. **Analysis of Empirical Solutions:** Building upon the empirical findings, the objective is to critically evaluate solutions and interventions that mitigate these barriers. I will assess their effectiveness, limitations, and impact on citizens and small businesses.
3. **Proposing an Inclusive Justice System Model:** Drawing from empirical evidence and informed by initiatives from other jurisdictions, the study aims to propose a novel justice system model<sup>7</sup> tailored to Zimbabwe's unique context. This model will prioritise accessibility, fairness, and efficiency, specifically focusing on enhancing access to justice for citizens and small businesses.
4. **Contributions to Policy and Practice:** Ultimately, this research aims to contribute actionable insights to policymakers, legal practitioners, and relevant stakeholders. By advocating for evidence-based reforms, this study strives to create a more equitable and efficient justice system—one that empowers all citizens, regardless of their socio-economic or political status.

Through this study, a transformative impact on Zimbabwe's legal landscape is envisioned, fostering a more just and accessible environment for those seeking formal redress. Before addressing the primary and subsidiary research questions, it is necessary to explain the context giving rise to issues surrounding access to justice in Zimbabwe. First, I outline the socio-political and economic factors contributing to the current state of the justice system. Next, I

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<sup>7</sup> The model is discussed in chapter six. The model is heuristic. Therefore, it is not discussed as or meant to be the only and final solution to access to justice challenges in Zimbabwe.

explore historical approaches to dispute resolution in traditional Zimbabwean society<sup>8</sup> and the colonial period to understand the country's legal culture.

An explanation of the contemporary Zimbabwean justice system follows, including the reforms undertaken between 1980 and 2020, which aimed to introduce alternatives to formal court processes to improve access to justice. After that, I highlight the remaining challenges of access to justice. The penultimate section unpacks the primary research question and the three subsidiary research questions, including methodological decisions regarding data collection and analysis. The last section outlines the structure of the thesis, with brief descriptions of each of the six chapters.

## 1.2. Prevailing socioeconomic environment

Zimbabwe has gone through over two decades of economic decline, with inflation rising from 32 per cent in 1998 to 11 200 000 per cent in 2008.<sup>9</sup> Zimbabwe went through a period of hyperinflation,<sup>10</sup> and at its peak, it reached 79.6 billion per cent month-on-month and 89.7 billion per cent year-on-year inflation.<sup>11</sup> Consequently, in 2009, Zimbabwe stopped printing its currency and adopted a multi-currency economic policy. Despite the official multi-currency policy, the United States dollar became the dominant currency. Approximately 40 per cent of

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<sup>8</sup> Aligned with the decolonisation agenda, I will avoid terms like 'pre-colonial' and 'post-colonial' and instead use 'traditional African' and 'contemporary African' society. I refer to the African dispute resolution system as the 'traditional' legal/justice system, except when using 'conventional' terminology for better syntax.

<sup>9</sup> Hanke and Kwok 'On the measurement of Zimbabwe's hyperinflation' (2009) 29 *Cato Journal* 2 at 355-356. Maune, Matanda, and Mundonde 'Is money supply the cause of inflation in Zimbabwe? An empirical examination' (2020) 16 *Acta Universitatis Danubius. Economica* 3 at 18-20.

<sup>10</sup> Informed by Hanke and Kwok (ibid), I adopt the Cagan definition of hyperinflation: a period where prices rise by more than 50 per cent in a month.

<sup>11</sup> Hanke and Kwok (n9) at 355-356.

the population live below the poverty line, translating to a purchasing power parity of US\$ 1.90 per person per day and a Gini coefficient of 50.3 per cent.<sup>12</sup>

Zimbabwe has no minimum wage, and the government allows wage negotiations between employers and employees. Much like access to justice, there is limited academic literature on people's living conditions. The available information is primarily derived from newspapers and first-hand accounts. For example, I found the latest information from an Al Jazeera story to obtain updated wages for teachers in Zimbabwe.<sup>13</sup> The story puts the average salary for teachers at US\$ 120 per month, well below the living wage of US\$ 305.<sup>14</sup> Teacher salaries reflect civil servants, who comprise the majority of formally employed people in Zimbabwe. Using these indicators, most people in Zimbabwe may be considered poor; therefore, a middle-class does not exist.

In the context of access to justice, the Law Society of Zimbabwe has set out tariffs ranging from US\$ 30 for an unregistered law student, to US\$ 350 per hour for a lawyer with over 30 years of experience.<sup>15</sup> In a hyperinflationary environment with multiple currencies, tariffs are unrealistic and unaffordable for most Zimbabweans. A thriving black market inadvertently controls exchange rates, rendering the tariff system vulnerable to manipulation. Like other service providers in Zimbabwe, lawyers must adjust prices multiple times per year to keep up with hyperinflation.

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<sup>12</sup> World Bank 'Zimbabwe country profile' available at <https://www.worldbank.org/en/country/zimbabwe/overview>, accessed on 21 April 2017.

<sup>13</sup> Matiashe 'Zimbabwe: Teachers' union and government in deadlock over wages' *Al Jazeera* 18 March 2022.

<sup>14</sup> Trading Economics 'Zimbabwe living wage' *Trading Economics* (ND) 2018. Living wage calculations use a predefined food basket from the Food and Agriculture Organisation database, reflecting 50 food groups mirroring national consumption. It includes housing, transportation costs, and a margin for unexpected expenses.

<sup>15</sup> Law Society of Zimbabwe 'General tariff of fees for legal practitioners USD with effect from April 2021' available at <https://www.law.co.zw/download/general-tariff-or-fees-for-legal-practitioners-usd-with-effect-from-april-2021/>, accessed on 8 November 2022.

### 1.3. Historical approach to disputing and settlement

Traditional African societies solved disputes in four main ways: wars, traditional courts (village head (*sabhuku*), headman (*sadunhu*), chief (*mambo*), and King for the Ndebele), family platforms (either at the household level or through extended family members), and through religious intermediaries.<sup>16</sup> These methods ensured harmonious living in communities. The chief's court held (and continues to hold) executive power. Traditional courts have been somewhat integrated into the formal justice system through legislation and find expression in the Constitution.<sup>17</sup> The family was largely and remains an informal dispute settlement platform<sup>18</sup>, and religious intermediaries resolved (and continue to resolve) disputes involving kingship. These judicial hierarchies, including the family, operate unofficially within non-state law.<sup>19</sup>

Disputes are related to people's way of life. Therefore, the social structure of a society determined the types, characteristics, and manner in which disputes were settled.<sup>20</sup> The socio-cultural values, customs, and philosophies of traditional African societies (which, to some extent, continue in contemporary rural areas) supported the dispute management approaches utilised.<sup>21</sup> For example, traditional African dispute resolution (hereinafter TADR) efforts

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<sup>16</sup> Rautenbach 'Traditional courts as alternative dispute resolution (ADR) – Mechanisms in South Africa' in Diedrich (ed) *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition* (2014) 296-319.

<sup>17</sup> Constitution, s 162 states that judicial authority is vested in the courts, which include customary courts; Customary Law and Local Courts Act, 1992 (as amended). The statute book in Zimbabwe is numbered according to the year the legislation was enacted and includes both the original and amending Acts.

<sup>18</sup> Members of a particular community fall under automatic jurisdiction of the family of their birth, which exercises authority over them.

<sup>19</sup> For a full discussion on non-state justice structures, see Koyana, Bekker and Mqoke 'Traditional authority courts' in Bekker, Ruatenbach and Goolam (eds) *Introduction to Legal Pluralism in South Africa* (2010) 177; Rautenbach (n16); Schärf 'Non-state justice systems in Southern Africa: How should governments respond?' (Unpublished Paper, Institute of Criminology, University of Cape Town, 2003) at 3.

<sup>20</sup> Ndlovu and Ndlovu 'Mediation as conflict resolution in traditional Ndebele Society' (2012) 6 *Africana* 1 at 169.

<sup>21</sup> Dodo, Muzenje, and Zihanzu 'Endogenous conflict resolution in Zimbabwe: A comparison of selected Shona mechanisms in Zimbabwe' (2017) 39-40 *Ethnic Studies Review* 135 at 136.

primarily used negotiation (*kutaurirana*), mediation (*kuyananiiswa*), reconciliation (*kuregererana*) and adjudication (*kutongwa/kutongeswa*).<sup>22</sup>

While African societies shared similar dispute resolution characteristics, each group<sup>23</sup> utilised a unique methodology, and the outcomes were often different.<sup>24</sup> For example, dispute resolution processes such as mediation were employed more to prevent rather than resolve disputes among the Ndebele people.<sup>25</sup> Therefore, mediators were trained from an early age to understand the nature of disputes in society and apply this knowledge to prevent and resolve them.

Additionally, because the Ndebele King ruled through chiefs, who in turn ruled over at least ten villages, with each village being under a headman, disputes between two people were resolved through passive mediation, and should *ukuxolisana* (reconciliation) fail at this stage, the issue was taken to the village headman for resolution. Passive mediation, as used and understood in the Ndebele culture, is akin to facilitated negotiation, whereby parties, through a neutral third-party, discuss the cause of the dispute, with a view to reconcile. The headman had three elders to help them mediate fairly, with the goal of *ukugezelana induna* (washing

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<sup>22</sup> Ibid at 139.

<sup>23</sup> The communities of Africa were multicultural, with many (but not all) having a paramount chief or a king-in-council at the head. For example, the Yorubas in Nigeria, the Zulus of South Africa, and the Bemba of Zambia. See Lloyd 'The integration of the new economic classes into local government in western Nigeria' (1953) 52 *African Affairs* 209 at 329-30; Roberts *Order and Dispute: An Introduction to Legal Anthropology* (2016) 31. Roberts describes pre-colonial African societies as units. For example, when a conflict arose between members of a unit, the entire community would become involved in resolving the dispute. The rationale, according to Roberts was that a conflict between individuals would automatically affect the whole community.

<sup>24</sup> Ndlovu and Ndlovu (n20) 169. These systems are all directed at reconciling the parties to a dispute. For descriptions of various African societies, see accounts of the Barotse, Bhaca, Tivu, and Shona in Bennet *Customary Law in South Africa* (2004) 161-168; Oomen *Chiefs in South Africa: Law, Power, and Culture in the Post-Apartheid Era* (2005) 21, 24, 64.

<sup>25</sup> Ndlovu and Ndlovu *ibid* at 168.

each other's scars). The process helped parties to forgive each other and live harmoniously once the dispute was concluded.<sup>26</sup>

Furthermore, active mediation in Ndebele culture placed more responsibility on the neutral third-party to strategically press both sides on points of contention and then offer suggestions and advice that encouraged parties to compromise and settle disputes. Passive and active mediation are not a preserve of Ndebele society but a way of life for many contemporary African societies. However, they are informal because they are not recognised in law.<sup>27</sup>

#### a. Dispute resolution under British colonialism

The Charter of 1889 defined legislative and judicial issues in Rhodesia (now Zimbabwe) under the British South Africa Company.<sup>28</sup> The first High Court was established in 1894, with appeals proceeding to the Supreme Court of the Cape of Good Hope (today, Cape Town, South Africa).<sup>29</sup> In 1898, the Legislative Council was established with the power to enact laws on behalf of the British Crown.<sup>30</sup> However, the imposition of colonial law negatively impacted African communities' functional dispute settlement systems<sup>31</sup>, limiting access to equitable justice.<sup>32</sup> It is axiomatic that colonial Britain imposed a legal system on the Indigenous peoples of Zimbabwe. Customary law as practised by African communities was permitted, but only to

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<sup>26</sup> Ibid at 178.

<sup>27</sup> Chapter two discusses the definitions of law, justice and access to justice, providing context for discussions on dispute resolution and the justice system.

<sup>28</sup> Pfumorodze and Chitsove 'The law in Zimbabwe' available at <https://www.nyulawglobal.org/globalex/Zimbabwe1.html>, accessed on 10 March 2017.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> For emphasis, it is worth repeating that multiple accounts of how traditional African societies developed legal systems have been written and recognised. The Privy Council pronounced in *re Southern Rhodesia* [1919] AC 211 at para 233-4 that 'there are Indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law' at para 233-4. For further discussion, see Elias *The Nature of African Customary Law* (1956); Allott *New Essays in African Law* (1970); Bennett and Peart *A Sourcebook of African Customary Law for Southern Africa* (1991).

<sup>32</sup> Ndlovu and Ndlovu (n21) 170.

the extent that it did not run contrary to the demands of the colonial administration, or where it was thought to be repugnant to European ideas of justice, humanity, and morality.<sup>33</sup>

Additionally, the colonial era brought laws to regulate industrial relations, which remain a priority in Zimbabwe today.<sup>34</sup> The Master and Servants Ordinance Act, 1901<sup>35</sup> provided civil and criminal remedies for breach of the employment relationship<sup>36</sup>, followed by the Industrial Conciliation Act, 1934.<sup>37</sup> Several constitutional revisions occurred, including in 1961, 1965, 1969, 1979, and the Lancaster House Constitution in the same year.<sup>38</sup>

Throughout colonial rule and present-day Zimbabwe, the perception of TADR as inferior to the colonial common law system created a chasm between traditional principles of justice and their practical application. Traditional justice systems have retained some substantive principles, but their enforcement mechanisms were diminished or removed.<sup>39</sup> Colonial administrators selected and supervised chiefs, controlled the interpretation of customary law, and added jurisdiction that previously belonged to other spheres, resulting in an adulterated version of TADR.<sup>40</sup> Thus, the term ‘customary law’ is a misnomer created to meet the

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<sup>33</sup> Bennet ‘Conflict of laws: The application of customary law and the common law in Zimbabwe’ (1981) 30 *International and Comparative Law Quarterly* 1 at 59; Benda-Beckmann and Turner ‘Legal pluralism, social theory, and the state’ (2018) 50 *The Journal of Legal Pluralism and Unofficial Law* 3 at 256; Mikano ‘The repugnancy and incompatibility tests and customary law in Anglophone Cameroon’ (2015) 15 *African Studies Quarterly* 2 at 85-106. The repugnancy test was used as a legal assessment to determine if a law contradicted *higher* (colonial) legal principles.

<sup>34</sup> The other area that was prioritised was commercial law to facilitate the extraction and export of resources. See Tamale *Decolonisation and Afro-Feminism* (2020) 135-136.

<sup>35</sup> A significant number of provisions carried criminal penalties for employees found to violate the ordinance. The name of the Act depicts the unequal relationship between employer and employee, i.e., master and servant.

<sup>36</sup> Mlambo ‘From the Second World War to UDI, 1940-1965’ in Raftopoulos and Mlambo (eds) *Becoming Zimbabwe: A History from Pre-colonial Period to 2008* (2009) 103.

<sup>37</sup> Industrial Conciliation Act, 1934.

<sup>38</sup> The Lancaster House Constitution was repealed and replaced with the current Constitution of Zimbabwe, 2013.

<sup>39</sup> Tamale *Decolonisation and Afro-Feminism* (2020) 138.

<sup>40</sup> *Ibid.*

objectives of colonisers.<sup>41</sup> For this reason, in this thesis, the term ‘living customary law’ and TADR refer to mostly<sup>42</sup> informal customs operating without state regulation.

In many African countries, including Zimbabwe, the colonial legal system is considered superior to indigenous laws, leading to constant competition for legitimacy among different legal systems.<sup>43</sup> Both living customary law and customary law are often considered inferior and have not been meaningfully developed, despite constitutional stipulations.<sup>44</sup> This hierarchy perpetuates the challenges faced by citizens who rely on living customary law platforms for justice. Sibanda<sup>45</sup> estimates that 70-80 per cent of disputes are resolved outside state regulation. The estimate is based on 80-90 per cent of the Zimbabwean population living in rural and peri-urban areas<sup>46</sup>, consistent with other studies’ findings. In Uganda, less than five per cent of disputes are resolved in formal courts, while the other 95 per cent utilise living customary law.<sup>47</sup> The colonial justice system imposed on African societies was/is inappropriate and has not evolved to keep pace with societal changes. This presents obstacles to citizens’ access to justice.

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<sup>41</sup> Ibid 142. Himonga ‘The future of living customary law in African legal systems in the Twenty-First Century and beyond, with special reference to South Africa’ in Fenrich, Galizzi and Higgins (eds.) *The Future of African Customary Law* (2011) 32-37; Mann and Roberts *Law in Colonial Africa* (1991) 8.

<sup>42</sup> Some customary mechanisms are part of the formal justice system, although their jurisdiction is symbolic.

<sup>43</sup> Tamale *Decolonisation and Afro-Feminism* (2020) 138-139, 313; Schärf (n20) at 3; Bennett *Application of Customary Law in Southern Africa: The Conflict of Personal Laws* (1985) 39.

<sup>44</sup> Constitution, s 46(2), s 176. To my knowledge, only the South African Constitutional Court has relied on the African philosophy of ubuntu in its decisions. It has encouraged the incorporation of living customary law principles within general law as a way of observing the dignity of Black Africans. See *Bhe v Magistrate, Khayelitsha*, 2005 (1) SA 580 (CC) at para 65. Also see *Mthembu v Letsela* 2000 (3) All SA 219 (A).

<sup>45</sup> Sibanda ‘An analysis of traditional leadership, customary law and access to justice in Zimbabwe’s constitutional framework’ 2019 *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* at 53. For further reading on large sections (90 per cent) of society relying on the non-state justice system, see the 2004 report published by the United Kingdom Department for International Development ‘Non-State Justice and Security Systems’ *DFID* (2004).

<sup>46</sup> According to the 2022 census, the rural population has fallen to 61.4 per cent from the previously reported 80 per cent. See ZimStat (n1).

<sup>47</sup> Hague Institute for Innovation of Law (Hiil) ‘Justice needs in Uganda, 2016: Legal problems in daily life’ available at: [https://www.hiil.org/wp-content/uploads/2018/07/Uganda-Mini-Folder\\_2016-1.pdf](https://www.hiil.org/wp-content/uploads/2018/07/Uganda-Mini-Folder_2016-1.pdf), accessed 26 November 2022.

#### 1.4. Overview of the contemporary Zimbabwean dispute resolution system

The judiciary of Zimbabwe consists of superior and lower courts, with the Constitutional Court<sup>48</sup> as the highest court. The Supreme Court<sup>49</sup> serves as the final court of appeal in all matters except those under the Constitutional Court's jurisdiction.<sup>50</sup> The High Court has original jurisdiction over all civil and criminal matters, supervises magistrates' courts, and reviews their decisions. The magistrates' court is the lowest court with civil and criminal jurisdiction as determined by statute.<sup>51</sup>

The Constitution recognises Customary law courts, with jurisdiction to apply customary law in civil disputes.<sup>52</sup> These are designated primary or community courts, presided over by a headman or a chief.<sup>53</sup> They were established to provide access to justice in rural areas consistent with African customs and values. Customary courts have limited jurisdiction, and defendants must consent to their jurisdiction.<sup>54</sup> Lawyers are not permitted in customary courts, and judgment is enforceable by first registering it with the magistrates' court. Appeals from primary courts go to community courts, then to magistrates' court, and finally to the Supreme Court.<sup>55</sup> Cases appealed to the magistrate's court from customary courts must be re-heard, which means 'appeals' are symbolic. Therefore, customary law courts lack legal authority, and thus are symbolic, since their decisions are not part of the record, and the relevant law(s) do not give such decisions the force of law.

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<sup>48</sup> Established in terms of s 166(i) of the Constitution as a superior court of record.

<sup>49</sup> Established in terms of s 168 of the Constitution.

<sup>50</sup> Constitution, s 169(1).

<sup>51</sup> Magistrates' Court Act, 1932 s 49(1)(a)(b)(c).

<sup>52</sup> Constitution, s 162(g) and s 174.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Supra* (n17) s 16(b)(1).

<sup>55</sup> For a historical discussion on customary law courts, see Ncube 'Customary law courts restructured once again: Chiefs and headman regain their judicial functions' (1989) 7 *Zimbabwe Law Review* at 9-17; Coldham 'Customary law and Local Courts Act, 1990 of Zimbabwe' (1990) 34 *Journal of African Law* 2 at 163-165.

### a. Specialist courts

Specialised courts were established in Zimbabwe to provide more accessible and efficient justice in specific areas of law. There are five main specialised courts: labour<sup>56</sup>, administrative<sup>57</sup>, income tax<sup>58</sup>, electoral<sup>59</sup>, and customary law courts.<sup>60</sup> Other specialised courts include small claims<sup>61</sup>, maintenance<sup>62</sup>, commercial<sup>63</sup>, and children's courts.<sup>64</sup> These courts' jurisdictions are restricted to their respective specialised areas. For example, the labour court's jurisdiction is limited to employment matters, as conferred by the Labour Act, 1985.<sup>65</sup> An appeal of a labour court decision goes to the Supreme Court on questions of law. Specialist courts were established to extend how people and businesses obtained justice. Still, significant portions of the population continue to face barriers, including lengthy delays and prohibitive costs, mirroring those in general law courts.<sup>66</sup>

### b. System of administration of the courts

Registrars administer the formal court system. They receive filed cases and assign hearing dates, while messengers of court<sup>67</sup> and Sheriffs<sup>68</sup> serve court processes and enforce court orders. The National Prosecuting Authority (NPA)<sup>69</sup> was established to prosecute criminal

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<sup>56</sup> Labour Act, 1985.

<sup>57</sup> Administrative Court Act, 1979.

<sup>58</sup> Income Tax Act, 1967.

<sup>59</sup> Electoral Act, 2005.

<sup>60</sup> Supra (n17).

<sup>61</sup> Small Claims Courts Act, 1993.

<sup>62</sup> Supra (n52).

<sup>63</sup> SI 2020-123 (High Court (Commercial Division) Rules, 2020).

<sup>64</sup> Children's Act, 1972.

<sup>65</sup> Supra (n56).

<sup>66</sup> See chapter two for a general discussion of barriers to access to justice and chapter four for empirical evidence from this study.

<sup>67</sup> Attends to execution and processes from the magistrates' court.

<sup>68</sup> Executes orders and serves process from superior courts and operates through the office of the Deputy Sheriff.

<sup>69</sup> National Prosecuting Authority Act, 2015.

cases on behalf of the state and is institutionally independent of the Attorney General (AG).<sup>70</sup> The Legal Practitioner's Act, 1981<sup>71</sup> regulates legal education and practitioners' registration, conduct and discipline, and establishes the Law Society of Zimbabwe as the institution to regulate the legal profession. However, the High Court administers the registration procedure for admission as a legal practitioner.

### 1.5. Legal aid

Legal aid (LA) is the provision of free legal services to indigent persons who cannot afford legal services. Three categories of LA services are available in Zimbabwe: civil, criminal, and LA provided by private institutions.<sup>72</sup> The Legal Aid Act, 2003<sup>73</sup> established the Legal Aid Directorate (LAD), consisting of a director and law officers. An applicant must satisfy the director of insufficient funds<sup>74</sup>, reasonable chances of success in court, and the need and benefit from the service provided.<sup>75</sup>

The Constitution requires the state to take practical measures to provide legal representation for people who need it and cannot afford legal fees.<sup>76</sup> However, the state can only act within the limits of available resources.<sup>77</sup> The state typically relies on this provision to justify its failure to provide broader access to LA, often citing the country's economic challenges. As a department within government, the LAD in Zimbabwe faces criticism over its independence

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<sup>70</sup> A presidential appointment made to a person who qualifies for appointment as a judge of the High Court. The AG is the principal legal advisor to the Government, representing it in civil and constitutional proceedings, drafting legislation and promoting, protecting, and upholding the rule of law.

<sup>71</sup> Legal Practitioner's Act, 1981.

<sup>72</sup> Madhuku *An Introduction to Zimbabwean Law* (hereinafter *Zimbabwean Law*) (2010) 127.

<sup>73</sup> Legal Aid Act, 2003.

<sup>74</sup> The term 'insufficient means' is not defined in the Act. Therefore, there is no clarity on who should qualify for LA services.

<sup>75</sup> The LA fund (s 14) consists of contributions from Parliament. LA beneficiaries may be required to contribute to the cost if deemed reasonable by the director under s 15 and s 16 of the Act. The director can also deduct any court-awarded amount under s 16.

<sup>76</sup> Constitution, s 31.

<sup>77</sup> *Ibid.*

and impartiality despite clear guidelines governing LA provision.<sup>78</sup> South Africa and England provide examples of independent statutory bodies that may be regarded as impartial because of their statutory independence from the government.<sup>79</sup>

#### a. Legal aid by private institutions

Private institutions in Zimbabwe offer LA services to fill gaps the state leaves. These organisations are staffed mainly by paralegals<sup>80</sup> and provide services based on their objectives and governing statutes. For example, the Legal Resources Foundation has a network of paralegals who offer services to the public. The Zimbabwe Lawyers for Human Rights provides qualified lawyers to represent individuals in court on human rights issues. The Zimbabwe Congress of Trade Unions has paralegals who serve and represent members of their affiliate trade unions in the labour court.<sup>81</sup> The Justice for Children Trust provides qualified legal practitioners to represent children in court. However, lack of funding hinders the ability of these organisations to fully provide LA to the poor because, in the absence of government support, private organisations rely on external financing, which is not always available.

#### 1.6. Reforms to the justice system related to access to justice: 1980-2020

The attainment of independence in 1980 brought about legal rights to Black Africans, and majority rule meant social justice and true parliamentarism. Parliamentarians are the voices of their constituents, and one of their fundamental roles is to pass laws that reflect citizens' will and cultural, historical, religious, and political views. Despite efforts to revamp the colonial

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<sup>78</sup> *Zimbabwean Law* 128, 133. For example, LAD officers have an inherent ethical challenge in situations involving claims against colleagues in the same government department.

<sup>79</sup> Legal Aid Act 22 of 1969 (as amended) (South Africa), Legal Aid, Sentencing and Punishment of Offenders Act 2012 (England)

<sup>80</sup> Paralegals are non-lawyers who receive basic legal training and provide legal advice on various issues, for example, drafting legal documents.

<sup>81</sup> *Supra* (n56) s 92.

legal structure, it remained challenging as the country was under the Lancaster House negotiated Constitution, which, though noble in some respects, maintained limitations in relation to the values of the liberation struggle. Redistribution of land was one such thorny issue that could only be addressed from 1990.<sup>82</sup>

#### a. Changes to the court system

Zimbabwe inherited the colonial Rhodesian legal system, laws, and courts, which remained the same.<sup>83</sup> For example, the Magistrates' Court Act, 1932<sup>84</sup> was never repealed and replaced, save for some amendments. Magistrates were not guaranteed independence until 1990; constitutional amendments corrected this anomaly. There were 69 magistrates in Zimbabwe in 1981, catering to a population of 7 million.<sup>85</sup> Currently, 235 magistrates and 71 judges serve 15 million people.<sup>86</sup> By contrast, England, with a population of 55 million, has 13 177 magistrates (down by more than half in the last decade) and 3 174 judges.<sup>87</sup> Even when the judicial attrition rate is accounted for, England shows the size of the judiciary that should be expected of an efficiently operating common law system.

The limited capacity of the judiciary in terms of the number of judicial officials relative to the size of the population negatively impacts citizens' access to justice. Therefore, there is a need for significant improvements to the current judicial structure and resources, including infrastructure, to ensure effective access to justice in Zimbabwe. Alternatively, and perhaps

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<sup>82</sup> During the 1979 Lancaster House Conference, a 10-year moratorium on land acquisition was agreed upon as part of the ceasefire negotiations.

<sup>83</sup> Ncube 'Lawyers against the law? Judges and the legal profession in Rhodesia and Zimbabwe' (1997) 14 *Zimbabwe Law Review* at 110.

<sup>84</sup> *Supra* (n51).

<sup>85</sup> Ziwire 'Justice: Overhauling colonial laws for the common good' *The Herald* 7 April 2020.

<sup>86</sup> *Ibid.*

<sup>87</sup> Diversity of the judiciary 2020 statistics. Ministry of Justice 'Diversity of the judiciary: Legal professions, new appointments and current post-holders - 2020 statistics, section 1.3 judicial office holders' available at <https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2020-statistics/diversity-of-the-judiciary-legal-professions-new-appointments-and-current-post-holders>, accessed on 8 November 2022.

more radically, the common law system may be abandoned in favour of a more appropriate legal system that suits the prevailing conditions in Zimbabwe.

*i. Transformation of customary law*

After Zimbabwe gained independence, headman, chiefs, and District Commissioner's courts were abolished in 1981, and primary courts were introduced.<sup>88</sup> However, these courts were later abolished in 1990 because of ministerial appointments that did not provide justice as intended. A new Act was enacted<sup>89</sup>, which restored the judicial functions of headman and chiefs and introduced changes to the colonial choice of law rules.<sup>90</sup> As discussed above, primary and community courts have limited jurisdiction, and customs are only valid if consistent with the Constitution.<sup>91</sup> Despite these reforms, there are gaps in providing justice to citizens because customary courts operate in the shadow of general law.

*b. Notable post-independence legislative changes*

The Labour Act, 1985<sup>92</sup> provides dispute resolution mechanisms, including negotiation, collective bargaining, arbitration, mediation (introduced by the 1992 amendments), and conciliation. Due to the adverse effects of disputes resulting in industrial action on industry, investments, and the economy, the labour field is prioritised in Zimbabwe. However, the effectiveness of dispute resolution mechanisms such as conciliation, arbitration, and specialist

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<sup>88</sup> Customary Law and Primary Courts Act, 1981 (repealed and replaced).

<sup>89</sup> Customary Law and Local Courts Act, 1992. There could be a political explanation for the shift including suspicion that the government wanted to consolidate its power and rule the rural power by proxy through the chiefs, like tactics used by the coloniser pre-independence.

<sup>90</sup> Ncube (n55) 9.

<sup>91</sup> Constitution, s 174(b). One might contend that these provisions perpetuate compatibility and repugnance tests from the colonial era.

<sup>92</sup> *Supra* (n56) s 93.

courts has been questioned for several reasons, including faulty processes<sup>93</sup>, staffing issues, and incompetence.<sup>94</sup>

#### *i. Arbitration*

The Arbitration Act, 1996<sup>95</sup> adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law<sup>96</sup> with minor modifications. It covers agreements made before and after September 1996, and has been useful in commercial law. However, some matters fall outside the scope of arbitration, such as contracts that violate public policy, for example, contracts that result in a breach of law, harm citizens, or cause injury to the state.<sup>97</sup> The Act requires that arbitration under the Labour Act, 1985 complies with the Arbitration Act, 1996 except where the Labour Act, 1985 has provisions that exclude its application.<sup>98</sup>

#### *ii. Ombudsman*

The Ombudsman Act, 1982 was enacted to bring more accountability to maladministration and violations of rights by corporations and public bodies.<sup>99</sup> The office of the Ombud (renamed Public Protector in 2011) was abolished in 2013, and the unfinished cases were transferred to the Zimbabwe Human Rights Commission (ZHRC)<sup>100</sup>, which continues to provide access to justice for complaints against public bodies and officials.

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<sup>93</sup> The Labour Act is silent on timelines for case completion in conciliation.

<sup>94</sup> Langa 'Public interviews expose judges' shortcomings' *The Standard* 5 October 2016. The story exposes multiple judges who churn out twelve judgments (with none of them reportable) compared to other judges delivering 300 judgments per year.

<sup>95</sup> Arbitration Act, 1996.

<sup>96</sup> Model Law on International Commercial Arbitration (1985), as amended and adopted in 2006, United Nations Commission on International Trade Law.

<sup>97</sup> *Supra* (n95) s 4(2)(b).

<sup>98</sup> *Ibid* s 5(2).

<sup>99</sup> Ombudsman Act, 1982.

<sup>100</sup> Constitution, para 16 in terms of Schedule 6.

A 2015 World Bank report recommended the appointment of a financial ombudsman to protect consumers of financial services, provide consistent professional help, and clear institutions of unfair charges.<sup>101</sup> The Constitution recognises the need for alternative dispute resolution<sup>102</sup> (ADR). To this end, the National Peace and Reconciliation Commission (NPRC) is mandated to conciliate and mediate disputes among communities, organisations, groups, and individuals.<sup>103</sup> This was after the realisation that non-state dispute resolution mechanisms may further enhance access to justice in Zimbabwe.

### c. Deficiencies with procedural and substantive law

Some commentators believe that procedural and substantive law deficiencies result in inequitable outcomes. Poor-performing judges who withhold or do not write judgments<sup>104</sup> and low-quality legal representation<sup>105</sup> are among the fundamental issues. The quality of legal resources such as expert witnesses and investigators, is often too costly for the poor and small businesses in Zimbabwe. The Constitution's guarantee of equality before the law<sup>106</sup> is undermined by socioeconomic barriers such as poverty, illiteracy, and ignorance<sup>107</sup>,

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<sup>101</sup> World Bank Group 'Zimbabwe: Diagnostic review of consumer protection and financial literacy – Volume I: Key findings and recommendations' (2015) at 48.

<sup>102</sup> The acronym ADR will be used throughout this thesis for convenience and maintenance of common usage of the phrase 'alternative/appropriate dispute resolution'. A broader discussion of the phrase is in chapter three § 3.2. Suffice it to say, ADR, as an independent dispute resolution system, is based on the theory of process pluralism and supported by cogent processual principles.

<sup>103</sup> Constitution, s 68(3b).

<sup>104</sup> Staff Reporter 'Review of Zimbabwe's judiciary system demanded' *Bulawayo24* 24 March 2013. The article reports a judge's failure to sentence Jonathan Mutsinze for over ten years, and the State keeping him in remand prison for the same period. Bwititi 'Under-performing judges face axe' *The Sunday Mail* 29 January 2017; Langa (n94). These articles highlight that some judges had over 40 per cent of their judgments appealed, while others had over 20 per cent overturned.

<sup>105</sup> Galanter 'Why the 'haves' come out ahead: speculations on the limits of legal change' (1974) 9 *Law & Society Review* 1 at 95–160.

<sup>106</sup> Constitution, s 165(1a).

<sup>107</sup> *Muziringa v Teteka* (8729/06) – an interdict was granted with costs, although Teteka had a defence but did not know what to do.

compounded by procedural complexities. Overly formalistic procedures and unhelpful condonations may also be criticised.<sup>108</sup>

During fieldwork between 2019 and 2022, I observed several cases at the magistrates' and small claims courts. My fieldwork revealed the significant challenges unrepresented litigants face in navigating the intricacies of court procedures. For instance, it was common to witness litigants unintentionally omitting the necessary affidavits crucial for specific legal actions. Additionally, a recurring issue revolved around litigants who, due to financial constraints, found it challenging to cover the fees required by the messenger of court for the proper service of summons.<sup>109</sup> These experiences shed light on broader issues surrounding access to justice in Zimbabwe and the obstacles faced by unrepresented litigants.

Unjust laws and institutions create challenges for accessing justice. In Zimbabwe, judges cannot ignore unjust rules, as they are not allowed to lean on the principle of *lex iniusta non est lex* ('an unjust law is no law at all').<sup>110</sup> The historical Somerset case<sup>111</sup> illustrates that some laws are unjust and against natural law. Examples of contemporary unjust laws include money bail, which poor people in Zimbabwe cannot afford, with a purchasing power parity of US\$ 1.90.<sup>112</sup> Foucault argued that these laws are not laws but pervasions of law and simply violence.<sup>113</sup> The judiciary's track record of protecting civil liberties is questionable because they must follow enacted rules, even if they are unjust. The case of *R v Sachs*<sup>114</sup> aptly captures

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<sup>108</sup> *Mandava v Chasweka* [2008] ZWHHC 42; *Main Road Motors v Zimra* [2018] ZWMSVHC 1. I discuss the cases in more detail in chapter four § 4.6(a).

<sup>109</sup> SI 2019-011 (Magistrates' Courts Rules, Ord 2).

<sup>110</sup> *Minister of Lands v Commercial Farmers Union* 2001 (2) ZLR 457 (S), 490F-491B.

<sup>111</sup> *Somerset v Stewart* (1772) 98 ER 499.

<sup>112</sup> World Bank (n12). Section 120 of the Criminal Procedure and Evidence Act, 1927, allows judges to exercise discretion in determining bail amounts, while the Standard Scale of Fines Notice (SI 14A, 2023) demonstrates the varying fines, ranging from US\$ 5 to US\$ 5 000 across 14 levels.

<sup>113</sup> Foucault *The history of sexuality: An introduction* (1990) 37, 60, 88.

<sup>114</sup> *R v Sachs* 1953 (1) SA 392 at 399G-H per Centlivres CJ (South African), whose reasoning affected how courts approached the protection of civil liberties.

how courts are incapable of partiality to transcendental values (e.g., fairness, justice, and human rights) over enacted rules. Therefore, the extent to which courts provide remedies to citizens' grievances stemming from broader societal injustices is limited.

In some instances, judicial techniques may only play a marginal role in resolving disputes, and formal courts may merely supply band-aid solutions to problems.<sup>115</sup> In societies like Zimbabwe, where people typically live along clan lines and have tightly knit relationships, adversarialism can have significant negative consequences. This is because formal court processes polarise litigants with little regard for empathy, thus expressing a frightening Hobbesian vision of humanity.<sup>116</sup> Despite these challenges, litigation remains the dominant disputing mechanism recognised in law outside the labour and commercial legal fields.<sup>117</sup>

It must be said from the outset that this study is not intended to be an anti-court campaign. A modern society without judges, courts, and lawyers is unfathomable because of their crucial role in actualising the ideals of justice. The central thesis is that things may be done differently to enhance access to justice for every Zimbabwean. This is in the face of the general acceptance that there is no single institution or process on its own that can produce a just ordering of a culturally and legally diverse Zimbabwean society. There is a consensus that no single institution can ensure a fair distribution of material and legal resources. Zimbabwe's plural legal and cultural system requires multiple 'formal' institutions and mechanisms to resolve disputes between people, businesses, and the state. I emphasise the term 'formal' because

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<sup>115</sup> Faruqi 'Justice outside the courts: Alternative dispute resolution and legal pluralism' 2000 *Universiti Teknologi MARA* at 1; Astor and Chinkin *Dispute Resolution in Australia* (2002) 29. The authors outline that 'in Western society, where litigation is the dominant method of dispute resolution, lawyers and courts play only a marginal role in resolving disputes and only a small percentage of these disputes is ever brought into the courts.'

<sup>116</sup> Auerbach *Justice Without Law?* (1984) 146.

<sup>117</sup> Constitution, s 69(3).

currently, many Zimbabweans are resolving their disputes outside state regulation through mechanisms that do not have the force of law, which is not sustainable in modern society.

### 1.7. Research questions

The primary question this study seeks to answer is, *how can the right of access to justice be effectively realised by all citizens, including the poor and small businesses in Zimbabwe?* To achieve this objective and answer the primary question, I explore the following subsidiary questions:

1. What factors, if any, impede effective access to justice in Zimbabwe?
2. How can access to justice barriers be overcome in Zimbabwe?
3. How can proposals for enhancing access to justice find practical expression in the formal justice system?

Subsidiary questions empirically address the extent to which the current formal justice system has successfully ensured citizens' access to justice. Furthermore, subsidiary questions assess whether the supply-side of the formal justice system is willing to enforce the right of access to justice effectively. After providing background information to ground the research questions, the following section outlines the methodological decisions, considering the research questions and the available literature.

### 1.8. Methodology and research design

This thesis considers the primary and subsidiary research questions from theoretical and practical perspectives, essential for interdisciplinary studies in the socio-legal field. This research aims to explore barriers to accessing justice, how to overcome these obstacles, and how to integrate the solutions into the formal justice system. Qualitative enquiry through in-

depth interviews with eighteen legal professionals from diverse backgrounds provides rich data to answer the research questions.

I employ ethnographic techniques by sitting in on court sessions at the magistrates' court, small claims court and the High Court during fieldwork. This allows me to observe first-hand, the barriers to access to justice in Zimbabwe, presented throughout this thesis. I apply inductive data analysis within a theoretical and comparative framework of access to justice and ADR and TADR to achieve the research goal. The following sections describe the qualitative research paradigm, data collection, and analysis. I rely on the forms of relevant material outlined below, examples of which are in the bibliography.

#### a. Recruitment of research participants

I collect qualitative empirical data by systematically selecting eighteen legal professionals to interview, guided by the purposive sampling technique.<sup>118</sup> Legal professionals are drawn from government departments, the judiciary, the legislature, private lawyers, academia, and non-governmental organisations (NGOs). Purposive sampling is appropriate for this research because it emphasises representativeness over generalisability.<sup>119</sup> The target segment is legal professionals with a minimum of seven years in practice. Lawyers in Zimbabwe are regarded as experts after seven years of practice and can be considered for judicial positions in Higher Courts. Although all individuals within the research population have an equal chance of

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<sup>118</sup> Babbie *The Basics of Social Research* 4 ed (2008) 204 defines purposive sampling as, 'a type of nonprobability sampling in which the units to be observed are selected based on the researcher's judgment about which ones will be the most useful or representative.'

<sup>119</sup> Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* 3 ed (2011) 176-178. See generally Greene and Caracelli *Advances in Mixed-method Evaluation: The Challenges and Benefits of Integrating Diverse Paradigms* (1997).

participating in a study that uses sampling, it is impossible to have a large sample owing to time and cost constraints. The table below outlines research participants profiles:

Participant	Years in practice	Practice Area	Notes
1	17	Procedural Law, Labour Law, ADR	University Lecturer
2	21	Commercial litigation, Arbitration	
3	45	Retired Judge, ADR	Part-time university lecturer
4	24	In-house counsel	Previously a magistrate. Works at a State Institution
5	15	In-house counsel	Previously a legislative drafter. Works at a State Institution
6	46	Corporate and Commercial law, ADR	Previously labour law
7	45	All	A Member of Parliament
8	16	Researcher	Works at an NGO
9	40	All, ADR	Former Government Minister
10	20	Family law	Works at an NGO
11	18	All, ADR	
12	46	ADR	Administrator
13	10	Constitutional law, Human Rights law	A Member of Parliament
14	14	Human Rights law	
15	23	Superior courts Administration	Previously a magistrate
16	26	Superior courts Administration	
17	13	Human Rights law, Legal research	Works at an NGO
18	16	Legal Officer	Works at a trade union

Table 1.

The interviewees are members of the legal profession who voluntarily participated and provided informed consent.<sup>120</sup> Research involving people and organisations must comply with ethical standards that must be observed. Permission to conduct this study was obtained from the Doctoral Ethics Committee at the University of Cape Town.<sup>121</sup> After getting clearance from the university, permission was obtained from the Judicial Services Commission (JSC) of Zimbabwe, which is responsible for judicial officials. I also obtained permission from the office of the Minister of Justice, Legal and Parliamentary Affairs, and from the Parliament of

<sup>120</sup> A copy of the consent form is in Appendix 1.

<sup>121</sup> Certificate number: L0110-2019 is appendix 3. The certificate was issued after I made a written application to the Committee. The Committee vetted my proposal and made several recommendations, which I implemented before they gave final approval.

Zimbabwe. At the time of conducting interviews (June-September 2019), I obtained written consent from each interviewee by requiring them to sign the university-approved interview consent form.

#### b. Interviews

Fifteen in-depth face-to-face interviews were conducted at various locations and times, which was convenient for participants. Two participants requested that the interview questions be sent via electronic mail, with which I duly complied, and they responded in writing. One participant requested that a telephone interview be conducted using WhatsApp. I conducted one interview per day, usually lasting approximately one hour. All interviews were recorded using a voice recorder and a backup mobile device.

Semi-structured interviews followed an interview guide to obtain experiential narratives from the participants. All the participants were asked a similar set of questions.<sup>122</sup> Participants were asked to elaborate on specific issues that needed clarification at specific points during the interviews.<sup>123</sup>

Absolute anonymity is impossible because I know and was in contact with each interviewee. In some instances, I had to go through gatekeepers in the form of secretaries. However, all participants were given the option of anonymity in subsequent reports and publications generated from this thesis.

Confidentiality is guaranteed by removing the identifying details and assigning numbers to each interviewee in the combined findings and analysis chapters. The documents, interview

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<sup>122</sup> The interview guide is appendix 2.

<sup>123</sup> Babbie (n118) 293.

recordings, and transcripts are stored safely in a password-encrypted file, while shredding will destroy printed copies upon graduation. Through these methods, I ensure that the information provided by research participants cannot be traced back to each of them in any report or subsequent publication generated from the research.

#### c. Literature review

There is limited academic literature on access to justice, ADR, and TADR in Zimbabwe. Notwithstanding, there is a growing body of books, peer-reviewed journal articles, and conference proceedings critically considering access to justice and ADR globally as either a parallel system or part of the formal legal and institutional framework. I draw on this regional and international literature when discussing concepts such as justice, access to justice, and the theoretical and empirical foundations of ADR and TADR to enhance access to justice in Zimbabwe.

#### d. Legal method / comparative analysis

The relevant Zimbabwean laws and policy documents are critical in deepening the understanding and analysis of the past, including the current approach to access to justice and ADR. I further consult the legislation of other jurisdictions, such as Australia, England, South Africa, and Ghana, to draw best practices for co-existential justice systems. International conventions and regional instruments help outline the importance of ADR in enhancing access to justice and its effectiveness in assisting with justice delivery at national, regional, and international levels.

Throughout this thesis, I rely on material from jurisdictions that have enjoyed some success after institutionalising ADR within their formal justice systems. For example, Australia and South Africa are relevant because, like Zimbabwe, they are former British colonies with

subjugated Indigenous people whose community laws were subjected to repugnancy tests in relation to colonial laws. The Black South Africans and Aborigines, like the Indigenous Zimbabweans, are communitarian societies whose traditional justice systems did not differentiate between criminal and civil law in the management and resolution of disputes. Accordingly, attempts to extend access to justice in contemporary Australia through ADR encompass criminal and civil law contexts. This can be instructive for Zimbabwe because the Australian model is an example of best practice.

While I rely on material from other jurisdictions, it is essential to emphasise that this is not a comparative study. I use material from other countries not in the strict comparative law sense, but more as a tool to illustrate examples Zimbabwe may draw from. Notwithstanding these benefits, I acknowledge the inherent challenge of comparative law and bear in mind its traditional deficiency, which assumes functional equivalence when analysing the successes and failures of other jurisdictions, and the lesson(s) Zimbabwe may draw for its access to justice project.

#### e. Analytical framework

This research project is undertaken from a socio-legal perspective to answer specific questions on access to justice in Zimbabwe. An interdisciplinary approach is preferable because of the appreciation that law operates in the context of society. For the study of law to be meaningful, it should reflect, define, shape and be shaped by fundamental social values.<sup>124</sup>

The analytical framework is crucial for identifying key variables that broadly influence the topic and extend knowledge on the subject under study. Therefore, the analysis phase of the

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<sup>124</sup> Abel 'Law in context, sociology and legal institutions, litigation in society' in Luckham (ed) *Law and Social Inquiry: Case Studies of Research* (1981) 34.

study receives considerable attention to maximise the rigour of the process and the quality of the findings. The research method supports selecting an inductive data analysis process for data gathered through semi-structured interviews. To mitigate potential bias, I use triangulation<sup>125</sup> by cross-checking findings with existing literature and multiple data sources. This ensures that interviewees' perspectives are accurately reflected and understood. Triangulation ensures the research goes beyond implying the use of several data sources to verify or improve the credibility and trustworthiness of the findings and interpretations.<sup>126</sup>

### *i. Empirical data analysis*

The research involves qualitative data analysis of interview transcripts and a review of related literature, including case law. The combination of ethnographic notes, existing literature, case law, and transcripts provides the most reliable and verifiable data for analysis. Grounded theory<sup>127</sup> is adopted to analyse the data and allow the findings to emerge.<sup>128</sup> Traditionally, the grounded theory approach has been used in a symbolic interactionism sense.<sup>129</sup> However, I utilise it herein as a broad interpretivist data analysis and theory development method. This is helpful because this thesis examines the historical and futuristic elements of the justice system.

Grounded theory results from systematically collected data within socio-legal research and lays a framework for conducting code-related analysis. This thesis employs coding and thematic

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<sup>125</sup> A method used in qualitative research that involves cross-checking multiple data sources and collection procedures to evaluate the extent to which all evidence converges. For a deeper discussion of triangulation, see Lather 'Issues of validity in openly ideological research: Between a rock and a soft place' in Lincoln and Denzin (eds) *Turning Points in Qualitative Research: Tying the Knots in a Handkerchief* (2003) 185.

<sup>126</sup> Lather *ibid* 194; Morgan *Focus Groups as Qualitative Research* (2009) 3.

<sup>127</sup> An approach to qualitative data analysis using emergent methodologies, such as constant comparison. It allows a theory to develop from the data (from the ground up) without preconceived or inflexible ideas. Creswell (n1 19) 210; Corbin and Strauss *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* 4 ed (2015); Charmaz *Constructing Grounded Theory* 2 ed (2014).

<sup>128</sup> Goulding 'Grounded theory: Some reflections on paradigm, procedures and misconceptions' (1999) WP006/99 *Wolverhampton Business School* at 7; see generally Glaser and Strauss *The Discovery of Grounded Theory: Strategies for Qualitative Research* (2017).

<sup>129</sup> Charmaz *Constructing Grounded Theory* 2 ed (2014) 249-255.

analysis to align with grounded theory fundamentals. Coding is a crucial step in the selective reduction process.<sup>130</sup> Multiple readings of ethnographic notes and interview transcripts enable the development and classification of raw data. This process leads to creating a framework that I utilise to capture the key themes emerging from the data. Categorising the data into content analytic units based on themes that emerge from the data reveals key themes related to the inaccessibility of justice, improving access to justice, and institutionalising ADR and its TADR form in the formal justice system.

Following the transcriptions of the interviews, I manually (using pen, paper, and sticky notes) code the text into manageable categories consisting of single phrases, enabling me to concentrate on specific patterns relevant to the primary and subsidiary research questions.<sup>131</sup> After that, I categorise the content of each transcript into analytic units based on thematic groupings.<sup>132</sup> Each piece of data from the transcripts related to a theme is grouped to assist in interpreting its meaning in relation to enhancing access to justice in Zimbabwe.

In analysing the interview data, I select direct quotes that best articulate the participants' responses to the interview questions. However, a limitation of this approach is that some participants may be overrepresented in the findings if their responses are more eloquent or provide more vivid examples. This could create the impression that the research relied on only a few interviewees, when others held similar views.

To ensure clarity and where the context demands it, reference to some participants may necessitate concise professional background descriptions. For example, P3 is now the head legal counsel at a state institution but used to be a provincial magistrate. It is sometimes

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<sup>130</sup> Howard-Wagner 'Who are the real "heroes" and "villains": The print media's role in constructing the "public liability crisis" as a "moral panic drama"' 2006 *The Newcastle Law Review* 10 at 73.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

necessary to add her previous employment when she shares her experiences as a magistrate to build context.

## 1.9. Structure of the thesis

### a. Chapter one: Zimbabwe in context: Dispute resolution as a research subject

Chapter one provides context for the broader issues underpinning the study, the primary research question, and methodological decisions.

### b. Chapter two: Building an understanding of justice and access to justice

Chapter two distils the thesis objective by discussing the concepts of law, justice, and access to justice. This chapter presents several philosophical debates and situates them in the Zimbabwean context. It also develops a theoretical foundation to analyse the empirical data collected through interviews with legal professionals. Cappelletti's third wave and Economides' fourth wave of access to justice reforms are discussed before highlighting common global barriers to access to justice.

### c. Chapter three: Theory and debates on alternative dispute resolution

Chapter three discusses ADR as an independent dispute resolution system, including its advantages and disadvantages. ADR processes: negotiation, conciliation, mediation, and arbitration are presented before discussing Sander's multi-door courthouse and how disputes can be matched to an appropriate forum for resolution.

### d. Chapter four: Barriers to access to justice in Zimbabwe

Chapter four discusses the empirical data collected on the first subsidiary research question assessing the accessibility of justice in Zimbabwe, with sub-headings addressing identified

barriers. Quotations from interviewees are used to provide direct, concurrently analysed information. This chapter discusses the link between the access to justice challenges participants identified and Zimbabwe's socioeconomic and political situation. It also unpacks participants' views about citizens' normative visions of justice and whether they receive their expected outcomes from the formal justice system.

e. Chapter five: Enhancing access to justice in Zimbabwe

Chapter five analyses empirical data related to participants' proposals for addressing the second subsidiary research question, focussing on enhancing access to justice. Decentralisation is proposed as a solution to geographical and financial barriers to access to justice. The chapter also discusses changes required to overcome substantive and procedural obstacles to access to justice. Three dispute resolution models suggested by participants are presented, including state-regulated ADR and TADR systems that some research participants called Room 57. The second model involves extending the pilot programme under trial at the Family Law Division of the Zimbabwe High Court. The third model involves adopting a dual legal system operating in Botswana, where customary and general law courts coexist.

f. Chapter six: Paving the way forward: Embedding socially appropriate dispute resolution within the formal justice system

Chapter six discusses data on the institutionalisation or integration of ADR in its TADR form within the formal justice system. It suggests that any change to the formal justice system should result in an innovation with the force of law, which can be achieved by amending the Constitution and enacting an ADR, TADR enabling statute that covers all legal fields in

Zimbabwe. The chapter also discusses two process theories<sup>133</sup>, institutional and structural. Process theory provides an analytical framework for operationalising the participants' proposals for enhancing access to justice in Zimbabwe. This framework identifies key variables broadly influencing the topic and extends knowledge on the subject under investigation.

g. Chapter seven: Conclusion

Chapter seven concludes the thesis. In doing so, it draws together key insights discussed in previous chapters. First, it provides a contextual overview (chapter one) of Zimbabwe's historical and contemporary justice system and dispute resolution. It also recaps the methodological decisions that influenced the research, including data gathering, analysis, and presentation. Secondly, it outlines the global and local philosophical debates on concepts such as law, justice, ADR, and TADR (discussed in chapter two and chapter three) influencing access to justice. Thirdly, it synthesises the analysis of empirical evidence addressing the three subsidiary research questions, i.e., barriers to access to justice, ways to overcome the obstacles, and implementation of the solutions (chapter four, chapter five, chapter six).

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<sup>133</sup> A process theory is a system of ideas that explains how an entity changes and develops. For a fuller discussion on process theory, see Van de Ven *Engaged Scholarship: A Guide for Organizational and Social Research* (2013).

## CHAPTER TWO

### BUILDING AN UNDERSTANDING OF JUSTICE AND ACCESS TO JUSTICE

#### 2.1. Introduction

This thesis is centred on the notion of justice and whether the available dispute resolution mechanisms are sufficient to ensure access to justice for citizens and small businesses in Zimbabwe. While *justice* and *citizens' access to justice* anchor this study, the definitions of these concepts are quite elusive. Thus, the chapter begins with a discussion of the philosophical debates on the definition of law, which is intrinsically connected with justice and access to justice. A discussion of law provides the necessary context. It shapes the analysis of empirical data gathered through interviews, particularly in chapter four, which addresses the first subsidiary research question on barriers facing citizens when accessing justice.

After discussing the concept of law, I outline the various definitions of justice, setting a foundation to contextualise the meaning justice takes among citizens in Zimbabwe. The following section examines the concept of access to justice from a global and local perspective. The section also discusses the four waves of reform and common barriers to access to justice.

#### 2.2. An overview of the definitions of law

Law is a dynamic concept, which explains the difficulty in arriving at a universally accepted meaning.<sup>1</sup> Legal definitions can be analysed through various theoretical lenses. Some of the prominent perspectives include natural law theory, legal positivist theory, and socio-anthropological theory. However, this is not an exhaustive list, and many other theories, such

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<sup>1</sup> Tamanaha 'An analytical map of social scientific approaches to the concept of law' (1995) 15 *Oxford Journal of Legal Studies* 4 at 501ff.

as the pure theory, the realist schools in America and Scandinavia, and the economic approach, offer valuable insights. Historical, anthropological, and sociological perspectives also provide important context and depth to our understanding of law.

This thesis focuses on three categories (natural law theory, positivist theory, socio-anthropological theory), relevant to the subject under study, legal practice, and lived experience in Zimbabwe. Natural lawyers advance the view of law involving principles of justice and right.<sup>2</sup> The defining characteristic of law in natural law theory is morality, which is known through reason. From a morality standpoint, evil legal systems and laws are disqualified.<sup>3</sup> The maxim *lex iniusta non est lex* captures the fundamental notion of justice in natural law.<sup>4</sup> It means the definition of law is limited to ‘only that which fits within a pre-existing normative order.’<sup>5</sup> When religious worldviews collapsed with the onset of the post-Enlightenment period, modern natural law theorists attempted to re-establish the theory by arguing for the reconnection of law and morality.<sup>6</sup> Law and morality are closely related because they regulate individual behaviour in society.

Law may also be founded on legal positivist theory as an institutionalised rule system established by governments. Therefore, the positivist definition of law does not consider the justness of the law but recognises primary rules (substantive laws) and secondary rules (laws governing how rules are made).<sup>7</sup> Unlike natural law theory, legal positivists recognise evil legal systems and laws as law.<sup>8</sup> This is because legal positivism clearly distinguishes between what

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<sup>2</sup> World Bank ‘World development report governance and law’ (2017) 84. Damich ‘Essence of law according to Thomas Aquinas’ (1985) 30 *The American Journal of Jurisprudence* 1 at 79.

<sup>3</sup> Historically, natural law theorists sought to discover and justify human sovereign law within the realm of religion and God, evidenced by nature. Therefore, what is evil is harmful, wicked, and morally reprehensible conduct.

<sup>4</sup> Damich (n2).

<sup>5</sup> Weinreb *Natural Law and Justice* 4 ed (1997) 101-126.

<sup>6</sup> Ibid 224-246.

<sup>7</sup> Hart *The Concept of Law* (1961) 89–96.

<sup>8</sup> Madhuku *An Introduction to Zimbabwean Law* (hereinafter *Zimbabwean Law*) (2010) 2.

the law is and what it ought to be. To illustrate, judges are prohibited from imposing their moral judgments when determining what the law is when adjudicating a case.

Anthropologists and sociologists represent another category. This approach defines law in terms of normative regulation within a social group regardless of state legal institutions.<sup>9</sup> The socio-anthropological definition of law is grounded in the idea that law is found in social life and between relations among community members.<sup>10</sup> The notion of law as consisting of an exclusively organised, centralised legal system with codes, courts, and constables is rejected.<sup>11</sup> Anthropologists and sociologists rather argue that law consists of fundamental customs and usages that order social life.<sup>12</sup> The approach faces criticism for being too broad, so much so that it is 'indistinguishable from the study of the obligatory aspect of all social relationships.'<sup>13</sup>

#### a. Contextualising the concept of law in Zimbabwe

In Zimbabwe, positivism is the dominant approach to defining state law. The positivist approach is applied to the formal justice system when interpreting the law in various situations.<sup>14</sup> This means that in Zimbabwe, moral acceptability is usually not the primary consideration when ascertaining what the law says in any situation.<sup>15</sup> Hence, regardless of the justness, fairness, or moral value of the law, if it is passed by Parliament and enforced by the State, it is law unless it is challenged for its failure to comply with constitutional values. Despite its dominance, the positivist approach contradicts the lived realities in Zimbabwe, where most

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<sup>9</sup> Tamanaha 'Understanding legal pluralism: Past to present, local to global' (2008) 30 *Sydney Law Review* 3 at 391.

<sup>10</sup> Malinowski *Crime and Custom in Savage Society* (1926) 14.

<sup>11</sup> *Ibid.*

<sup>12</sup> World Bank (n2) 84.

<sup>13</sup> Moore *Law as Process: An Anthropological Approach* (1978) 220.

<sup>14</sup> *Zimbabwean Law* 2.

<sup>15</sup> *Ibid.*

citizens subject themselves to regulation by living customary law.<sup>16</sup> The historical context of Zimbabwe is characterised by Indigenous Black Africans relying on customary practices to govern<sup>17</sup> their lives, including resolving disputes (some of which are informal and not part of state law). This means that a *de facto* parallel dispute resolution system exists, leading to conflicts between formal and informal systems.

What exacerbates the situation in Zimbabwe is that, in principle, customary law is as much law as state law because the Constitution encourages its development.<sup>18</sup> Still, there are constant tensions between customary and statutory law. For example, general law courts are bound by statutory law and obligated to develop customary law. The obligation to develop customary law while remaining faithful to legal positivism creates a paradox that may obstruct access to justice. This is because the different approaches to law are constantly vying for legitimacy, with statutory law recognised and enforced by the state and customary law recognised and respected by citizens.

### 2.3. An overview of the concept of justice

This section outlines a historical account of justice. It relates the concept of justice to the problem statement this thesis is seized with, i.e., enhancing access to justice for citizens and small businesses. A historical approach is necessary to illustrate the international context of the rule of law and the leading debates that informed the methodological decisions adopted to address primary and subsidiary research questions.<sup>19</sup> The earliest written definition of ‘justice’

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<sup>16</sup> Sibanda ‘An analysis of traditional leadership, customary law and access to justice in Zimbabwe’s constitutional framework’ 2019 *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* at 53.

<sup>17</sup> Customary law is like what Galanter called ‘Indigenous law’ and defines it in terms of ‘concrete patterns of social ordering’. See Galanter ‘Justice in many rooms: Courts, private ordering, and indigenous law’ (1981) 13 *Journal of Legal Pluralism and Unofficial Law* 19 at 17-18. See chapter one §1.3.

<sup>18</sup> Constitution, s 46(2), s 176.

<sup>19</sup> It is beyond the scope of this thesis to engage in-depth a topic as broad as justice.

identified the term as consisting of righteousness and complete virtue in relation to a neighbour, a cultivated set of dispositions, attitudes, and good habits.<sup>20</sup> This definition is commonly referred to as distributive justice, wherein equals are treated equally, and unequals are treated unequally, in direct proportion to the differences between them.<sup>21</sup>

In addition to distributive justice, ‘corrective justice’<sup>22</sup> is another form of justice that pertains to rectifying unjust situations arising from voluntary or involuntary transactions, such as contracts and torts. Examples of corrective justice include judicial attempts to restore equality between parties following an injustice.<sup>23</sup> The idea is that liability resolves the injustice one person inflicts on another. Although the early definitions of justice are somewhat abstract, they shed light on some significant justice aspects, summarised as desert<sup>24</sup>, fairness<sup>25</sup>, equality<sup>26</sup> and moral righteousness.<sup>27</sup> These four understandings of justice are associated with each other, working in unison, and therefore, are not mutually exclusive.

#### a. The elusive definition of justice

Justice is an evaluative concept.<sup>28</sup> It is difficult to define because providing a neutral definition without expressing one’s support for it is challenging.<sup>29</sup> The subsequent sub-sections outline

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<sup>20</sup> Hurlbert (ed) and Mulvale ‘Defining Justice’ *Pursuing Justice: An Introduction to Justice Studies* (2018) (hereinafter *Defining Justice*) 9-19.

<sup>21</sup> Ibid 13.

<sup>22</sup> Ibid 14.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid. Defined as the idea of ‘getting what one deserves,’ that is, recognition for doing good and punishment for harmful actions.

<sup>25</sup> Ibid 15 and defined as treating equals equally, for example, equal pay for equal work and qualifications.

<sup>26</sup> Ibid 16. The idea of equal citizenship rights for all and equitable sharing of civic burdens.

<sup>27</sup> Ibid 17. Being just when individuals engage in altruistic behaviour to make society a better place.

<sup>28</sup> An evaluative concept involves assigning value to an axiom or belief. Describing something is only part of this concept; it also requires an opinion about its value or lack thereof.

<sup>29</sup> *Defining Justice* 13.

the three perspectives (natural law, positivist, socio-anthropological) on justice relevant to the current study.

*i. Justice according to the natural law perspective*

Justice is directed toward someone other than oneself. The foundation of the natural law perspective stems from the notion of doing good and promoting the common good.<sup>30</sup> Natural law theory uses this foundation to justify a range of natural rights emanating from a set of ‘basic forms of human flourishing’ in which all community members can participate.<sup>31</sup> Natural justice in the English-language jurisprudence denotes rules associated with court or tribunal procedures with emphasis on *nemo iudex in causa sua* (‘no one should be a judge in their own cause’) and *audi alteram partem* (‘hear the other side’).<sup>32</sup> Despite being non-theological, contemporary natural law theory aligns with Aquinas’ perspective that moral considerations are pertinent in establishing the substance of law.<sup>33</sup> This means one is not obligated to obey unjust laws because, by virtue of being unjust, the law cannot be truly valid.<sup>34</sup> Therefore, an unjust law places no moral obligation and cannot impose a legal obligation on an individual or society.

The natural law theory reasoning that there are predetermined, supreme and metaphysical moralities that determine the moral principles upon which the validity of all laws are based is

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<sup>30</sup> Aquinas *Summa Theologica* §§ 90-97 (S. Parry Ed. 1966) (Questions) cited in Starr ‘Law and morality in H.L.A. Hart’s legal philosophy’ (1984) 67 *Marquette Law Review* 4 at 674.

<sup>31</sup> Murphy ‘Natural law and natural justice: A Thomistic perspective’ in Crowe and Lee (eds) *Research Handbook on Natural Law Theory* (2019) (hereinafter *Thomistic Perspective*) 19.

<sup>32</sup> *Ibid* 304–325.

<sup>33</sup> *Ibid* 1; Grisez, Finnis, and Boyle ‘Practical principles, moral truth, and ultimate ends’ (1987) 32 *American Journal of Jurisprudence* 1 on what many regard as the definitive formulation of new natural theory; Finnis *Natural Law and Natural Rights* (1980).

<sup>34</sup> To quote a letter King Jr wrote from jail, ‘[t]o put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality’ King Jr ‘Letter from a Birmingham Jail’ 16 April 1963.

rejected by some commentators.<sup>35</sup> The natural law proposition is further rejected by claims that law does not derive its validity from injustice or the justice it can deliver.<sup>36</sup> This argument rests on the belief that justice and law have no apparent relationship.

While legal positivists think of justice as an ideal aspiration for legal systems, natural law lawyers consider justice a relevant moral consideration in determining the validity of positive laws.<sup>37</sup> According to Luis (quoting Aquinas)<sup>38</sup>, when one is writing a judgment, what is naturally just is derived from the nature of the case being judged: *ex ipsa natura rei* ('from the very nature of the thing'), *quod dicitur ius naturale* ('that which is called natural law'). This means that magistrates and judges have discretion to interpret or apply the law depending on the case or situation. Positivists, however, vehemently argue against this, claiming that judges, for instance, should not have power to push aside the constitution to fit the circumstances of a case. Such judicial conduct would be viewed by positivists as judicial activism or legislating from the bench. In chapter six, I provide empirical evidence from participants who circumvented procedure to provide outcomes that met the parties' justice needs.<sup>39</sup> Arriving at outcomes that parties consider acceptable (even when the outcome goes against a party) regardless of the text of the law is also a prominent feature of ADR and TADR: two dispute resolution systems that I use in chapter five to analyse ways of extending access to justice in Zimbabwe.<sup>40</sup> Chapter three is also dedicated to delineating ADR and TADR.

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<sup>35</sup> Dworkin *Taking Rights Seriously* (1977) ch 2-4, 13; Mackie 'The third theory of law' (1977) 7 *Philosophy and Public Affairs* 1 at 4-6.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Thomistic Perspective* 1.

<sup>38</sup> *Nicomachean Ethics*, V.7.1134b.20–1135a10 as quoted in *Thomistic Perspective* 13.

<sup>39</sup> Participant four (P4), interviewed on 16 July 2019.

<sup>40</sup> See chapter five.

*ii. Justice according to the positivist perspective*

Legal positivism believes that there are two senses of justice: ‘*justice according to the law*’ and ‘*justice as an ideal form of dealing*.’<sup>41</sup> Justice according to the law entails the proper operation of the legal system and an expectation of due process.<sup>42</sup> Justice as an ideal form of dealing refers to an external standard utilised to evaluate the legal system.<sup>43</sup> The two senses of justice have in common that legal obligations are derived from the validity of laws.<sup>44</sup> Hence, one must obey all laws, including those perceived as unjust, because they are valid.<sup>45</sup>

Validity is accounted for by understanding the set criteria giving legal force to a precept in a legal system.<sup>46</sup> For instance, if we take on face value that parliamentarians are representatives of the people with a mandate to pass laws on behalf of their constituencies, it is possible to understand the point positivists make regarding the validity of the law. Nonetheless, this positivist perspective may be problematic when applied to countries like Zimbabwe because parliamentarians rarely formulate laws. The executive branch has a monopoly on pushing new or amending existing legislation.<sup>47</sup> For this reason, defining justice from a positivist perspective in Zimbabwe may be inappropriate because legislation is not derived from the people or their representatives, perhaps in the same way as in other countries.

On top of that, legal positivism has been criticised for having logical flaws within its two underlying assumptions.<sup>48</sup> The first assumption is that legal validity can be analysed using the

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<sup>41</sup> Penner *McCoubrey and White’s Textbook on Jurisprudence* (2008) 228.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> Tamanaha (n1) at 524; Kramer *In Defense of Legal Positivism: Law Without Trimmings* (2003).

<sup>45</sup> According to the positivist doctrine, laws passed by Parliament, signed by the executive, and (in some instances) upheld by the judiciary are valid laws, imposing legal obligations.

<sup>46</sup> Gillers ‘Can a Good Lawyer Be a Bad Person’ (1986) 84 *Michigan Law Review* 4-5 at 1011-1012.

<sup>47</sup> Most Bills start from Cabinet and Private Member’s Bills are rare. See Murenzvi ‘From Bill to Law – An easy guide to how laws are made in Zimbabwe’ *Newswire* 31 January 2020, available at <https://newswire.live/column-from-bill-to-law-an-easy-guide-to-how-laws-are-made-in-zimbabwe/#>, accessed 21 November 2022.

<sup>48</sup> Austin *The Province of Jurisprudence Determined* (2012) (Recreated from the original (1832)).

same analytical tools for analysing legal obligations.<sup>49</sup> The second assumption is that legal validity entails legal obligation. The two assumptions mistakenly perceive law as a ‘one-way projection of authority’<sup>50</sup>, when law is not exclusively top-down. Legal positivism does not distinguish between having legal obligations and being legally obliged, which impedes the emergence of a coherent theoretical position.<sup>51</sup> Therefore, curing the flaw in legal positivist theory requires abandoning the two underlying assumptions.

Moreover, legal positivism ignores the tacit cooperation between the lawgiver and the citizen by viewing the law as simply acting on the citizen, whether morally or immorally, justly or unjustly.<sup>52</sup> To illustrate, history is filled with examples of civil disobedience – fighting against perceived unjust laws imposed on citizens.<sup>53</sup> The most famous examples are Martin Luther King<sup>54</sup> and Mahatma Gandhi<sup>55</sup>, who fought against the one-way projection of authority. Citizens in African countries do not distinguish between law and justice from morality and fairness.<sup>56</sup> These concepts are intrinsically linked by their lived realities. Law and justice are, therefore, not just constitutional requirements and rule of law principles as they are perceived in Western countries.<sup>57</sup> This means that living customary and state law may sometimes be diametrically opposed. As mentioned in chapter one, most people in Zimbabwe do not rely on

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<sup>49</sup> Hill ‘Legal validity and legal obligation’ (1970) 80 *The Yale Law Journal* 1 at 48.

<sup>50</sup> Fuller *The Morality of Law* (1969) 192.

<sup>51</sup> Hill (n49).

<sup>52</sup> Fuller *The Morality of Law*.

<sup>53</sup> ‘Civil disobedience, also called passive resistance, the refusal to obey the demands or commands of a government or occupying power, without resorting to violence or active measures of opposition; its usual purpose is to force concessions from the government or occupying power’ *Britannica* The Editors of Encyclopaedia ‘Civil disobedience’ Encyclopedia Britannica, 10 March 2020.

<sup>54</sup> King and others found the Jim Crow segregation laws unjust and disobeyed them, agreeing with St. Augustine that, ‘an unjust law is no law at all.’

<sup>55</sup> Gandhi inspired the Indian population to resist British colonial rule, which he deemed unjust.

<sup>56</sup> Bennett ‘Access to justice and human rights in the traditional courts of sub-Saharan Africa’ in Bennett et al (eds) *African Perspectives on Tradition and Justice* (2012) 1-2. See also *Defining Justice* 13.

<sup>57</sup> Bennett *ibid*.

the formal justice system for their legal needs and consequently avoid following or, to some extent, blatantly ignore some of the state laws.<sup>58</sup>

### *iii. Justice according to the socio-anthropological perspective*

Different social and cultural settings impact the meaning ascribed to justice. This may be explained by the fact that normative thinking and value judgements influence the basis of what is regarded as equal or unequal in most societies<sup>59</sup>, including Zimbabwe. The normative nature of justice may be illustrated by contrasting Greek and Korean conceptions.<sup>60</sup> The Greeks emphasise equality and harmony, while the Koreans, who have a vertically structured social life, deny the intrinsic equality of all people.<sup>61</sup> Despite the deep-seated differences between the two societies, each considers itself to have and dispense justice to citizens. Acceptance of the conceptions of justice in these two divergent societies requires that we do away with the ‘universality’ principle, which legal positivism encourages. Relativism<sup>62</sup> is, therefore, central to the socio-anthropological perspective on justice, which explains the emphasis on normativity within this school of thought. Thus, it is essential to consider sociocultural elements and values when defining terms.

The justice system is just one among numerous social structures in society. In Zimbabwe, as in most societies, these social structures heavily influence the justice system. For instance, laws

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<sup>58</sup> Sibanda (n16). For further reading on large sections (90 per cent) of society relying on non-state justice system, see the 2004 report published by the United Kingdom Department for International Development ‘Non-state justice and security systems’ *DFID* (2004).

<sup>59</sup> *Defining Justice* 13.

<sup>60</sup> Nader ‘The words we use: Justice, human rights, and the sense of injustice’ in Clarke and Goodale (eds) *Mirrors of Justice: Law and Power in the Post-Cold War Era* (2010) 319.

<sup>61</sup> *Ibid.*

<sup>62</sup> ‘Relativism, roughly put, is the view that truth and falsity, right and wrong, standards of reasoning, and procedures of justification are products of differing conventions and frameworks of assessment and that their authority is confined to the context giving rise to them...justice is relative to local norms’ Baghramian and Carter ‘Relativism’ in Zalta (ed) (Spring 2022 Edition) *The Stanford Encyclopedia of Philosophy* available at <https://plato.stanford.edu/archives/spr2022/entries/relativism/>, accessed on 29 November 2022.

surrounding marriage and divorce are influenced by the nuclear family structure, with a father, mother (sometimes more than one woman or man), children and extended family. The family structure influences the affairs of the nuclear family, including how disputes are avoided, managed, and resolved. Because culture and norms are not static, the definition of justice can be viewed as a constantly moving target, and its contextualisation is an ever-changing and subjective process of assessing the fairness of relations between individuals and groups of people.<sup>63</sup> As discussed in the following section, the family also influences whether or how one of its members accesses the justice system (formal or informal).<sup>64</sup>

#### b. Conceptions and perspectives of justice in Zimbabwe

A nationwide empirical study in Zimbabwe revealed that various research participants had divergent conceptions of justice.<sup>65</sup> For example, legal professionals in the research team understood justice in a narrow legal sense.<sup>66</sup> They understood justice as timely and efficacious recognition, vindication, protection, and enforcement of rights.<sup>67</sup> These legal professionals emphasised substantive and procedural fairness, that is, the right to be heard and impartial determination.<sup>68</sup>

On the other hand, many laypeople who participated in the same study associated justice with social justice elements such as social security, economic security, rights to health, education,

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<sup>63</sup> *Defining Justice* 14.

<sup>64</sup> Stewart, Sithole, and Ncube (eds) *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (hereinafter *In the Shadow of the Law*) (2000) 58.

<sup>65</sup> See generally *In the Shadow of the Law*.

<sup>66</sup> *Ibid* 158.

<sup>67</sup> *Ibid* 157.

<sup>68</sup> Justice, rule of law, and fairness have substantive and procedural dimensions, which suppose an inherent need for compliance with procedural and substantive prerequisites of the law. These, as Moyo explains, ensure that justice is delivered to individuals and communities. Moyo 'Standing, access to justice and the rule of law in Zimbabwe' (2018) 18 *African Human Rights Law Journal* 1 at 270. Also see *S v Sunday* 1995 (1) SA 497 (C) 507C and *Taylor v Minister of Education* 1996 (2) ZLR 772.

and decent homes.<sup>69</sup> Stewart, Sithole, and Ncube's (eds) study provides anecdotal evidence that laypeople's idea of good citizenship under the law extends beyond legal obligations or positivist notions of justice. Their participants' emphasis on social justice elements in their understanding of law and justice suggests that the idea of justice for laypersons encompasses broader societal issues. For many, good citizenship includes virtues, supererogation, and ideals.<sup>70</sup> Sentiments of laypeople in Stewart, Sithole, and Ncube (eds) starkly contrast the idea of procedural and substantive fairness emphasised by legal professionals who undertook the study.

Like laypeople, traditional leaders who participated in the same study emphasised the need to link justice and expected customary outcomes, which should emerge from customary ways of resolving disputes.<sup>71</sup> As indicated in chapter one, a previous study<sup>72</sup> found comparable results when examining mediation among Ndebele people, where disputing and settlement were embedded in the day-to-day lives of people in various communities. The literature on justice and empirical studies conducted in Zimbabwe reflect the disconnect between normative conceptions of law and justice and what the statutory justice system provides. This is another demonstration of tensions within the Zimbabwe system of administering justice. Such tensions between how citizens define justice and how the state defines and administers justice may help understand why challenges associated with access to justice discussed throughout this thesis emerge, are sustained and difficult, if not impossible to overcome under the current structure

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<sup>69</sup> *In the Shadow of the Law* 157.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid* 66, 113, 150. The case study that Sibanda (n16) at 60-63 highlighted that considers the views of traditional leaders also came to the same conclusion.

<sup>72</sup> Ndlovu and Ndlovu 'Mediation as conflict resolution in traditional Ndebele Society' (2012) 6 *Africana* 1 at 168-169.

of the formal justice system. In sum, the formal justice system seems to be designed in contrast to people's way of life.

*i. Multiplicity of systems of law*

The multiplicity of systems of law compounds the problem of defining justice in Zimbabwe. However, this challenge is not unique to Zimbabwe. As Pospisil<sup>73</sup> postulated in the 1960s, no human society possesses a consistent legal system. Rather, subgroups (society's segments) within society regulate members' relations. I posit that subgroups find expression in different forms in contemporary society. For example, in federal countries, each state regulates relations among its members independent of the central government. In Zimbabwe, the subgroup of the family influences its members and the choices they make from the available options.

Additionally, every subgroup member is simultaneously exposed to multiple legal systems because a larger group usually regulates subgroups.<sup>74</sup> What Pospisil referred to as subgroups and 'societal structure'<sup>75</sup> is akin to 'semi-autonomous social fields.'<sup>76</sup> Both societal structures and semi-autonomous social fields can generate rules, coerce, or induce compliance.<sup>77</sup> For instance, although the state may deem a gangster's behaviour illegal, this may not be so from the viewpoint of the gang.<sup>78</sup> Thus, the field of law does not escape the notion of relativity, which is critical for the current research on access to justice because while the dominant formal

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<sup>73</sup> Pospisil 'Legal levels and multiplicity of legal systems in human societies' (1967) 11 *The Journal of Conflict Resolution* 1 at 3.

<sup>74</sup> *Ibid* at 24.

<sup>75</sup> *Ibid*.

<sup>76</sup> Moore 'Law and social change: The semi-autonomous social field as an appropriate subject of study' (1973) 7 *Law & Society Review* 4 at 722.

<sup>77</sup> *Ibid*.

<sup>78</sup> Pospisil (n73) 24.

approach is positivist, the citizenry ascribes to the socio-anthropological approach to justice and access to justice.

Furthermore, any examination of law, justice, and access to justice must consider how society is organised and the rules that regulate community members. Cochrane is instructive, proffering that society controls the law, not the reverse.<sup>79</sup> Such sentiments demonstrate the difference between centralised societies (Western) with set rules, and acephalous societies (African), where procedures are subject to adaptation.<sup>80</sup> Reglementary processes in acephalous societies operate within a range of semi-autonomous social fields, intact with their legal order.<sup>81</sup> Scholarship has often overemphasised state laws and institutions at the expense of ‘unplanned’ rules that emerge from social life. Consequently, customary values are often dismissed, or, in some instances, their reality may be reluctantly recognised.<sup>82</sup>

In contrast to dismissing customary values, Roberts’<sup>83</sup> observation and Moore’s findings<sup>84</sup> echoed Holleman, who described procedure as subordinate to justice in specific social contexts.<sup>85</sup> The central argument is that in the interest of justice, the social setting, the relationship of parties, and their position in the community should be considered when determining a lawsuit.<sup>86</sup> Law is, therefore, not the only determining factor but one among

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<sup>79</sup> Cochrane *Development Anthropology* (1971) 93-94.

<sup>80</sup> Roberts *Order and Dispute: An Introduction to Legal Anthropology* (2016) 13. In this context, the term ‘acephalous’ is not employed in the colonial sense, which erroneously implied that African societies lacked structured systems of nationhood, defined governance hierarchies, and succession protocols. Rather, this usage signifies the decentralised nature of decision-making, wherein authority is diffused among diverse individuals or groups, fostering collective decision-making based on consensus.

<sup>81</sup> Moore (n76) 721.

<sup>82</sup> Moore ‘Certainties undone: Fifty turbulent years of legal anthropology, 1949– 1999’ (2001) 7 *The Journal of the Royal Anthropological Institute* 1 at 107. The article was reprinted under the same title in Moore (ed) *Law and Anthropology: A Reader* (2005) 357.

<sup>83</sup> Roberts *Order and Dispute: An Introduction to Legal Anthropology* (2016) 31.

<sup>84</sup> Moore (n82), Moore (n76) 721.

<sup>85</sup> Holleman *Issues in African Law* (1974) 17. Also see Allott and Woodman (eds) *People’s Law and State Law: the Bellagio Papers* (1985) 2.

<sup>86</sup> *Ibid* 2.

multiple factors. And the result may be that ‘legal rules are sometimes thrown overboard.’<sup>87</sup>

When it comes to the definition of, or the provision of justice, it must meet the expectations of the people it is meant to serve. Meeting the expectations of justice seekers may mean adopting and accepting a multiplicity of systems of law instead of a single broad-based justice system.<sup>88</sup>

Sociological jurisprudence adopts an evolutionary conception of society, suggesting that communities have customs and laws outside of all forms of ‘official law.’<sup>89</sup> Thus, more than one modality of law exists. These diverse modalities are coextensive with the social ordering, including the plurality of norms necessary for maintaining social life.<sup>90</sup> From Murphy, we derive a sense of law and justice that is neither positivist nor natural law. Instead, a sociological understanding of law and justice indicates ‘something like the way things tend to be done’ or what the community generally approves.<sup>91</sup> This way of conceptualising law and justice may be the most relevant in Zimbabwe, where the current legal order was imposed, and indigenous systems were relegated to become informal.

Significantly, approaching this study from a normative perspective may avert the dangers associated with conducting cross-cultural studies based on Western legal theory.<sup>92</sup> A good example is the contrast between Greek and Korean societies outlined above, which cannot be analysed using the same analytical tools or legal theory premise due to their inherent differences. In the same way, using Western legal theory as a point of departure to analyse the

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<sup>87</sup> Ibid.

<sup>88</sup> As mentioned in chapter one, colonisation imposed the Western justice system, incompatible with the traditional African justice system. David commented, ‘the regulation of internal relationships between members of a family or, in Africa, of a village or tribe is a matter of mores, not of law ... [I]t is not the function of jurists operating in the courts’ cited in Conference on the Integration of Customary and Modern Legal Systems in Africa and University of Ife ‘Integration of customary and modern legal systems in Africa: A conference held at Ibadan on 24th-29th August 1964’ *Africana Publishing Corporation* (1971) at 58.

<sup>89</sup> *Thomistic Perspective* 304–325.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid. On the issue of whether it is useful to call all forms of social ordering ‘law’, see Merry ‘Legal pluralism’ (1988) 22 *Law & Society Review* 5 at 869, 878–9 and *Thomistic Perspective* 180–190.

<sup>92</sup> Roberts *Order and Dispute: An Introduction to Legal Anthropology* (2016) 13.

justice system in Zimbabwe may neglect the fact that different communities have varying normative frameworks. Thus, the importance of emic perspectives on access to justice (the subject under study in this thesis) cannot be overstated. In the following section, I contextualise the concept of justice in this study. The aim is to firmly ground this core concept into an analytical foundation before introducing the empirical data in later chapters.

### c. Justice in the context of the current research

Attempts to define justice from Aristotle to contemporary scholars, including justice actors or stakeholders from empirical studies all have ‘fairness’ at their core. Still, different individuals, societies, and countries have varying conceptions of justice despite the existence of the universal human rights movement. That being the case, the best definition can be found when political philosophy and jurisprudence converge. For this study, justice is broadly defined as encompassing fairness and judgment free of prejudice. The definition adopted in this thesis is derived from the conceptual belief that the law operates or ought to operate in a system that meets the legal and social justice needs and citizens’ expectations.

On top of that, law is understood in this study as something that is not imposed on citizens but emanates from the cultural norms, values and social interactions regulating everyday lives of community members. With perceptions of fairness at the core of defining justice, it is vital for individuals, societies or countries that perceive laws as unjust to seek to remedy such laws to achieve justice. In contemporary democratic and quasi-democratic states, including Zimbabwe, the legislature is the primary way to achieve this end. This point is made clear by Ebrahim JA in a dissenting judgment in *Minister of Lands v Commercial Farmers Union*:

‘During argument, the view was expressed that justice was on the applicants’ side, but the law was on the respondent’s side. Admittedly law and justice do not always coincide. Examples of oppressive and unjust laws can be found in many countries. But this does not mean that the courts, which are sworn to uphold the law can ever allow their personal, subjective view of what constitutes justice to override the clear provisions of the law. It is not the function of the courts to support the government of the day, or the would-be government of tomorrow. It is not

their function to support the state against the individual or the individual against the state. The courts' duty is to the law and to the law alone. Judges, as individuals, have their own political, legal, and social views and opinions. But it is the sworn duty of every judge to apply the law, whatever he or she may think of the law. If a law is patently unjust, the courts can seek to better matters as far as possible, within the law, but they may never subvert the law. The remedy for an unjust law lies, not with the courts, but with the legislature'.<sup>93</sup>

The judge makes it clear that to improve the justice system and access to justice, the first step is enacting 'good' laws, which is within the prerogative of Parliament.

From the judgment above, we understand how judicial officials and general law courts enforce the law to the letter in most instances (except for judicial activists who legislate from the bench)<sup>94</sup>, irrespective of their perception of justice or fairness. The judgment illustrates the point on *lex iniusta non est lex* and general law courts' marginal role in dispute resolution.<sup>95</sup>

The primary means of obtaining formal justice (jurisprudentially) in Zimbabwe is through general law courts, and courts are creatures of law, meaning the law binds judges. While it is undeniable that law ought to serve the ends of justice, the fairness of law is not usually the primary consideration in a legal positivist country like Zimbabwe.<sup>96</sup> The preceding discussion makes it clear that following the law as it is, has the potential to lead to irremediable, unjust outcomes. If this is so, (perhaps) citizens' perceptions regarding justice should be considered, and the goal of a justice system should be to strike a balance between 'justice according to the law' and 'justice as an ideal form of dealing.'<sup>97</sup> This is a gap that this study hopes to plug, paving the way for effective access to justice for citizens.

The discussion above on the notions of law and justice is motivated by a desire to demonstrate the challenges of arriving at precise definitions of these terms. By attempting to capture the

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<sup>93</sup> *Minister of Lands v Commercial Farmers Union* 2001 (2) ZLR 457 (S), 490F-491B.

<sup>94</sup> Peabody 'Legislating from the bench: Definition and defense' (2007) 11 *Lewis & Clark Law Review* 1.

<sup>95</sup> Faruqi 'Justice outside the courts: Alternative dispute resolution and legal pluralism' 2000 *Universiti Teknologi MARA* at 2; Damich (n2) at 79.

<sup>96</sup> Despite attaining independence in 1980 and the inclusion of constitutional provisions emphasising developing customary law, the legal system in Zimbabwe remains positivist.

<sup>97</sup> See Harris *Legal Philosophies* (1997) 277. Penner (n41) 297.

definitions of law and justice, I do not seek to impose my preferences for one definition over another. I am motivated by the desire to provide a conceptual background for upcoming discussions on access to justice. The following section outlines the concept of access to justice from global and Zimbabwean perspectives.

#### 2.4. The concept of access to justice

There is no absolute universal morality that captures the idea of justice. This is despite the dominance of a particular perspective among different communities. Significantly, the dominance of a viewpoint is different from the existence of justice. It is generally accepted that moral rules in society are converted into law through custom. The sheer force of their widespread acceptance makes them binding, ergo, making custom a source of law.<sup>98</sup> At the same time, the fact that a rule is law does not mean it is just. This is because an unjust law is as much law as a just law in many jurisdictions.<sup>99</sup> In contemporary society, it is vital to reject the notion of justice as dependent on the views of the dominant elite, who can enact their moral rules into law and enforce them through the courts.

The lack of a universal definition of law and justice means access to justice may need to be contextually defined. First, I turn to Cappelletti and Garth<sup>100</sup>, who, in 1978, wrote on the two basic purposes of the legal system: the system by which people may vindicate their rights or resolve their disputes under the general auspices of the state. The authors explained that all must have equal access to the justice system, and the results must be individually and socially

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<sup>98</sup> *Zimbabwean Law* 4.

<sup>99</sup> *Ibid* 5.

<sup>100</sup> Cappelletti and Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 *Buffalo Law Review* 2.

just.<sup>101</sup> Cappelletti and Garth perceived access to justice as an effective right rather than a simple formal right.

Similarly, the welfare reforms in the post-World War II period came to understand the right of access to justice as the most important human right because possessing rights without mechanisms for effective vindication is meaningless. Galanter supported this position by arguing that access to justice is about enhancing the justice quality of the relations and transactions in which people are engaged rather than merely bringing matters before judicial officials.<sup>102</sup> As mentioned, the quality of outcomes is a significant factor when considering the quality of justice delivered. For justice outcomes to be considered just, they must reference the immediate context (nature of the dispute and characteristics of the parties) and the broader social context.<sup>103</sup>

Francioni understood access to justice as ‘the right to seek a remedy before a court of law or a tribunal, which is constituted by law, and which can guarantee independence and impartiality in the application of the law.’<sup>104</sup> Critically, an understanding of access to justice, which positions state courts as the only avenue for people to obtain justice, is premised on the concept of ‘rule of law’ and constitutional separation of powers. Such presumptions reflect Western countries’ legal standards, concepts, processes, and outcomes, represented in access to justice literature.

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<sup>101</sup> Ibid at 6.

<sup>102</sup> Galanter (n17) at 161–162.

<sup>103</sup> Cappelletti and Garth ‘Access to justice: The worldwide movement to make rights effective: A general report’ in Cappelletti and Garth (eds) *Access to Justice Vol. I: A world survey (Book I & II)* 6, 64, 68–69; Moorhead and Pleasence ‘Access to justice after universalism: Introduction’ (2003) 30 *Journal of Law and Society* 1 at 1–3.

<sup>104</sup> Francioni ‘The rights of access to justice under customary international law’ in Francioni (ed) *Access to Justice as a Human Right* 3.

The United Nations Development Programme (UNDP) defines access to justice as ‘the ability of people to seek and obtain a remedy through formal or informal institutions of justice and in conformity with human rights standards.’<sup>105</sup> This definition of access to justice has several notable differences from that of Cappelletti and Garth. First, the UNDP definition explicitly references informal institutions. Secondly, the definition includes a more straightforward ‘remedy’ to the existing emphasis on ‘rights vindication.’ While the UNDP definition’s objective is unclear, it is logical, especially in the Zimbabwean context, to conclude that general law courts should not be the only object of access to justice research, and other remedies must be explored. This is the approach adopted in this thesis. This study seeks to research the subject broadly, identifying obstacles and ways to enhance access to justice.

Access to justice can be grouped into three distinct but interdependent components: *substantive*, *procedural*, and *symbolic* access to justice.<sup>106</sup> Substantive access to justice concerns the rights claims available to those seeking a remedy.<sup>107</sup> Procedural access to justice focuses on opportunities and impediments in getting a claim into court, i.e., the path to justice.<sup>108</sup> Lastly, symbolic access to justice goes beyond doctrinal law, and questions how a given legal regime promotes legal empowerment.<sup>109</sup>

Considering these three categories of access to justice, questions arise on whether the available laws provide remedies to potential disputing parties. In addition, questions arise regarding whether fundamental rights and liberties are guaranteed in terms of the laws available in Zimbabwe. Equally important is establishing whether potential disputants know the laws and

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<sup>105</sup> United Nations Development Programme (UNDP) ‘Programming for justice: Access for all’ (2005) 5.

<sup>106</sup> Bahdi ‘Background Paper on Women’s Access to Justice in the MENA Region’ *International Development Research Centre (IDRC) Women’s Rights and Citizenship (WRC) Program and the Middle East Regional Office (MERO) Middle East and North African (MENA) Regional Consultation* December 9th-11th, 2007.

<sup>107</sup> *Ibid* at 5.

<sup>108</sup> *Ibid* at 28.

<sup>109</sup> *Ibid* at 38.

whether they know that their rights are provided for in substantive, procedural, and symbolic terms.

While the definition of justice is widely accepted as fluid, with different people attaching different meanings to the term, that of access to justice seems to have fewer critiques. This thesis' most acceptable definition of access to justice is from UNDP, cited above. Despite this preferred definition, there is no universally accepted *process* of access to justice. I submit that neither scholarship nor reform efforts should focus on establishing a universally acceptable definition or process of access to justice as a primary goal. This is because access to justice, like the concepts of law and justice, has an interpretive<sup>110</sup> and contextual nature attached to its definition and process(es).

In Zimbabwe, social justice dominates how citizens find meaning in the concepts of justice and access to justice.<sup>111</sup> Acceptance of normative interpretation and consideration of the context in discussing access to justice presupposes effective access to institutions that make the rights of citizens real and not symbolic, whether formal or informal. Second, effective access to justice dictates that results obtained through the dispute resolution process must be individually and socially just.<sup>112</sup> Meeting the threshold for 'effective access to justice' subsequently fulfils the two purposes of legal systems outlined above.<sup>113</sup> Garth and Cappelletti, however, caution that perfect equality is utopian and differences between parties, for example, may never be completely eradicated.<sup>114</sup> Contemporary scholars and policymakers face the question of how

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<sup>110</sup> Cornford 'The meaning of access to justice' in Palmer et al (eds) *Access to Justice: Beyond the Policies and Politics of Austerity* (2016) 28. Remarking on an interpretive concept, Cornford views it as something assumed to be desirable but whose exact nature is disputed. Therefore, proponents of different interpretations are 'activated by competing moral, aesthetic, or political outlooks.'

<sup>111</sup> *In The Shadow of The Law*. See also UNDP (n105) 102.

<sup>112</sup> Cappelletti and Garth (n100) at 6.

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* at 186.

far to push towards this utopian ideal, and how many obstacles to access to justice can and should be tackled at any one point.

The discussion above informs the strategic decision in this thesis to encompass public and private law<sup>115</sup> within the concept of *access to justice*, the focus of which depends on the discussion at hand. While adopting a broad scope under the term ‘access to justice’ offers a comprehensive perspective and identifies common barriers<sup>116</sup>, concerns can be raised about oversimplifying the unique challenges faced by, for instance, civil and criminal justice contexts. However, I maintain that the holistic approach of considering both public and private law remains beneficial, as it can unveil solutions that are not apparent with a sole focus on one system. Citizens often experience legal problems spanning multiple areas, and common barriers hinder access to justice. Examining different divisions of law collectively can help identify these common barriers and develop comprehensive solutions.<sup>117</sup>

Moreover, a comprehensive approach recognises the interconnectedness of legal problems.<sup>118</sup> Adopting a holistic approach does not negate or invalidate the need for differentiated solutions. On the contrary, it provides a framework for identifying common barriers and developing overarching solutions while recognising the need for tailored approaches. This balanced approach addresses the broader issues affecting access to justice while providing targeted solutions for specific areas of law.

Lastly, to give meaning to the term ‘effectiveness’, it is crucial to identify the barriers to access to justice. I rely on case law, existing literature, personal observations during fieldwork, and

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<sup>115</sup> Public law encompasses constitutional law, criminal law, tax law, and administrative law, while private law includes property law, the law of obligations (contract and tort), and personal law - *Zimbabwean Law* 39.

<sup>116</sup> See generally *In the Shadow of the Law*.

<sup>117</sup> See analysis of empirical data discussed in chapter five and six.

<sup>118</sup> *Zimbabwean Law* 39 aptly illustrates the distinction between private and public law using labour law, contrasting union registration under public law with employer-individual worker relationships under private law.

stories reported in the media to illustrate the barriers discussed below. But before highlighting some common global barriers to accessing justice, it is imperative to lay out the historical background of the access to justice movement.

a. The four waves of access to justice reform

Several reforms have targeted improving access to justice. The Florence Access to Justice Project helped shape global thinking on this subject. The project had an underlying philosophy of making rights effective, emphasising a shift from formal rights towards substantive justice: equality of arms and a form of utopia mentioned above.<sup>119</sup> The analytical framework of that project was structured around the metaphors of the three waves. Economides<sup>120</sup>, who was Cappelletti's student, provided the fourth wave discussed below.

i. *The first wave*

The first wave introduced LA to equalise legal resources and the court access.<sup>121</sup> Notable reforms included the 1949 Statute in England, which created the Legal Aid and Advice Scheme.<sup>122</sup> The statute bolstered the judicare system by establishing LA as a matter of right, and the state was responsible for paying legal fees to private lawyers providing the legal services.<sup>123</sup> In chapter one, I discussed the LA system and how it works in Zimbabwe, including how it is financed.<sup>124</sup> Despite the efforts of the LA system to equalise access to legal resources, shortcomings persist primarily because the system requires a multitude of lawyers to function well. Zimbabwe, for example, has approximately two thousand lawyers<sup>125</sup> for a population of

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<sup>119</sup> Ibid.

<sup>120</sup> Economides 'Reading the waves of access to justice' (1999) 31 *Bracton Law Journal* at 67.

<sup>121</sup> Cappelletti and Garth (n100) at 196.

<sup>122</sup> Legal Aid and Advice Act 1949 (United Kingdom).

<sup>123</sup> Cappelletti and Garth (n100) at 197.

<sup>124</sup> See chapter one § 1.5.

<sup>125</sup> Law Society of Zimbabwe available at <https://www.lawsociety.org.zw/>, accessed 9 November 2022.

16 million.<sup>126</sup> Many of these lawyers are in private practice, and the obligation to do *pro bono* work is not strictly enforced.<sup>127</sup> But, even with enough lawyers, the government could not remunerate them because the country has experienced over two decades of economic decline, including a long period of hyperinflation.<sup>128</sup>

*ii. The second wave*

Historically, litigation has been viewed as a two-party affair. Civil procedure, therefore, left little room for protection of diffuse interests or class action suits.<sup>129</sup> The second wave of reforms aimed to correct these structural inequalities within the justice system and make access more meaningful by changing the laws of standing, rules of procedure, and roles of judges. These regulations were not designed to facilitate private enforcement of the rights of diffuse interests.<sup>130</sup> For example, Sweden created the Consumer Ombudsman to represent consumers' collective but fragmented interests in response to this second wave of reforms.<sup>131</sup> In Zimbabwe, it was not until 2009 that the rules governing standing changed. After 2009, any person alleging that a right 'has been, is being or is likely to be infringed' was now entitled to approach the courts for relief.<sup>132</sup> Before 2009, only those acting in their interests were entitled to approach the court for relief.<sup>133</sup> Limiting the number of categories of people who could approach the

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<sup>126</sup> ZimStat '2022 Population and housing census - preliminary report' available at [https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022\\_PHC\\_Functioning.pdf](https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022_PHC_Functioning.pdf), accessed on 23 August 2022.

<sup>127</sup> Participant six (P6) commented during an interview that he has not provided *pro bono* services in decades because the Law Society of Zimbabwe has not compelled him to do so.

<sup>128</sup> See chapter one § 1.2.

<sup>129</sup> Cappelletti and Garth (n100) at 209.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* at 213.

<sup>132</sup> Chidyausiku CJ stated in *Mawarire v Mugabe* that the court will consider even those who perceive a looming infringement of their rights and issue a declaration or appropriate order to prevent the threat. The applicant sought an order to compel the first respondent to proclaim an election date, while the first, second and fourth respondents opposed the application. The court had to decide if the applicant had *locus standi* to approach the court under s 24(1) of the Constitution.

<sup>133</sup> Section 24(1) of the Lancaster House Constitution. See in *Re Wood v Hansard* 1995 (2) SA 191 (ZS) 195 and *Chairman of the Public Service Commission v Zimbabwe Teachers Association* 1996 (9) BCLR 1189 (ZS) 1199.

court for remedies threatened access to justice in Zimbabwe.<sup>134</sup> Legislation and courts have rectified this shortcoming.<sup>135</sup>

### *iii. The third wave*

The adoption of the Universal Declaration of Human Rights by the United Nations in 1948 marked the birth of modern normative and institutional structures for human rights. Cappelletti and Garth characterised the third wave as the ‘access to justice approach’, emphasising informal justice and its importance in preventing disputes from occurring or escalating.<sup>136</sup> The access to justice approach recognised the need to relate and adapt civil processes if these new rights were to be enforceable.<sup>137</sup> Cappelletti and Garth proposed changes in the rules of procedure<sup>138</sup>, structure of the courts<sup>139</sup>, creation of new courts<sup>140</sup>, and use of lay persons or paraprofessionals on the bench and in the bar.<sup>141</sup> They advocated modifications to substantive law designed to avoid disputes.<sup>142</sup>

The third wave recognised that citizens could also achieve justice in non-legal institutions. This wave was driven by societal needs, which were not met by the formalistic and adversarial legal tradition.<sup>143</sup> Before the third wave, the formal justice system had failed to adequately address and adjust to the challenges presented by socioeconomic, institutional responses and

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<sup>134</sup> Moyo (n68) at 271.

<sup>135</sup> Supra (n132).

<sup>136</sup> Cappelletti and Garth (n100) at 222-225.

<sup>137</sup> Ibid.

<sup>138</sup> These include free evaluation of evidence, close contact between judges, parties, and witnesses; use of active judges to seek the truth and help equalise the parties. Ibid at 228.

<sup>139</sup> To empower weaker parties like consumers in disputes with stronger parties like merchants, specialised courts could handle such cases, ensuring access to justice and the protection of fundamental rights. Ibid at 239,

<sup>140</sup> For example, small claims courts, neighbourhood or social courts. Ibid at 255.

<sup>141</sup> An advantage of the ‘new approach’ is its ability to attract individuals to assert their rights in a forum attuned to evolving substantive laws. This encourages participation from those who might otherwise hesitate to pursue legal action. Ibid at 269.

<sup>142</sup> For instance, disputes could be diverted to specialised agencies with relevant expertise, allowing for exploring a broader range of reforms. Ibid at 226-227.

<sup>143</sup> Cappelletti ‘Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement’ (1993) 56 *The Modern Law Review* 3 at 283.

inequalities.<sup>144</sup> The third wave can, therefore, be understood as adding a social dimension to the rule of law because it responded to society's needs.

The third wave, explicated by Cappelletti and Garth, was discussed within a Eurocentric or Western paradigm. In African societies, the question of how to define informal justice, for example, and, therefore, an alternative to state law, is irrelevant. Before the introduction of state law (during the colonial period), Africans had their own disputing and settlement systems.<sup>145</sup> A more pertinent question within the African context, which this thesis addresses in chapter six is how to integrate more socially appropriate dispute resolution processes that most citizens already utilise, albeit informally, into the formal justice system. Such integration should go beyond the mere existence of statutes, which provide rational legal legitimacy<sup>146</sup> and should strive for effective implementation based on the substantive legitimacy<sup>147</sup> of the justice system. I shall return to the third wave in chapter five when I discuss findings from empirical data gathered through interviews with eighteen legal professionals on enhancing access to justice in Zimbabwe.

#### *iv. The fourth wave*

The fourth wave, a continuation of Cappelletti's work by his student Economides, addressed the following questions: do the reforms associated with the third wave promote access to justice or access to peace?<sup>148</sup> Is there a correlation between dispute resolution and access to justice?<sup>149</sup> These questions are derived from the fact that peaceful resolutions, which citizens may be

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<sup>144</sup> Ibid.

<sup>145</sup> See chapter one § 1.3(a) on the Privy Council acknowledging the sophistication of traditional African law even before colonisation.

<sup>146</sup> Refers to authority that comes from a legal order and the laws enacted in it.

<sup>147</sup> The abstract normative judgment, underpinned by shared values. For example, if someone believes an entity has the right to exercise social control, they may accept personal disadvantages.

<sup>148</sup> Economides (n120) at 66.

<sup>149</sup> Ibid.

pleased with could result in something less than they would receive through state law.<sup>150</sup> The fourth wave argues that the informalisation of law neglects many of legal formalism's values, importance, and historical significance.<sup>151</sup> These sentiments were also shared by participants in this study. Some participants believed that informalising state justice institutions or integrating informal dispute resolution processes into the formal justice system might trivialise issues and lead to decisions or outcomes that are not sound in law.<sup>152</sup>

Historically, access to justice has been equated to access to court or the availability of legal assistance. This is despite many disputes being resolved through informal institutions such as the family.<sup>153</sup> Early access to justice scholarship limited its scope to citizens' access from the demand side, with the court serving as the central supplier of justice. This view fails to consider that access may be a consequence of choice rather than ignorance or lack of economic resources.<sup>154</sup> The supply side of access to justice has been negated in scholarship. Consequently, the fourth wave sought to expose justice administration's ethical and political dimensions. Notably, the fourth wave connected professional responsibility with legal education.<sup>155</sup> Professional responsibility and ethics of judges and lawyers are critical to the supply side of justice and can act as significant barriers to access to justice. For example, even after surmounting obstacles to accessing the justice system, citizens may encounter judges and lawyers ill-equipped to deliver justice.<sup>156</sup>

As I will discuss in chapter four, some interviewees identified the incompetence of lawyers and judicial officers as a significant access to justice barrier. The fourth wave emphasises the

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> See chapter six § 6.7.

<sup>153</sup> Sibanda (n16) at 53, 61.

<sup>154</sup> Economides (n120) at 63.

<sup>155</sup> Ibid at 67.

<sup>156</sup> Ibid.

critical role that law schools occupy in the accessibility of justice as gatekeepers to the legal profession. It is equally vital that once qualified, both lawyers and judges facilitate access to justice by maintaining professional standards through continuous learning. At the same time, the fourth wave identified the central role professional bodies play in controlling entry into the profession and determining standards of the profession that meet societal needs, i.e., fluid and not static.<sup>157</sup>

Cappelletti's third wave and Economides' fourth wave heavily influenced the methodological choices of this thesis. Empirical research of this nature is virtually non-existent in Zimbabwe. Therefore, I aim to contribute to the existing body of knowledge by combining concepts from the third and fourth waves of access to justice reforms in the analytical toolbox. Furthermore, this thesis goes beyond employing qualitative research methods to deepen our understanding of the subject matter. It examines the supply side of access to justice from a normative perspective through interviews with diverse legal professionals in Zimbabwe, details of which are in the methodology section in chapter one.<sup>158</sup> Thus far, this chapter has outlined the fluid nature of defining the terms law, justice, and access to justice, as well as how the terms are conceptualised and contextualised in Zimbabwe.

The generally agreed-upon broad definitions of the concepts have also been outlined, including how access to justice is about more than just entering the formal justice system or the right to participate in dispute resolution. It involves more than just having an opportunity to present or defend a claim. Access to justice has been presented herein as including various aspects of the path to justice and, more importantly, the normative outcomes resulting from participating in the dispute resolution process. There is, therefore, a link between the mechanisms utilised in

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<sup>157</sup> Ibid.

<sup>158</sup> See chapter one § 1.8.

resolving disputes and access to justice. Below, I outline factors that generally limit access to justice, which provides a background to situate Zimbabwe's challenges, as expressed by interviewees in chapter four.

b. Global and local barriers to accessing formal justice

The discussion above demonstrates the relative nature of the concept of access to justice. What can be said to be accessible from the supply side may be viewed as inaccessible from the demand side. For example, the supply side may consider the existence of a court building as adequate. Still, justice seekers living under the poverty line who cannot afford transport costs may perceive justice as inaccessible. A key takeaway is that access to justice cannot be equated with access to court. Court is but an instrument through which citizens attempt to access justice. Considering the discussions in this study, general law courts are not even the predominant instrument citizens utilise to resolve their disputes. Fifty years of socio-legal research have exposed the myth surrounding the consistent but incorrect aggrandisement of general law courts' role in resolving disputes.<sup>159</sup> Nonetheless, challenges associated with accessing general law courts are part of the obstacles citizens face when attempting to access justice.

Additionally, the characterisation of the obstacles to access to justice with the metaphor 'barriers' has faced criticism.<sup>160</sup> The charge is that the metaphor is premised on the view that the problems are 'legal' in nature; thus, they can be resolved through state law.<sup>161</sup> The premise of defining disputes as legal in nature is not always accurate because some people make informed decisions to reject the formulation of their problems as legal.<sup>162</sup> Moreover, even when

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<sup>159</sup> Bedner and Vel 'An analytical framework for empirical research on access to justice' (2010) 1 *Law, Social Justice & Global Development Journal* at 5.

<sup>160</sup> Macdonald 'Access to justice and law reform' (1990) 10 *Windsor Yearbook of Access to Justice* at 302.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

some people accept the formulation of their issues as legal, they may prefer to resolve problems using processes other than those provided by the formal system.<sup>163</sup> This is the case discussed in Stewart, Sithole, and Ncube's (eds), where citizens framed justice within the broader social justice framework.

I agree with Macdonald that the 'barriers' metaphor may not be the best way to characterise the obstacles citizens face in the justice system. However, for this thesis, the metaphor allows me to focus on specific problems citizens and small businesses face at the point of entry and once they have entered the justice system. Below, I discuss obstacles in the path to justice, both globally and locally, as depicted in the literature. The subsection provides an analytical foundation for analysing the empirical data on Zimbabwe-specific obstacles, gathered through interviews and discussed in chapter four.

*i. Accessing the formal justice system is expensive*

Access to justice cannot be optimally achieved where the legal system is financially inaccessible, where citizens cannot afford lawyers, filing fees or the fees required to execute judgments made in their favour. A 2015 *NewsDay* article cast doubt on the state of justice in Zimbabwe. Of the many stories in that article, one involved a widow whose water supply had been cut off by the municipality without following due process. With assistance from the Legal Aid Foundation, she brought a successful spoliation<sup>164</sup> application against the municipality. However, she could not have the water turned back on because she could not afford the US\$ 10 court fees as well as a further US\$ 70 messenger of court service fee.<sup>165</sup> In such

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<sup>163</sup> Ibid.

<sup>164</sup> The wrongful destruction or alteration of evidence relevant to a legal proceeding.

<sup>165</sup> Chinhamo 'Access to justice costly for the poor' *News Day* 30 July 2015.

circumstances, disputants find that the justice trail ends in a piece of paper because they cannot afford to execute the judgment.

The cost barrier is compounded by, for example, the opportunity cost for self-employed people, especially in the informal sector (which makes up 89 per cent of the economy), who are forced to choose between pursuing the case or feeding their families.<sup>166</sup> The situation is more dire for self-employed breastfeeding mothers without help at home because courts are by no means baby-friendly. A breastfeeding mother pursuing a case in court must find a babysitter because she cannot bring the child into court.

The small claims court was introduced in many jurisdictions to deal with minor cases speedily and affordably.<sup>167</sup> It is standard across many countries to have monetary jurisdiction to regulate the court's activities. In 2016, the monetary jurisdiction of the Zimbabwean small claims court was increased from US\$ 250 to US\$ 1 000, and the Statutory Instrument (SI) governing it was only repealed in 2020 and replaced with a jurisdiction of ZW\$ 300 000, which has now been further revised to US\$ 5 000.<sup>168</sup> The monetary jurisdiction is, however, challenging to implement consistently in a country like Zimbabwe, which has experienced hyperinflation for over two decades and operates under a multi-currency system. Before 2016, the small claims court was only found in Harare and is now located in cities and some towns, making it

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<sup>166</sup> Saungweme, Matsvai, and Sakuhuni 'Econometric analysis of unemployment, output and growth of the informal sector in Zimbabwe (1985-2013)' 2014 *International Journal of Economics and Research* at 5. See chapter one § 1.2., for a description of the average wage and cost of litigation, which makes attempts to access formal courts difficult for most Zimbabweans.

<sup>167</sup> Cappelletti and Garth (n100) at 255.

<sup>168</sup> Small Claims Court (Jurisdiction) Notice, 2016 published in SI 36 of 2016, Small Claims Court (Jurisdiction) Notice, 2020 published in SI 247 of 2020, Small Claims Courts (Jurisdiction) Notice, 2023 published in SI 43 of 2023. See chapter one § 1.4.

geographically inaccessible to most of the population.<sup>169</sup> The court only has jurisdiction if the defendant does not object to its jurisdiction.

Although legal representation is allowed, the formal procedures in small claims court remain another obstacle for self-represented litigants without legal representation.<sup>170</sup> Theoretically, illiterate individuals can seek help from court officials to transcribe their claims and complete forms, but understaffed offices often hinder this resource.<sup>171</sup> Consequently, citizens often rely on friends and family to navigate the court system. Without legal backgrounds, they may struggle with understanding rules, terminology, case preparation, document filing, deadlines, and courtroom etiquette. Presenting evidence effectively and knowing its relevance can also be difficult, as it requires legal knowledge and experience.<sup>172</sup>

Lastly, the economic decline in Zimbabwe has made it increasingly difficult to retain good lawyers in public service and other positions within the justice system. The materially deprived are thus at risk of receiving second-class justice because many experienced lawyers leave the country<sup>173</sup> or go into private practice, where they serve the interests of corporate clients. The poor must rely on LA when it is available or compete against experienced lawyers as self-represented litigants.

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<sup>169</sup> Small claims courts are in Harare, Mutare, Bindura, Marondera, Chinhoyi, Bulawayo, Gwanda, Masvingo and Gweru, in terms of the Small Claims Courts (Designation) Notice SI 34 of 2016.

<sup>170</sup> See discussion on complex procedures in § 2.4(b)(v).

<sup>171</sup> Nemukuyu 'Judiciary in staff shortage: CJ' *The Herald* 28 March 2018.

<sup>172</sup> In *Mutsinze v Attorney General* [2014] ZWCC 13, Garwe JCC, stated in para 30 that serious (criminal) matters require the services of senior legal practitioners if defendants are to receive appropriate representation.

<sup>173</sup> *Ibid.* The *pro deo* counsel representing the defendant left Zimbabwe to practice in Botswana, contributing to a 15-year delay in concluding the matter.

*ii. Geographic inaccessibility of courts*

The issue of geography is linked to the financial inaccessibility of the justice system. Until 2016, Zimbabwe had two High Courts for a population of 14 million. Despite establishing three more High Courts for the current population of 15 million, litigants must travel long distances to access these courts.<sup>174</sup> Furthermore, until 2019, the Supreme Court only had a registry in Harare. The Supreme Court now has a second registry in Bulawayo. The distance travelled to settle disputes increases the cost of obtaining justice owing to increased transportation prices. This may sometimes outweigh the financial advantages of pursuing the case.<sup>175</sup>

It is expensive for individuals to file their claims and virtually impossible for them to self-represent.<sup>176</sup> The reason is that disputing parties ultimately need a lawyer because one cannot file a claim with an address more than ten kilometres from the court.<sup>177</sup> Worse still, it is well-documented that self-represented litigants secure fewer victories regardless of the subject matter.<sup>178</sup> For example, parties who represent themselves consistently fail to comply with basic procedural requirements, a prerequisite for gaining access to court and for a judge to hear the merits of their case.<sup>179</sup>

Moreover, the contemporary market economy determines the areas of legal work and the geographical areas where legal professionals are available. First, Zimbabwe has always had a

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<sup>174</sup> See chapter one § 1.2.

<sup>175</sup> *In the Shadow of the Law* 98. In South Africa, like Zimbabwe, rural people refer disputes to traditional processes because, among other reasons, formal institutions are too far away. Accessibility, therefore, affects the fundamental step in dispute resolution: reporting a dispute, which informs the exercise of choice. See South African Law Commission (SALC) (Project 90 Customary Law) Report on Traditional courts and the judicial function of traditional leaders (2003) at 1.

<sup>176</sup> Steinberg 'Demand side reform in the poor people's court' (2015) 47 *Connecticut Law Review* 3 at 744.

<sup>177</sup> High Court Rules. R 15 amended by SI 202 of 2021 stipulates that, '...the address of service shall be within a radius of ten kilometres from the registry where the defendant is required to enter appearance...'

<sup>178</sup> Steinberg (n175).

<sup>179</sup> *Ibid.*

shortage of legal practitioners.<sup>180</sup> Second, many lawyers in practice work from either Harare or Bulawayo, two cities that historically hosted the High Court. Centralisation makes it difficult for peri-urban and rural citizens to access formal courts.<sup>181</sup>

*iii. The justice system can be alienating*

Several psychological issues affect the decision to seek remedies or defend claims through the justice system. One such issue is fear of the formal justice system for reasons including complex legal texts, language that includes Latin words, and the system being alien to most citizens.<sup>182</sup> Despite being staffed by Zimbabweans, courts in Zimbabwe do not conduct work in ChiShona, isiNdebele or any official languages spoken by 99.6 per cent<sup>183</sup> of the population. Accessing the justice system requires English language literacy and some legal literacy.

Although Zimbabwe boasts a 94 per cent literacy rate, there remain 840 000 people who cannot read or write.<sup>184</sup> The chances of an illiterate and indigent party being able to afford exorbitant legal fees are extremely low. Such individuals would have to rely on non-expert help from family or friends, whose help is not guaranteed. Interpreters are not always available; when they are, challenges of untranslatable proverbs and legalese prove unsurmountable.<sup>185</sup> There is no recourse for people who cannot read or understand written legislation, court documents, or procedural rules, i.e., people without legal literacy.

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<sup>180</sup> Sithole *Towards a Theory and Practice of Access to Justice for the Poor in Zimbabwe: Law and Dispute Resolution on a Pluralistic Society* (unpublished PhD thesis, University of Toronto, 1997) 200-201.

<sup>181</sup> Government of Zimbabwe and United Nations Development Programme (UNDP) 'Enhancing justice delivery and human rights for all' (2012) at 10.

<sup>182</sup> United States Institute of Peace 'Necessary conditions, access to justice' available at <https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/rule-law/access-justice>, accessed on 4 April 2018.

<sup>183</sup> Constitution, s 6(1) provides that Zimbabwe has sixteen official languages.

<sup>184</sup> ZimStat (n126).

<sup>185</sup> Sithole (n179) 182.

*iv. Social distance of lawyers and judicial officials from citizens*

Lawyers and judges are far removed from the public. They are often sheltered in central business districts and clad in formal suits, robes, and wigs. People's inability to understand the law and the actors that operate the system often leads to misconceptions about how the law works. In Stewart, Sithole, and Ncube (eds), the interlocutors joked about lawyers being sharp operators and persons of no integrity who can lie consummately for a guilty person.<sup>186</sup> What became apparent to the researchers was that such perceptions were not mere jokes by interlocutors, but a true reflection of laypersons' perceived cynicism of the legal profession.<sup>187</sup>

In Australia, distrust of legal institutions coincides with the perception that obtaining justice from the legal system is difficult or impossible.<sup>188</sup> The perception, perhaps not unfounded, that the justice system is adversarial (winner-take-all, zero-sum-game) and destructive to relationships, keeps citizens and small businesses from approaching the courts. This paints a bleak picture of justice and citizens' access to justice when justice seekers avoid formal institutions.

*v. Complex rules of substantive and adjectival law*

Legal systems tend to exhibit highly structured adversarial procedures. Substantive and procedural rules are understood and utilised by highly trained lawyers and expensive expert witnesses, who serve a vital function in litigation.<sup>189</sup> Nevertheless, adversarial and complex procedures that are only understood by lawyers place severe limits on the accessibility of courts

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<sup>186</sup> *In The Shadow of the Law* 116.

<sup>187</sup> *Ibid.*

<sup>188</sup> Van Rooij and van de Meene *Access to Justice and Legal Empowerment Making the Poor Central in Legal Development Co-operation* (2008) 11.

<sup>189</sup> Cappelletti and Garth (n100) at 239.

for claims made by citizens.<sup>190</sup> Still, it may be unrealistic to expect the court to be simple, fast, inexpensive and staffed with active decision-makers because contemporary laws are complex and will likely continue to be highly technical.

Lord Woolf attributed the complexity of procedures to the rules governing the justice system.<sup>191</sup> Both self-representing and represented litigants find procedural rules complex to navigate.<sup>192</sup> The justice system is further complicated by the ‘incoherent and illogical’ manner, which procedural rules have developed over time. For example, diverse rules are applied in different courts without sufficient justification.<sup>193</sup> Effective access to justice requires courts with simplified procedures while creating or integrating more accessible platforms for dispute resolution within the purview of state jurisprudence.

In the first chapter, I introduced the notion that procedural justice can produce substantive injustice, which aligns well with the legal positivist view that justice is secreted in the interstices of procedure.<sup>194</sup> However, the law of evidence<sup>195</sup>, rules of limitation, and technicalities of procedure have minimal impact on achieving justice.<sup>196</sup> In fact, these factors diminish respect for the legal profession in the eyes of litigants whose substantive cases may be dismissed or lost on mere technicalities.<sup>197</sup> Faruqi justifies the claim with three points, that is, (i) exclusion of hearsay evidence also results in the rejection of eminently truthful testimony;

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<sup>190</sup> Ibid.

<sup>191</sup> Lord Woolf ‘Access to justice: Interim report to the Lord Chancellor on the Civil Justice System in England and Wales’ 1995 *Lord Chancellor’s Department* 15.

<sup>192</sup> Ibid.

<sup>193</sup> Dingwall and Durkin ‘Time management and procedural reform: Some organisational questions for Lord Woolf’ in Zuckerman and Cranston (eds) *Reform of Civil Procedure: Essays on ‘Access to Justice’* (1995) 371, 376.

<sup>194</sup> Faruqi (n95) at 2. See chapter one § 1.6.

<sup>195</sup> An empirical study found that judges felt that death and rape cases are especially complex from an evidentiary perspective; see Heise ‘Criminal case complexity: An empirical perspective’ (2004) 1 *Journal of Empirical Legal Studies* 2 at 360.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

(ii) focus on form over substance and the process is more dominant than the result; (iii) perpetuation of inequality because the success of a pleading does not depend on the intrinsic merit of the case but on the brilliance (or otherwise) of the lawyer.<sup>198</sup>

Moreover, rules of procedure have an intrinsic risk of prejudice towards a particular group. For example, abused women who are asked to produce proof in the form of a medical certificate face a challenge from medical professionals who refuse to issue the certificates, fearing that they may be called to testify in court.<sup>199</sup> A well-functioning justice system is fundamental to access to justice or the lack thereof because accessibility is a consequence of the various justice elements working in unison. Hence, the dysfunctionality of one element renders the entire system vulnerable and potentially inaccessible.

To avoid bias, it is essential to mention that the above is not a universally accepted argument because the law of evidence, rules of limitation, and technicalities of procedure are essential components of a fair and just legal system, especially in its current form in Zimbabwe. These aspects provide a structured framework for resolving disputes, help maintain consistency, ensure due process, protect individual rights, and prevent abuse of power.

#### *vi. Complex rules cause delays*

Following the adage justice delayed is justice denied<sup>200</sup>, the delays experienced in concluding cases have led to case backlogs and, at times, encouraged citizens to seek non-judicial remedies to enforce their rights. The irony is that general law courts receive fewer cases than the informal

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<sup>198</sup> Ibid at 1. See *Mandava v Chasweka* [2008] ZWHHC 42. *Main Road Motors v ZIMRA* [2018] ZWMSVHC 1. These cases are discussed in detail in chapter four § 4.6 and 4.7.

<sup>199</sup> Sibanda (n16) at 55. See *Mapingure v Minister of Home Affairs* [2014] ZWSC 22.

<sup>200</sup> Constitution, s 165(1)(b).

platforms and yet maintain backlogs.<sup>201</sup> When justice is delayed, it is rendered ineffective and inaccessible. A collaborative report by the UNDP and the Zimbabwe Government observed how the country's deteriorating infrastructure and brain drain have resulted in case backlogs in ordinary and specialised courts.<sup>202</sup> Many factors contribute to the failure to deliver justice expeditiously, including the complexity of the issues within a case, the complexity of the system, or the overburdening of the justice system. In addition to these factors, complex rules ringfenced within a complex system that laypersons cannot comprehend, taking access to justice beyond the reach of most citizens.

An example of a bad combination of complex rules within a complex system and disastrous consequences is illustrated in the *Mapingure v Minister of Home Affairs* case.<sup>203</sup> Mildred Mapingure was raped and sought emergency contraception, but due to complex rules and delays, she was unable to obtain it within the required timeframe. She later became pregnant and sought to terminate the pregnancy, but again faced bureaucratic hurdles and was ultimately denied the procedure, despite fulfilling all the requirements as set out in the Termination of Pregnancy Act, 1977.<sup>204</sup> This case highlights the impact of complex rules and procedures on individuals seeking justice.

#### *vii. Ignorance of the substantive and adjectival law*

To access justice, the population must know their rights and the channels to follow to seek a remedy. When people are ignorant of the fundamental human rights enshrined in the

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<sup>201</sup> Tamale *Decolonisation and Afro-Feminism* (2020) 139 cites the Government of Uganda 'The Justice, Law and Order Sector (JLOS) Annual Report 2017/ 2018' available at <https://www.jlos.go.ug/> where they reported a 21 per cent backlog despite less than five per cent of cases taking place in formal courts. See also Mangwaya 'COVID-19 spawns courts backlog' *NewsDay* 12 January 2021.

<sup>202</sup> Government of Zimbabwe and UNDP (n180) 10. Nemukuyu (n170) describes nineteen courts having been closed, which contributed to the increased backlog countrywide.

<sup>203</sup> *Supra* (n198).

<sup>204</sup> Termination of Pregnancy Act, 1977.

Constitution, they cannot assert them. In Zimbabwe, the government has never had a clear policy for disseminating legal information outside the Constitution's language translation. It is worth mentioning that translations of the Constitution to some Indigenous languages exist, and several NGOs have embarked on awareness campaigns, but this has not been sufficient. The gap in information dissemination identified by Tsanga<sup>205</sup> in 1996 is yet to be filled. Much of the legal literature is primarily kept at government printers, at lawyers' offices and with law students or at university libraries. The Latin maxim *ignorantia juris non excusat* or *ignorantia legis neminem excusati* ('ignorance of the law is no excuse') is adhered to in Zimbabwean courts.<sup>206</sup>

As mentioned above, self-represented litigants face the near-impossible hurdle of acquainting themselves with adjectival law when prosecuting a claim or defending themselves. In the case of *Chawagona Housing Cooperative v Johannes Chimonyo*<sup>207</sup>, Chimonyo explained that he did not enter an appearance to defend the summons served on him because he did not know how to do it. In *Mupapa v Mandaya*, Tsanga J. averred:

'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.'<sup>208</sup>

Although there is no explicit duty to do so<sup>209</sup>, it is inadequate to promulgate laws of which the population is ignorant. The Aboriginal voting status case in Australia best illustrates this point. Aborigines were granted the right to vote in the 1800s, but it was not until the 1960s that they

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<sup>205</sup> Tsanga *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* (1996).

<sup>206</sup> Section 236 of the Criminal Law (Codification and Reform) Act 2006. The Act provides an exception to the rule, when a person acts on the advice of an official who is primarily responsible for administering the statute to which the matter relates. See *S v White* [2017] ZWBHC 7.

<sup>207</sup> *Chawagona Housing Cooperative v Johannes Chimonyo* M 3376/2005. See also *Supra* (n107), where an interdict was granted with costs despite Teteka having a defence. Teteka's inaction due to ignorance of adjectival law resulted in a default judgment.

<sup>208</sup> *Mupapa v Mandaya* HH-443-14.

<sup>209</sup> There is no explicit duty under Zimbabwean law; however, as a signatory to the African Charter on Human and People's Rights, it must implement Article 25, which requires the state to educate citizens on laws.

were allowed to vote.<sup>210</sup> They were simply not informed that they had such rights. As Korff writes, very few Aboriginal men knew that they had the right to vote, and so they went on with ignorance for close to one hundred years. Writing on allegiance and obedience of citizens, Green argues that it is irrational to expect people to obey laws and stand guided by them when they do not know about the law.<sup>211</sup> Therefore, a society that is committed to the presumption of innocence, to proof beyond a reasonable doubt, to due process of law or to the obligation not to discriminate, suffers a moral deficiency when citizens are unaware that these principles animate their legal system and are unaware of what they involve and how they are justified.<sup>212</sup> One can only access or claim that they know to exist, and therefore, to be obeyed, the law should be within the grasp of citizens.

Inequality in the justice system is exacerbated by the differential capability of litigants to recognise and pursue their rights (for numerous reasons).<sup>213</sup> Capability refers to the advantages of individuals or organisations with more financial and other resources.<sup>214</sup> Those with more resources have the competence (through elite education or hired help) to navigate the legal system. In contrast, those with fewer resources are often disadvantaged by their lack of familiarity with the system.<sup>215</sup> This is particularly evident in the case of ‘one-shot’ litigants<sup>216</sup>,

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<sup>210</sup> Korff ‘Voting rights for Aboriginal people’ available at <https://www.creativespirits.info/aboriginalculture/selfdetermination/voting-rights-for-aboriginal-people>, accessed on 31 May 2022.

<sup>211</sup> Green ‘Law and obligations’ in Coleman and Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2004) 4, 18.

<sup>212</sup> *Ibid.*

<sup>213</sup> Galanter ‘Afterword: Explaining litigation’ (1975) 9 *Law and Society Review* 2 at 360. He believes lay people lack legal information and skills required to vindicate rights, leading them to rely on informal dispute resolution systems or to withdraw claims from the formal system.

<sup>214</sup> Cappelletti and Garth (n100) at 190.

<sup>215</sup> *Ibid* at 191.

<sup>216</sup> Galanter ‘Why the haves come out ahead: Speculation on the limits of legal change’ (1974) 9 *Law & Society Review* 1 at 97.

such as spouses in divorce cases or auto-injury claimants, who face ‘repeat-player’ litigants, such as insurance companies or prosecutors.<sup>217</sup>

*viii. Procedural limitations affect how courts function*

Courts may sometimes be perceived as lacking initiative and rendered ineffective in cases where the law is unjust and reflects structural injustice.<sup>218</sup> Moreover, courts are not designed or mandated to proactively discover and correct legal errors or abuses of power. Rather, courts can only address structural injustices when petitioned by aggrieved persons.

The legal principle of *stare decisis*, which requires that the decisions of higher courts bind lower courts, may sometimes present significant challenges to courts’ ability to deal with structural injustices. Although the judiciary is focused on maintaining certainty and predictability<sup>219</sup>, the principle of *stare decisis* dictates that the judiciary must (although not absolute) determine points in litigation following principles established in the past decisions of higher courts.<sup>220</sup> While acknowledging the importance of certainty and predictability as central to the rule of law, justice that produces fair outcomes should be the primary objective.

This thesis aims to empirically explore the obstacles citizens face when entering and navigating the formal justice system. As part of this objective, chapter five delineates empirical ways of enhancing access to justice in Zimbabwe. But importantly, this thesis aims to go beyond general recommendations and portray a formal justice system derived from empirical data gathered from the supply side of the justice system in chapter six.

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<sup>217</sup> Ibid.

<sup>218</sup> Faruqi (n95) at 2.

<sup>219</sup> Hahlo and Kahn *The South African Legal System and Its Background* (1968) 214-215.

<sup>220</sup> *Zimbabwean law* 23.

## 2.5. Conclusion

Before discussing the development of ADR and its various mechanisms, it was vital to outline the theoretical concepts of law, justice, and access to justice and how they find expression in Zimbabwe. Several conclusions can be drawn from the discussion on law, justice, and access to justice. These include the fact that the dominant legal approach in Zimbabwe is positivism, which prioritises legality and enforceability over traditional custom and moral acceptability, potentially creating a disconnect between the law and citizens' lived realities.

Living customary law also presents a challenge as a *de facto* parallel dispute resolution system, and the obligation to develop it while adhering to legal positivism creates a paradox that may impede access to justice. Therefore, it is necessary to investigate whether harmonising the formal and informal justice systems will improve access to justice and better cater to society's needs. In Zimbabwe, social justice influences access to justice, and effective access requires institutions that make citizens' rights real. Thus, the question for policymakers and scholars is how far to push towards equality in access to justice and which obstacles should be tackled at any one point.

This chapter sought to purposefully represent a synopsis of the literature objectively, which meant deliberately omitting critical commentary on the respective merits, challenges or successes of each piece of academic literature reviewed in some instances. The conceptions of law and justice related to access to justice were broadly presented to encompass social justice from a normative perspective. However, from a legal point of view, the conceptions of law and justice may be compartmentalised into procedural and distributive justice. The chapter observed that people and societies perceive justice differently depending on how they interact with the concept within their unique circumstances. Subsequently, these diverse conceptions inform what is needed to address or resolve disputes in each community. From this perspective,

there seems to be a connection between the justice of the process utilised to resolve disputes and the justice of the outcomes resulting from the process.

The Florence Access to Justice Project provides a good point of departure for this thesis. I rely on the three waves to outline the history of efforts to improve access to justice. The third wave is significant to this thesis because it incorporates ADR and non-state dispute resolution processes, which inform the analytical concepts of this study. These are essential in Zimbabwe, where most people obtain justice through non-state mechanisms. This thesis builds on such literature and furthers the work by enquiring into the implementation of access to justice initiatives in Zimbabwe. The following chapter delineates ADR and individual processes such as negotiation, mediation, conciliation, and arbitration. Finally, I outline the connection between mainstream ADR and TADR within the broader access to justice discourse.

## CHAPTER THREE

### THEORY AND DEBATES ON ALTERNATIVE DISPUTE RESOLUTION

#### 3.1. Introduction

This chapter defines alternative dispute resolution (ADR) and its manifestation in Zimbabwe, i.e., traditional African dispute resolution (TADR). From the outset, it is vital to avoid creating an impression that ADR is the only panacea for disputing parties to overcome their access to justice challenges. Maligning and picturing litigation as a pit trap is also incorrect. This is because, despite being imposed on Indigenous people, common law, general law courts, and litigation have continued to be central in Zimbabwe. In this context, this chapter unpacks ADR and TADR.<sup>1</sup>

The first section highlights philosophical debates on ADR, including the three schools of thought on ADR discourse. The second section unpacks the advantages and disadvantages of ADR as an independent system for dispute resolution. Although I mention litigation and general law courts, I deliberately evaluate ADR as an independent/separate system without too much comparison with other dispute resolution systems. Comparisons may distract the discussion from ADR, which I intend to assess on its merit. Framing ADR processes in a dichotomous relationship with general law court processes rests on an oversimplified logic, which assumes that all ADR processes are alternatives to formal court processes.<sup>2</sup> On the contrary, such assumptions are a logical fallacy because they draw a false equivalence between ADR and all non-litigious dispute resolution processes. Consequently, such logic leads to the

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<sup>1</sup> As discussed in chapter one, this thesis is not an anti-litigation or anti-court project but seeks to examine how to enhance citizens' access to justice.

<sup>2</sup> Faris *An Analysis of The Theory and Principles of Alternative Dispute Resolution* (unpublished PhD thesis, University of South Africa, 1995) 9.

adulteration of terminology and dilutes the scope and function of ADR as an independent dispute resolution system.<sup>3</sup>

In the following sections, I examine individual ADR processes such as negotiation, mediation, conciliation, and arbitration, including their advantages and disadvantages. Discussions of individual ADR processes are brief because much of the literature already exists. Moreover, individual processes are not the focus of this thesis, which concerns itself with the broader ADR system. The penultimate section provides an overview of the multi-door courthouse and how different types of disputes may be matched to appropriate processes for effective resolution. The last section concludes the chapter and provides a segue into the combined presentation of findings and analysis of empirical data gathered through interviews with eighteen legal professionals.

### 3.2. The pursuit of a single theory of ADR

There is no single philosophy or consensus that any ADR process can properly and authentically represent the ‘true spirit’ of ADR.<sup>4</sup> On the one hand, the term ADR is said to denote all forms of dispute resolution other than full-scale general law court processes.<sup>5</sup> The concept is also defined as, ‘the use of private parties to resolve disputes that might otherwise be litigated.’<sup>6</sup> It is not clear from the literature whether a judge taking up the role of mediator is also a private party. For example, the United States Federal and State Courts provide public ADR to court users, but judges who act as mediators cannot be described as private parties.<sup>7</sup>

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<sup>3</sup> Ibid 18-19.

<sup>4</sup> Brown and Marriot *Alternative Dispute Resolution Principles and Practice* (2011) (hereinafter *Principles and Practice*) 9.

<sup>5</sup> Brown, Cervenak, and Fairman *Alternative Dispute Resolution Practitioners Guide* (1998) 4.

<sup>6</sup> Tarpley ‘Alternative dispute resolution, jurisprudence, and myth’ (2001) 17 *Ohio State Journal on Dispute Resolution* 1 at 114 quoting Lipsky and Seeber ‘Top General Counsels support ADR: Fortune 1000 lawyers comment on its status and future’ (1999) 8 *American Bar Association: Business Law Today* 4 at 24.

<sup>7</sup> Reuben ‘Constitutional gravity: A unitary theory of ADR and public civil justice’ (2000) 47 *UCLA Law Review* 949 at 954.

From Australia, Sir Lawrence Street added to the theoretical debate by elucidating that ADR describes:

‘a holistic concept of a consensus-oriented approach to dealing with potential and actual disputes or conflict. The concept encompasses conflict avoidance, conflict management and conflict resolution. The over-arching element of ADR in addressing these three aspects of conflict is the consensus-oriented philosophy that pervades the newly evolving recognition that conflict avoidance, management and resolution are simply three closely related sequential approaches each of which has relevance and application within the broad field of social, commercial, and personal interaction. This is inherently the province and function of ADR.’<sup>8</sup>

A critical consideration when defining the concept is that it allows resolving disputes by utilising a process or technique best suited to the dispute.

The concept of ‘justice’ is crucial to ADR, and three normative conceptions are latent in the development of ADR processes: just harmony, authentic participation, and appropriate fit.<sup>9</sup>

*Just harmony* entails presenting a vision for what justice ought to look like, providing a benchmark against which each dispute resolution process can be measured.<sup>10</sup> *Authentic participation* involves parties’ meaningful participation and active involvement in resolving disputes, which guards against strategic manipulation.<sup>11</sup> *Appropriate fit* outlines the circumstances to be considered when routing specific disputes to an appropriate process.<sup>12</sup> In this study, justice in ADR empowers disputing parties to play an active role in resolving disputes, providing input in the design of the process and having control over the outcome that considers their interests.

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<sup>8</sup> National Alternative Dispute Resolution Advisory Council (NADRAC) (Australia) ‘ADR terminology: Responses to NADRAC discussion paper’ *NADRAC* (2005) at 10 quoted in Law Reform Commission Consultation Paper on Alternative Dispute Resolution (LRC CP 50 – 2008). See Street ‘Foreword’ in Sourdin *Alternative Dispute Resolution* (2005) vii – viii.

<sup>9</sup> Kruse ‘Learning from practice: What ADR needs from a theory of justice’ (2004) 5 *Nevada Law Journal* 405 at 392.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid* at 394.

## a. The schools of thought in the ADR discourse

In mainstream legal scholarship, three primary schools of thought exist regarding ADR discourse. The first school posits that general law courts are the alternative system. The second school of thought suggests that the acronym ADR stands for ‘appropriate dispute resolution’ rather than ‘alternative dispute resolution.’ The third school of thought is process pluralism. In the following sections, each school of thought is discussed in detail.

### i. *The first school of thought*

The first school of thought argues that general law courts are not the main dispute resolution system in jurisdictions like Zimbabwe.<sup>13</sup> Empirical studies support this claim, with only twenty per cent<sup>14</sup> of the population resolving disputes through litigation and formal courts.<sup>15</sup> Even disputes that commence in the courts are often concluded through other means outside the court.<sup>16</sup> Galanter and Frozena go to the extent of claiming that trial is ‘approaching extinction.’<sup>17</sup> This first school of thought on ADR differentiates the Western and African ADR (TADR) paradigms<sup>18</sup>, with ADR understood as ‘alternative dispute resolution’ being a concept

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<sup>13</sup> Kohlhagen ‘Alternative dispute resolution (ADR) and mediation: The experience of French-speaking countries’ (2006) 6; Sander ‘Alternative methods of dispute resolution: An overview’ (1985) 37 *University of Florida Law Review* 1 at 1-2. Sander concludes that ADR is not founded upon the need for a litigation substitute because litigation is not the norm.

<sup>14</sup> Sibanda ‘An analysis of traditional leadership, customary law and access to justice in Zimbabwe’s Constitutional Framework’ 2019 *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* found that only 20 per cent of the Zimbabwean population utilise general law courts, while the other 80 per cent who are mostly rural, rely on TADR.

<sup>15</sup> Himonga ‘The future of living customary law in African legal systems in the Twenty-First Century and beyond, with special reference to South Africa’ in Fenrich, Galizzi, Higgins (eds) *The Future of African Customary Law* (2011) 32.

<sup>16</sup> Galanter ‘Reading the landscape of disputes: What we know and don’t know (and think we know) about our allegedly contentious and litigious society’ (1983) 31 *UCLA Law Review* 4 at 8, 20; Galanter ‘The vanishing trial: An examination of trials and related matters in federal and state courts’ (2004) 1 *Journal of Empirical Legal Studies* 3 at 507. See Faris ‘Reconciling alternative dispute resolution and judicial dispute resolution’ (1992) 7 *Codicillus* 33 at 14; Fulton *Commercial Alternative Dispute Resolution* (1989) 13-15.

<sup>17</sup> Galanter and Frozena ‘The continuing decline of civil trials in American courts’ 2011 *Pound Civil Justice Institute* at 23.

<sup>18</sup> For a discussion on an emic theory of African ADR, see Maraire ‘The pursuit of an appropriate dispute resolution philosophy for Africa’ (2024, forthcoming) *Journal of African Law*.

developed in countries with legal traditions that differ from the social realities in sub-Saharan Africa.<sup>19</sup> In African societies, indigenous dispute resolution mechanisms are dominant, with general law court processes being the ‘additional’ or ‘alternative’ mechanisms. State courts were used as an instrument of ‘civilised’ repression in the colonial period<sup>20</sup>, banning African customs viewed as ‘barbaric’.<sup>21</sup> Africans could not rely on a system they regarded as illegitimate, and thus continued to use their dispute resolution mechanisms, albeit informally and outside state regulation.<sup>22</sup>

### *ii. The second school of thought*

The second school of thought propounds that the acronym ‘ADR’ should be taken to mean ‘appropriate dispute resolution’ instead of the widely used term ‘alternative dispute resolution’.<sup>23</sup> This school of thought does not differentiate between formal and informal dispute resolution and is part of Cappelletti’s third wave of access to justice reforms.<sup>24</sup> Disputes can be grouped into many categories, depending on several factors affecting their nature and range. Differences between types of disputes are also present in the same category. Such is the nature of disputes. Accordingly, disputing parties could start with informal processes attempting to cure the injury, and if such attempts fail, they may resort to formal processes. Reuben canvasses this school of thought with what he calls ‘a unitary theory of public civil dispute resolution.’<sup>25</sup>

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<sup>19</sup> Kohlhaugen (n13) 6. See also Okafo *Reconstructing Law and Justice in a Postcolony* (2009).

<sup>20</sup> Section 11(a) of the Black Administration Act 38 of 1927 (South Africa).

<sup>21</sup> Hinz ‘Legal pluralism in jurisprudential perspective’ in Hinz and Patemann (eds) *The Shade of New Leaves: Governance in Traditional Authority: A Southern African Perspective* (2005) 51.

<sup>22</sup> Kohlhaugen (n13) 6. The Ethiopian and Francophone countries demonstrate the resilience of traditional courts that, despite being abolished during colonial rule, have operated informally 50 years after the countries gained independence.

<sup>23</sup> SALC Issue Paper 8 (Project 94) *Alternative Dispute Resolution* (1997) 13. Ogbuabor, Nwosu, and Ezike ‘Mainstreaming ADR in Nigeria’s criminal justice system’ (2014) 45 *European Journal of Social Sciences* 1 at 36 refer to ADR as ‘authentic’ dispute resolution, because it is indigenous to Africans and predates Western conceptions of the system.

<sup>24</sup> Cappelletti and Garth ‘Access to Justice: The newest wave in the worldwide movement to make rights effective’ (1978) 27 *Buffalo Law Review* 2 at 181.

<sup>25</sup> Reuben (n7) at 1048.

The unitary theory joins trial and ADR processes into ‘a single system of interrelated dispute resolution processes.’<sup>26</sup> There is an appreciation among commentators that utilising the term ‘appropriate’ in place of ‘alternative’ acknowledges the functional importance of ADR within mainstream dispute resolution and legal discourse.<sup>27</sup>

### *iii. The third school of thought*

ADR proponents argue that the term ‘alternative’ in the acronym ADR is used in the sense that whatever mechanism is utilised to resolve a dispute, is only one of many available processes.<sup>28</sup> Sander occupies a middle position between the above two schools of thought and relies on ‘process pluralism.’ ADR is procedural, involving how a claim must be processed and the forum in which disputes must be resolved.<sup>29</sup> ADR, therefore, does not dictate the substantive content of the law to be applied. Accordingly, there are no competing or conflicting systems of law.<sup>30</sup>

To illustrate the point above, an employer-employee dispute may be litigated in an ordinary court, negotiated, mediated, or subjected to arbitration. The governing labour laws apply in all cases, and access to justice would have been served. Even without a single philosophy, most proponents of ADR now agree that the term ‘alternative’ is inappropriate.<sup>31</sup> ADR derives its

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<sup>26</sup> Ibid.

<sup>27</sup> Astor and Chinkin *Dispute Resolution in Australia* (2002) 69-71; Spencer *Principles of Dispute Resolution* (2016) 3; Pears *Beyond Dispute: Alternative Dispute Resolution in Australia* (1989) 1; Trollip *Alternative Dispute Resolution in a Contemporary South African Context* (1991) 7; Faris (n16) at 11.

<sup>28</sup> Sander ‘Dispute resolution within and outside the courts – An overview of the US experience’ in Rao and Sheffield (eds) *Alternative Dispute Resolution: What it is and How it Works* (1997) 123 suggests that a better acronym is (AMDR) ‘Alternative Methods of Dispute Resolution.’

<sup>29</sup> Faruqi ‘Justice outside the courts: Alternative dispute resolution and legal pluralism’ 2000 *Universiti Teknologi MARA* at 6.

<sup>30</sup> Ibid.

<sup>31</sup> Mackie (ed) *A Handbook of Dispute Resolution: ADR in Action* (1977) 3.

value from the plurality or range of dispute resolution processes adding to and enhancing instead of replacing litigation, even in colonised countries where litigation was imposed.

#### b. The intersection of mainstream ADR and TADR

Chapter two explored the concept of ‘access to justice’, encompassing both public law (criminal law, law of taxation, and administrative law) and private law (the law of property, of obligations (contract and delict), and of persons).<sup>32</sup> This strategic decision laid the foundation for the current discussion on ADR and TADR within the broader access to justice framework. Indigenous to Africa, ADR and TADR differ in their level of formalisation.<sup>33</sup> Mainstream ADR has been partially formalised through legislation such as the Arbitration Act, while TADR remains largely informal and operates at the grassroots level. In mainstream ADR in Zimbabwe, parties volunteer<sup>33b</sup> and consent to ADR, while TADR processes apply automatically.<sup>33c</sup>

TADR is deeply embedded in the socio-cultural fabric of African societies, with dispute resolution mechanisms reflecting the community’s values, customs, and philosophies.<sup>33d</sup> It operates unofficially within non-state law and strongly emphasises reconciliation and restoring harmony within the community. In contrast, mainstream ADR is more standardised and less influenced by specific cultural contexts. While it also seeks amicable resolution, its focus may be more on finding a mutually agreeable solution to the dispute rather than restoring relationships among community members. In ADR, the dispute belongs to the parties alone,

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<sup>32</sup> *Zimbabwean Law* 39, see chapter two § 2.4.

<sup>33</sup> Ogbuabor, Nwosu, and Ezike (n23); Barrett and Barrett *A history of alternative dispute resolution: the story of a political, cultural, and social movement* (2004) xxv-xxx. See chapter one § 1.3, for a discussion of TADR mechanisms and their functional equivalence with mainstream ADR mechanisms.

<sup>33b</sup> Arbitration Act [Chap 7:15]. In Zimbabwe, compulsory arbitration is only regulated by the Labour Act and voluntary arbitration is regulated exclusively by the Arbitration Act.

<sup>33c</sup> Rautenbach ‘Traditional Courts as Alternative Dispute Resolution (ADR) – Mechanisms in South Africa’ in Diedrich (ed) *The Status Quo of Mediation in Europe and Overseas: Options for Countries in Transition* 291.

<sup>33d</sup> Ogbuabor, Nwosu, and Ezike (n23); see generally *In the Shadow of the Law*.

whilst in TADR, the dispute belongs to the community, which is also a party that participates in its resolution.<sup>33e</sup>

Interestingly, there is a consensus in the literature that mainstream ADR was informed by the works of legal anthropologists who had travelled to African and other communitarian societies, such as Native Americans and Aborigines in present-day Australia, China, and Japan.<sup>33f</sup> Thus, while both systems aim to provide effective, accessible, and timely dispute resolution, they do so through different mechanisms and with different emphases, yet they share a common heritage and foundational principles. This understanding accentuates the importance of recognising and appreciating the value of both systems in the pursuit of justice and dispute resolution.

#### c. The role of TADR and ADR in civil and criminal justice: Distinctions and applications

Rooted in Africa's restorative justice and legal philosophy, TADR does not distinguish between public and private law, handling criminal and civil matters, as seen in its application to violence or theft cases.<sup>34</sup> To maintain focus on the central theme of this thesis, a deliberate decision was made to avoid protracted theoretical discussions (beyond the discussion above) on distinguishing between ADR and TADR or assessing the suitability of ADR or TADR for handling civil and criminal justice matters. Suffice it to say that ADR and TADR are already expressed in both civil and criminal law in Zimbabwe. For example, plea bargaining legislation and pre-trial conferencing are integrated into the criminal and civil justice contexts.<sup>35</sup> Moreover, existing legal needs surveys and access to justice literature often do not differentiate

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<sup>33f</sup> See (n33) above.

<sup>33e</sup> See chapter two § 1.6(b)(i) societal structures and semi-autonomous social fields that generate rules, coerce, or induce compliance from community members.

<sup>34</sup> Okafo *Reconstructing Law and Justice in a Postcolony* (2009) 8.

<sup>35</sup> Criminal Procedure and Evidence Act, 1927 s 271. See chapter four § 4.2(e) on the pre-trial conference.

between citizens' criminal and civil legal needs globally<sup>36</sup>, reinforcing this approach's rationale.

Despite the strategic decisions mentioned above, it is imperative to demonstrate awareness of the fact that ADR and TADR differ in the criminal and civil justice contexts. O'Connell aptly illustrates the distinction between ADR and customary processes (TADR) in criminal and civil justice contexts using conferencing and victim-offender mediation to highlight their theoretical and practical underpinnings.<sup>37</sup> ADR emphasises conflict resolution, compromise, and collaboration, avoiding blame while considering all interests and relationships for optimal outcomes.<sup>38</sup> The advantages extend to criminal cases, with conferencing distinctly grounded in criminology, psychology, and sociology, and its goal is to stigmatise the crime, not the offender, fostering acceptance of responsibility.<sup>39</sup> The table below summarises the distinguishing factors between ADR in criminal and civil justice contexts:

<b>Feature</b>	<b>Civil Context</b>	<b>Criminal Context</b>
Parties involved	Parties only	Parties and the State or society
Blame	No blame	Blame, attached to the act, not the offender
Interests involved	Private interests	Public interest
Admission of guilt	No initial admission of guilt	Initial admission or assumption of guilt

Table 2.<sup>40</sup>

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<sup>36</sup> This line of thought finds support from Deutsch 'Justice and conflict' in Deutsch and Coleman (eds) *The Handbook of Conflict Resolution: Theory and Practice* (2000) 45 when defining substantive and procedural justice based on local normative frameworks. See Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Postconflict Societies (2004) S/2004/616 para 7. See Hiil for multi-country surveys on justice needs, <https://www.hiil.org/research/> Accessed 15 November 2023.

<sup>37</sup> O'Connell 'Restorative justice for police: Foundations for change' Paper presented at the United Nations crime congress ancillary meeting on implementing restorative justice in the international context, Vienna, Austria, 10-17 April (2000) at 9.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Table adapted from the original in Ogbuabor, Nwosu, and Ezike (n23) at 34.

Although ADR has typically been associated with civil justice disputes in the (predominantly Western) literature, it has gained recognition and application in other areas, including criminal justice.<sup>41</sup> Gutman posits that ADR's potential benefits, such as cost-effectiveness, efficiency, and flexibility, can satisfy victims and offenders.<sup>42</sup> However, there are some limitations and challenges in using ADR in the public law context, particularly in disputes involving constitutional or fundamental issues, intentional torts, and criminal activity.<sup>43</sup> The argument is that while ADR may satisfy parties, it may fail to serve other interests, such as public safety and punishment. This means evaluating the use of ADR in non-civil justice contexts is imperative, considering potential implications. Notwithstanding these limitations, this thesis argues that an efficient, effective, and credible *African justice system* must embrace indigenous principles. To contextualise TADR's relevance in contemporary society, this thesis acknowledges the importance of assessing its alignment with constitutional and international human rights standards.

### 3.3. Advantages of ADR

#### a. Strength in numbers: Plurality and flexibility

ADR allows tailored interventions to resolve and settle disputes without comparison with previous disputes under different circumstances. There are many ADR processes, each with a distinct set of characteristics that can be customised to match unique disputes, including the types of parties and issues in controversy. The plurality of ADR processes and inherent flexibility illustrates how a neutral third-party/practitioner (such as a mediator or conciliator)

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<sup>41</sup> Gutman 'The reality of non-adversarial justice: Principles and practice' (2009) 14 *Deakin Law Review* 1 at 41; Harris 'A sentencing conversation': Evaluation of the Koori Courts: Pilot program: October 2002 - October 2004 (2006) at 13. Harris provides data relating to reduced recidivism levels among Koori defendants sentenced in Victorian Koori Courts that utilise ADR.

<sup>42</sup> Gutman *ibid*.

<sup>43</sup> Gutman *ibid*; Sherman and Strang 'Restorative justice: The evidence' 2007 *The Smith Institute* at 32, 33, 44.

can, after considering the unique circumstances of a dispute, design collaboratively with the parties, a format that best suits the features of the dispute. The counterargument to the claim that ADR diminishes the importance of legal representation asserts that, unlike litigation where only lawyers can appear, ADR allows parties the option of legal or non-lawyer representation.<sup>44</sup>

ADR also passes the legal empowerment test discussed in chapter two<sup>45</sup> because intrinsic within ADR is an understanding that each dispute is unique, with a different history and a special set of issues that defy simple classification or comparison.<sup>46</sup> The objectives of restoring harmony, upholding cultural values, and entrenching respect for elders, among other goals of ADR and TADR, are absent in state law.<sup>47</sup> In response to various infractions, such as adultery or witchcraft, a community may enact punishments, carry out rituals to expel negative energies, or impose penalties for failing to fulfil community service obligations outlined in community norms.<sup>48</sup> The multitude of mechanisms available to resolve matters and the flexibility of procedures, grounded in community norms, explain how and why the outcomes of ADR and TADR are perceived as just by the affected parties.<sup>49</sup>

#### b. Informality

The informality of ADR is a key advantage that makes it accessible to a broader range of people and allows for more flexible and holistic solutions to disputes. ADR offers a reprieve from the rigidity of general law court proceedings, which can be daunting and inaccessible to those

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<sup>44</sup> Ogbuabor, Nwosu, and Ezike (n23) at 34.

<sup>45</sup> See chapter two § 2.4. See Brinks and Botero ‘The social and institutional bases of the rule of law in Brinks, Mainwaring, and Leiras (eds) *Reflections on Uneven Democracies: The Legacy of Guillermo O’Donnell* (2014) 218 on ‘legal agency,’ which they define as the empowered ability to exercise one’s legal rights and protections, ensuring a high probability of securing redress when those rights are violated.

<sup>46</sup> Cooper and Field ‘The family dispute resolution of parenting matters in Australia’ (2008) 8 *Law and Justice Journal* 1 at 158, 165 cited in Gutman (n41) at 29-51.

<sup>47</sup> Brinks ‘Access to what? Legal agency and access to justice for Indigenous peoples in Latin America’ (2019) 55 *The Journal of Development Studies* 3 at 357.

<sup>48</sup> *Ibid* at 357-358.

<sup>49</sup> Brinks *ibid*, cites multiple empirical studies that reported similar findings in different countries.

unfamiliar with the legal system or intimidated by its formality. ADR also offers additional avenues for seeking redress beyond what the legal system recognises. It allows for more flexible and adaptable solutions that may be more appropriate for the parties' specific needs.<sup>50</sup> Stewart, Sithole, and Ncube (eds)<sup>51</sup> highlighted an illuminating example of the benefits of ADR's informality. In *Binga*, a lady sought an apology from her erring brother, hoping the customary court would reprimand him to prevent future transgressions. She did not desire monetary compensation, even though she was legally entitled. The chief ordered a nominal sum as damages, respecting the woman's wishes. The case illustrates how ADR can achieve win-win solutions that align with laypersons' holistic understanding of justice.

Through a pure legal lens, the case appears 'silly' to reference, but underscores the normative vision of justice laypersons uphold and what they expect from the justice system. ADR's informality, flexibility, and adaptability enable the exploration of win-win remedies rather than win-lose dynamics often associated with formal court proceedings. This empowers individuals to have a say in dispute resolution and aligns with their understanding of justice.

### c. ADR provides better outcomes for parties

The procedural flexibility afforded by ADR to parties and the assistance of a neutral third-party are advantages. The neutral third-party for instance, uses expertise to assist disputing parties in matching the issues in dispute to the most appropriate process. To illustrate, the full bench of the Western Cape Division of the High Court of South Africa<sup>52</sup> observed that litigation had only succeeded in increasing the hostilities between parties. Regardless of the dispute resolution mechanism that is utilised, the remedy should solve the kernel of the problem that

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<sup>50</sup> Harris (n41) at 21, 52-55.

<sup>51</sup> Stewart, Sithole, and Ncube (eds) *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (2000) 68.

<sup>52</sup> *Townsend-Turner v Morrow* [2003] ZAWCHC 53.

gave rise to the dispute. Even in situations where the dispute is too deeply entrenched and has completely damaged the relationship between the parties, ADR makes termination of the relationship more cordial.<sup>53</sup> This satisfaction is derived from ADR's rejection of the one-size-fits-all approach and the tendency to strictly adhere to the application of rules of evidence and procedure in the adversarial context.<sup>54</sup>

#### d. Legal empowerment of parties

ADR empowers parties to a dispute and gives them greater control over resolving their issues.<sup>55</sup> The philosophy of party self-determination is the foundation on which ADR is based.<sup>56</sup> Party self-determination is further bolstered by the problem-solving approach of the respective ADR process utilised.<sup>57</sup> An ethnographic study in Guatemala illustrates the problem-solving approach.<sup>58</sup> A traditional justice process in the Quiché community involved the public investigation, confession, judgment, shaming, and punishment of three young men accused of stealing a pickup truck.<sup>59</sup> The community employed a consensus-based decision-making approach.<sup>60</sup> The chosen penalties, a public march of shame and traditional whipping, were a clear assertion of the community's legal agency and a means to uphold indigenous law and community values.<sup>61</sup>

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<sup>53</sup> See discussion on satisfactory outcomes from ADR above at (n41).

<sup>54</sup> *Mandava v Chasweka* [2008] ZWHHC 42. See chapter four § 4.9.

<sup>55</sup> Boule *Mediation: Principles, Processes, Practice* (2011) 99-224. Boule calls it the client empowerment model that underlies ADR theory and practice.

<sup>56</sup> Gutman (n41) at 47.

<sup>57</sup> *Ibid.*

<sup>58</sup> Sieder and Flores 'Dos justicias: Coordinación interlegal e intercultural en Guatemala' *F&G Editores* at 39-55 cited in Brinks (n47) at 356.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

In mainstream ADR, the neutral third-party in some processes provides input into the process merely as a facilitator.<sup>62</sup> Disputing parties remain in control of the content and outcome.<sup>63</sup> Even in binding ADR processes such as arbitration, the parties still have significant control over the process as they can determine the choice of arbitrator, applicable law, venue and the rules of the process. The Academy of Experts in the United Kingdom produced a chart showing how the more formal a dispute resolution process is, the more parties lose control of their disputes. In the chart, negotiation provides maximum party control, whereas litigation provides the least party control in dispute resolution.

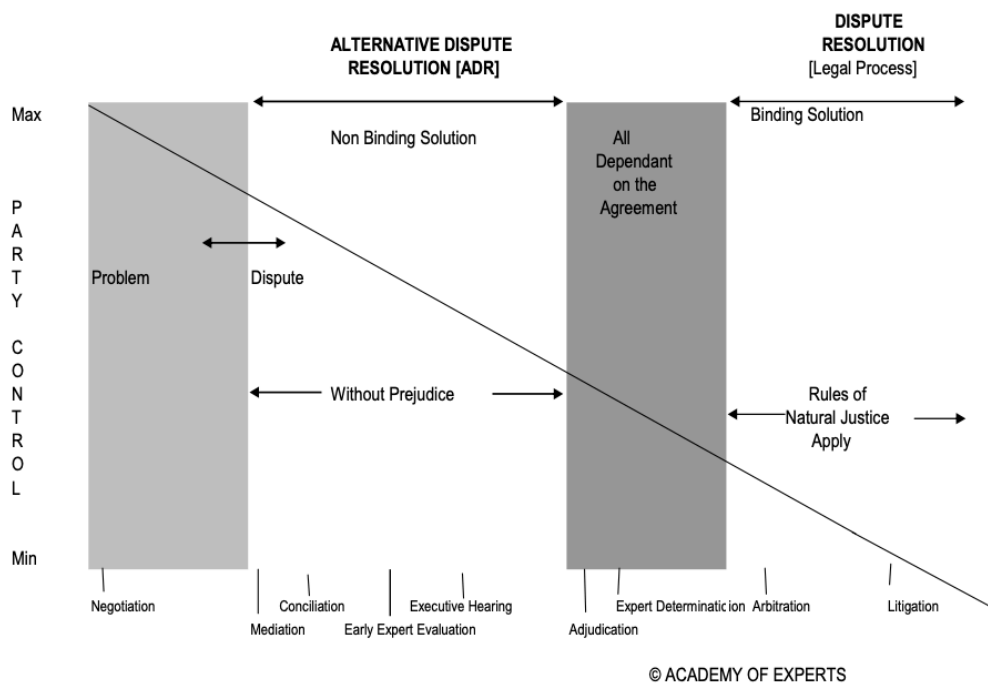


Figure 1.

The difference between ADR and general law court is that the adjudicator has the exclusive right to determine the outcome according to legal rights, rules of evidence and rules of

<sup>62</sup> Cooper and Field (n46) at 158, 165.

<sup>63</sup> Ibid.

procedure. While many forms of ADR rely on parties adopting a problem-solving approach, ADR can still be effective even when parties adopt positional bargaining.<sup>64</sup> ADR resolves individual issues in a dispute and culminates in a negotiated settlement, made possible by the parties' voluntary participation, good faith, and consent.<sup>65</sup>

e. ADR is effective in preserving ongoing relationships

ADR aims to preserve relationships among disputing parties, while litigation is based on a flawed conception of how justice emerges from adversary participation.<sup>66</sup> The adversarial nature of litigation may irreparably damage relationships<sup>67</sup>, whereas ADR helps parties reach more effective settlements.<sup>68</sup> For example, among the legal professionals who took part in the interviews for this study, some highlighted how businesses whose survival depended on each other avoided protracted legal battles by resorting to ADR.<sup>69</sup>

An effective dispute resolution mechanism should drive parties towards durable and easily implementable outcomes. ADR achieves this by creating a framework that anticipates and avoids future disputes.<sup>70</sup> ADR supports the notion that dispute resolution is not a one-off event but a continuous process that must be tailored to each dispute's unique circumstances. The TADR system in African communities mirrors this normative vision of justice. By preserving

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<sup>64</sup> Competitive negotiation focused on claiming value over creating it, *Principles and Practice* 5.

<sup>65</sup> All ADR mechanisms are voluntary, except for arbitration in labour matters, including voluntary and mandatory arbitration. Compulsory arbitration under s 93(5)(a) means the Minister of Labour appoints an arbitrator, while in voluntary arbitration, the parties choose an arbitrator under s 93(5)(b).

<sup>66</sup> Kruse (n9) at 390. For a fuller critique of adversary justice, see Luban *Lawyers and Justice: An Ethical Study* (1988) ch 5 67-103.

<sup>67</sup> Nhlapo 'The judicial function of traditional leaders: A contribution to restorative justice?' Paper presented at the Conference of the Association of Law Reform Agencies of Eastern and Southern Africa Cape Town 14-17 March 2005 at 3, 6 and 17. Nhlapo contrasts the Western concept of retribution in criminal cases with the African concept of restorative justice, arguing that traditional tribunals promote reconciliatory processes, in opposition to the technical rules in Western courts, designed for punishment - not social healing.

<sup>68</sup> *Principles and Practice* 13-14.

<sup>69</sup> See chapter five § 5.7(d).

<sup>70</sup> Povey, Cattell, and Michell 'Mediation practice in the South African construction industry' (2006) 13 *Acta Structilia: Journal for the Physical and Development Sciences* 1 at 60-61.

ongoing relationships, ADR reflects society's normative vision of justice, which addresses the relationship between procedure and the expected outcome after the dispute is settled.<sup>71</sup>

Legislation allows for the settlement of civil and criminal matters outside of general law court.<sup>72</sup> According to Ogbuabor, Nwosu, and Ezike, it is wrong to argue that criminal cases are inappropriate for ADR.<sup>73</sup> The argument is that many cases involving violence do not typically occur in a vacuum, as most cases involve an underlying relationship.<sup>74</sup> Ongoing relationships make resolving the root cause of the matter even more critical, thereby adequately dealing with the parties' needs and concerns, rather than obtaining a pyrrhic conviction in a criminal court.<sup>75</sup> As discussed, ADR and TADR are already entrenched in the criminal justice system in Zimbabwe, either formally through plea bargaining or pre-trial conferencing and informally by virtue of being utilised by most people.<sup>76</sup> Evidently, ADR and TADR are already functional in the Zimbabwean justice system, despite theoretical debates on their appropriateness in certain matters.

#### f. Quick and cost-effective resolution of disputes

ADR, utilising a skilled facilitator, ensures the timely resolution of disputes. In *MB v NB*<sup>77</sup>, the court recognised that ADR would have been a better option for resolving the dispute. Brassey AJ asserted that the presence of a skilled third-party can help parties evaluate their prospects of success and appreciate the costs and consequences of continued litigation. Skilled ADR

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<sup>71</sup> Kruse (n9) at 389.

<sup>72</sup> See Criminal Procedure and Evidence Act, 1927 s 271; see chapter four § 4.2(e), chapter five § 5.9(a) and (b) for discussions on roundtable and pre-trial diversion and conferencing. These are part of the legislation and court rules, aiming to settle cases without going to trial.

<sup>73</sup> Ogbuabor, Nwosu, and Ezike (n23) at 34.

<sup>74</sup> Adler, Mueller, and Laufer *Criminal Justice* (1994) 30 found that between 40 and 50 per cent of crimes occur between people with an ongoing relationship, and 60 per cent of homicides occur between relatives and friends.

<sup>75</sup> Ibid. In *NNPC v Lutin* (2000) 50 WRN 81, the Nigerian Court of Appeal found that fraud allegations were not a good reason for stopping arbitration proceedings.

<sup>76</sup> See § 3.2(b).

<sup>77</sup> *MB v NB* 2010 (3) SA 220 (GSJ) at para 50.

practitioners are familiar with the nature and context of disputes, facilitating a decision-making process that achieves substantial justice by resolving individual issues underlying the dispute.<sup>78</sup>

ADR can result in significant cost savings and reduced delays. For example, mediation<sup>79</sup> provides a streamlined and cost-effective process.<sup>80</sup> The Chief Justice in New South Wales found that mediated commercial disputes were 95 per cent cheaper than litigated cases with similar issues.<sup>81</sup> ADR can help overcome cost barriers to accessing justice, which is particularly important in Zimbabwe's socioeconomic environment. While cost barriers may still exist, parties can negotiate and agree on covering them, providing overall greater control and predictability.

The process was swift and effective in the Quiché community car theft example discussed above.<sup>82</sup> The investigation, trial and punishment took three days, and the boys could return to their everyday lives.<sup>83</sup> This example depicts the three normative conceptions of justice held by Indigenous people. Such normative conceptions of justice are typically incompatible or not acknowledged in state law, which explains why many disputes are resolved outside state regulation.<sup>84</sup> Brandt and Valdivia<sup>85</sup> found that a significant minority (seven per cent) of matters resolved through customary systems had no normative legal basis in state law. In other words,

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<sup>78</sup> Getu and Eshetu 'Alternative dispute resolution (teaching material)' 2009 *Justice and Legal System Research Institute* at 38-39.

<sup>79</sup> I have used mediation as an example, but any ADR process could have been used to support the same argument.

<sup>80</sup> Boule *Mediation: Principles, Processes, Practice* (2011) 99.

<sup>81</sup> New South Wales Chief Justice's Policy and Planning Committee Subcommittee on Court Annexed Mediation, Report of the Chief Justice's Policy, and Planning Subcommittee on Court Annexed Mediation (1991).

<sup>82</sup> Brinks (n47) at 357. Brinks highlights that years later, the boys' parents expressed gratitude that their children reformed because of the process and punishment meted upon them by the community through the elders.

<sup>83</sup> *Ibid.*

<sup>84</sup> See § 3.2., chapter one § 1.3., chapter four § 4.3.

<sup>85</sup> Brandt and Valdivia *Justicia Comunitaria en los Andes: Perú y Ecuador - El Tratamiento de Conflictos: Un estudio de actas en 133 comunidades indígenas y campesinas en Ecuador y Perú* (2006) 75 quoted in Brinks (n47) at 358.

ADR and its manifestation in pluri-legal and cultural countries like Zimbabwe, TADR plays a significant role in resolving disputes.

### 3.4. Disadvantages of ADR

#### a. ADR is susceptible to manipulation by bad faith actors

One of the fundamental assumptions of ADR is that all parties participate in good faith, motivated by a collective desire to resolve the dispute. However, this assumption is both an advantage and a potential flaw. While it is essential for the success of ADR, history has shown that parties can engage in bad-faith conduct, using ADR mechanisms only as a means to an end.<sup>86</sup> In such cases, ADR may be unable to award punitive damages to deter similar future conduct.

Critics of ADR argue that settling disputes through ADR cannot be preferable to a formal court's binding judgment because such settlements are akin to plea bargaining.<sup>87</sup> They contend that the institutionalisation of ADR should be avoided.<sup>88</sup> ADR removes criminal cases like domestic violence from public view and judicial scrutiny.<sup>89</sup> Critics of ADR claim that general law processes involving the arrest, prosecution, and conviction of a perpetrator go beyond protecting the victim of the crime, and serve a greater purpose of sending a message to society that crime cannot be engaged with impunity.

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<sup>86</sup> *Principles and Practice* 11.

<sup>87</sup> Fiss 'Against Settlement' (1984) 93 *The Yale Law Journal* 6 at 1073, 1075.

<sup>88</sup> *Ibid.*

<sup>89</sup> Ver Steegh 'Yes, no and maybe: Informal decision making about divorce mediation in the presence of domestic violence' (2003) *William & Mary Journal of Women and the Law* 9, at 145. Arbitral awards in Zimbabwe, for example, can only be reviewed based on three grounds: s 4(2)(b) of the Arbitration Act, 1996.

ADR may lead to secondary or re(victimisation) of abused women, which negatively affects their willingness to report and use courts in the future.<sup>90</sup> Rivera, Sullivan, and Zeoli refer to a respondent in their study who disclosed her concerns to the ADR practitioner, however, the other party was able to dismiss these concerns, causing her distress.<sup>91</sup> The proceedings appear to have ignored the fundamental principles of ADR in selecting the most appropriate process for the type of dispute and parties involved. Consequently, the wrong process was chosen, which did not achieve the goal of providing effective access to justice. This is one of the dark sides of ADR.

b. ADR does not adequately address power imbalances between parties

Giving parties responsibility over the ADR process may further entrench power imbalances among them.<sup>92</sup> The weaker party in a two-person dispute may be less empowered and coerced into agreeing to submit a case to ADR.<sup>93</sup> Legal anthropologists<sup>94</sup> have criticised this potential for power differentials and the lack of intervening mechanisms. These are also among the most significant concerns of critics of ADR in the criminal justice system.<sup>95</sup> Socioeconomic status, culture, gender, geography, and education levels collectively affect power dynamics in ADR.<sup>96</sup>

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<sup>90</sup> Rivera, Sullivan, and Zeoli 'Secondary victimisation of abused mothers by family court mediators' (2012) 7 *Feminist Criminology* 3 at 247. The authors at 237 define secondary victimisation as 'the negative or unresponsive behaviours by others toward an abuse victim, who experiences such response as a further violation of their rights.'

<sup>91</sup> Ibid. For a discussion on the negative impact of bad faith actors in ADR, see Erez-Navot 'The repeat player effect in child protection mediation: Dangers of and protections against second-class justice for marginalised parties' (2015) 16 *Cardozo Journal of Conflict Resolution* 831 at 831–856.

<sup>92</sup> Rivera, Sullivan, and Zeoli *ibid* at 247. The authors provide several examples of men gaining the upper hand during mediation. Ogbuabor, Nwosu, and Ezike (n23) at 33 define power imbalance as situations where one person has control, and the other is subservient, removing any likelihood of negotiating based on equality.

<sup>93</sup> Getu and Eshetu (n78) at 23. See also Fiss (n87) at 1073, 1075.

<sup>94</sup> Benda-Beckmann 'Forum shopping and shopping forums: Dispute processing in a Minangkabau village' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 19 at 260.

<sup>95</sup> Fisher, Vidmar, and Ellis 'Procedural justice implications of ADR in specialised contexts: The culture of battering and the role of mediation in domestic violence cases' (1992) *Southern Methodist Law Review* 46 at 2117; Goldberg, Sander, and Rogers *Dispute Resolution: Negotiation, Mediation, and Other Processes* 2 ed (1995) 328.

<sup>96</sup> Fiss (n87) at 1073, 1075.

Another issue with ADR is that a party that believes they have the upper hand may be willing to use ADR but may not be willing to settle. The strength of ADR rests on parties' willingness to compromise, and without it, ADR is weak and not fit for purpose. Failure to settle leads to the issuance of a certificate of no settlement<sup>97</sup>, which often results in the matter being referred to the courts, incurring further costs. Moreover, the 2004 International Council for Commercial Arbitration (ICCA) conference revealed that ADR in centres like New York and London had become more expensive and complex.<sup>98</sup> The high cost and complexity of ADR, coupled with the difficulty of enforcing decisions, cast a dark shadow on the system.

c. ADR has a negative impact on legal certainty

The flexibility of ADR has advantages and disadvantages. While it offers innovative solutions not found in court processes, it may also undermine legal certainty and predictability.<sup>99</sup> This is due to the potential for divergent outcomes from similar cases, as ADR does not rely on precedent like courts.<sup>100</sup> Furthermore, there is no uniform legal framework governing ADR as a dispute resolution system beyond individual processes, and widespread ADR statutes are lacking. Due to the secrecy, privacy, and confidential circumstances under which it often occurs, the inability to rely on precedent in ADR limits its contribution to the development of jurisprudence. Jurisprudence goes beyond serving an academic purpose and is critical for interpreting and developing law. The increased use of ADR can potentially undermine its power, leading to legal uncertainty and unpredictability.<sup>101</sup>

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<sup>97</sup> A document issued by the neutral third-party after a failed ADR process such as conciliation. It is used to unlock the next stage in the dispute resolution process, typically by the applicant. Section 93 of the Labour Act, 1985 in § (3), (4) and (5) deals with referral to arbitration by the Labour Officer after issuance of a certificate of no settlement.

<sup>98</sup> Marriot 'Arbitrators and settlement' (2004) 70 *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 4 at 297.

<sup>99</sup> Kubasek and Silverman 'Environmental Mediation' (1988) 26 *American Business Law Journal* 3 at 548.

<sup>100</sup> *Ibid.*

<sup>101</sup> Patterson and Seabolt *Essentials of Alternative Dispute Resolution* 2 ed (2001) 18.

d. Few people are aware of ADR

The limited adoption and use of mainstream ADR in the justice system is a drawback, partly due to its relative obscurity. Many people, including legal professionals who do not distinguish between various processes, are unaware of ADR as an independent dispute resolution system.<sup>102</sup> While South Africa has advanced its use of formal ADR, even its legislature has misappropriated the mediation process as an adjudicative settlement mechanism.<sup>103</sup> Similarly, Ghana's ADR framework includes mediation and arbitration.<sup>104</sup> Still, a limited understanding of ADR and a focus on commercial arbitration limits its adoption and widespread use, especially in rural areas.

Additionally, a study by Nolan-Haley and Annor-Ohene found that many survey participants did not understand ADR.<sup>105</sup> ADR legislation's focus on arbitration primarily benefits multinational corporations<sup>106</sup> and fails to meet the needs of citizens who rely on ADR and TADR.<sup>107</sup> The adoption of the UNCITRAL Model Law by many African countries has further entrenched the focus of arbitration on commercial matters, leaving out most of the population who need ADR mechanisms.

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<sup>102</sup> Riskin and Westbrook *Dispute Resolution and Lawyers* 2 ed (1998) 7.

<sup>103</sup> Faris 'Deciphering the language of mediatory intervention in South Africa' (2006) 39 *The Comparative and International Law Journal of Southern Africa* 3 at 427–449. See also the Short Process Courts and Mediation in Certain Civil Cases Act of 103 of 1991 (South Africa), where the mediation model prescribed endows the mediator with the power to make orders and give judgments.

<sup>104</sup> Alternative Dispute Resolution Act, 2010 (Act 798) (Ghana).

<sup>105</sup> Nolan-Haley and Annor-Ohene 'Procedural justice beyond borders: Mediation in Ghana' (2014) 1 *Harvard Negotiation Law Review Online* at 10-11. The authors drew survey participants from a pool of people where over 60 per cent of them had either been through litigation or had been referred by the court to ADR.

<sup>106</sup> The ADR projects in Ghana and Ethiopia were implemented with funding from the U.S. Department of State and the World Bank, respectively, which may explain why their design leans towards serving the justice needs of multinational corporations.

<sup>107</sup> In Ghana, private individuals and corporations mostly lead ADR processes. These include the ADR Coalition of Ghana and the Ghana Arbitration Centre, among others. See Dieng 'ADR in sub-Saharan African countries' in Ingen-Housz (ed) *ADR in Business: Practice and Issues Across Countries and Cultures* (2011) 616.

#### e. Lack of trained practitioners

The uniqueness of disputes requires constant training and evaluation of ADR practitioners. In cases where a dispute hinges on a difficult point of law, ADR practitioners may lack the necessary legal expertise to guide the process or determine the best course of action.<sup>108</sup> Therefore, more suitably qualified ADR practitioners are needed. One solution to improve skills is to have joint ADR sessions, where two practitioners can collaborate and bring complementary expertise to the process. Additionally, it is possible to use online services where the ADR session is facilitated by an in-person practitioner who is assisted remotely by another practitioner.

### 3.5. Types of ADR mechanisms

In Zimbabwe, there is a lack of consistent definitions of the terms associated with ADR, leading to oversimplification<sup>109</sup> of the debate surrounding the effectiveness and appropriateness of ADR processes in resolving disputes.<sup>110</sup> Even among legal practitioners, the lack of understanding of ADR processes and the tendency to lump them into one homogenous mechanism are significant issues.<sup>111</sup> ADR represents a justice paradigm primarily concerned with serving the interests of disputing parties, whereas general law court processes serve the public interest.<sup>112</sup> Mainstream ADR can be categorised into negotiation, mediation,

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<sup>108</sup> In *Heimlich v. Shivji*, 441 P.3d 857 (Cal. 2019), A client sought costs under California Code of Civil Procedure s 998 after the arbitration resulted in a US\$ 0 award. The arbitrator claimed lack of jurisdiction, but the court of appeals reversed the decision, holding that s 998 petitions can be heard after arbitration and that the arbitrator erred in law.

<sup>109</sup> Bush 'Defining quality in dispute resolution: Taxonomies and anti-taxonomies of quality arguments' (1989) 66 *Denver University Law Review* 335 at 343.

<sup>110</sup> There is no mention of mediation, which is treated like conciliation in the Act. See Faris (n103). Faris identifies a major problem with terminology and provides an example of how these terms are used/defined differently in different legislation.

<sup>111</sup> Riskin and Westbrook *Dispute Resolution and Lawyers* 2 ed (1998) 7.

<sup>112</sup> Crowne 'The Alternative Dispute Resolution Act of 1998: Implementing a new paradigm of justice' (2001) 76 *New York University Law Review* 6 at 1769.

conciliation, arbitration, and ombudsman. They are grouped into three categories: facilitative<sup>113</sup>, advisory<sup>114</sup> and determinative.<sup>115</sup>

This study focuses on negotiation, mediation, conciliation, and arbitration, outlining the definitions of each term and the associated merits and demerits, focusing on unique criticisms and advantages to avoid repetition. For example, the entrenchment of power imbalances between parties is a common criticism by feminist scholars of negotiation, mediation, conciliation, and arbitration.<sup>116</sup> Similarly, advantages like self-determination and preservation of relationships are discussed only once because they are common to all ADR processes.

#### a. Negotiation

Negotiation is the oldest form of dispute resolution and involves parties directly engaging each other to reach a compromise.<sup>117</sup> Parties reach a settlement by objectively assessing each other's positions through non-binding communication. The direct involvement of parties makes it quick and efficient.<sup>118</sup> Deeds of settlement (settlement agreements) are usually the outcome of negotiations, which can be enforced<sup>119</sup> even if not reduced to writing.<sup>120</sup>

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<sup>113</sup> When a neutral third-party assist disputing parties to identify issues and reach an agreement about the dispute, for example, mediation.

<sup>114</sup> When a neutral third-party advises disputing parties about the issues and or possible outcomes, for example, conciliation.

<sup>115</sup> When a neutral third-party decides on the dispute, for example, arbitration. See for instance *Dispute Resolution in Australia* 115; Nolan-Haley *Alternative Dispute Resolution in a Nutshell* 5 ed (2001) 119.

<sup>116</sup> Rivera, Sullivan, and Zeoli (n90) at 247; Fiss (n87) at 1073, 1075; Benda-Beckmann (n94) at 260.

<sup>117</sup> Ramsden *The Law of Arbitration, South African and International Arbitration* (2009) 2; Maddux *Successful Negotiations* (1988) 14.

<sup>118</sup> Wang 'Are alternative dispute resolution methods superior to litigation in resolving disputes in international commerce?' (2000) 16 *Arbitration International* 2 at 191.

<sup>119</sup> *NSSA v Trust Bank Corp. Ltd* [2017] ZWHHC 181.

<sup>120</sup> *Gailey Projects Pty Ltd v McCartney* [2017] QSC 185, The parties tried to settle a dispute over a consulting agreement on the first day of trial. The defendant offered AUD\$ 450 000 payable within 24 hours and a call option. The plaintiff verbally accepted the offer but later claimed the email confirmation misrepresented the terms and the agreement was conditional on executing a deed of settlement. The court ruled the verbal agreement binding, upholding the principle of orality in dispute resolution. See Oliveira 'Mauro Cappelletti and the Brazilian procedural law' (2017) 1 *Revista da Faculdade de Direito* 22 at 386, which informs the stance taken by the court.

*i. Approaches to and advantages of negotiation*

There are two primary approaches to negotiation: the *problem-solving approach* and the *competitive approach*.<sup>121</sup> The *problem-solving approach* emphasises the parties' interests and seeks to create value for all parties. For example, in a lease negotiation, the landlord and tenant may work together to find an affordable rent amount for the tenant while still providing a fair return for the landlord. The *competitive approach* focuses on parties' rights<sup>122</sup>, who advocate their positions and use their bargaining power to settle. To illustrate, in a salary negotiation, an employee may argue for a higher salary based on their qualifications and experience. In contrast, the employer may argue for a lower salary based on market conditions and the company's budget.

Both approaches are centred on assessing the outcome versus the cost of litigation, commonly referred to as the 'best alternative to a negotiated agreement' (BATNA).<sup>123</sup> Negotiation allows for informality and flexibility, as parties communicate directly with each other and control the pace of proceedings, including the ultimate settlement.<sup>124</sup> The strength of negotiation lies in its ability to consider official and unofficial values that may be important to parties.<sup>125</sup> Disputing parties communicate directly with each other when negotiating and typically do not go through third parties, which helps save time and money.<sup>126</sup>

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<sup>121</sup> Bernstein and Tackaberry *Handbook of Arbitration Practice* 2 ed (1993) 585.

<sup>122</sup> Ibid.

<sup>123</sup> A tool for assessing the risk of continuing a dispute, which suggests identifying the best possible outcome if negotiation fails before resorting to trial. Fisher, Ury, and Patton *Getting to Yes: Negotiating Agreement Without Giving In* 3 ed 97-106.

<sup>124</sup> Ramsden (n117) 1.

<sup>125</sup> Cassim, Hurter, and Faris *Civil Procedure Study Guide CIP 2601* (2013) 40-41; Susskind and Cruikshank *Breaking the Impasse: Consensual Approaches to Resolving Public Disputes* (1987) 11.

<sup>126</sup> Yates 'The art of negotiation in construction contract disputes' (2011) 3 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 3 at 94-95. As a result of saving time and money, negotiation is the most utilised dispute resolution mechanism in construction disputes.

## *ii. Disadvantages of negotiation*

Negotiation may not be the best method to resolve disputes where parties belong to different cultures because cultural differences can lead to difficulties in communication and finding common ground. For example, some cultures consider it disrespectful to say ‘no’ directly, which can lead to ambiguity and unrealistic expectations.<sup>127</sup> Furthermore, negotiations can be influenced by a power imbalance, resulting in an unequal distribution of benefits and a lack of fairness. However, proponents argue that this process, which is less formal, rigid, and legalistic, can lead to quicker outcomes and lower costs, thereby improving access to justice.<sup>128</sup>

Negotiation is dominated by bargaining without the assurance of settlement after investing time, money, and effort. If parties misrepresent their goal and background information, or if circumstances change for one or more parties during the process, the soundness of the settlement may be severely impaired. Moreover, negotiated agreements may not satisfy third parties’ relevant and lawful interests, making the outcome unenforceable at best and subjecting one or both parties to criminal penalties at worst. Nonetheless, negotiated agreements may be legally binding in certain jurisdictions.<sup>129</sup>

## **b. Mediation**

Mediation is a voluntary and consensual dispute resolution process that lacks a distinct analytical model to differentiate it from other dispute resolution mechanisms.<sup>130</sup> Although scholars have attempted to define it, mediation specifics depend on various factors, such as the disputing parties, the mediator, and the settlement.<sup>131</sup> The process involves an independent

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<sup>127</sup> Wang (n118) at 191.

<sup>128</sup> Gutman (n41) at 47.

<sup>129</sup> *AJ Lucas Operations Pty Ltd v Gladstone Area Water Board* [2015] QCA 287.

<sup>130</sup> Boule *Mediation: Principles, Processes, Practice* (2011) 56 and more broadly ch 1, 3.

<sup>131</sup> Getu and Eshetu (n78) at 104.

mediator that assists parties in focusing on their interests and strengths rather than emotions to settle.<sup>132</sup> The success of mediation depends on the disputants' willingness to settle through compromise, with consensus being necessary to reach an agreement. The mediator facilitates the process and aids the parties in designing solutions while the parties themselves take the lead.

### *i. Advantages of mediation*

Mediation provides an educational function by allowing parties to understand each other's positions and interests, address underlying issues and emotions, and reach compromise solutions, thereby reducing the likelihood of future disputes.<sup>133</sup> Mediation also encourages direct communication between parties, without the need for attorneys who may misrepresent the issues. This is particularly useful in ongoing relationships.<sup>134</sup>

Mediation is quick and enables creative solutions that satisfy all parties involved.<sup>135</sup> Additionally, mediation is affordable, potentially increasing access to justice for under-resourced groups.<sup>136</sup> Mediation can reduce litigation expenses, avoid exacerbating tensions, and promote mutual give-and-take between parties.<sup>137</sup> Mediation proceedings are also private and confidential, promoting openness and good faith among disputing parties.

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<sup>132</sup> Newman *Alternative Dispute Resolution* (1999) 9. See also Cormick and Patton 'Environmental mediation: Defining the process through experience' in Axelrod and Lake (eds) *Environmental Mediation: The Search for Consensus* (1980); Weidner (ed) *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries* (1998) 16.

<sup>133</sup> Fuller 'The forms and limits of adjudication' (1978) 92 *Harvard Law Review* 2 at 397-398.

<sup>134</sup> Harder 'Environmental mediation: The promise and the challenge' (1995) 19 *Environs: Environmental Law and Policy Journal* 1 at 32.

<sup>135</sup> Weidner (ed) *Alternative Dispute Resolution in Environmental Conflicts: Experiences in 12 Countries* (1998) 76 et seq cites the seventeen-year Snoqualmie River case, which involved twelve parties but was resolved in months through mediation. See also *S v J* (695/10) [2010] ZASCA 139.

<sup>136</sup> South African Law Commission (n23) 18.

<sup>137</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), The South African Constitutional Court at para 40 endorsed mediation.

## *ii. Disadvantages of mediation*

### *Mediation can be vulnerable to intangible factors*

Mediation lacks the integrity of litigation because the notion of a mediator being an impartial and disinterested intermediary is dismissed in the literature.<sup>138</sup> Even ADR proponents concede that the mediator has personal opinions about the dispute and the outcome and, therefore, cannot be wholly impartial.<sup>139</sup> Gulliver goes to the extent of claiming that the mediator is a party in the process because they react to what the parties say, evaluate positions, clarify areas of uncertainty, and point out whether the proposals by disputants are realistic.<sup>140</sup> Such criticism harms mediation because parties must trust the mediator for the process to succeed.<sup>141</sup>

### *Confidentiality in mediation*

Confidentiality is a fundamental aspect of mediation. However, it can result in reduced accountability as confidentiality limits public participation. Because only parties with a direct interest in the outcome of the dispute are involved in the process, the public, who may have a legitimate interest in the matter, is disenfranchised.<sup>142</sup> This can undermine the legitimacy of the process, particularly in cases where there is public interest. Moreover, the confidential nature of the mediation process can hinder the development of jurisprudence in issues of public interest as the process cannot generate precedent.<sup>143</sup> However, in some jurisdictions, limited

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<sup>138</sup> Gulliver *Dispute and Negotiations: A Cross-Cultural Perspective* (1988) 217. Gulliver's ethnographic research suggests that the concept of a neutral third-party is often not a reality. He believes that such notions can be dogmatic.

<sup>139</sup> Moore *The Mediation Process - Practical Strategies for Resolving Conflict* 4 ed (2014) 15.

<sup>140</sup> Gulliver *Dispute and Negotiations: A Cross-Cultural Perspective* (1988) 213.

<sup>141</sup> Harder (n134) at 32.

<sup>142</sup> *Ibid.*

<sup>143</sup> Edwards 'Alternative dispute resolution: Panacea or anathema?' (1986) 99 *Harvard Law Review* 3 at 671-72. Judge Edwards questions whether public disputes involving constitutional and product liability issues should be handled outside of litigation.

statutory regulation may not guarantee confidentiality in the mediation process<sup>144</sup>, and there can be public interest exceptions to confidentiality. Confidentiality in mediation can be challenged if parties proceed to litigation, if a third party makes claims related to the mediation, or if a party wants to take legal action against the mediator for breach of contract.<sup>145</sup> This may result in requests to produce notes, evidence, transcripts, or agreement details.

### *Mediation may lead to the trumping of legal rights*

Mediation prioritises self-determination and neutrality of the mediator over legal rights, potentially disadvantaging the weaker party.<sup>146</sup> As a result, the more powerful party, who may be more articulate during the process, may benefit at the expense of the less articulate party. To safeguard against such potential abuses, Economides advocates for reforms in the fourth wave of access to justice reform, arguing that access to peace is not equivalent to access to justice.<sup>147</sup> Therefore, satisfying disputing parties should not come at the expense of upholding the rule of law.

Critics of mediation argue that it places greater emphasis on peace than on justice, and that justice sometimes requires more than just maintaining peaceful relations.<sup>148</sup> For example, punishment and public apologies may be necessary in cases involving human rights abuse.<sup>149</sup> However, unless included in the settlement agreement, the prohibition of laying blame in

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<sup>144</sup> Wood and Field 'Confidentiality: An ethical dilemma for marketing mediation' (2006) 17 *Australasian Dispute Resolution Journal* 2 at 8, 11; Astor and Chinkin (n27) 291; *Field v Commissioner for Railways for New South Wales* (1955) 99 CLR 285.

<sup>145</sup> Astor and Chinkin *ibid*; *Field v Commissioner for Railways for New South Wales*.

<sup>146</sup> Nelle 'Making mediation mandatory: A proposed framework' (1992) 7 *Ohio Street Journal on Dispute Resolution* 2 at 291. Bryan 'Killing us softly: Divorce mediation and the politics of power' (1992) 40 *Buffalo Law Review* 2 at 441, 449, 481 where, from a feminist perspective, the argument is that women do not get the desired results out of mediation because they are ill-equipped to argue during mediation proceedings.

<sup>147</sup> Economides 'Reading the waves of access to justice' (1999) 31 *Bracton Law Journal* at 66. See chapter two § 2.4.

<sup>148</sup> Brunet 'Questioning the quality of alternative dispute resolution' (1987) 62 *Tulane Law Review* 1 at 3-4.

<sup>149</sup> Kurtzberg and Henikoff 'Freeing the parties from the law: Designing an interest based and rights focused model of landlord/tenant mediation' (1997) 1997 *Journal on Dispute Resolution* 1 at 56.

mediation limits the scope of such remedies. Some argue that ADR processes like mediation trade justice for harmony, thereby pacifying the assertion of rights, a view contested by some legal anthropologists.<sup>150</sup> Nonetheless, proponents of ADR must ensure that they distinguish normatively between harmony that resolves disputes and harmony that silences the voices of the weak in society.<sup>151</sup>

### c. Conciliation

The definition of conciliation is not clearly defined and varies between jurisdictions. In South Africa and Zimbabwe, no precise definition is provided in statute.<sup>152</sup> Although some scholars suggest that conciliation and mediation are interchangeable, the two processes are treated differently in various jurisdictions, with conciliation often seen as a form of non-binding arbitration that is informal, facilitative, and non-interventionist.<sup>153</sup> In this study, mediation is distinguished from conciliation despite their similarities. In Zimbabwe, conciliation is closer to arbitration than mediation because conciliators in labour matters, for example, can give a legally binding ‘draft’ award sent to the labour court for confirmation, before enforcement.<sup>154</sup>

The Constitutional Court<sup>155</sup> recognises the important role played by conciliation in resolving disputes. The court recommended that the conciliator be given more powers, ensuring legal issues are fully ventilated at this early stage.<sup>156</sup> An empowered conciliator can amicably facilitate the resolution of most matters and reduce the number of issues resolved through

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<sup>150</sup> Nader ‘Controlling processes in the practice of law: Hierarchy and pacification in the movement to re-form dispute ideology’ (1993) 9 *Ohio State Journal on Dispute Resolution* 1 at 1 cited in Kruse (n9) at 392-393.

<sup>151</sup> *Ibid* at 393.

<sup>152</sup> Faris (n103) at 432. The Hoexter Commission advocated for conciliation in divorce cases in 1983, aiming to ease separation’s impact on spouses and their children through direct communication. It highlights conciliation’s potential to resolve contentious issues like child custody and asset division.

<sup>153</sup> *Ibid* at 434-435.

<sup>154</sup> Labour Act, 1985, s 93 (1).

<sup>155</sup> *Isoquant Investments (Pvt) Ltd t/a Zimoco v Darikwa* [2018] ZWCC 6.

<sup>156</sup> *Ibid*, see also *supra* (n154).

arbitration or trial. Similarly, in Australia, the Victorian Ombudsman in 2019 found that conciliators had limited powers, and as a result, 70 per cent of cases that proceeded to court in 2017-2018 were overturned.<sup>157</sup> Therefore, without sufficient powers entrenched in statute, conciliation becomes just one more bureaucratic process, but does not help in facilitating effective access to justice.

#### d. Arbitration

Arbitration is a formal dispute resolution process outside the court system<sup>158</sup> where an impartial third-party arbitrator hears both sides and issues a binding or non-binding decision.<sup>159</sup> Binding arbitration concludes disputes in a legally binding way, while non-binding arbitration gives parties the option to abide by the decision or not. Arbitration is often compared to litigation, leading commentators to sometimes refer to arbitration as privatised adjudication.<sup>160</sup> Disputing parties expect the arbitrator to act judicially, which has also earned arbitration the nickname ‘litigation without wigs.’<sup>161</sup>

Arbitration comes in various forms, such as ad-hoc<sup>162</sup>, contractual in-built<sup>163</sup>, institutional<sup>164</sup>, and statutory.<sup>165</sup> The UNCITRAL Model Law<sup>166</sup> provides the basis for much of the global arbitration legislation and is recognised in Zimbabwe for domestic and international arbitration

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<sup>157</sup> Victorian Ombudsman ‘WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims’ (2019) at 5 para 26–27.

<sup>158</sup> Fulton (n16) 67.

<sup>159</sup> Ramsden (n117) 174.

<sup>160</sup> Goldberg, Green, and Sander *Dispute Resolution* (1987) 189.

<sup>161</sup> Fulton (n16) 67.

<sup>162</sup> The parties set procedure.

<sup>163</sup> Included in a contract and covers present and future dispute resolution.

<sup>164</sup> Parties agree in advance that disputes will be resolved by a named institute (that they both belong to as members), according to pre-set rules.

<sup>165</sup> Legal provision imposing on disputing parties to submit cases to specified person(s) or institution for dispute resolution regardless of their consent.

<sup>166</sup> Model Law on International Commercial Arbitration 1985 adopted by the United Nations Commission on International Trade Law and amended in 2006.

agreements.<sup>167</sup> In Zimbabwe, parties usually use registries such as the Commercial Arbitration Centre (CAC) or the Africa Institute of Mediation and Arbitration (AIMA) to allocate arbitrators.<sup>168</sup> An arbitration agreement can be entrenched in a contractual clause or a separate agreement.<sup>169</sup> In cases where the law requires arbitration, this is considered an arbitration agreement in Zimbabwe.<sup>170</sup> The superior courts in Zimbabwe recognise that the UNCITRAL Model Law provides for instances without a signed agreement or written contract.<sup>171</sup> The Arbitration Act, 1996 is primarily used in confidential commercial cases, resulting in limited commentary. In contrast, there is more material on arbitration under the Labour Act, 1985, which is why labour cases have prominence in this study.

#### *i. Advantages of arbitration*

Arbitration is an effective dispute resolution process that relies on independent and impartial experts<sup>172</sup> to make legally binding decisions. The process is designed to be more efficient than traditional court proceedings, as arbitrators are selected based on their specialist knowledge to match the complexity of the dispute.<sup>173</sup> This means disputes are resolved in a more targeted manner, resulting in quicker resolution.<sup>174</sup> In contrast, courts do not necessarily have specialist

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<sup>167</sup> Arbitration Act, 1996, s 3(1) and s 3(2).

<sup>168</sup> AIMA and CAC are independent organisations that promote and facilitate ADR mechanisms like mediation and arbitration for individuals and businesses. They maintain a roster of ADR practitioners from various fields, which is used to allocate disputes when parties approach them for ADR services.

<sup>169</sup> UNCITRAL Model Law, 1985 (n166) Article 7.

<sup>170</sup> *Supra* (n67) s 5(1).

<sup>171</sup> *TelOne (Pvt) Ltd v Capital Insurance Brokers (Pvt) Ltd* SC 60 – 2018. The Supreme Court of Appeals held that a court can rely on the exchanges between the parties to conclude that there was an arbitration agreement.

<sup>172</sup> *Principles and Practice* 288. Arbitrators can be non-lawyers or subject experts operating in a relevant area. In practise though, many of the arbitrators in Zimbabwe are lawyers, law professors, and former judges – see the list of arbitrators registered with the AIMA available at <http://www.aima.org.zw/service/arbitration/>, accessed 11 November 2022.

<sup>173</sup> Fulton (n16) 121; Henry and Lieberman *The Manager's Guide to Resolving Legal Disputes: Better Results Without Litigation* (1985) 76.

<sup>174</sup> Fulton *ibid*, Henry and Lieberman *ibid*.

knowledge of the subject matter and may need to rely on expert testimony, which can be time-consuming and costly.

Many countries around the world have ratified international treaties on arbitration, making it easier to enforce foreign arbitral awards. Zimbabwe is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>175</sup> The New York Convention imposes mandatory obligations on signatory countries to stay judicial proceedings involving arbitration agreements as defined in the Convention.<sup>176</sup> This means arbitral awards are more easily enforced across jurisdictions than court judgments.<sup>177</sup> Although many countries ratified The New York Convention, jurisdictional challenges may still exist when enforcing arbitral awards in countries that view enforcement as private.<sup>178</sup>

*Funnekotter v Republic of Zimbabwe*<sup>179</sup> is an example of the effectiveness of arbitration. The case involved thirteen Dutch farmers displaced from their farms in Zimbabwe without compensation. The farmers alleged a breach of the Bilateral Investment Treaty between the Netherlands and Zimbabwe.<sup>180</sup> The International Centre for Settlement of Investment Disputes (ICSID) declared that Zimbabwe breached the bilateral treaty protections and ordered the country to pay €16 million.<sup>181</sup>

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<sup>175</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) (hereinafter, *The New York Convention*). The Convention applies to the enforcement of foreign arbitral awards.

<sup>176</sup> Ibid.

<sup>177</sup> Wang (n118) at 202.

<sup>178</sup> Ibid at 202, 206.

<sup>179</sup> *Funnekotter v Republic of Zimbabwe* Case No. Arb/05/6. The case is printed in International Legal Materials, 48 (2009) 764ff.

<sup>180</sup> The agreement on encouragement and reciprocal protection of investments between the Republic of Zimbabwe and the Kingdom of the Netherlands, 11.12.1996 (signed), 01.05.1998 entered into force.

<sup>181</sup> Supra (n179). See also *Bernhard von Pezold and others v Zimbabwe* ICSID Case No. ARB/10/15. The award on merits is available at [http://www.italaw.com/sites/default/files/case-documents/italaw7095\\_0.pdf](http://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf) accessed on 20 January 2023. It is unclear whether the government has paid the amount or not.

Binding arbitration ensures that disputes are finalised, meaning a party has limited opportunities to appeal. In the event of a party challenging the arbitral award through a review at the High Court, for example, the court is only permitted to regulate processual abuse. Still, it cannot interfere with the substantive content of an award.<sup>182</sup> The arbitral award is final, and there is a general prohibition for an appeal as this would violate the arbitration's content.<sup>183</sup>

## *ii. Disadvantages of arbitration*

The competence and qualifications of arbitrators and the absence of global professional standards have been the subject of concern among stakeholders.<sup>184</sup> The lack of minimum qualifications in Zimbabwe before 2012 may have contributed to the significant number of poorly made awards deemed to result from incompetence.<sup>185</sup> While the Labour (Arbitrators) Regulations of 2012<sup>186</sup> established minimum standards for labour law matters, concerns remain about the quality of arbitrators in other areas, given that the Arbitration Act, 1996 does not specify qualifications, only that parties agree on them when appointing an arbitrator.<sup>187</sup>

Although one of the strengths of arbitration is the finality of awards, this can also be a weakness. Awards with scant application of law may lead to unfair results, contradicting the

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<sup>182</sup> Cowling 'Finality in arbitration' (1994) 111 *South African Law Journal* 2 at 306 who discusses the finality of an arbitral award. See supra (n95) s 4(2)(b): specifically Article 34. The *FSI Holdings Ltd v Rio Tinto Zimbabwe Ltd*, 1996 (1) ZLR 356 (H) illustrates the reluctance of the court to interfere with the arbitration proceedings.

<sup>183</sup> Butler and Finsen *Arbitration in South Africa - Law and Practice* (1993) 271; Jacobs *The Law of Arbitration in South Africa* (1977) 128. For a review of the case law on statutory and non-statutory grounds for vacating commercial arbitration awards, see Hayford 'Law in disarray: Judicial standards for vacatur of commercial arbitration awards' (1995) 30 *Georgia Law Review* 3 at 731.

<sup>184</sup> Dieng (n107) comments on the French-speaking countries that have seen efforts of mandatory preliminary conciliation hampered by the lack of qualified mediators.

<sup>185</sup> Watadza, Mahapa, and Muchadenyika 'Effectiveness of conciliation and arbitration in the ferro-chrome industry in Zimbabwe' (2016) 12 *European Scientific Journal* 25 at 340.

<sup>186</sup> SI 173 of 2012/ Labour (Arbitrators) Regulations 2012.

<sup>187</sup> Arbitration Act, 1996 Article 11.

idea of justice as fairness. In Zimbabwe, some arbitrators have been criticised for giving unrealistic awards favouring one party over another.<sup>188</sup>

The Arbitration Act, 1996 does not set a time limit for arbitrators to deliver their award. This presents a significant gap in the law that can be exploited.<sup>189</sup> In contrast, South Africa requires arbitral awards to be given within four months and 21-30 days for labour arbitral awards.<sup>190</sup> Research shows that government-appointed arbitrators in Zimbabwe may take longer than private arbitrators, potentially due to a lack of oversight.<sup>191</sup>

Arbitration fees in Zimbabwe are set at a minimum of US\$ 300 for matters involving two parties, which can burden those who cannot afford it.<sup>192</sup> This is especially true in unfair dismissal cases, where applicants are often out of employment and seeking reinstatement through arbitration.<sup>193</sup> Therefore, the system favours employers with more financial resources, leaving employees vulnerable to financial abuse.

### 3.6. The multi-door courthouse

Sander proposed the multi-door courthouse<sup>194</sup> to address the problematic relationship between ADR and the formal justice system.<sup>195</sup> Sander expanded Pound's<sup>196</sup> initial criticism of the

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<sup>188</sup> Mahapa and Watadza 'The dark side of arbitration and conciliation in Zimbabwe' (2015) 3 *Journal of Human Resources Management and Labour Studies* 2 at 71.

<sup>189</sup> *Ibid* at 68.

<sup>190</sup> South African Arbitration Act 42 of 1965, s 23; South African Labour Relation Act 66 of 1995.

<sup>191</sup> Mahapa and Watadza (n188) at 68 cite that arbitration cases Gwisai reviewed took more than 12 months to conclude.

<sup>192</sup> As discussed in chapter one § 1.2., Zimbabwe continues to experience hyperinflation, making it difficult to keep pace with the fees.

<sup>193</sup> Mahapa and Watadza (n188) at 67.

<sup>194</sup> Sander and Crespo 'A dialogue between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the evolution of the multi-door courthouse' (2008) 5 *University of St. Thomas Law Journal* 3 at 670.

<sup>195</sup> Sander 'Varieties of dispute processing' in Levin and Wheeler (eds) *The Pound Conference: Perspectives on Justice in the Future* Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (1979) 86.

<sup>196</sup> Roscoe Pound delivered a speech in 1906, outlining several criticisms of the United States justice system. The conference was later named after him – The Pound Conference. It was then held again in 1976 and again in 2016.

formal justice system that was slow and procedurally archaic. He suggested that courts should play a greater role in resolving disputes and that different dispute resolution methods could be used based on the characteristics of each case.<sup>197</sup> Sander proposed that some doors could have labels including arbitration, mediation or mini-trial.<sup>198</sup> The multi-door courthouse approach aims to provide more responsive and practical solutions to disputes and improve access to justice.<sup>199</sup>

The approach has been tested and has continued to be utilised in various jurisdictions, with some success.<sup>200</sup> The process is as follows: once a potential disputant contacts the court, a preliminary analysis is conducted to determine the most appropriate dispute resolution process for the type of dispute.<sup>201</sup> Several factors are considered in the analysis, including the kind of issues in dispute, whether it is a right or interest-based dispute, the type of or likely remedy, among other factors. The initial screening, which results in specialised advice to a potential disputant, may refer the matter to, for example, social services, should the dispute entail non-legal issues.<sup>202</sup>

#### a. Multi-door courthouse: Embracing process pluralism

Process pluralism raises the question of which dispute resolution process is appropriate for parties. While it is acknowledged that choosing a process is more art than science<sup>203</sup>, one

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<sup>197</sup> Pound Conference Report cited as 70 Federal Rules Decisions (FRD) 79 at 113.

<sup>198</sup> See Sander (n28) at 133.

<sup>199</sup> Pound Conference Report (n197).

<sup>200</sup> *Principles and Practice* 46.

<sup>201</sup> *Ibid* 45. This can also be referred to as screening. In this study, some of my interlocutors referred to the process as ‘filtering,’ discussed in chapter five, dealing with empirical data related to the second subsidiary research question on enhancing access to justice.

<sup>202</sup> *Ibid* 46.

<sup>203</sup> Sander and Rozdeiczerd ‘Matching cases and dispute resolution procedures: Detailed analysis leading to a mediation-centered approach’ (2006) 11 *Harvard Negotiation Law Review* 1 at 2.

suggestion is to match the characteristics of the dispute to a process.<sup>204</sup> For example, negotiation or mediation is preferred when parties have a pre-existing relationship to preserve. The most appropriate process has the highest payoff for both parties<sup>205</sup> and satisfies the goals of the court, society, or the state.<sup>206</sup> Other factors such as the amount in controversy, complexity of legal issues, and urgency of the matter should also be considered when selecting the most appropriate mechanism. When cases are filed, the clerk performs the vital screening function in the multi-door courthouse. Process pluralism allows clerks to match disputes to the appropriate mechanism.

ADR's growth positively impacts access to justice because disputes can be matched with a process based on parties' needs and issues causing the dispute.<sup>207</sup> The ADR system does not merely provide alternatives to court but offers multiple processes for citizens to choose from based on the nature of the dispute and available resources.<sup>208</sup> This approach supports disputing parties in achieving the best possible justice outcome.<sup>209</sup> How people dispute is a function of how and whether they relate to each other. Hence, dispute resolution procedures reflect society's most basic values and the quality of relationships.<sup>210</sup> Accordingly, multiple dispute resolution mechanisms should complement general law court processes or operate separately to mirror these countries' legal and cultural pluralism.<sup>211</sup> ADR creates a non-confrontational dispute settlement system that extends citizens' access to formal justice.

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<sup>204</sup> Sander and Goldberg 'Fitting the forum to the fuss: A user-friendly guide to selecting an ADR procedure' (1994) 10 *Negotiation Journal* 1 at 49.

<sup>205</sup> Sander and Rozdeiczerd (n203) at 2.

<sup>206</sup> Ibid.

<sup>207</sup> King et al *Non-Adversarial Justice* (2014) 96.

<sup>208</sup> Ibid.

<sup>209</sup> Akin Ojelabi and Noone 'ADR processes: Connections between purpose, values, ethics and justice' (2017) 35 *Law in Context* 1 at 5.

<sup>210</sup> Faruqi (n29) at 8.

<sup>211</sup> Kohlhagen (n13) 10.

## b. Examples of multi-door courthouses in Africa

Although mainstream ADR is underutilised within the confines of state law, there are several transplant cases on the African continent. Senegal introduced mainstream ADR through statutes in several sectors, including criminal cases.<sup>212</sup> Article 7 of Senegal's Civil Code allows judges to resolve disputes through conciliation.<sup>213</sup> In family law, conciliation by any means is an obligation.<sup>214</sup> Like Zimbabwe, Senegal allows the public prosecutor to proceed to mediation in cases concerning first-time minor delinquents<sup>215</sup>, in a process referred to as pre-trial diversion.<sup>216</sup>

Ghana introduced court-connected mediation in 2003 as part of a judicial service reform programme.<sup>217</sup> In Ghana, a judge or magistrate invites parties to resolve disputes before a mediator is selected from a list of mediators accredited to the court.<sup>218</sup> Should an agreement signed by both parties materialise after the mediation session, it is confirmed by the court as an enforceable consent judgment.<sup>219</sup> If mediation fails, the matter is referred to the court for trial. Several cases have been successfully handled in Nigeria since establishing multi-door courts and the ADR Centre.<sup>220</sup> People who participated in the mediation process in Nigeria were satisfied and would recommend it to others.<sup>221</sup>

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<sup>212</sup> Dieng (n107) 615.

<sup>213</sup> Article 7 of the Civil Code of Senegal.

<sup>214</sup> Dieng (n107) 615.

<sup>215</sup> Article 752, para 2 of the Criminal Code Procedure of Senegal.

<sup>216</sup> The Prosecutor General has the power in terms of s 9 of the Criminal Procedure and Evidence Act, 1927 – to decline to prosecute any matter if: the accused is below the age of 18 years; the accused is admitting to the crime committed; that the crime committed would not ordinarily attract a custodial sentence of more than one year.

<sup>217</sup> Dieng (n107) 616.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid.

<sup>220</sup> Uwazie, 'Alternative dispute resolution in Africa: Preventing conflict and enhancing stability' (2011) 16 *Africa Center for Strategic Studies* at 4.

<sup>221</sup> Ibid.

Several points are worth considering before proceeding. First, the wholesale adoption of Western ADR processes in African jurisdictions may be criticised for its ineffectiveness in enhancing access to justice.<sup>222</sup> This criticism stems from the argument that Western ADR models often fail to adequately incorporate local norms and values<sup>223</sup>, rendering them exclusionary for a significant portion of the African population. Second, the field of TADR is still in its nascent stages of development in theoretical underpinnings, although it has existed in practice among locals for time immemorial. Compared to mainstream ADR, this relative lack of theoretical maturity has led to an overreliance on Western perspectives in analysing ADR practices in African countries.<sup>224</sup> These factors contribute to the knowledge gap this thesis aims to bridge, specifically in chapter five, which delves into empirical data on various approaches to expanding access to justice in Zimbabwe.

### 3.7. Conclusion

This chapter's analytical approach to ADR allowed a comprehensive exploration of its theory, principles, and practical applications. This chapter provided a broad overview of ADR and TADR, its manifestation in Zimbabwe. Philosophical debates on ADR discourse, the advantages and disadvantages of ADR as an independent system for resolving disputes, and individual ADR processes such as negotiation, mediation, conciliation, and arbitration have been examined. The chapter has also highlighted the importance of the multi-door courthouse approach and the need to match different disputes to appropriate processes for resolution.

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<sup>222</sup> Maraire (n18).

<sup>223</sup> Ciftci and Howard-Wagner 'Integrating indigenous justice into alternative dispute resolution practices: A case study of the Aboriginal care circle pilot program in Nowra' (2012) 16 *Australian Indigenous Law Review* 2 at 82-84.

<sup>224</sup> Maraire (n18).

Through this examination, it has become clear that ADR can effectively resolve disputes in Zimbabwe. However, it is vital to recognise that ADR is not the only panacea for access to justice challenges and that litigation and general law courts remain central to justice delivery. International human rights law requires access to courts. Thus, the key to enhancing access to justice in Zimbabwe is to strike a balance between ADR and other dispute resolution systems such as general law courts.

This chapter serves as a background for the upcoming analysis of empirical data gathered through interviews with eighteen legal professionals in Zimbabwe. The examination of empirical data in chapters four, five, and six yields valuable insights into the obstacles citizens encounter when accessing and navigating the formal justice system. The analysis also explores strategies for overcoming these hurdles, and integrating into the formal justice system, the proposed solutions to address the access to justice challenges in Zimbabwe.

## CHAPTER FOUR

### BARRIERS TO ACCESS TO JUSTICE IN ZIMBABWE

#### 4.1. Introduction

This study aimed to investigate the effective realisation of the right of access to justice for all citizens, including the poor and small businesses in Zimbabwe. This chapter empirically addresses the first subsidiary research question on the factors impeding access to justice. In this regard, I rely on the views elicited from interviewees, represented with identifiers such as P1 and P2. The data revealed that multiple factors make justice and access to justice elusive for citizens in Zimbabwe. These include prohibitive costs, physical and social distance of citizens from justice officials and institutions, human and capital incapacity of justice institutions and incumbents, complex substantive and procedural law.

The chapter is organised as follows: I begin by outlining the correlation between the cost of obtaining justice and access to justice. Then, I discuss the psycho-social and physical barriers hindering access to the formal justice system, primarily due to the centralisation of judicial institutions and officials. This exclusion extends to TADR mechanisms, further limiting options for seeking redress. After that, I discuss the impact of Zimbabwe's economic depression on the justice system, including the inability to employ qualified personnel in the judiciary.

Findings on complex substantive and adjectival law then follow, with specific case law examples to illustrate the issues raised by interviewees. Next, I discuss the relationship between the time taken to conclude cases and access to justice. Participants highlighted numerous disadvantages of general law courts, which I summarise in the penultimate section of this chapter. These include the destructive nature of litigation to ongoing relationships and the

absence of restitution, which disincentives people from bringing or defending meritorious claims. The final section discusses unexpected findings about how the separation of powers doctrine relates to access to justice.

#### 4.2. The current justice system is anti-poor

This section discusses interviewees' views on the cost of obtaining formal access to justice in Zimbabwe. There are five subsections, starting with the legal and court fees citizens must pay during the life of a dispute. The last three subsections analyse justice reforms such as legal aid, arbitration, and pre-trial conference, which fell short of achieving the goal of enhancing access to justice for various reasons.

##### a. Prohibitive legal fees

Prohibitive costs hinder access to justice, discouraging citizens from using the formal justice system. Participants confirmed that the financial burden makes justice unattainable for most people. Legal practitioners' fees are particularly problematic, with P2 stating that it was 'unthinkable for most Zimbabweans to pay my [advocate] hourly rate or an attorney's rate.' P7 suggested that a US\$ 1 000 consultation fee is meant to 'financially discriminate' against the poor. While this may sound like P7 does not want clients, his comment points to basic supply and demand principles in a market-driven economy. The small elite of private people and large business enterprises provide sufficient cases, ensuring lawyers in metropolitan areas thrive. As P2 put it, reform efforts to extend access to justice should not target his current clients but the remaining 90 per cent who cannot afford legal fees.

Laypersons also face challenges when navigating the justice system without legal representation. According to P6, because the court system is protracted and relatively complicated, 'it's a brave person who embarks on litigation without legal representation and

legal representation is expensive.’ A study in the United States found similar results when assessing how self-represented litigants interact with court processes.<sup>1</sup> The authors found that although most cases by self-represented litigants were not factually or legally complicated, many litigants in these easy cases struggled to go through an unfamiliar justice system.<sup>2</sup> While the law allows for self-represented litigants in the courts, it is challenging bring or defend a claim without legal representation successfully. This is a point I will pick up below when discussing substantive and adjectival law.<sup>3</sup>

#### b. Prohibitive court fees

Courts place an additional financial burden on citizens. For instance, in addition to obtaining the services of an attorney, one must pay the Sheriff or the messenger of court<sup>4</sup> to serve papers – costs that P10 called ‘life-changing money’<sup>5</sup> for some parties. As highlighted in chapter one, the justice system in Zimbabwe is pyramidal<sup>6</sup> – the higher you go, the more expensive it becomes.<sup>7</sup> P10 provided an example of a High Court decision they were appealing on behalf of an indigent client at the time of the interview. P10’s NGO paid US\$ 2 500 in security costs<sup>8</sup> before the Supreme Court heard the appeal. The consequences for the indigent party in the

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<sup>1</sup> Owen, Staudt and Pednell *Access to Justice: Meeting the Needs of Self-represented Litigants* (2002) 3. See chapter one § 1.8(a) for research participant profiles.

<sup>2</sup> Ibid.

<sup>3</sup> Matsikidze ‘The civil procedure in magistrates’ court of Zimbabwe: A denial of justice to self-actors?’ (Unpublished master’s thesis, University of Zimbabwe, 2014) conducted a study at the magistrates’ court and made follow-up visits to litigants who abandoned their cases mainly due to complicated procedural rules. See § 4.6. and 4.7.

<sup>4</sup> See chapter one § 1.4., for the function of these officials.

<sup>5</sup> The phrase is commonly used in Zimbabwe to refer to large sums of money that have the effect of transforming one’s life instantly. Application forms typically incur additional costs, often requiring commissioned affidavits to be filed alongside the application fee. For a discussion on fees around filing applications and the ordeal citizens face in the prevailing socioeconomic environment, see Machakanja, Jeranyama, and Bere ‘The constitutional and legal frameworks for the protection of women against violence in Zimbabwe’ (2022) *Final Papers of the 2016 National Symposium on the Promise of the Declaration of Rights under the Constitution of Zimbabwe* at 37-38.

<sup>6</sup> For a discussion of Zimbabwe’s justice system see chapter one § 1.4.

<sup>7</sup> Law Society of Zimbabwe ‘General Tariff and Fees For Legal Practitioners’ available at <https://www.law.co.zw/download/general-tariff-or-fees-for-legal-practitioners-usd-with-effect-from-april-2021/>, accessed on 8 November 2022.

<sup>8</sup> A deposit paid by an appellant to cover the respondent’s costs of appeal if the appeal is unsuccessful.

matter, according to P10, would have been to ‘abandon the claim because I don’t have that kind of money.’ Still, even if the party P10 represented won the case, like many other cases, once the court proceedings are completed, litigants must engage the services of the Sheriff or the messenger of court to enforce the court’s decision.<sup>9</sup>

Furthermore, the fees paid to lawyers, the Sheriff, a messenger of court, the Taxing Master<sup>10</sup>, and the court demonstrate the impediments citizens face in accessing justice. P2 lamented the enforcement proceedings’<sup>11</sup> fees set at ten per cent of the assessed amount for litigants to have their costs evaluated by the Taxing Master. This is against the backdrop of a Zimbabwean economy that has been in freefall for over two decades, with astronomical inflation rates and a financially precarious population. It is unfathomable how justice and access to justice can be attainable for citizens under such conditions.

Pastor Mukaro’s case reveals how High Court user fees hinder access to justice.<sup>12</sup> He sued the Zimbabwe Republic Police, Home Affairs Minister, and Detective Dondo over his wife’s alleged death due to police assault. The main issue was the \$ 735 fee required by the High Court Registrar. P18 emphasised that such fees exclude the poor from obtaining justice. Mukaro’s representatives argued this fee transforms justice into a commodity only available to the wealthy, challenging its constitutionality.<sup>13</sup> This case underscores the need for Zimbabwe to review its fee structure to ensure accessible and affordable justice. Zimbabwe should

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<sup>9</sup> See chapter two § 2.4. for the story of the widow who could not execute judgment because she lacked the US\$ 70 needed to execute the order.

<sup>10</sup> The Taxing Master, appointed under the High Court Act, 1981, determines legal costs incurred. They ensure reasonable and proportionate costs, preventing parties from being unfairly burdened.

<sup>11</sup> Legal steps taken to compel a judgment debtor to comply with a court order.

<sup>12</sup> *Mukaro v Minister of Justice, Legal and Parliamentary Affairs*.

<sup>13</sup> Mukaro challenged the constitutionality of Item 2 of the High Court (Fees) (Civil Cases) Regulations, 1992, as stipulated in SI 221 of 2020. He contended that it infringed upon his constitutional rights to equal protection under the law (Constitution of the Republic of Zimbabwe Act (No. 20) Amendment (“the Constitution”) s 56(1)) and access to the courts (Constitution, s 69(3)).

consider South Africa<sup>14</sup> and France,<sup>15</sup> where court fees were abolished to ensure access to justice.

Legal and court fees, along with socioeconomic inequalities<sup>16</sup>, determine who can access justice through courts.<sup>17</sup> Therefore, access to financial resources becomes the key to unlocking the doors of justice.<sup>18</sup> In Zimbabwe, the connection between socioeconomic inequalities and access to justice is evident in the imposition of legal and court fees as well as a poor population described by P10 as having ‘no disposable income.’ Simply put, the cost of obtaining justice is anti-poor. These observations align with Galanter’s perspective, who viewed the basic architecture of the legal system as creating and limiting ‘the possibilities of using the system as a means of redistributive (that is, systematically equalising) change.’<sup>19</sup> Galanter made these assertions in the United States context, where the law recognises poverty as a classification like race.<sup>20</sup> Although the classification does not apply in Zimbabwe, Galanter’s insights remain relevant and instructive.

Galanter’s perspective gains heightened significance when applied to the Zimbabwean context, where the economic landscape underscores the urgency of utilising the formal justice system for redistributive purposes. The poor define justice in relation to social justice, as elucidated in Stewart, Sithole, and Ncube’s (eds) ethnographic study encompassing various communities in Zimbabwe.<sup>21</sup> For citizens, the line between legal and social issues blurs, presenting a complex

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<sup>14</sup> Rules Board for Courts of Law Act 107 of 1985 as amended by R. 107 of 7 February 2020.

<sup>15</sup> Cappelletti and Garth ‘Access to justice: The newest wave in the worldwide movement to make rights effective’ (1978) 27 *Buffalo Law Review* 2 at 229.

<sup>16</sup> See chapter one § 1.2.

<sup>17</sup> Crawford and Maldonado ‘Introduction: Access to justice: Theory and practice from a comparative perspective’ (2020) 27 *Journal of Global Legal Studies* 1 at 6.

<sup>18</sup> *Ibid.*

<sup>19</sup> Galanter ‘Why the ‘haves’ come out ahead: Speculations on the limits of legal change’ (1974) 9 *Law & Society Review* 1 at 95-96.

<sup>20</sup> *Goldberg v John Kelly* 397 US 254 (1970).

<sup>21</sup> Stewart, Sithole, and Ncube (eds) *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (hereinafter *In the Shadow of the Law*) (2000).

interplay that complicates the pursuit of justice and access to legal remedies. Addressing these challenges necessitates a transformative approach, one that embraces redistributive change. This entails establishing legal frameworks that seamlessly intertwine with the broader fabric of social and economic justice. Chapter six presents a theoretical model, offering insights into what such an integrated justice system might resemble and how it could effectively operate in the Zimbabwean context.

### c. The shortcomings of legal aid

Many developed countries' middle and upper classes can afford court and legal fees, while the lower socioeconomic classes cannot.<sup>22</sup> The first access to justice wave reforms addressed financial issues faced by indigent people through LA.<sup>23</sup> Consequently, countries like France extended LA to the middle class. In important cases, LA is offered regardless of one's financial status – the goal is the provision of justice.<sup>24</sup> In Zimbabwe, LA exists in name only. Two things illustrate this point. First, the LAD lacks the skills and financial capacity to assist the poor. Second, with over 89 per cent of the economy being informal<sup>25</sup>, Zimbabwe does not have a middle class. Many participants confirmed that even those classified as the arch-type middle class could not afford their fees and, hence, would require LA.

The Constitution requires the State to do everything it can, within the limits of its budget, to provide legal representation in civil and criminal cases for those who need it but cannot afford to hire a lawyer of their choice.<sup>26</sup> Section 31, read with s 50 1(b)(ii), categorically absolves the

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<sup>22</sup> Crawford and Maldonado (n17).

<sup>23</sup> For a discussion on the first wave of the access to justice movement, see chapter two § 2.4.

<sup>24</sup> Cappelletti and Garth (n15).

<sup>25</sup> Saungweme, Matsvai, and Sakuhuni 'Econometric analysis of unemployment, output and growth of the informal sector in Zimbabwe (1985-2013)' 2014 *International Journal of Economics and Research*. See chapter one §1.5 for a discussion on LA.

<sup>26</sup> Constitution, s 31 and s 70 1(e).

State from providing LA to arrested and detained persons, in direct contravention of Principle 7 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.<sup>27</sup> Principle 7 provides that ‘States should ensure that effective LA is provided promptly at all stages of the criminal justice process.’<sup>28</sup> This is not the case in Zimbabwe, and it is a significant shortcoming of the LA system, which has negative consequences for citizens who cannot afford legal representation.

#### d. The shortcomings of arbitration

Arbitration was introduced as a cost-effective alternative to litigation because it provides specialised skills that judges lack and averts appeal processes.<sup>29</sup> However, arbitration is not cheaper than litigation in Zimbabwe because many awards are contested at the High Court. Some research participants shared how it has become ‘almost automatic’ for the losing party to challenge arbitral awards. Reasons for contesting awards ranged from ‘unscrupulous’ attorneys who provided terrible advice to clients and judges willing to overturn awards on their merits, something outside the permissible legal provisions.<sup>30</sup> P5 blamed the newer judges for ignoring the Arbitration Act, 1996 and the fact that ‘you can only set aside that kind of decision [arbitral award] when it is so wrong that no reasonable person could ever arrive at that decision.’ P5 explained, ‘I even had to call the Judge President to say please, will you conscientise the judges? They are interfering with arbitration cases too much by addressing the merits.’

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<sup>27</sup> Principle 7 of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems. Zimbabwe is a signatory. Section 50 1(b)(ii) states that arrested persons must be permitted ‘at their own expense, to consult in private with a legal practitioner...’ See chapter one § 1.5.

<sup>28</sup> *Ibid.*

<sup>29</sup> For a discussion introducing arbitration, see chapter three § 3.3.

<sup>30</sup> Arbitration Act, 1996, s 4(2)(b) on matters contrary to public policy.

To illustrate the point above, the Supreme Court in *Peruke Investments (Private) Limited v (I) Willoughby's Investments (Private) Limited*<sup>31</sup> set aside a High Court judgment that had overturned an arbitral award on the basis that it was contrary to public policy. The dispute involved the distribution of rentals to the appellant and the first respondent, who owned adjoining stands they had jointly developed. The building constructed by the parties straddled more on the appellant's than the respondent's stand. Therefore, the arbitrator awarded 70 per cent of the rentals (and purchase price) to the appellant and 30 per cent to the respondent.

Aggrieved by the arbitral award, the first respondent challenged the award at the High Court, which set aside the arbitral award. Patel JA found that the judge *a quo* misdirected himself and relied on the words of Gubbay CJ (as he then was) in the *locus classicus* on the subject, *Zimbabwe Electricity Supply Authority v Maposa*<sup>32</sup>, to the effect that 'an award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation, the court would not be justified in setting the award aside.'<sup>33</sup> To err is human, and it is possible that the judge *a quo* was sincere in his finding. However, when analysed in the Zimbabwe context, where, as discussed in later sections, the narrative of judicial corruption is rife, it is difficult to view the judgment as an honest mistake, particularly given authoritative precedent. In this case, justice was delayed, and costs increased with each additional step in the path to justice.

Given the possibility of arbitration proceedings escalating to superior courts, there is credence to the criticism that ADR may not always be more cost-effective or time-efficient than general law court processes. While it may be difficult to establish reasonable estimates for how much

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<sup>31</sup> *Peruke Investments (Private) Limited v Willoughby's Investments (Private) Limited* SC 11/2015 Civil Appeal SC 208/14.

<sup>32</sup> *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S) at 465D-E.

<sup>33</sup> *Ibid.*

each ADR proceeding costs, P5 mentioned that complex arbitration proceedings can cost several thousands of American dollars.<sup>34</sup> In 2015, through the Arbitration Act, 1996, the government gazetted arbitration fees at US\$ 300 as the minimum for proceedings between one person against a company.<sup>35</sup> According to Maitireyi and Dube, 71 per cent of survey participants believed the cost of arbitration was unaffordable and prohibitive.<sup>36</sup> Arbitration is, therefore, out of reach for citizens who continue to be legally disenfranchised on account of affordability.

#### e. The shortcomings of pre-trial conference

According to some participants, the pre-trial conference was a valuable addition to court procedures and yielded results for a time.<sup>37</sup> The pre-trial conference aims to define and reach an agreement (best effort) on issues, including the length of the trial or the possibility of settling the matter without going to trial.<sup>38</sup> It is held after discovery<sup>39</sup>, chaired by a judge or magistrate, and both parties attend.<sup>40</sup> Subrule 11 allows the judge to dismiss a party's claim or strike out a defence if that party fails to comply with the judge's directions during the pre-trial conference.<sup>41</sup>

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<sup>34</sup> Kubasek and Silverman 'Environmental mediation' (1988) 26 *American Business Law Journal* 3 at 540 calculated that complex mediation cases sometimes cost as much as litigation.

<sup>35</sup> Mahapa and Watadza 'The dark side of arbitration and conciliation in Zimbabwe' (2015) 3 *Journal of Human Resources Management and Labor Studies* 2 at 67.

<sup>36</sup> Maitireyi and Dube 'Labour arbitration effectiveness in Zimbabwe: Fact or fiction?' (2011) 11 *African Journal on Conflict Resolution* 3 at 147.

<sup>37</sup> Pre-trial conferences are held in terms of Order 26 r 181 of the High Court Rules 1971. Subrule 4 allows the registrar to instruct parties to attend a pre-trial conference with a judge. The judge may also direct who should attend and what documents should be exchanged.

<sup>38</sup> Madhuku *An Introduction to Zimbabwean Law* (hereinafter *Zimbabwean Law*) (2010) 110. See *Sande (nee Nyamangunda) v Sande* [2012] ZWHHC 134, where pre-trial conference resolved five issues and only one issue, sharing immovable property was referred to trial.

<sup>39</sup> Requires parties to specify the documents and books they intend to use at the trial. *Ibid.*

<sup>40</sup> *Zimbabwean Law* 110.

<sup>41</sup> In *Afrasia Bank Zimbabwe Limited v Simbarashe Chidakwa* [2015] ZWHHC 177, the judge relied on subrule 11 of the High Court Rules 1971 to make an order in favour of the plaintiff when the defendant did not appear at the pre-trial conference.

Participants affirmed that a pre-trial conference was an effective way to filter out cases and reduce backlogs. According to P9, some judges ‘took the attitude ‘thou shalt not pass. If I think the matter should be settled, I am not just going to refer this matter to trial.’ P7 pointed out how pre-trial conference judges attempted ‘to see if the matter cannot be resolved amicably just in case it is you, the lawyers, who are persisting with the case just so that you can make money.’ Nevertheless, from the onset, the pre-trial conference always had fundamental challenges because, according to P9, the process came ‘at a stage post the closure of pleadings, discovery of documents and so on, in other words it [the pre-trial conference] is far down. You have expended a lot of money getting there already; attitudes would have hardened.’

Additionally, Zimbabwean civil procedure involves common steps in the High Court and the magistrates’ court.<sup>42</sup> The classic action has three stages - pleadings, pretrial, and trial, with the pleading stage potentially lasting months as parties can be met with different interlocutory applications relating to the pleadings. Discovery is also a time-consuming exercise. Depending on the matter, parties may wait many months for expert summaries to be tendered as part of the discovery process.

Furthermore, the pre-trial conference is the tenth step in a civil trial. It is classically arranged after discovery, which, according to P9, can lead to parties hardening their positions as they would have expended a lot of time and resources on the dispute. A more efficient system is needed to encourage earlier dialogue and resolution. However, the extent to which parties become entrenched may depend on the type of litigants involved, with financially constrained litigants more likely to compromise on less favourable grounds than if they had pursued ADR

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<sup>42</sup> The following are common to both courts: letter of demand, issue of summons, appearance to defend, request for further particulars, defendant’s plea, replication, close of proceedings, discovery, pre-trial conference, trial date, the trial, the judgment. See *Zimbabwean Law* 108-111.

much earlier in the process. Nonetheless, the pre-trial conference may still come too late for those who have invested significant resources to facilitate meaningful dialogue and resolution.

The zealously litigious nature of some lawyers may also pose a challenge. P10 gave an example of an opposing counsel who said to her, ‘I don’t believe in dialogue, period!’ She also noted that even if the parties were willing to discuss and resolve the issue, their lawyers may not be inclined to do so and may push for a trial instead. P9 believed that ‘we have legal practitioners who are not so much concerned about settlement considerations but by winning their cases come what may.’ These sentiments are consistent with the literature, which highlights the vulnerability of the pre-trial conference to the whims of lawyers because the success of the process depends on their whole-hearted voluntary cooperation.<sup>43</sup>

In Zimbabwe, as evidenced by the participants, attorneys are hesitant to show their hands before trial, which undermines the effectiveness of the pre-trial conference because it relies on transparent disclosure and willingness to compromise. Exploitation of the vulnerability inherent in the pre-trial conference demonstrates the competitiveness of Zimbabwe’s positivist legal system. Although it is unclear whether lawyers are competitive through training or because they operate in an adversarial system, it is abundantly clear that lawyers and the system do not focus on resolving issues between parties. The net result is that pre-trial conferences are an additional process on the path to litigation in court that increases the cost of obtaining justice.

The purpose of the pre-trial conference mentioned above is to define issues. To do so, a skilled judge should be able to cut through the fog and determine the most feasible way to proceed.

P9 was critical of current judges he accused of not having the skills necessary to run pre-trial

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<sup>43</sup> Crawford ‘Legal problems of the pre-trial conference’ (1946) 31 *Cornell Law Review* 3 at 300. See § 4.4. for a discussion on lawyers as obstacles to citizens’ access to justice.

conferences. This has resulted in the pre-trial conference becoming just another cog in the justice system that adds to the cost of litigation. As P9 put it, ‘we sometimes have relatively inexperienced judges who are not able to stamp their authority on a pre-trial conference. And it is often a fatal combination.’

An experienced and skilled judge should exert authority over the pre-trial conference proceedings, for example, by ordering preliminary reference of issues to a Taxing Master or the Master of the High Court, depending on the case’s specifics.<sup>44</sup> The effectiveness of pre-trial conferences in facilitating access to justice in Zimbabwe is questionable, as cases lacking merit still proceed to trial. Examining and addressing any capacity issues among judges is crucial to ensure the pre-trial conference effectively promotes efficient dispute resolution.

#### 4.3. Centralisation: psycho-social and physical impenetrability of the justice system

Formal justice institutions are mostly located in metropolitan areas. P3 and P10 mentioned the 52 magistrates’ courts ‘dotted around the country’, and circuit courts that usually sit at the provincial level. P3 lamented how the country has one labour court located in Harare.<sup>45</sup> Given that approximately 80 per cent of the population lives in rural and peri-urban areas<sup>46</sup>, courts are geographically inaccessible. As P10 put it, ‘if you are a person living in the rural areas, in addition to the court fees, you are adding your transport, all that to be able to access justice itself.’ An already precarious population is more vulnerable to injustice when the path to justice

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<sup>44</sup> Ibid at 291.

<sup>45</sup> The country has since (after the interview with the participant in 2019) established centres in Bulawayo and Gweru and circuit courts in Mutare, Hwange and Masvingo, which sit once every term.

<sup>46</sup> According to the 2022 census, the rural population has fallen to 61.4 per cent. See ZimStat ‘2022 Population and Housing Census - Preliminary Report’ available at [https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022\\_PHC\\_Functioning.pdf](https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022_PHC_Functioning.pdf), accessed on 23 August 2022. The Chief Justice lamented the distances citizens must travel to access justice; he said, ‘One needs only to note that from Hwange to Binga one travels 209 kilometres; from Hwange to Lupane is a distance of 165 kilometres; and Hwange and Victoria Falls are 102 kilometres apart. The Judicial Service Commission is disturbed by such long distances between the courthouses...’ Malaba CJ ‘Keynote address: On the occasion of the opening of Lupane magistrates court complex’ 30 September 2022.

is marred by structural barriers. Although it may be reasonable on paper to increase the number of courts in Zimbabwe to extend access to justice, it is not a practical or sustainable solution. The challenge of physically distant courts from where many people reside is further compounded by the country's economic conditions.

The limited number of High Courts (five) in Zimbabwe exacerbates the concentration of justice institutions in metropolitan areas.<sup>47</sup> The High Court is a court of first instance for different matters, including divorce, which makes it geographically inaccessible. For example, a couple living in Gutu (Masvingo Province) are forced to engage attorneys.<sup>48</sup> After all, the High Court rules<sup>49</sup> stipulate the service address should be within a radius of ten kilometres from the registry of required appearance.<sup>50</sup> When access to justice is restricted to centralised courts, it cannot be considered accessible.

#### a. Consequences of physical inaccessibility of the formal justice system

The Constitution requires the development of customary law.<sup>51</sup> In practise, little has been done to develop customary law. In chapter one, I outlined the farcical jurisdictions of the primary and community courts despite the majority of Zimbabweans relying on these institutions.<sup>52</sup> According to participants, these primary and community courts consistently and persistently exceed their jurisdiction to provide disputing platforms to citizens. Findings from Stewart, Sithole, and Ncube<sup>53</sup> revealed that citizens seek to resolve their disputes wherever justice

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<sup>47</sup> The High Court sits a few times yearly as a circuit court in Gweru and Hwange.

<sup>48</sup> While it is difficult to arrive at an exact figure for how much attorneys in Zimbabwe charge to use their office as the service address for High Court cases, the schedule of fees indicates that it is in the range of US\$ 350, which is the average hourly rate. See Law Society of Zimbabwe (n7).

<sup>49</sup> High Court Rules. R 15 amended by SI 202 of 2021.

<sup>50</sup> In contrast, South Africa, through amendments to rule 5(3)(a) of the rules of civil procedure in the magistrates' court, increased the 8km distance for service address to a 15km radius of the Office of the Registrar of the Court, and there are no fees to use a service address.

<sup>51</sup> Constitution, s 89.

<sup>52</sup> Sibanda 'An analysis of traditional leadership, customary law and access to justice in Zimbabwe's constitutional framework' 2019 *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* at 6.

<sup>53</sup> See generally *In the Shadow of the Law*.

platforms are available. This aligns with findings from this study where P3, while working as a provincial magistrate, experienced traditional leaders exceeding their jurisdiction to assist people living in their communities.

According to P3, a local chief was ‘trying maintenance cases, signing Salary Service Bureau (SSB)<sup>54</sup> stop orders or just writing to SSB to say that can you [must] ‘sic’ deduct this money from him.’ The community court exceeded its jurisdiction in child maintenance cases involving the failure of some fathers to maintain their children. By ordering SSB to place a stop order on the man’s salary and diverting a certain amount to the women and their children, the traditional leader thought he was providing justice. The traditional leader granted emoluments attachment orders because there was no other option for the women in his rural village. This is a clear example of a traditional leader exceeding his jurisdiction and the legal system (SSB complied with his orders), allowing him to do so regardless of what the law says.

In contrast, *The Chronicle*<sup>55</sup> reported the story of Chief Ndiweni, who was treated differently when he fell victim to customary courts exceeding their authority. In this case, an unfaithful wife the chief banished from the homestead defied his orders. The husband also defied the order to banish the wife from the village, and Chief Ndiweni ordered villagers to destroy the kraal and fence around their household. Chief Ndiweni was subsequently charged and found guilty of destruction of property, along with 23 other villagers who acted on his orders. It is common cause that other chiefs conduct their courts similarly across the country, perhaps with a genuine motivation to fill a gap left by the limited resources and capacity of the formal justice system. Chief Ndiweni is, however, a government critic, so the law was used to prosecute and remove him from his position as chief. Both cases raise concerns about the lack of legal

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<sup>54</sup> A bureau that processes government employees’ salaries.

<sup>55</sup> Netsianda ‘Chief Ndiweni, 23 others convicted of destroying property’ *The Chronicle* 16 August 2019.

oversight over judicial functions exercised by traditional leaders, which has the potential to lead to abuse of power.

b. Marginalisation of customary law and living customary law

Dispute resolution is part of a community's way of life.<sup>56</sup> In chapter one, I discussed how traditional Zimbabwean society managed and resolved disputes in accordance with the cultural norms and practices of the different communities.<sup>57</sup> When asked to define and discuss the notion of justice, P7 described it as 'common sense', stating that 'what is common and acceptable to every one of us, that is justice'. P7 said, 'you will notice common sense, and there is a reason for doing everything in our culture.' P8 gave an example of her parents, who refuse to settle disputes in general law courts despite being well educated, with a daughter who is a lawyer. She believed her parents do not accept formal courts because '*hazvina hunhu* [lacks dignity] to drag each other to court – it's not good for relationships. You think about how we are going to live together afterwards.'

Additionally, for P8's parents, it is better to '*ngatitaurirane* [let's talk it out], even if it means you are going to lose property.... It is also about how we have been socialised as a people; the concept of the formal justice system obviously came with colonisation.' Therefore, by excluding culturally and socially appropriate processes from the formal justice system, access to jurisprudential justice is impeded for most Zimbabweans. The fact that the Constitution calls for the development of customary law in the face of continued relegation of socially appropriate dispute resolution leads to a hallowed promise without much substance.

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<sup>56</sup> Sibanda (n52).

<sup>57</sup> See chapter one § 1.3.

But first, something must be said about the family unit's role in members' decision to seek justice in formal state institutions. A Shona idiom, '*chakafukidza dzimba matenga*,'<sup>58</sup> is appropriate to explain how matters are emphasised as internal and should be dealt with as such, with no external assistance. Stewart, Sithole, and Ncube (eds)<sup>59</sup> found a similar narrative, where citizens voluntarily ceded their legal rights after calculating the opportunity cost of resolving a matter within the family instead of pursuing the formal court route. The family as a dispute resolution platform is informal, and resolutions passed therein are extrajudicial and do not carry the force of law.

According to Sibanda, 80 per cent of the population is marginalised from the formal justice system because their preferred dispute resolution processes are not recognised in law.<sup>60</sup> This is not a problem unique to Zimbabwe. Numerous government reports in Australia have also found that Indigenous people and people living in rural areas are also marginalised from the formal justice system.<sup>61</sup> The difference between the two countries, as I will highlight in chapter five, is that Australia, unlike Zimbabwe, has completed several pilot programmes in civil and criminal justice that incorporate Aboriginal cultural norms and values.

Importantly for this thesis, the notion that the formal justice system is the only legitimate mechanism for resolving disputes is increasingly being challenged. Many individuals, especially those in rural areas, deliberately avoid approaching the formal justice system. One study in Zimbabwe found that rural women were not ignorant of the law but instead consciously chose to use the customary system to resolve disputes.<sup>62</sup> This highlighted the arrogant narrative

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<sup>58</sup> A ChiShona idiom referring in the literal sense: the roof covers the house. It metaphorically refers to handling internal matters using internal channels without involving outsiders who should not see what is under the roof.

<sup>59</sup> *In The Shadow of the Law* 26.

<sup>60</sup> Sibanda (n52).

<sup>61</sup> Law Council of Australia 'Justice Project Final Report' (2018).

<sup>62</sup> *In The Shadow of the Law* 26.

held by some legal professionals and scholars who assume that laypersons use customary processes because they are unaware of their legal rights. The normative vision of ‘appropriate fit’<sup>63</sup>, which is critical for the effective dispensation of justice, is often achieved through resolving conflicts within the family.

Citizens consider several factors, including the circumstances under which the dispute occurs, when selecting the mechanism to use for peaceful resolution. However, some commentators argue that access to peace, which customary and living customary law provides, is insufficient if it comes at the expense of legal rights.<sup>64</sup> They proffer that there is a difference between access to peace and access to justice. Therefore, it is essential to consider TADR and general law institutions when seeking to provide effective and accessible justice to all citizens.

As discussed throughout this thesis, although indigenous ways of dispute resolution were made informal during the colonial period, Africans continued to rely on these platforms and processes.<sup>65</sup> To date, Africans continue to rely on these mechanisms to resolve arising matters despite often lacking the force of law.<sup>66</sup> TADR is informal because law and access to justice have been centralised as part of the state machinery.<sup>67</sup> Moreover, the displacement of customary law courts and other living customary law platforms means disputes previously heard in simple fora are now exclusively heard in courts applying general law. These courts are not always required to use customary procedures.<sup>68</sup> Accordingly, there is no pluralistic

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<sup>63</sup> Kruse ‘Learning from practice: What ADR needs from a theory of justice’ (2004) 5 *Nevada Law Journal* 405 at 389.

<sup>64</sup> *Ibid.*

<sup>65</sup> See chapter one § 1.3.

<sup>66</sup> See generally Schärf ‘Non-state justice systems in Southern Africa: How should governments respond?’ (Unpublished paper, *Institute of Criminology*, University of Cape Town, 2003).

<sup>67</sup> Ubink and Mnisi Weeks ‘Courting custom: Regulating access to justice in rural South Africa and Malawi’ 51 *Law and Society Review* 4 (2017) at 827-828.

<sup>68</sup> *Ibid.*

equality in the justice system in Zimbabwe, and formal courts have an exclusive monopoly in providing justice.

Access to general law courts is treated by definition and in practise to mean access to justice, which creates a false equivalence. Because how people dispute and settle matters is a part of social life, these two realms influence one another. In the case of access to justice, processes contrary to the accepted ‘way of doing things,’ what P7 called ‘common sense,’ may be excluded at the individual or community level. At the same time, relying exclusively on TADR platforms can perpetuate discrimination and unfair treatment of certain groups, particularly women and marginalised communities.<sup>69</sup> Therefore, while TADR has its place in dispute resolution, it should not be the only option available to citizens, and the formal justice system should work towards providing equal and accessible justice for all.

Building on the idea that access to justice should not be limited to general law courts, it is important to consider how individuals navigate the justice system and how their everyday lives are affected. As Galanter argued, ‘ultimately, access to justice is not just a matter of bringing cases to a font of official justice, but of enhancing the justice quality of the relations and transactions in which people are engaged.’<sup>70</sup> This perspective of access to justice considers the interactions people have with the justice system and how they are treated, highlighting the need for a holistic approach to justice that addresses legal issues and the broader social and economic contexts in which they arise.<sup>71</sup> What is apparent from the empirical data presented and

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<sup>69</sup> Ibid at 831, 847. The scholars argue that these traditional courts are often at odds with constitutional guarantees of gender equality.

<sup>70</sup> Galanter ‘Justice in many rooms: Courts, private ordering, and indigenous law’ (1981) 13 *The Journal of Legal Pluralism and Unofficial Law* 19 at 161–162.

<sup>71</sup> Noone and Akin Ojelabi ‘Alternative dispute resolution and access to justice in Australia’ (2020) 16 *International Journal of Law in Context* 2 at 110.

discussed in this chapter and the literature is that equating access to justice to access to a centralised institution or enforcement of rights is wrong.

Effective access to justice improves people's way of life – that is, how they relate to one another. This entails providing people with choices that carry the force of law, such as resolving a dispute within the family unit if that is the appropriate forum for the type of dispute, considering the characteristics of the parties and the issues in dispute. These measures enhance the quality of justice because the focus is on dealing with disputes quickly using simple procedures and in a culturally sensitive manner. This way of thinking about access to justice is like the utopian ideal discussed in chapter two. The question is how far to push towards this utopia in Zimbabwe. In chapter five, I discuss three models participants suggested that incorporate and give the force of law to citizens' normative values in the formal dispute resolution system.

#### c. Access to justice and social realities

Elitism within the legal system cannot be more evident than in a system created by and for legal professionals. Consequently, the legal profession is closed to any other person or entity.<sup>72</sup> The irony of enshrining in the Constitution a right of access to justice for every citizen while systematically excluding them from meaningful participation due to insurmountable impediments is quite apparent. Structurally, the formal justice system excludes citizens from using the legal system even when the citizenry knows how the system works. As P10 said, 'the court doesn't understand [Chi]Shona [language].' P2 mentioned the difficulties faced by 'a rural Zimbabwean, who possibly doesn't speak English very well, if at all, possibly doesn't own a suit...I think the average court user may be extremely intimidated...'

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<sup>72</sup> Crawford and Maldonado (n17) at 6.

P2 believed that citizens who are not lawyers would not know what is going on and ‘you see this person who is referred to as My Lord, My Lady and sitting there with a wig and gown on, I think in terms of culturally whether that’s accessible, there are issues there that could be addressed.’ P2’s sentiments resonate with scholarship<sup>73</sup>, which suggests a need for the justice system to be more culturally sensitive and accessible to all citizens, regardless of their background or level of education. This is particularly important because most litigants are unrepresented at the magistrate’s court.<sup>74</sup> Therefore, one-shot litigants do not stand a chance when faced with parties (private persons and business enterprises) with legal representation.<sup>75</sup>

In the *Chikweche case*<sup>76</sup>, the High Court denied Chikweche’s application for registration as a legal practitioner<sup>77</sup> due to his Rastafarian religion and dreadlocks, which the judge considered ‘unkempt.’<sup>78</sup> The Supreme Court overturned this decision, finding that the judge’s finding was factually incorrect and that Chikweche was a ‘fit and proper person’ to be registered.<sup>79</sup> This case highlights the level of decorum and lofty standards for officials in formal court settings.

#### 4.4. Lawyers as barriers to access to justice

Despite being lawyers, participants viewed members of the profession as a barrier to access to justice. P1 claimed that lawyers are often unaware of alternatives to litigation and may sometimes encourage clients to avoid negotiations. Justice and access to justice, thus, become inaccessible when lawyers are ignorant of, or unwilling to explore alternatives. This is not unique to Zimbabwe. An empirical study in the United States revealed that parties were

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<sup>73</sup> Ubink and Mnisi Weeks (n67) 846.

<sup>74</sup> Ibid.

<sup>75</sup> Galanter (n19) at 98.

<sup>76</sup> In *re Chikweche*, CA 626/93, Zimbabwe: Supreme Court, 27 March 1995.

<sup>77</sup> Legal Practitioners Act, 1981.

<sup>78</sup> Ibid s 5(1)(f).

<sup>79</sup> Lancaster House Constitution, s 24(2).

unaware of the available ADR options<sup>80</sup>, and lawyers played a marginal role in raising awareness. Similarly, a study that investigated the attitudes of one-shot and repeat player litigants in Russia revealed the ignorance of all parties towards knowledge of ADR processes and how they work.<sup>81</sup> Unfortunately, even when parties know the available options, they do not know how they operate in practice, which removes them from being practically viable options regardless of the benefits.<sup>82</sup>

It is possible, though, that legal professionals in jurisdictions with mandatory ADR may have greater awareness of alternatives to court and may encourage clients to pursue such routes when appropriate. In Zimbabwe, where ADR is mainly voluntary<sup>83</sup>, the prevailing sentiment among the participants was that lawyers are ignorant of ADR processes and how they work. Moreover, lawyers aware of ADR undermine any such pursuits due to greed.

P10's experience with the failure of the pre-trial conference discussed earlier in the chapter is illustrative of the ignorance, which may be structural. P1 and P2 commented that the current formal justice system prepares lawyers, citizens, and businesses for trial without considering whether a trial in court is the most appropriate forum to manage and resolve the issues among the parties. There are many reasons for this, and one might be the formal justice system's design, which allows lawyers to make more money when cases go to trial.<sup>84</sup> According to P9 and P10, greed among lawyers was a leading factor in lowering ethical standards in the profession, to the extent that it is common for lawyers to refuse settling matters early even

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<sup>80</sup> Shestowsky 'When ignorance is not bliss: An empirical study of litigants' awareness of court-sponsored alternative dispute resolution programs' (2017) 22 *Harvard Negotiation Law Review* at 189.

<sup>81</sup> Hendley 'Resistance, indifference, or ignorance? Explaining Russia's non-use of mediation' (2017) 32 *Ohio State Journal on Dispute Resolution* 487 at 484.

<sup>82</sup> Reynolds 'Does ADR feel like justice?' (2020) 88 *Fordham Law Review* 6 at 2359-60, 2375.

<sup>83</sup> Labour Act, 1985 s 5(a) and 5(b) provide for voluntary and compulsory arbitration.

<sup>84</sup> See § 4.2(b) on the pyramic structure of the justice system.

when it is in the client's best interests.<sup>85</sup> An alternative explanation for low ethical standards may be attributed to the fact that legal ethics is an elective 2-credit course in a Bachelor of Laws (LLB) (Honours) programme.<sup>86</sup>

Lawyers are not empathetic towards their clients and lack the emotional intelligence to find the best possible solution to a legal problem. P9 thought that 'one of the problems with lawyers is that they get bogged down with legalese, and they do not fully appreciate the psychological nuances of a case, and that is where an element of psychology or at the very least emotional intelligence is critically important.' Commentators have defended the use of legalese. I discuss this in more detail in the following section, save to say it is an identifying mark of the profession, creating tension between preserving the profession and serving clients. This tension between a lawyer's loyalty to the court system and the client is widely recognised. Lawyers are often expected to maintain a professional distance from their clients, and resultantly, the court or legal guild can become the default strategy for resolving various types of cases.<sup>87</sup>

#### a. Poor legal training as a barrier to access to justice

Law schools are gatekeepers of the legal profession. They are responsible for training would-be lawyers and preparing them to aid citizens in obtaining access to justice. Lawyers are critical in advising clients on available options to solve different problems. This means that lawyers must be aware of various options and legal strategies. Participants lamented the legal training of university law students, who they argued are not trained in plural dispute resolution methods. P7 squarely blamed the younger lawyers for being unidimensional. In his view, younger lawyers do not consider the issues in dispute or the relationship between parties before selecting

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<sup>85</sup> See § 4.2(e).

<sup>86</sup> Midlands State University website available at <https://www5.msu.ac.zw/home/faculties/law/laws-llb/>, accessed on 6 July 2023.

<sup>87</sup> Galanter (n19) at 114-115.

the best course of action. In other words, young lawyers are overly litigious – a point that could be supported by the fact that a Bachelor of Laws (LLB) (Honours) at Midlands State University, for example, has a single ADR 2-credit elective course.<sup>88</sup> According to P7, he was trained in the 1970s, and during that time, law schools emphasised that lawyers prioritise the best possible outcome for their client, even if it meant making less money than they would otherwise make if they went to trial.

Furthermore, P7 mentioned how, to this day, he commences every case by calling parties to his office to start a dialogue if the other party does not have representation. If the other party has legal representation, he ‘requests for a without prejudice meeting’ with the other attorney to try and find a workable solution without going to court. It is plausible that legal education has changed in Zimbabwe, given the country’s socioeconomic transformation. There has been periodical mass exodus of teachers and lecturers in Zimbabwe over the last two decades.<sup>89</sup> This brain drain massively affects the quality of teachers/lecturers, adversely affecting the quality of legal practitioners.

Law schools can lead the access to justice movement. They are strategically positioned to help close the gap and bring the justice system closer to its ideals.<sup>90</sup> To achieve this, legal education must be improved by developing a curriculum that helps to create a closer connection between students and the lived experiences of justice seekers. While much has been written on improving law curricula<sup>91</sup>, literature has focused on linking legal education to practice. But

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<sup>88</sup> Midlands State University (n86).

<sup>89</sup> Khumalo ‘Zim loses 20 000 teachers in two years’ *Reliefweb* 23 May 2009; University World News ‘Zimbabwe: Brain drain bites, academics strike’ *University World News: Africa Edition* 14 February 2010.

<sup>90</sup> Rickard ‘The role of law schools in the 100% access to justice movement’ (2018) 6 *Indiana Journal of Law and Social Equality* 2 at 241.

<sup>91</sup> Garon ‘Take back the night: Why an association of regional law schools will return core values to legal education and provide an alternative to tiered rankings’ (2017) 38 *University of Toledo Law Review* 2 at 531-532; *Ibid* at 253.

merely linking legal education to practice is insufficient if legal practice is already divorced from the lived realities of the community would-be lawyers or practising lawyers seek to or are currently serving. This is the case in Zimbabwe, where, as discussed, there is a disconnect between the people's way of life and the formal justice system.

The effect of teaching law students a common law curriculum can be seen in how some participants defined justice and access to justice in positivist terms, without regard to other legal theories and systems. That is, justice according to the law.<sup>92</sup> Some participants perceived customary law and institutions as providing an inferior standard of justice, even when scholarly evidence proves otherwise.<sup>93</sup> Law schools have been slow to adapt to the fourth wave of access to justice.<sup>94</sup> Lawyers receive little or no training in alternative lawyering styles, such as collaborative lawyering, emphasising cooperation and mutual problem-solving between parties in a legal dispute. When lawyers receive inadequate training, they become terrible practitioners. Although lawyers are central to the functioning of the justice system, the reality is that poor legal representation is not necessarily better than no representation.

#### b. Language as an obstacle to access to justice

The primary language in court remains English, 40 years after independence, and Latin words dominate legal speech and writing, commonly referred to as legalese. Legalese even confuses Constitutional Court judges, who could not understand an advocate during the 2018 televised election trial.<sup>95</sup> Legalese makes clients vulnerable to their lawyers because if Constitutional

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<sup>92</sup> *Zimbabwean Law* 5-6.

<sup>93</sup> Sibanda (n52) refuted the inferiority of customary law and institutions with empirical findings from numerous local and community courts where the treatment of evidence was equal to the standard expected of the judiciary. Interestingly, the Privy Council in *re Southern Rhodesia* [1919] AC 211 at para 233-4 acknowledged how traditional African law, though different, was equal to, and as enforceable as English law.

<sup>94</sup> Economides 'Reading the waves of access to justice' (1999) 31 *Bracton Law Journal* at 67.

<sup>95</sup> The case was televised on the national broadcaster Zimbabwe Broadcasting Corporation (ZBC).

Court judges could not understand the language used by an advocate, how much more a layperson? Using legalese, lawyers become unaccountable to their clients who cannot understand the legal representative's submissions.

In addition, during a televised interview of judges for the Supreme Court, one judge could not describe the principle of collegiality.<sup>96</sup> The judge excused himself, citing that he may know the legal principles if they asked him in [plain] English.<sup>97</sup> It is expected that a person writing for judicial office should be well acquainted with legal principles, but that is not the case for some judicial officials in Zimbabwe. This situation is worrying for justice provision and citizens' access to justice, mainly because the dominance of legalese in legal proceedings is deemed necessary to maintain consistency and accuracy in legal language.

Where there is provision for translators in court, they are not always available to litigants<sup>98</sup>, making self-representation impossible. Litigation is by design adversarial, and when coupled with prejudicial rules on dress code imposed on the litigants, foreign language, and antiquated wigs and robes, the court becomes an intimidating setting, deterring citizens from seeking justice from the institution, rendering justice inaccessible. Although citizens can present their legal issues to legal practitioners in any local language, all applications can only be made in English because translated versions of the forms do not exist.<sup>99</sup> According to Machakanja, Jeranyama,

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<sup>96</sup> Defined by Villanova University as mutual respect and trust among groups with a shared interest in promoting the welfare and mission of an academic community. Judge Edwards suggested that collegiality is how 'appellate judges overcome their individual predilections in decision making.' Both cited in Cross and Tiller 'Symposium: Positive approaches to constitutional law and theory understanding collegiality on the court' (2008) 10 *Journal of Constitutional Law* 2 at 257-258.

<sup>97</sup> ZimEye 'Justice Kudya embarrasses himself yet again in supreme court interviews' *ZimEye* 21 June 2019.

<sup>98</sup> Svongoro 'Court interpreter training at the crossroads: Challenges and future prospects for Zimbabwe' (2016) 7 *Mediterranean Journal of Social Sciences* 2 at 108. During fieldwork, on several occasions, some courtrooms closed for the day due to the absence of interpreters. This was despite the prosecutor and magistrate being native Shona speakers.

<sup>99</sup> Machakanja, Jeranyama, and Bere (n4) at 38.

and Bere<sup>100</sup>, this instils feelings of inferiority in citizens, particularly when they cannot adequately express themselves because they cannot understand a foreign language.

P2, who practised as an advocate in England and now in Zimbabwe, found it interesting that ‘in England, they are now going the other way, you know they are doing away with wigs and gowns, they are doing away with unnecessary formality.’ Ironically, Zimbabwe is doubling down and spent £118 000 on 64 wigs for judges in 2019.<sup>101</sup> This is despite 63 per cent of Zimbabweans living below the poverty line.<sup>102</sup> Issues of transformation have not taken centre stage in Zimbabwe. Despite attaining independence in 1980, the justice system is stuck in colonial Rhodesia, where justice was the preserve of the few. The formal justice system should be decolonised to reflect the social and cultural realities.

Still, the use of legalese by professional lawyers has received support in scholarship.<sup>103</sup> Legalese is viewed as one way of distinguishing lawyers from other professions.<sup>104</sup> The central argument is that law is a verbal art and a sign of professional status emanating from specialised training. However, it is challenging to translate many legal ideas into indigenous languages. In company law, for instance, words and terms such as derivative actions, trusts, insider trading, share bloc, and body corporate do not have readily available translations in ChiShona or IsiNdebele. Effectively, legalese goes beyond the use of Latin words. The language of the law is alien to many people, which has the effect of denying them access to justice.

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<sup>100</sup> Ibid.

<sup>101</sup> Chingono ‘Zimbabwe’s £118 000 outlay on judges’ wigs met with fury’ *The Guardian* 5 April 2019. Ironically, the wigs are imported from colonial Britain, whose judges no longer use wigs.

<sup>102</sup> World Food Programme ‘Country Brief: Zimbabwe’ available at <https://www.wfp.org/countries/zimbabwe>, accessed on 11 November 2022.

<sup>103</sup> Ludlow ‘Legalese’ (1990) 47 *ETC: A Review of General Semantics* 3 at 259.

<sup>104</sup> Ibid.

Additionally, some Latin maxims are challenging to translate into manageable English. For example, *res gestae* ('things done') and *res ipsa loquitur* ('the thing speaks for itself'). What cannot be contested is that legalese makes it difficult for laypersons to understand legal documents, thus, stifling active participation in court proceedings. Additionally, legalese makes reading legal documents challenging for those unfamiliar with its specialised language. Legalese impedes self-represented litigants from accessing legal information; the only way around that challenge is engaging a lawyer, which creates a dependency relationship.<sup>105</sup> Consequently, citizens who cannot afford to hire lawyers cannot access the necessary legal information to make or defend claims. Poor people's access to justice is rendered useless because of unintelligible language. Regardless of the justification for legalese, it is undisputed that it impedes people from accessing justice.

#### 4.5. Institutional incapacity

The Zimbabwean formal justice system is plagued by multiple capacity issues, which hinder citizens, especially the poor and small businesses, from having effective access to justice. This section analyses interview data under the following subsections: insufficient financial and human capital, judicial incapacity, asynchronous relationship between justice actors, corruption and diminished ethical standards, and the incapacity of general law institutions to deal with certain disputes.

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<sup>105</sup> Sithole *Towards a Theory and Practice of Access to Civil Justice for the Poor in Zimbabwe: Law and Dispute Resolution in a Pluralistic Society* (unpublished PhD thesis, University of Toronto, 1997) at 184.

#### a. Insufficient financial and human capital

Participants identified the shortage of resources, both human and capital as one of the most significant challenges of access to justice in Zimbabwe.<sup>106</sup> The Ministry of Justice, NPA, JSC, ZRP, and Prisons and Correctional Services all suffer from a lack of funding<sup>107</sup>, making it difficult for these institutions to attract top talent. P7 blamed the Minister of Justice for this problem, accusing the Minister of failing to employ competent lawyers in the LAD to defend the poor. Professionals should be hired and paid well to address this problem. According to P7, shoring up state LA would also serve the purpose of advertising to citizens and law graduates who may select public service ahead of private practice. Given the prevailing socioeconomic landscape in Zimbabwe, where many Zimbabweans cannot afford legal and court fees, strengthening LA might enhance access to justice. Without such interventions, access to justice will remain out of reach for many vulnerable and marginalised citizens.

#### b. Judicial incapacity

The economic downturn experienced in Zimbabwe has not spared the judiciary. Two research participants demonstrated the judiciary's lack of financial capacity by boasting that they each turned down judgeship appointments on three occasions since 1990. P6 highlighted, 'the remuneration is pretty poor, and so you are not going to attract as historically you did from higher echelons of the profession.' Salary data are difficult to obtain in Zimbabwe.<sup>108</sup> However, *salaryexplore.com* revealed that the salary of an Administrative Law Judge is pegged on average at ZW\$ 575 000 per month, which is equivalent to US\$ 1 000 at the official rate and

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<sup>106</sup> Government of Zimbabwe and UNDP 'Enhancing justice delivery and human rights for all' (2012) at 9. NA 'Courts run out of stationery in Zimbabwe' *ReliefWeb* 7 June 2006. Courts could not print transcripts and judgments, which resulted in delays in proceedings and hindered the filing of appeals.

<sup>107</sup> Malaba CJ 'The role of the judiciary in entrenching constitutionalism' speech delivered on the official opening of the 2024 legal year *JSC* 8 January 2024 at 38.

<sup>108</sup> See chapter one § 1.2.

US\$ 500 using the black-market rate.<sup>109</sup> The net result of low remuneration, as indicated by P9, was judicial appointments of ‘people who have come through the civil service or have been plucked from fairly insignificant roles in the legal profession.’ These categories of people are happy to accept appointments because of their status but may otherwise be incompetent. It is also possible that the legal professionals who accept judicial appointments with paltry remuneration have mediocre careers, and a judgeship is their chance to step up the ladder.

The hiring strategy of judicial officials can be viewed as a political ploy to erode the judicial system.<sup>110</sup> The argument is that a weak judicial system is akin to a ‘captured’ judiciary, albeit without the need for threats of violence or bribery. As discussed below, although P9 did not provide specific cases, he mentioned ‘remarkable’ judgments with ‘scanty reference to the law.’ Similarly, P12 remarked the following about a judge,

‘We can’t have a poor judge like [name anonymised] who has been drowning in cases for I don’t know how many years now, heading up the [specialist court name anonymised]... I mean, he gets lumbered with transcripts that are 10K pages, and he has never practised law, has been a magistrate and not necessarily clued up on [subject/field anonymised as a measure to remove identifying features of the judge] matters.’

Participants viewed the fact that some magistrates and judges have never practised law as one of the leading factors affecting the calibre of the judiciary and, consequently, justice delivery. Some magistrates are appointed directly after graduating from law school or previously from the judicial college. After that, some judges are appointed from those magisterial positions, which makes it possible for one to become a judge without ever having practised law – whether prosecuting or representing clients.

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<sup>109</sup> As mentioned in chapter one, there is a thriving parallel market in Zimbabwe, which dictates commodity prices and the real value of money. This was relevant in November 2022.

<sup>110</sup> In § 4.4(c) below, Malaba CJ discusses the challenge of achieving judicial independence in an underfunded judiciary. According to the Chief Justice, the Harare civil court (busiest in the country) grappled with a shortage of magistrates and those available were inexperienced, which worsened the situation for litigants. See Malaba CJ’s speech on the official opening of the 2018 judicial year *JSC* 15 January 2018 at 12.

P12 mentioned that many judges at the High Court, Supreme Court, and Constitutional Court had not practised law, which is concerning. Although P12 quickly clarified that he was not claiming that the magistrates and judges were not qualified, he maintained that having never practised law means they lack practical experience in drawing pleadings or appearing on behalf of clients, which manifests in delays.<sup>111</sup> When judges have never represented clients, this may affect their attitude and their ability to empathise with litigants or see nuances in a case. This may also affect the quality of justice such officials administer and negatively impact access to justice. The issue of insufficient human capital in the court system is compounded by the work ethics of largely unsupervised magistrates, which leads to long delays in the hearing of cases and delivery of judgments.<sup>112</sup>

P2 added, ‘I think you need to know what it is like to be on the other side. You need to appreciate how documentation is generated, why certain issues are especially important to clients. And I think a lot of the Zimbabwean judges don’t come from that background.’ Judicial officials without practical legal experience may lack the ability to evaluate evidence, a criticism levelled against traditional leaders at the local and community courts.<sup>113</sup> In general law, evaluating evidence is essential because careful evaluation leads to truth-finding, which leads to justice.

P2 pointed out a certain judge he named as an exception because he comes from private practice. According to P2, ‘you appear in front of him, and you feel the difference, you talk the same language...you know you are going to get speedy resolution and it might not go your way, but you will understand why it didn’t go your way.’ To understand why there is a

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<sup>111</sup> Ibid.

<sup>112</sup> Ubink and Mnisi Weeks (n67) 846.

<sup>113</sup> Sibanda’s (n52) empirical findings at local and community courts refute participants’ claims of improper adherence to rules of evidence. See *Lopez v Nxumalo* SC 115/85, one among many examples of the Supreme Court upholding community court decisions.

discrepancy, P2 suggested that ‘you have to understand who it is that becomes a judge because that’s where it’s starting, and on what basis are those people getting appointed. Is it political affiliation, or is it competence? Is it competence proven in what context, in academia, or in private practice?’

Low quality of judges means judges are less competent to make proper judicial pronouncements and possibly lack the confidence to dispense cases faster. The consequences are unclear from available literature on whether judicial skill capacity leads to more appeals or if parties settle for fear of having the matter heard by bad judges.<sup>114</sup> As discussed throughout this thesis, there is a plethora of bad judgments in Zimbabwean courts, and it is difficult to analyse the ‘real’ reasons for the poor judgments in each case. Stewart, Sithole, and Ncube (eds) highlighted an institutional and skill capacity, when a magistrate tried a case that the Supreme Court had already decided.<sup>115</sup> Further, a 2004 judgment was reversed in 2018 because ‘it was wrong at law.’<sup>116</sup> This is a fascinating case because the judge who reversed the judgment is the same judge who had previously agreed with it – justice delayed is justice denied.

In a recent decision, the Supreme Court ordered the immediate release of Last Tamai Maengahama and Tungamirai Madzokere, who were convicted of murder and sentenced to 20 years imprisonment in 2016.<sup>117</sup> The Supreme Court held that, in reaching his decision, the trial judge relied on the doctrine of common purpose, which is no longer part of Zimbabwean law. Consequently, the appellants had been in custody for five years from the initial arrest in 2011 until sentencing in 2016. They spent a further five years wrongfully in prison when it was clear

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<sup>114</sup> Langa ‘Public interviews expose judges’ shortcomings’ *The Standard* 5 October 2016. The article highlights how some judges only managed to write twelve judgments in a year, and none were reportable. See also chapter one § 1.6., for a discussion on some judges having 40 per cent of their judgments appealed, while others had over twenty per cent of judgments overturned.

<sup>115</sup> *In The Shadow of the Law* 101. See *Jeche v Mahovo* 1989 (1) ZLR 364 (S).

<sup>116</sup> *Minister of Foreign Affairs v Jenrich* [2018] ZWSC 73.

<sup>117</sup> *S v Madzokere* [2021] ZWSC 71.

the judge erred and misdirected himself in finding them guilty of murder, contrary to s 47 of the Criminal Law (Codification and Reform) Act, 2006.<sup>118</sup>

The above cases contain patent errors by judges, which a reasonably skilled judge should not have made. I concede that it is difficult to use the abovementioned cases alone to conclude that Zimbabwe's entire formal justice system has been eroded. Such a claim would exaggerate the situation. However, these cases serve as examples to support the participants' views.

Some judges acknowledged the dysfunctionality of the courts. One judge is on record confirming the chaos at specialist courts.<sup>119</sup> Specialised courts were part of the reform effort to enhance access to justice<sup>120</sup>, but when incumbents lack the required expertise, they hinder rather than facilitate access to justice. The admission substantiated participants' views that some judges are career, not merit appointments. The judge publicly confessed to not being well-versed or competent in tax and fiscal matters.<sup>121</sup> As the chief magistrate before becoming a judge, he presided over a court roll with a backlog of over 60 000 cases. Despite such a record, captured in two successive televised interviews for the apex courts, he sits in the Supreme Court today. Incompetence resulting from low-quality magistrates and judges may explain, as I will outline in chapter five, why some participants were more amenable to ADR than formal courts because they can choose the ADR practitioner on merit, unlike a judge.

Under these circumstances, it is difficult to see how citizens can attain justice with a weak bench and poor prosecution operating on a shoestring budget, with some judges often having to work without clerks.<sup>122</sup> With highly trained private practice attorneys and advocates who

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<sup>118</sup> Criminal Law (Codification and Reform) Act, 2006 s 47.

<sup>119</sup> Langa (n114); ZimEye (n97).

<sup>120</sup> See chapter one § 1.4.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

can hire expert witnesses, judges and prosecutors are overwhelmed, leading to postponements and delays at the expense of speedy dispute resolution. Adequate public funding is central to the effective functioning of justice actors like the judiciary, police, NPA and prison services.<sup>123</sup>

Without these institutions operating at total capacity, citizens cannot enjoy access to justice.

### c. Asynchronous relationship between justice system actors

According to P10, the efficiency of the justice system is hindered by JSC policies that offer guidelines on how long judicial officers should take to adjudicate specific types of disputes. P10 emphasised the importance of prosecution and police carrying out their duties diligently for the justice system to operate efficiently per JSC guidelines.<sup>124</sup> Once the prosecution presents thoroughly investigated evidence, a sound legal mind is required to apply the law and make equitable decisions. It is common cause that justice actors (ZRP, NPA and prison services) operate in silos in Zimbabwe, and the phrase ‘catch and release’ has become a nationwide ‘joke’ about the criminal justice system.

Participants discussed this asynchronous relationship between justice actors as a major cog in the wheel of justice. One of the major weaknesses is that the criminal and civil justice systems are paper-based, which makes it easy for documents to go missing or difficult to find and share with other stakeholders.<sup>125</sup> While the High Court recently began permitting online filing, there is still no synchronised electronic system for all the justice actors. An electronic system shared by all justice actors would bring transparency, which would plug loopholes for corruption, such

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<sup>123</sup> ZLHR and the Law Society of Zimbabwe ‘Pre-trial detention in Zimbabwe: Analysis of the criminal justice system and conditions of pre-trial detentions’ (2013) 21-22. See also (n129) below on the impact of the executive austerity measures on the judiciary.

<sup>124</sup> For timelines and rules of the courts, see SI 2021-153 Magistrates’ Court (Civil) (Amendment) Rules, 2021 (No. 3) and SI 202 High Court Rules, 2021.

<sup>125</sup> See discussion on the *Mutsinze case* that led to a 15-year incarceration mostly due to missing files, first discussed in chapter one § 1.6., and chapter two § 2.4.

as dockets disappearing.<sup>126</sup> More importantly, an efficient system among and between justice actors may deter criminal acts, such as bribes from parties intending to influence decisions.<sup>127</sup>

P13 bemoaned the disconnect between justice actors, which led people to spend extended periods in remand prisons awaiting trials. He said,

‘Imagine you are on remand for three years. Your freedoms are restricted, and at the end of three years, you are acquitted. It means you have spent a lot of money; a lot of time and you could not even plan your future because you are constrained by a case that is hanging over your shoulder.’

There are many cases of people spending between three and fifteen years in remand prisons.<sup>128</sup>

Remand prison is detention while awaiting trial, meaning at this point, one is still a suspect in a crime. On the one hand, it seems the police are not questioned by the prosecution about the strength of the case and resort to what P13 called ‘arrest first, investigate later.’ On the other hand, prison services admit the suspect into custody, and the three actors have no synchronised system that follows up on detained suspects. This directly contradicts the Declaration of Rights<sup>129</sup> and the cardinal principle of presumption of innocence.

According to the Zimbabwe Lawyers for Human Rights (ZLHR) and Law Society of Zimbabwe, adequate public funding is critical to the functioning of the judiciary because it would ensure that courts can settle cases and avoid incarceration of pre-trial detainees.<sup>130</sup> In 2019, the Chief Justice weighed in on the impact of adequate public funding on the proper function of the judiciary after the government implemented austerity measures. He said,

‘Any such [austerity] measures are a threat to the independence of the judiciary and to the rule of law. An independent judiciary is one that receives enough funding to run the courts in order

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<sup>126</sup> *S v Chihera* [2020] ZWHHC 118. See Rickard ‘Record mysteriously disappears: What should a court do?’ *AfricanLII* 12 March 2020.

<sup>127</sup> Belton ‘Competing definitions of the rule of law: Implications for practitioners’ (2005) 55 *Carnegie Endowment for International Peace* at 13.

<sup>128</sup> Mhike ‘Attack on judiciary unjustified’ *University of Minnesota Human Rights Library* 7 January 2023. The article highlights Justice Makarau discovering several inmates who have spent over nine years in remand prison without trial.

<sup>129</sup> Constitution, Chapter 4.

<sup>130</sup> ZLHR and the Law Society of Zimbabwe (n123) 21-22.

to protect the rights of its citizens. It is only a judiciary that is independent which decides matters impartially without fear, favour, or prejudice; and is impervious to extraneous influences.’<sup>131</sup>

Acknowledging the Chief Justice’s sentiments on the correlation between judicial independence and adequate funding, it is crucial to recognise that underfunding affects the judiciary and court infrastructure, administration, and personnel. To maintain an efficient and effective justice system that upholds the rule of law, it is essential to ensure sufficient funding for all justice actors. As previously discussed, the underfunding of the judiciary and other actors in the justice system and inadequate infrastructure raise suspicion that politicians may be deliberately weakening the justice system to operate with impunity.

#### d. Corruption and diminished ethical standards

Participants were convinced that corruption was rampant within the justice system. Many could not point to specific cases involving proven allegations of corruption, which, for this thesis, makes it largely speculation. P9 pointed out, ‘whilst one cannot prove that there has been corruption, it certainly indicates that there has been. And that has led to declining confidence in the judiciary’s integrity by individuals and companies alike.’ P3 mentioned how cases ‘die’ at the police stations, which might be the fault of prosecutors and investigating officers and not the magistrate or judge. Even under such circumstances, the judicial officials are accused of corruption or being ‘captured.’ Narratives of judicial capture are rife within Zimbabwean society.<sup>132</sup>

P3 connected low remuneration to corruption. In addition to attracting students who fail to land jobs at top-tier law firms and some failed practitioners to the judiciary, the JSC remunerates

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<sup>131</sup> Laiton ‘Malaba attacks Ncube’s austerity measures’ *Newsday* 15 January 2019.

<sup>132</sup> In 2021, the Minister of Justice accused the judiciary of being ‘captured’ by foreign forces, see Dzirutwe ‘Zimbabwe justice minister accuses judiciary of being ‘captured’ *Business Live* 16 May 2021.

them poorly once appointed. P3 alluded to the correlation between low pay and corruption because judicial officers have a special ‘kind of lifestyle’ they are expected to live. The ZLHR and Law Society of Zimbabwe support this view and suggest that adequate remuneration would reduce the chances of bribery and corruption among judicial officers.<sup>133</sup> These sentiments resonate with those of the Chief Justice discussed above on financial independence being an integral part of judicial independence.

Corruption is problematic to analyse in academic writing because it is exceedingly difficult to prove when it occurs. The absence of confirmed cases makes critical scientific analysis difficult. This also has implications for the reliability and validity of the data. Therefore, triangulating interview data with ethnography, literature and newspaper articles helped verify the findings. The *Kereke case*<sup>134</sup> presents a compelling subject for analysis. In this case, the then Prosecutor-General (PG) refused to prosecute the former Member of Parliament accused of raping his 11-year-old niece at gunpoint. Despite the child’s grandfather’s insistence, the PG also hesitated and reluctantly issued the certificate for private prosecution.<sup>135</sup> Ultimately, the accused was convicted, and the PG was dismissed.<sup>136</sup> Even in the wake of such a case, it remains challenging to assert definitively (beyond reasonable doubt) whether collusion or corruption was involved, highlighting the elusive nature of corruption.<sup>137</sup>

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<sup>133</sup> ZLHR and the Law Society of Zimbabwe (n123) 21-22.

<sup>134</sup> *Maramwidze v Kereke* [2016] magistrates’ court (unreported). It was a private prosecution, which, according to reports, cost the minor’s grandfather over US\$ 200 000. See Manayiti and Langa ‘Kereke rape victim’s granddad loses empire, girl left “broken”’ *NewsDay* 23 April 2017.

<sup>135</sup> Criminal Procedure and Evidence Act, 1927.

<sup>136</sup> Lwanda-Rutsate ‘The interface between women and the criminal justice system in Zimbabwe: Interrogation of the gender equalities and discrimination women offenders, suspects, victims and witnesses experience and the need for law reform’ 2022 *Final Papers from the 2018 National Symposium on Gender Equality and the Human Rights of Women in Zimbabwe* at 195.

<sup>137</sup> Manayiti and Langa (n134) highlight how Kereke attempted to use state institutions in vain to block his rape trial. The PG was dismissed but never convicted of a crime related to the case.

Scholarship has also canvassed a growing perception of corruption in formal courts.<sup>138</sup> However, measuring and arriving at a sound scientific analysis is nearly impossible. The 2019 Global Corruption Barometer (GCB) – Africa found that 25 per cent of public service users paid a bribe in the previous year, while 60 per cent of the people surveyed thought corruption had increased in the same period.<sup>139</sup>

It is important to mention that the JSC has demonstrated a willingness to combat corruption and diminishing ethical standards. The table below presents data on the number of corruption and misconduct cases handled by the JSC from 2018 up to the present.

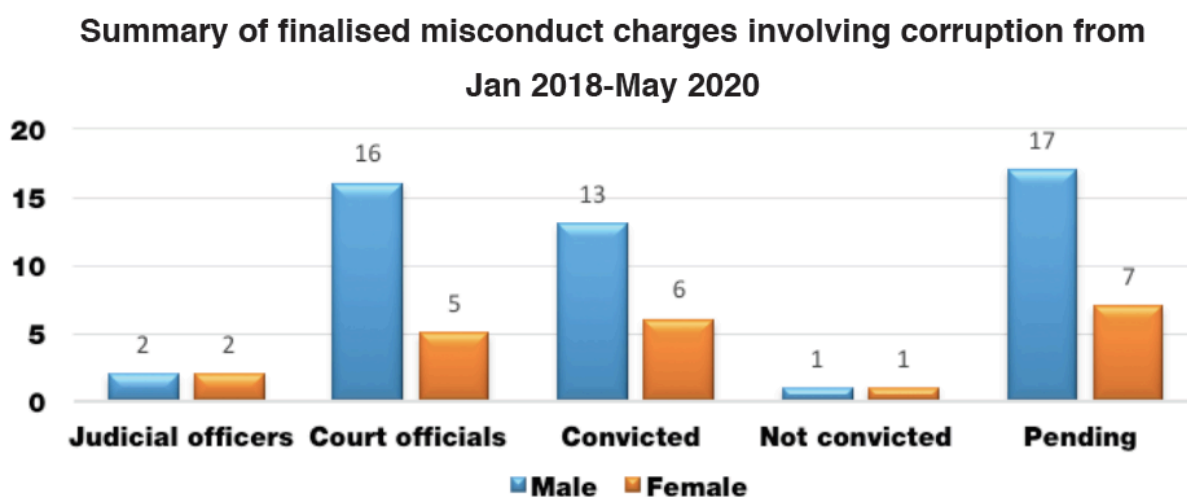


Figure 2.

Given this data, it would be wrong to paint a bleak picture of a corrupt judiciary in Zimbabwe.<sup>140</sup> However, participants suggested that the perception of corruption in the

<sup>138</sup> Kanyongolo ‘Malawi: Justice sector and the rule of law: A discussion paper’ *Open Society Initiative for Southern Africa* (2006) 131-142; Schärf et al ‘Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums’ Report prepared for the Department of International Development (2002) 7-10.

<sup>139</sup> Global Corruption Barometer (GCB)—Africa available at <https://www.transparency.org/en/gcb/africa/africa-2019>, accessed 11 November 2022.

<sup>140</sup> Chingarande ‘Ex-ChiTown official jailed for bribery’ *Newsday* 22 November 2022.

judiciary might be corroborated by issues such as inconsistent sentencing patterns discussed below.

*i. Inconsistent sentencing patterns*

Some significant findings from the interviews included disparities and inconsistencies in sentencing patterns at magistrates' courts. While at a workshop, P8 was shocked to find that there were provinces 'where someone commits rape, and they are given a 3-month community service or warning caution statement.' P8 went on to say that 'the perpetrator has infected someone with HIV, and it's a minor who has been raped.' She shared how she and her colleagues could not understand how such sentences stood after the judicial review process was completed at the provincial level and the High Court.

P8 attributed the disparate sentencing patterns to corruption, which results in persons accused of offences punishable with a minimum of a jail term, such as rape, being given community service by some courts. P8's organisation evaluated judgments passed in the judicial year 2017-2018 and found such disparities prevalent across the country. However, another way to analyse the view held by P8 is to attribute the differentiations in sentencing patterns to judicial incompetence and simply wrong or erroneous judgments, again speaking to the difficulty in measuring and analysing corruption as a concept in the justice system. Nevertheless, several cases of corruption involving the judiciary have been reported.<sup>141</sup>

*e. General law courts are not equipped to resolve certain types of disputes*

Litigation may be inappropriate in certain disputes. One example cited by participants was that of domestic violence. At face value, domestic violence that occurs between married people is

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<sup>141</sup> Dube-Matutu 'Magistrate arrested for embezzling funds' *Chronicle* 7 September 2009; NA 'Zimbabwe judge found guilty of corruption' *Voice of America* 31 October 2009.

easy for courts because they only need to deal with the actions of the offending party. P10 and P3 explained that courts do not have the structure to deal effectively with domestic violence cases. Such cases are delicate and require flexibility, which, by design, courts lack. These participants found that court outcomes regarding restraining orders and, in some cases, divorces were unsatisfactory to women who would have initiated the actions. Women who reported cases of domestic violence, according to participants, did so only to scare their husbands so that they would stop the abuse (physical or emotional). Still, incarceration or banishment from the marital home was never the objective. This points to the difficulty of articulating citizens' legal needs. The problem is compounded by the fact that it is also difficult to differentiate between the legal needs of urban and rural inhabitants.<sup>142</sup>

Still on the same point, P10 provided an example of issues that cannot be resolved effectively through general law courts. She pointed out that women sometimes seek defamation or adultery damages when their husbands cheat. However, the underlying objective is to end the affair, and the money awarded should they win the case is not the primary concern. When such cases are brought before the court, parties must present evidence, which deviates from the primary goal of ending the affair. Women litigants may feel that justice was not served if the affair continues despite the court's decision. As P10 explained, these issues are unsuitable for the formal court system. P10's organisation represents women *pro bono* but has decided to avoid such cases because the court outcome is usually not aligned with the expectations of women.

The law makes it possible for women to institute the moral failing of a man as a legal action, which the courts accept but cannot resolve because it is beyond any court to order a cheating

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<sup>142</sup> Curran, American Bar Association, American Bar Foundation *A Joint Undertaking by the American Bar Association Special Committee to Survey Legal Needs and the American Bar Foundation* (1977) quoted in Sithole *Towards a Theory and Practice of Access to Civil Justice for The Poor in Zimbabwe: Law and Dispute Resolution in a Pluralistic Society* 153.

husband to stop. As discussed above, citizens do not differentiate between legal and social problems and the formal justice system is not equipped to deal with conflated issues, leading to dissatisfaction among citizens who end up avoiding general law courts. In this case, the failure of the formal justice system has more to do with citizen expectations than the dispute resolution mechanism itself. However, the formal justice system's design, which does not sufficiently consider the local context, remains central to the challenges citizens continue to face regarding access to justice.

Similarly, cases involving sexual relationships are too complicated for courts to deal with to the satisfaction of the parties. P10's view was that Zimbabwe is a conservative society, and casual conversations about sexual intercourse, even between consenting adults, are taboo. Within the context of a married couple, it bears mentioning that topics such as marital rape are inappropriate for general law courts to handle when citizens have a tough time publicly discussing consensual sex. Even though courts are allowed to have private sittings if the issues involved are sensitive, there is always the risk that the court's decision will become part of publicly available records unless the court seals the relevant documents.

Furthermore, according to P10, while rape within a marriage is undoubtedly an issue, it cannot be resolved by the court due to the nature of the dispute and the limitations of the legal system. One party may argue that the claim of rape was due to another party's refusal to use protection rather than the act of sex itself, making it difficult for the court to determine what was illegal. P10 argued that bringing general law into such a conflict overlooks the underlying issues and the general dialogue that needs to occur. Moreover, even if a court reaches a judgment, it may not be satisfactory to all parties. Hence, this issue is beyond the capacity of general law courts to resolve.

It may be challenging to adjudicate matters involving political parties or other controversial areas related to the political landscape. The issues in controversy are often more political than legal, and a strict application of the law is inadequate to satisfy the public, not least the parties to the dispute.<sup>143</sup> The goal of using the justice system is misaligned with what the law and justice system are set up to achieve. The disputes outlined in this section render general law courts unsuitable for resolving polycentric disputes. Fuller<sup>144</sup> uses the term ‘polycentric’ to describe a situation where pulling one strand of a web creates a complex pattern of tensions throughout the web, and doubling the pull will double the tensions and create different and even more complicated patterns of tension. According to Fuller, ‘unexpected repercussions make the decision unworkable; it is ignored, withdrawn, or modified, sometimes repeatedly.’<sup>145</sup> This aligns with Lord Reid’s guideline on the disadvantage of judges developing the law, ‘it would be impracticable to foresee all the consequences of tampering with it.’<sup>146</sup> Judicial restraint is, therefore, critical to avoid exceeding the court’s competence when confronted with polycentric disputes.

Disputes involving interdependent or ongoing relationships like divorce are examples of polycentric cases.<sup>147</sup> The variety of issues that must be determined reveals the polycentricity of such disputes. For example, distribution of property<sup>148</sup>, custody of children<sup>149</sup>, and spousal maintenance<sup>150</sup>, among others. Every one of the issues is a ‘centre’ with a direct impact on how

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<sup>143</sup> See *Tsvangirai v Mugabe* (CC20-17) - judgment was passed despite the withdrawal of the petition. Also see *Chamisa v Mnangagwa* [2018] ZWCC 42.

<sup>144</sup> Fuller ‘The forms and limits of adjudication’ (1978) 92 *Harvard Law Review* 2 at 395.

<sup>145</sup> *Ibid* at 401.

<sup>146</sup> *Steadman v Steadman* [1976] A.C. 536, 542C (United Kingdom).

<sup>147</sup> Criminal matters can also be polycentric given that half of the cases involve parties with ongoing relationships and over 60 per cent of homicides occur between friends and relatives, see Adler, Mueller, Laufer *Criminal Justice* (1994) 30. The situation is worse in communitarian societies like Zimbabwe, where most people live along clan lines and must continue relations after the conviction.

<sup>148</sup> Governed by the Matrimonial Causes Act, 1986.

<sup>149</sup> Regulated by the Guardianship of Minors Act, 1961.

<sup>150</sup> Governed by the Maintenance Act, 1971.

the other issues will be resolved. Suppose courts are indeed an inappropriate forum for the disputes outlined above. In that case, it opens the door for other, more appropriate processes that may produce equitable outcomes that satisfy international standards of justice, parties, and the public.

It should, however, be mentioned that almost every dispute contains polycentric elements. The presence of polycentricity in cases is precisely why courts are cautioned to be aware of its nature. By acknowledging disputes' complex and multi-faceted nature, courts may carefully consider the interests and perspectives involved. This awareness enables courts to fashion appropriate remedies that account for the multiple dimensions and stakeholders within the dispute. Rather than being a deterrent, the polycentric nature of disputes serves as a call to action for courts to approach them with sensitivity and ensure a fair and equitable remedy. For this reason, Fuller acknowledged that adjudication may occasionally be applied.

#### 4.6. Substantive law barriers to access to justice

The Constitution is the primary legislation protecting substantive access to justice. Section 18(9) provides that 'every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court.'<sup>151</sup> However, implementing this constitutional guarantee has not been smooth sailing. Participants criticised the slow pace of aligning existing laws with the 2013 Constitution. They believed that the architecture of the formal justice system has become an impediment to access to justice because people do not have full access to the 'new' entitlements provided under the Constitution.

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<sup>151</sup> Constitution, s 18 (9).

a. Ignorance of and lack of information on substantive law

Citizens are unaware of their substantive rights.<sup>152</sup> Some legal professionals in this study referred to the public as ‘ignorant and legally illiterate.’ These participants believed that laypeople in Zimbabwean society did not know or understand substantive and procedural law. P8 provided an example from a community outreach programme she conducted with colleagues from her organisation. They found that community members did not trust the justice system and resolved their disputes outside state law institutions.<sup>153</sup> She said, ‘you will hear people saying hmmm this person raped someone but *akatobudiswa* [released without charge].’ Upon further enquiry, P8 found that the person accused of rape was out on bail, and the community was unaware of bail provisions for an accused person. Within the same community, P8 found that mistrust of the justice system was worse among people who attempted to resolve disputes through formal courts and either lost or had their matter dismissed on a technicality. Members of this community completely lost trust in the formal justice system without realising that their issues may have had merit, save for the minor technicalities.

To reinforce the point, confusion arose in the narrative surrounding the *Kereke case*<sup>154</sup>, where he was convicted of raping a minor but was later released on bail. The Herald’s headline, ‘Kereke walks out of prison,’ and an accompanying image of Munyaradzi Kereke jumping in the air may have led the public<sup>155</sup>, unfamiliar with legal proceedings, to believe he was

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<sup>152</sup> See chapter one § 1.6. for a discussion that references the *Muziringa v Teteka*, where procedural formality made it difficult to fulfil the constitutional guarantee of equality before the law.

<sup>153</sup> The same distrust of the formal justice system and trust in local elders can be found in many countries, see Helbling, Kälin, and Nobirabo ‘Access to justice, impunity and legal pluralism in Kenya’ (2015) 47 *The Journal of Legal Pluralism and Unofficial Law* 2 at 8.

<sup>154</sup> *Supra* (n132).

<sup>155</sup> Hunda ‘Kereke walks out of prison’ *The Herald* 5 August 2021.

acquitted. However, it was simply a bail-pending appeal at the Supreme Court, which is the right of every accused person.<sup>156</sup>

Another illustration can be found in the case of *Mandava v Chasweka*<sup>157</sup>, which was about a divorcing couple who were married under customary law and sought to share property.<sup>158</sup> The High Court's position, when seized with the matter on appeal, was that unregistered customary unions are not marriages for the purposes of the Matrimonial Causes Act, 1985.<sup>159</sup> The court's decision meant that general law courts cannot divorce parties to such unions, and distribution of property cannot be done in terms of Zimbabwean divorce laws. In this case, the self-represented litigant was unaware that the Act does not cover unregistered customary marriages and could not enforce her rights. The justice system is designed for and by lawyers, which places people without legal training at an acute disadvantage.<sup>160</sup>

Substantive law is sometimes so complex that even lawyers struggle to interpret legislation. P1 remarked how substantive law was so sophisticated that 'it is not for everyone' and 'lawyers themselves struggle to interpret one clause, what about other people?' Lawyers have access to specialised education that trains them in the knowledge, rites and structures constituting the law<sup>161</sup>, but they still face challenges with substantive law. We know that not all citizens can access specialised legal knowledge, creating an epistemological distance between the law and most people.

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<sup>156</sup> Criminal Procedure and Evidence Act, 1927, s 117.

<sup>157</sup> *Mandava v Chasweka* [2008] ZWHHC 42.

<sup>158</sup> Divorcing couples divide assets and property acquired during marriage through sharing property. It involves determining each spouse's entitlement and dividing the property fairly, such as a family home, investments, and bank accounts.

<sup>159</sup> *Supra* (n148).

<sup>160</sup> Rhode 'Access to justice: Again, still' (2004) 73 *Fordham Law Review* 3 at 1013.

<sup>161</sup> Crawford and Maldonado (n17) at 6.

Lack of legal information and socioeconomic inequalities are interrelated barriers to access to justice. People who lack financial means or access to basic education may be directed away from the law<sup>162</sup>, exacerbating the knowledge gap between the law and the people. This knowledge gap creates barriers that exclude citizens from aspects of the public sphere.<sup>163</sup> In Zimbabwe, for example, the lack of legal education and socioeconomic inequalities intersect to create and maintain barriers to access to justice.<sup>164</sup> Citizens do not have the necessary tools to navigate the justice system and effectively exercise their rights, perpetuating inequality and undermining the rule of law. A justice system only accessible to those with the resources and knowledge necessary to navigate it, is unjust.

To address the financial barriers to university education, Zimbabwe established the now-defunct judicial college that trained prosecutors and magistrates.<sup>165</sup> However, the quality of training the college provided has been criticised. Some commentators argue that magistrates and prosecutors lack the skills and knowledge to fulfil their roles owing to inadequate training. The question arises as to whether low-quality representation is better than no representation. A more nuanced approach is needed considering the plurality of institutions and processes beyond litigation and general law courts. The more appropriate question is, ‘What process best serves the interests of justice per international human rights standards?’ This question is at the heart of the discussions in chapter five on the different models of the justice system and chapter six on institutionalised ADR in its TADR form, designed to extend access to justice.

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<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

<sup>164</sup> Rhode (n160) at 1013. The *Kereke case* (supra n132) highlights the financial constraints faced by victims seeking justice in Zimbabwe. The ability of the minor’s grandfather to afford the US\$ 200 000 private prosecution starkly contrasts the plight of 40 per cent of Zimbabweans living under the poverty line.

<sup>165</sup> Judicial College of Zimbabwe Act, 1999.

#### 4.7. Procedural law barriers to access to justice

##### a. Complex rules of procedure

General law court procedures can be formalistic and overly complex. For instance, according to P2, filing an application must ‘...be by way of an affidavit, [which] has to say the right blurb at the beginning. You have to use form 29A, and if you submit form 29B, then suddenly the whole thing can be struck out.’ To ensure their validity, the forms must be signed before a Commissioner of Oaths, issued, and served on the other party in hard copy. P2 explained, ‘you have got a certain number of days and if you are outside of those days, then possibly you have lost the entire case, that’s not what makes justice accessible.’ The complexity of procedure led Popovic to ask, ‘have we thrown the baby and the bath water.’<sup>166</sup>

Popovic questions whether the justice system has lost sight of the law’s real purpose by focusing on the formalities of procedures. As discussed in chapter two, complex procedures have led to the loss of the essence of justice.<sup>167</sup> While the formalities of the law may be necessary, they should not overshadow the substantive purpose of justice. In other words, the law must focus on providing just outcomes to citizens rather than getting bogged down in procedural technicalities. After all, citizens are more likely to accept even unfavourable outcomes if they feel that they have been treated with respect and dignity during the decision-making process.<sup>168</sup>

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<sup>166</sup> Popovic ‘Court process and therapeutic jurisprudence: Have we thrown the baby out with the bathwater?’ (2006) Special Series *eLaw Journal: Murdoch University Electronic Journal of Law* 1.

<sup>167</sup> See chapter two § 2.4.

<sup>168</sup> Deutsch ‘Justice and conflict’ in Deutsch and Coleman (eds) *The Handbook of Conflict Resolution: Theory and Practice* (2000) 45.

The *Mandava v Chasweka*<sup>169</sup> case illustrates the stringent rules of the justice system. In her judgment, Makarau JP (as she then was) scolded both the clerk and the magistrate for allowing a mixture of procedures, i.e., the action and the application/motion procedures, which should be used separately.<sup>170</sup> Chasweka issued a summons and then filed an affidavit in support of her claim, an unusual mixture of procedures that the rules do not provide for or allow.<sup>171</sup> Makarau JP referred the matter for trial *de novo*, with conditions that the parties should file pleadings following the rules of the lower courts. The judge further referred the case to the chief magistrate to conscientise magistrates countrywide that flexibility and informality are not permissible and would not be allowed to stand. While the plaintiff had a genuine property rights case, she could not obtain justice because she filed incompetent papers, which deviated from the civil procedure and magistrate's court rules.

In *Main Road Motors v Zimra*<sup>172</sup>, the case revolved around disputed vehicle import duties from South Africa to Zimbabwe due to alleged fraud. The applicants initially declared certain customs values, but ZIMRA officers at the port substituted higher values. The applicants paid, but later, ZIMRA demanded more due to post-clearance audits.<sup>173</sup> An urgent application was filed to prevent vehicle impoundment, challenged by ZIMRA on three technicalities<sup>174</sup>, leading to a court victory without examining the case's merits. In civil and criminal justice, procedure is simply a technique or means to obtain a specific result, which is not an end in itself.<sup>175</sup> The Zimbabwean approach makes the procedures an end in themselves instead of the case's merits.

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<sup>169</sup> Supra (n157).

<sup>170</sup> Magistrates' Court Act, 1932. Also see the Magistrates' Court (Civil) Rules.

<sup>171</sup> Ibid.

<sup>172</sup> *Main Road Motors v ZIMRA* [2018] ZWMSVHC 1.

<sup>173</sup> Post-clearance audits are authorised by s 223A of the Customs and Excise Act, 1955.

<sup>174</sup> These include: (i) the applicants approached the court with 'dirty hands'; (ii) the application was out of time by virtue of Order 33 Rule 259 of the Rules of the High Court (iii) an order of court would amount to *brutum fulmen* ('an empty threat') because the relief sought had been overtaken by events.

<sup>175</sup> Cappelletti and Garth (n15) at 185.

On the other hand, it is worth noting that non-compliance with certain formalities, such as completing forms correctly, has been viewed as a minor error that should not prevent applicants from having their cases heard.<sup>176</sup> Hungwe J<sup>177</sup> stated that the court should be slow in dismissing legitimate causes based on technical deficiencies in the papers. He cited the approach adopted in multiple cases as eminently proper<sup>178</sup>, because litigants should not be denied access to justice because of technicalities. The judge highlighted the tension between pragmatism and formalism, emphasising that excessive reliance on procedural technicalities can waste the court's time and delay the resolution of matters without necessarily disposing of the substantive issues. This position aligns with the constitutional command<sup>179</sup> that procedural technicalities should not unreasonably restrict courts. Similarly, in *Mutsinze v Attorney General*<sup>180</sup>, Garwe JCC condoned the applicant's failure to assert his right to a speedy trial, considering the applicant's status as a layperson represented by *pro bono* counsel, who, according to the judge, were likely inexperienced legal practitioners. Garwe JCC relied on Kriegler J's<sup>181</sup> remarks, which highlighted that denying relief to accused persons who may not be aware of their right to a speedy trial would be unjust.

### *i. Multifarious rules*

With 40 years of experience in the legal profession, P6 highlighted the front-row seat he had occupied, watching the muddying of the justice system through the multifarious rules. He viewed court processes as lending themselves to particularly defendants who have an interest

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<sup>176</sup> *Telecel Zimbabwe (Pvt) Ltd v Post and Telecommunications Regulatory Authority of Zimbabwe* [2015] ZWHHC 446. At 446-5, Mathonzi J emphasised that minor rule violations should be overlooked if the rules are substantially followed, and no harm is likely to occur. Insisting on including application grounds in a particular form, when they are already detailed in the application unnecessarily prioritises form over substance.

<sup>177</sup> *Zibani v JSC* [2016] ZWHHC 797 pp. 4.

<sup>178</sup> *Ibid.* See *Tripple C Pigs v Commissioner General, Zimbabwe Revenue Authority* 2007 (1) ZLR 27. *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (1) ZLR 232 (H).

<sup>179</sup> Constitution, s 85(3)(c).

<sup>180</sup> *Mutsinze v Attorney General* [2014] ZWCC 13.

<sup>181</sup> *Sanderson v Attorney – General*, Eastern Cape 1998 (2) SA 38 (CC), 53 E-G.

in delaying matters. He explained how ‘they [the defendants] can enter an appearance to defend on the last day allowed, and on the last day allowed they can file a request for further particulars, and on the last day allowed they can file to request an exception.’ P6 explained further that the rules require a court hearing before addressing the defence, which can lead to obfuscation despite time limits set by the JSC.<sup>182</sup> For example, in a recent case involving the retirement of the Chief Justice<sup>183</sup>, the lawyers filed papers at 4 pm the day before the hearing, giving no chance for opposing counsel and the bench to review the filed documents.<sup>184</sup>

The views expressed by P6 are consistent with existing literature, highlighting that the formal justice system can lead to outcomes that contradict its intended objectives of promoting truth and justice, as litigation often results in strategic manipulation and obfuscation.<sup>185</sup> The negative impact of the adversarial system on the pursuit of justice is exacerbated by lawyers’ role in the justice system. As discussed earlier, lawyers viewed themselves as obstacles to justice and access to justice. When combined with a justice system designed to be rigid and predictable, the legal education lawyers receive, and the adversarial nature of trial lends itself to impeding laypeople’s effective access to justice.

P2 corroborated the negative impact of the justice system design and legal training on the accessibility of justice. He said, ‘my training teaches me to see problems everywhere, see arguments and not solutions. Solutions are not my job, and that’s the judges’ job. I just find the argument, and I can be extremely technical.’ This is because to be a ‘good’ lawyer, one must be very technical to win cases. Professional training lawyers receive, plus the governing rules of procedure, are responsible for narrowly framing their clients’ interests into legal issues.<sup>186</sup>

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<sup>182</sup> See supra (n124).

<sup>183</sup> *Kika v Minister of Justice Legal & Parliamentary Affairs* [2021] ZWHC 264.

<sup>184</sup> The case was televised on the national broadcaster ZBC.

<sup>185</sup> Kruse (n63) 390-391.

<sup>186</sup> Ibid.

Lawyers do not consider whether framing clients' interests into specific legal issues captures clients' true wishes. By so doing, the lawyer often distorts the client's goals while stunting their ability to solve problems creatively.<sup>187</sup> As I will explore in chapter five, this may explain why many participants favoured an ADR system without legal representatives as a panacea to the access to justice challenges facing Zimbabwean society.

Like the civil justice system, the criminal justice system is also governed by many rules, often leading to delays and complexities that can deny justice to those who need it most. The Termination of Pregnancy Act, 1977's intricacies illustrates the complexities of Zimbabwe's criminal justice system. Despite allowing termination in specific cases, the Act's rigorous verification process<sup>188</sup> for rape allegations often leads to delays that can push pregnancies beyond the termination stage, as exemplified by Mildred Mapingure's seven-year ordeal.<sup>189</sup> Social class also significantly influences case resolution, often leaving the impoverished majority without access to justice.<sup>190</sup> Systemic reforms are required to ensure equitable and timely justice for all Zimbabweans.

## *ii. Prejudicial rules of evidence*

Empirical evidence from this study suggests that rules of evidence are prejudicial, particularly towards self-represented litigants. P10 used the family law example of a divorcing couple married under community of property. In P10's experience, women often cannot produce receipts for building materials purchased during the construction of the matrimonial home or the tuition paid to the children's schools. Consequently, they are often dispossessed of property

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<sup>187</sup> Ibid. For an elaboration of this argument, see Lehman 'The pursuit of a client's interest' (1979) 77 *Michigan Law Review* 4 at 1078.

<sup>188</sup> Termination of Pregnancy Act, 1977, s 4 and s 5.

<sup>189</sup> *Mapingure v Minister of Home Affairs*. See chapter two § 2.4.

<sup>190</sup> Machakanja, Jeranyama, and Bere (n4) at 35-36.

during divorce because they cannot prove their contributions in the same manner as men. Conversely, men usually have evidence in the form of bank loans and can easily refer to various bank account deductions.

The case of *Muswere v Makanza*<sup>191</sup> exemplifies the potential for rules of evidence to disadvantage women disproportionately. In this case, the court ruled that the husband could sell the matrimonial property without the wife's consent unless she could prove her financial contribution to the property's acquisition. This burdens women, who may not have formal documentation of their contributions, such as receipts or bank statements. In *Mutsinze v Attorney General*<sup>192</sup>, the applicant's conviction was overturned due to the prejudicial impact of a rule of evidence that excluded all but the original trial transcript. The loss of the original transcript prevented the accused from adequately defending himself, resulting in a miscarriage of justice. This case highlights the potential for prejudicial rules of evidence to undermine fair trials. It underscores the need to consider their impact on the accused's right to a fair hearing. While designed to uphold fairness, rules of evidence can paradoxically impede the pursuit of truth and justice, as exemplified in the *Mutsinze case*.

#### 4.8. Time taken to start and conclude cases negatively impacts access to justice

The adage, justice delayed is justice denied, is personified in the Zimbabwe formal justice system. Participants were uncompromising in expressing their displeasure at how slow the justice system worked. P2 proffered, '...there is no point in having amazing judges who take three years to decide a case.' When asked how long criminal and civil cases took in their experience, participants said 2-3-years and up to 7-9-years with appeals. P2 referenced that the

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<sup>191</sup> *Muswere v Makanza* 2004 (2) ZLR 262 (H).

<sup>192</sup> *Supra* (n180). See also chapter one § 1.6., chapter two § 2.4.

JSC<sup>193</sup> ‘has some regulation about how quickly judgments should be handed down. From memory, the maximum should be six months, and that’s clearly not complied with.’ P2’s statement provides a telling insight into the state of justice delivery in Zimbabwe. He boasted of never having lost a case against ZIMRA ‘because I have never had one single decision handed down, and my first case was four years ago. *You can’t even call it justice delivery because it is not being delivered.*’ P2’s remarks highlight a growing concern that justice delivery in Zimbabwe falls short of its intended goals.

When asked for an example of how delays impact access to justice, P3 shared how the organisation she works for appeared before the Constitutional Court six times with similar cases. The court failed to deliver a judgment in all six cases to guide the organisation, leading to the repetition of the transgression. P3 explained that the organisation did not know how to proceed because ‘...we get an order, but we don’t know how to proceed because the Constitutional Court never really pronounced itself on it.’ By failing to provide a judgment (for reasons unknown to the participant), the court did not provide any clear guidance or interpretation of the law to assist the organisation in understanding how to comply with the order. Consequently, the organisation was uncertain about how to proceed and repeated the transgression that led to the initial legal action against it.

The delays experienced in court are not only caused by the adversarial system but also by administrative bureaucracy. P9 identified the Chief Justice’s strict adherence to red tape as responsible for courts being bogged down by almost arbitrary postponement of cases and a preoccupation with legal technicalities rather than pursuing just decisions based on the merits

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<sup>193</sup> See *supra* (n124).

of cases. It is, however, unclear from following the legal news whether the Chief Justice who came into office in 2017 has indeed affected the other courts in Zimbabwe.

Delays in the justice system increase legal fees and cause disputants to lose faith in the system. Stewart, Sithole, and Ncube's<sup>194</sup> interlocutor spent a large sum of money in legal and coordination fees only to give up on recovering his stolen property because he had spent more money than the cost of the property due to several postponements of his case by the court.<sup>195</sup> The man's view of lawyers, litigation, and general law courts was tainted, leading the community where Stewart, Sithole, and Ncube (eds) researched to refer to lawyers as witches.<sup>196</sup>

It has been argued that the failure of the justice system to resolve cases timeously hurts all parties involved, including their willingness to use the system.<sup>197</sup> During the public interviews of judges seeking appointment to the Supreme Court, several judges were exposed as having handed down as little as two judgments in a judicial year.<sup>198</sup> A report on magistrates' courts revealed a staggering backlog of over 60 000 cases countrywide.<sup>199</sup> The Constitution guarantees a fair and public trial 'within a reasonable time.'<sup>200</sup> However, in *S v Chilimanzi*,<sup>201</sup> the Court found it 'normal' that a trial could be delayed by over three years. Such lengthy delays contradict the right to a speedy trial.

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<sup>194</sup> *In The Shadow of the Law*.

<sup>195</sup> *Ibid* 116.

<sup>196</sup> *Ibid*.

<sup>197</sup> Williams 'Consensual approaches to resolving public policy disputes' (2000) 2000 *Journal Dispute Resolution* 1 at 144. Helbling, Kälin, and Nobirabo (n153).

<sup>198</sup> Langa (n114). Murwira 'Chidyausiku slams lazy judges' *The Herald* 1 October 2016.

<sup>199</sup> United Nations Office for the Coordination of Humanitarian Affairs: as quoted in *The New Humanitarian* 'Overcrowding leads to prison crisis' *The New Humanitarian* 5 February 2004. See the discussion above on people spending many years in remand prison and then being found not guilty.

<sup>200</sup> The Constitution, s 69(1).

<sup>201</sup> *S v Chilimanzi* [1990] (1) ZLR 150.

#### 4.9. General law court processes are destructive to ongoing relationships

Formal court processes are destructive to relationships. For instance, litigation typically commences with a list of grievances in both civil and criminal proceedings, which are considered outside the context in which parties exist. Moreover, litigation is quite impersonal, and P14 pointed out that judges are only obligated to consider the facts, law, and submissions made when reaching a decision. According to P14, courts are strict and do not consider social relationships between parties who want to maintain cordial relations once a dispute is concluded. There is consensus in the literature that litigation is adversarial and encourages hostilities between parties without consideration for continuing relationships and peaceful coexistence once the dispute is resolved.<sup>202</sup> Worse still, judges are not obliged to consider the long-term effects of their judgments if they feel they have appropriately applied the law.

Rule of law and rule by law outlined in chapter two have a foundational limitation, which makes judges servants of the law. Accordingly, when faced with structural injustices, they still apply the law to the letter, to the detriment of fair and equitable justice.<sup>203</sup> Therefore, the justice system in Zimbabwe does not adhere to the principle of treating equals equally and unequals unequally, as judges are constrained in applying this Aristotelian principle.<sup>204</sup> Whereas judges only consider facts, law and submissions, lawyers only regard their clients in the legal positivist approach dominating the Zimbabwean legal system. The *Mandava v Chasweka* case (supra) illustrates an instance where a judge correctly enunciated the law but ignored the issue of whether their interpretation of the law enhanced justice or impeded it. Therefore, there is

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<sup>202</sup> Williams (n197) at 145.

<sup>203</sup> Faruqi 'Justice outside the courts: Alternative dispute resolution and legal pluralism' 2000 *Universiti Teknologi MARA* at 2. See Abraham J's judgment on the role of parliament in chapter two.

<sup>204</sup> Hurlbert and Mulvale 'Defining justice' in Hubert (ed) *Pursuing Justice: An Introduction to Justice Studies* (2011) 13.

insufficient room for redistributive justice and transformation in the current formal justice system.

To buttress the point, Lord Brougham declared that an advocate's duty is to their client alone, regardless of the harm it may cause others.<sup>205</sup> The adversarial process neglects to consider that disputes are bound to occur in the future. If the previous litigation process fostered hostilities and negative feelings, future disputes would be difficult to resolve.<sup>206</sup>

#### 4.10. Without restitution, there is no incentive to bring or defend meritorious claims

Cultural practices and socially appropriate disputing processes emphasise harmonious living and restitution to the victim and the community. P13 compared the current justice system with the traditional system that aimed to reconcile and compensate the parties. He explained as such, 'Inini ukandibira panapa [if you steal from me right now] and I go and report kumapaurisa [to the police], I don't benefit anything – if you can't retribute, you will simply serve your term and that's it.' According to P13, the traditional system made sure that if someone stole your cow, they would pay back three cows as restitution and 'I will probably meet you tichitaura kuti ndakaripa wani mhosva yangu iya, zvonzi haiwa yakapera iya [we would be able to speak about it cordially if we met after the dispute has been resolved]. But if you serve your jail term and I see you, we are still so and so [no relationship].'

The above example points to how the formal justice system is out of step with people's normative expectations.<sup>207</sup> The formal justice system emphasises punishing wrongdoers who

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<sup>205</sup> Trial of Queen Caroline 8 (J. Nightingale Ed. 1821), quoted in Gillers 'Can a good lawyer be a bad person?' (1986) 2 *Journal of the Institute for the Study of Legal Ethics* 14 at 1011.

<sup>206</sup> Kubasek and Silverman (n34) at 545.

<sup>207</sup> Kanyongolo and Malunga 'Conflicting conceptions of justice and the legal treatment of defilement cases in Malawi' in Johnson and Karekwaivanane (eds) *Pursuing Justice in Africa: Competing Imaginaries and Contested Practices* (2018) 164.

either pay a monetary fine to the state or serve jail terms. In the process, the victim is relegated to a witness, leading people to view the justice system as wholly unfair, repressive, and inappropriate to the needs of the parties.<sup>208</sup> The formal justice system does not consider that principles of law, such as meting a punishment proportional to the offence, are also practised in TADR.<sup>209</sup> For example, the Machaya family voluntarily paid 35 cattle and US\$ 15 000 compensation (*kuripa ngozi*)<sup>210</sup> in addition to their son being convicted in a court of law.<sup>211</sup>

Unlike the formal justice system, an offender using TADR pays debt to society through restitution, not just serving a jail sentence. After all, jails like general law courts are colonial institutions and should be decolonised. By not providing restitution to victims in criminal cases, participants believed that citizens may be disincentivised from solving their disputes through formal courts. Equating access to justice to citizens' access to litigation and courts fails to acknowledge the unequal distribution of legal knowledge among citizens.<sup>212</sup> The unjust hierarchies created by socioeconomic differences in Zimbabwean society are equally ignored. Moreover, the dominance of formal courts in dispute resolution means lawyers have a monopoly over the legal services market, which impedes large sections of Zimbabwean society from settling their disputes through formal, state-sanctioned channels.

Addressing restitution and inadequacies within the formal justice system may also be mitigated by incorporating restitution orders in criminal law. By so doing, judges and magistrates are granted authority to impose such orders in place of, or in addition to, custodial sentences. Implementing this approach does not negate the need for TADR but instead might establish a

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<sup>208</sup> Ibid.

<sup>209</sup> Goldin and Michael *African Law and Custom in Rhodesia* (1975) 109-117.

<sup>210</sup> Appeasement practice in which the perpetrator's family retribute the victim's family.

<sup>211</sup> NA 'Governor pays US\$ 15 000, 35 cattle compensation to deceased's family' *The Herald* 18 October 2011.

<sup>212</sup> Zimbabwe has always had a shortage of lawyers. See Sithole *Towards a Theory and Practice of Access to Civil Justice for the Poor in Zimbabwe: Law and Dispute Resolution in a Pluralistic Society*.

harmonised system wherein general law and TADR mechanisms offer comparable remedies to citizens. This alignment would help ensure citizens have access to equitable remedies regardless of the forum they choose for dispute resolution.

#### 4.11. Unexpected findings

##### a. Access to justice and political party politics

The concept of separation of powers is intended to guarantee a system of checks and balances. P7 believed that the principle of separation of powers is not upheld in Zimbabwe because magistrates are instructed by their superiors, who in turn receive instructions from politicians, undermining their ability to issue independent judgment. P7 provided details of a case he dealt with on the interview day, where a parastatal CEO was prosecuted for criminal misconduct. Witnesses testified that his client did nothing wrong because she merely followed a board resolution, and failure to execute the resolution would have resulted in her being subjected to disciplinary proceedings. He said, ‘...but I tell you what, she will be convicted despite that evidence because the magistrate will be told that it is politically not right for you not to convict her.’ P7’s dual role as a lawyer and Member of Parliament for a dominant political party gives credibility to the data derived from his interview, suggesting that political interference may be a factor in how the judiciary conducts cases.

P7 provided another example of one of his cases, where his clients had their product seized by the Reserve Bank of Zimbabwe. After the trial, the AG concurred with the High Court’s judgment that P7’s clients should have their products reinstated. The government, however, appealed to the Supreme Court, even though they knew they could not appeal a judgment that the AG conceded to. The government subsequently withdrew its appeal after P7 protested.

After that, the judge received a visit at his farm from people who identified themselves as political party youth league members who told the judge that despite being a war veteran, he was now an enemy of the state because of his judgment. The judge immediately advised the government to ‘apply in terms of rule 449 that my [the judge] decision was made because certain information which [participant name anonymised] knew was not made available to me [the judge].’ The judge reversed the judgment once the government made the application as advised. P7 then received a call from his headman informing him that the judge delivered a goat for him and, ‘when I phoned him [the judge], he said that is my apology.’ This case is widely known in legal circles in Zimbabwe.

Politicians and the government have consistently interfered with the judiciary’s work. A retired Justice of the Supreme Court who participated in this study acknowledged political interference with judicial proceedings. In his experience, only political cases are particularly polarising and where the judiciary may be unduly influenced. According to P5, such political cases constitute approximately two per cent of court matters. Outside of these politically polarising cases, he felt that ‘the adjudication itself was quite good’ and ‘when you get the matter dealt with, and the judgment comes, it is usually very well thought through.’ P9 added, ‘...the High Court, so long as matters are not controversial and non-political, still functions reasonably efficiently in terms of obtaining judgments.’

Systemic level factors theory provides a conceptual framework for analysing the court’s attitudes when handling politically sensitive cases.<sup>213</sup> This theory helps to explain the reasoning behind controversial court decisions. At its core, the theory argues that the factors within a political system that influence how the judiciary decides politically sensitive cases have little

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<sup>213</sup> Vondoepp and Ellett ‘Reworking strategic models of executive-judicial relations: Insights from new African democracies’ (2011) 43 *Comparative Politics* 2 at 150.

to do with the law.<sup>214</sup> Political risks posed to the government by politically sensitive cases are the most critical factors considered by the judiciary, and the law is only used to justify a predetermined political outcome.<sup>215</sup> P7 explained that rumours circulated that the judge who reversed the decision did not write the judgment himself and could not read it properly when pronouncing it in court. The Constitutional Court has also been accused of deciding in favour of the ruling political party for fear of the political risks the case poses to the government.<sup>216</sup>

Zimbabwe's land redistribution programme aimed to correct the injustice of colonialism that had displaced Indigenous communities from fertile land. However, the justice system, also affected by colonialism, has not received the same attention. One possible reason for this omission is that the justice system serves the ruling elite at the expense of the poor and does not warrant redress. Even after independence, the colonial justice system was adopted intact, with minor modifications.<sup>217</sup>

Like all citizens, judicial officials were entitled to benefit from the land redistribution programme. However, participants believed that land redistribution brought political pressures that had hitherto existed. As P9 explained, 'increasingly, our judiciary has been compromised,' adding that 'the Supreme Court bench became increasingly politicised' and 'judges across the country were compromised by being given land, which made them beholden to the government.' P9 claimed that the possession of farms without tenure<sup>218</sup> compromised judicial officers and made them vulnerable to threats of dispossession.

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<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Krönke 'Bounded autonomy: What limits Zimbabweans' trust in their courts and electoral commission?' (2018) *AfroBarometer's Policy Paper* 52.

<sup>217</sup> Ncube 'Lawyers against the law? Judges and the legal profession in Rhodesia and Zimbabwe' (1997) 14 *Zimbabwe Law Review* at 14.

<sup>218</sup> Land redistribution in Zimbabwe resulted in state ownership and offer letters for citizens, convertible to 99-year leases, subject to the Minister of Lands' power to withdraw and non-judicial dispute resolution.

Considering these circumstances, the potential impact of political pressures on the judiciary's decisions in politically sensitive cases is noteworthy. The systemic level factors theory<sup>219</sup> provides a framework for analysing how the political system can influence judicial decision-making and the impact on access to justice when cases are decided in ways that have little to do with the law. Much like the discussion on corruption, it is difficult to state conclusively, even on politically sensitive matters, the extent to which a judge is pressured into a decision favouring the government of the day or the would-be government of tomorrow.

Montesquieu's principle of separation of powers is closely linked to access to justice, as it provides a framework for ensuring that the judiciary operates as a check on the executive and upholds the rule of law. The judiciary operates on the circumference of the administrative arm of the State rather than as the focal point for checking executive power and policy.<sup>220</sup> In formal courts, political judges may use the separation of powers doctrine to justify self-restraint and non-justiciability, resulting in executive decisions not being subject to judicial intervention.<sup>221</sup> This was seen in the case of the extension of the term of the current Chief Justice in contravention of the Constitution<sup>222</sup>, where the Minister of Justice appealed the High Court ruling, and the Chief Justice was reinstated. The Court ruled in favour of Mupungu<sup>223</sup>, who was not party to the case but initiated legal proceedings seeking the nullification of the declaratory order issued by the High Court in the case of *Kika v Minister of Justice, Legal and Parliamentary Affairs*.<sup>224</sup>

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<sup>219</sup> Vondoepp and Ellett (n213).

<sup>220</sup> Faruqi (n203) at 3.

<sup>221</sup> Ibid at 2; Van Rooij and van de Meene *Access to Justice and Legal Empowerment Making the Poor Central in Legal Development Co-operation* (2008) 10.

<sup>222</sup> Constitution, s 186, supra (n183); a ruling favouring the plaintiff dismissed the incumbent Chief Justice. After the Minister of Justice's appeal, Kika withdrew the case for unstated reasons.

<sup>223</sup> *Mupungu v Minister of Justice, Legal and Parliamentary Affairs* [2021] ZWCC 7.

<sup>224</sup> Supra (n183).

Traditional customary law courts also suffer from a lack of independence, with widespread executive interference dating back to the colonial period.<sup>225</sup> Even without direct interference, traditional leaders acting as judges in these courts felt obliged to convict suspects, compromising their impartiality.<sup>226</sup> This lack of separation of powers in both formal and traditional courts undermines access to justice for those affected by decisions made by the executive.

#### 4.12. Conclusion

This chapter highlighted several factors that prevent citizens, particularly the poor and small businesses, from accessing justice effectively. These include the prohibitive costs associated with litigation, physical and social distance from judicial institutions and officials, the absence of TADR processes from the formal justice system, the impact of Zimbabwe's economic depression on the judiciary, complex substantive and procedural laws, and the time taken to conclude cases. Additionally, unanticipated findings emerged regarding the impact of a lack of separation of powers on access to justice.

The analysis of these factors emphasised that access to court does not necessarily translate into access to justice because parties often face significant financial, logistical, cultural, and psychological barriers to obtaining outcomes that satisfy their normative expectations. The inductive analysis employed through grounded theory was instrumental in providing a unique and comprehensive understanding of the barriers to access to justice in Zimbabwe.

As the analysis unfolded, an embryonic theory on access to justice within the Zimbabwean context started to surface. Provisionally, I will call this concept the *Zimbabwean contextualised*

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<sup>225</sup> Ubink and Mnisi Weeks (n67) at 845-846.

<sup>226</sup> Ibid.

*access to justice*. This concept augments existing scholarship while integrating the specific nuances revealed through the interviews. Initially, the analysis echoed established barriers to access to justice, spotlighting the challenges of inadequate legal aid and various limitations of the formal court system. These findings harmonise with Galanter's viewpoint on the inherent constraints of the legal system, which creates and limits the possibilities of using the system for redistributive change. The findings also aligned with the first and second waves of access to justice reform, which concentrate on legal resources and fair procedures.

The marginalisation of living customary law emerged as a pivotal factor, highlighting the necessity for legal and process pluralism within a more inclusive justice system. Similarly, the destructive impact of formal court processes on community social relationships emphasised the importance of considering the social repercussions of a dispute resolution system and associated mechanisms. These unique insights enrich our understanding of the complexities of access to justice in Zimbabwe. Furthermore, the insights develop the third wave's focus on social justice by broadening the concept to include the long-term social effect of dispute resolution. The analysis suggests *the emergence of a fifth wave of access to justice reform*, one which stems from and is contextualised within the Zimbabwean (perhaps post-colonial African) context.

Moreover, the research unearthed political interference as a significant obstacle. This discovery aligns with the fourth wave's emphasis on systemic reforms and suggests a potential novel concept within access to justice theory. The erosion of judicial independence due to political influence highlights the critical role of judicial autonomy in upholding the rule of law and ensuring equal access to fair adjudication.

The analysis in this chapter has paved the way for a more nuanced understanding of access to justice in Zimbabwe. The findings resonate with existing access to justice scholarship and

propose new directions for theoretical development, thereby contributing to the academic discourse on access to justice. The subsequent chapters will discuss solutions to these barriers and their potential for institutionalisation within the formal justice system. They will further refine the concept within this evolving theory and its potential impact on achieving a more just and equitable formal justice system for all citizens.

## CHAPTER FIVE

### EXTENDING ACCESS TO JUSTICE IN ZIMBABWE

#### 5.1. Introduction

Access to justice is a critical part of any functioning democracy, yet it remains elusive for many in Zimbabwe, as discussed in chapter four. This chapter addresses the second subsidiary research question on overcoming barriers to and enhancing access to justice in Zimbabwe. While numerous strategies exist, the focus is on proposals by interviewees in this study, who have first-hand experience with the Zimbabwean justice system. Importantly, some solutions to access to justice challenges may be overlooked in this analysis, as the research participants did not recommend them specifically for Zimbabwe.

Following this introduction is a discussion of research findings on five initiatives to overcome the barriers to access to justice discussed in chapter four. These include reforms to substantive law, simplifying procedural rules, capacitating justice institutions and officials, constructing more court buildings, and further devolving the Legal Aid Directorate (LAD). Decentralisation of the formal justice system emerged as a central theme, with participants suggesting various forms of devolution that will be examined in detail.

The third section explores ADR and its TADR manifestation as a mechanism that enhances access to justice if well implemented. I will analyse the arguments provided by interviewees for embracing TADR as a first step towards a normative justice system that will deliver outcomes that citizens consider equitable or socially/culturally appropriate. Examples from Australia and South Africa, among other jurisdictions, will be used to discuss and interpret the data.

The fourth section discusses arguments that question the effectiveness of ADR and TADR in providing dispute resolution that is sound in law. Lastly, the chapter discusses three justice system models suggested by participants. These models include ‘Room 57,’ an indigenised version of Sander’s multi-door courthouse (many rooms approach). The second model involves expanding the Family Law Pilot Programme, which requires mandatory ADR before divorce trials at the High Court. The third model suggests adopting the dual system operating in Botswana<sup>1</sup>, where customary law processes operate parallel to the common law system.

## 5.2. Extending access to justice through substantive law reform

Participants commonly suggested legal reform to improve and extend access to justice. This section presents their collective voice on required reforms, from the highest form to specific legislation and policies. This approach ensured a systematic and comprehensive presentation of the data.

### a. Extending access to justice by amending the Constitution

Improving access to justice in Zimbabwe may require amending the Constitution. The Constitution<sup>2</sup> grants citizens the right to a fair, speedy, and public hearing within a reasonable timeframe before an independent and impartial court, tribunal, or other legal forum. The reference to ‘other forum’ in the Constitution provides a legal basis for using ADR<sup>3</sup>, either in the Western conception or in the form of TADR.<sup>4</sup> However, s 69(2) limits such forums only to those established by law, which led P1 to argue for amending the Constitution to pave the way for extending access to justice through ADR. He said,

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<sup>1</sup> See chapter five § 5.9.

<sup>2</sup> Constitution of the Republic of Zimbabwe Amendment (No. 20) Act (“the Constitution”), s 69.

<sup>3</sup> Constitution, s 69.

<sup>4</sup> See chapter three § 3.2.

‘...and more importantly, I do believe that the Constitution of Zimbabwe, especially s 69, should be amended to make it mandatory for the government to consider ADR systems. Because that one is really not there but it is very important. If you look at ADR, it is not so far from pre-colonial justice system and that is where we need to go.’

Australia<sup>5</sup> achieved what P1 advocated, implementing ADR through legislation, not constitutional amendments. This legislative approach aimed to enhance the experience of disputing parties in the formal justice system by reducing stress and unpleasantness.<sup>6</sup> Examples of success include Sentencing Circles and the Care Circle Programme, the latter addressing Aboriginal care and protection matters in a culturally appropriate way.<sup>7</sup> This aligns with P1’s argument for ADR adoption to improve access to justice. In contrast, Zimbabwe restricts ADR processes to those established by law, contributing to limited use within the formal justice system.

Although Australia has made strides in enhancing access to justice through legislation, Zimbabwe must amend the Constitution. The argument is rooted in the idea that the formal justice system should reflect citizens’ relationships, with the Constitution as the foundational document. Throughout this thesis, I have emphasised the need for a justice system aligned with people’s way of life, values, norms, and definition of security. Currently, the Constitution prioritises the colonial general law court system, overshadowing the traditional African system, despite African customary law being a valid source of law, albeit diluted. Customary law is

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<sup>5</sup> Noone and Akin Ojelabi ‘Alternative dispute resolution and access to justice in Australia’ (2020) 16 *International Journal of Law in Context* 2 at 116.

<sup>6</sup> Department of Attorney General and Justice (NSW), NSW Care Circles Procedure Guide (Version 2, October 2011). The Care Circle Pilot Programme was established using the alternative dispute resolution (‘ADR’) provisions under the Children and Young Persons (Care & Protection) Act 1998 (NSW).

<sup>7</sup> Ibid.

applicable in civil matters under specific conditions<sup>8</sup>, while in Australia, Aboriginal dispute resolution mechanisms are embraced, expanding the use of ADR, even in criminal matters.<sup>9</sup>

The close relationship between ADR and access to justice<sup>10</sup> necessitates the inclusion of the right to ‘culturally appropriate’ dispute resolution mechanisms within the existing right of access to justice.<sup>11</sup> Several jurisdictions have successfully integrated ADR within their definitions of access to justice.<sup>12</sup> For instance, an empirical comparative study of twelve jurisdictions supported the right of access to ADR. It stated that the state should provide a reliable framework for ADR and support it within its means.<sup>13</sup> P1’s views on adopting ADR in Zimbabwe aligned with the government’s obligations to ensure ADR was part of the formal justice system. Therefore, amending Zimbabwe’s Constitution<sup>14</sup> to ensure the widespread adoption of culturally appropriate dispute resolution processes is a viable (perhaps necessary) option<sup>15</sup>, as demonstrated by Australia’s use of legislation to prescribe dispute resolution processes for specific types of disputes.<sup>16</sup> Empirical research in Zimbabwe has highlighted

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<sup>8</sup> *S v Matyenyika* 1996 (2) ZLR 536 (H), Customary Law and Local Courts Act, 1992 s 3.

<sup>9</sup> Lewis and McCrimmon ‘The role of ADR processes in the criminal justice system: A view from Australia’ (Paper presented at ALRAESA Conference, Entebbe, Uganda, 4-9 September 2005) at 4. See Larsen ‘Restorative justice in Australian criminal justice system’ (2014) Research and Public Policy Series no. 127. *Australian Institute of Criminology*. Ciftci and Howard-Wagner ‘Integrating indigenous justice into alternative dispute resolution practices: A case study of the Aboriginal care circle pilot program in Nowra’ (2012) 16 *Australian Indigenous Law Review* 2.

<sup>10</sup> See chapter two § 2.4.

<sup>11</sup> Nolan-Haley ‘International dispute resolution and access to justice: Comparative law perspectives’ (2020) 2020 *Journal of Dispute Resolution* 2 at 408, 410. See chapter two § 2.4., on social justice dominating citizen conception of access to justice.

<sup>12</sup> Task Force on Access to Justice and Alternative Dispute Resolution ‘Access to justice through alternative dispute resolution’ *Task Force on Access to Justice and Alternative Dispute Resolution* (White Paper, 2015) at 1. See Raffaelli ‘The implementation of the mediation directive’ 2016 *European Parliament: Directorate-General for Internal Policies* at 57.

<sup>13</sup> Steffek et al (eds) *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (2013) 18. The countries included Austria, Belgium, England and Wales, France, Germany, Italy, Japan, Netherlands, Norway, Switzerland, and the United States.

<sup>14</sup> Constitution, s 69.

<sup>15</sup> See generally Stewart, Sithole, and Ncube (eds) *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (hereinafter *In the Shadow of the Law*) (2000).

<sup>16</sup> Noone and Akin Ojelabi (n5) at 115-116. The disputes included those involving public interest, power imbalances, and potential financial burdens if resolved through formal courts.

citizens' challenges in accessing the formal justice system.<sup>17</sup> Substantive law reform, as evidenced by Australia's integration of indigenous ADR forms is necessary to enhance access to justice.

### 5.3. ADR enhances access to justice because of simplified rules of procedure

The challenge of complex rules of procedure can be resolved in two ways: simplifying rules in formal courts to enhance accessibility and inclusivity for citizens and integrating ADR in the formal justice system. In chapters two and four<sup>18</sup>, I discussed the intricacies of procedural rules in general law courts, acknowledged even by legal professionals. Addressing access to justice in Zimbabwe involves a simultaneous pursuit of both solutions, and not an either-or scenario. This section, however, concentrates on adopting ADR to align with research participants' perspectives.

Mainstream ADR boasts simplicity by design, effectively overcoming challenges to dispute resolution arising from complex procedures. P6 highlighted that arbitration, overseen by an arbitrator motivated for swift resolution, can be significantly streamlined under the UNCITRAL Model Law,<sup>19</sup> leading to faster dispute resolution. Similarly, customary systems like TADR are apt to resolve matters quickly and efficiently.<sup>20</sup>

P10 corroborated the effectiveness of ADR in overcoming challenges to dispute resolution. She cited her client, whose contributions towards the construction of the marital home were

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<sup>17</sup> *In the Shadow of the Law; Tsanga Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* (2003); Sithole *Towards a Theory and Practice of Access to Civil Justice for the Poor in Zimbabwe: Law and Dispute Resolution in a Pluralistic Society* (Unpublished PhD thesis, University of Toronto, 1997). See also chapter four.

<sup>18</sup> See chapters two § 2.4(v) and four § 4.7(a).

<sup>19</sup> Model Law on International Commercial Arbitration 1985 adopted by the United Nations Commission on International Trade Law.

<sup>20</sup> See chapter four § 3.3(d) about the theft case, resolved by Indigenous elders within three days.

overlooked due to her inability to produce receipts. In contrast, the husband's contributions, evidenced by bank statements and loan agreements, were acknowledged. Similarly, in the *Muswere v Chakanza* case<sup>21</sup>, the court ruled in favour of the husband's property sale rights without the wife's consent unless she could prove direct/indirect contributions to its acquisition. In both cases, adversarial litigation impeded genuine negotiations<sup>22</sup>, disadvantaging women in property distribution matters. Recognising these realities, P10 encouraged facilitated negotiations outside general law courts, emphasising that her clients achieved better outcomes through ADR than formal court proceedings.<sup>23</sup>

The principles of orality and simplicity are critical to achieving effective access to justice.<sup>24</sup> Orality, particularly for laypersons, is inherent in ADR, allowing them to present oral evidence more effectively than in general law courts. It is essential to highlight that even in formal courts, litigants can make oral statements transcribed by court officials. However, caution should be exercised to ensure that other evidence corroborates oral evidence during ADR proceedings. Simplicity demands simplified procedures to empower self-represented litigants to pursue claims without hindrance.<sup>25</sup> Unlike formal court rules that limit laypersons' ability to express themselves, ADR imposes no such restrictions. Matsikidze's<sup>26</sup> study of court cases in Zimbabwe revealed that many self-represented litigants abandoned their cases due to complex procedural rules. As Matsikidze found, the primary challenge was drafting pleadings, not oral

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<sup>21</sup> *Muswere v Makanza* 2004 (2) ZLR 262(H).

<sup>22</sup> For a discussion on litigation execrating hostilities between parties, see chapter three § 3.3(c). Also see *Townsend-Turner v Morrow* [2003] ZAWCHC 53.

<sup>23</sup> See chapter three § 3.3(c) for a discussion on ADR providing better outcomes in civil and criminal justice contexts.

<sup>24</sup> Oliveira 'Mauro Cappelletti and the Brazilian procedural law' (2017) 1 *Revista da Faculdade de Direito* 2 at 386.

<sup>25</sup> *Ibid* at 385.

<sup>26</sup> Matsikidze *The Civil Procedure in the Magistrates' Court of Zimbabwe: A Denial of Justice to Self-actors?* (Unpublished Master's thesis, University of Zimbabwe, 2014). See chapter two § 2.4 for a discussion on complex rules of procedure and chapter four § 4.7(a) for empirical data on complex adjectival law in Zimbabwe.

presentations.<sup>27</sup> Presenting oral evidence requires less specialised professional training than drafting pleadings. Accepting a disputant's claims outlined in a simple letter could be an adequate means to initiate dispute resolution, eliminating the need for outdated forms and templates that prioritise formality over the essence of dispute resolution.<sup>28</sup>

Significantly, efforts to enhance substantive law must be complemented by improving adjectival law, particularly the principles of orality and simplicity. Access to justice relies on citizens' ability to navigate legal procedures, making procedural simplification imperative. Integrating TADR within state law in Zimbabwe would mark the third wave of access to justice reform.<sup>29</sup> These reforms could address the challenge of complex procedures, as ADR and TADR are simple and less discriminatory towards poor or unrepresented citizens.

#### 5.4. Improving access to justice through education, training, and professionalism

##### a. Education and training

Enhancing the capacity of legal practitioners and improving law student education is essential to overcoming barriers to access to justice posed by inadequate legal representation.<sup>30</sup> For instance, prosecutors have historically been able to prosecute cases within six months after obtaining a certificate from the ZRP Staff College or the Judicial College.<sup>31</sup> This is inadequate. Considering the complexity of the formal justice system, a law degree should be a mandatory

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<sup>27</sup> Ibid. See the discussion on the challenges encountered by self-represented litigants in chapter four § 4.2(a).

<sup>28</sup> Courts in Zimbabwe have begun to condone infractions involving forms, emphasising the importance of substance over form, see chapter four § 4.7(a) for a list of case law.

<sup>29</sup> See chapter two § 2.4(a)(iii).

<sup>30</sup> See chapter four § 4.4(a).

<sup>31</sup> Madhuku *An Introduction to Zimbabwean Law* (2010) (hereinafter *Zimbabwean Law*) 115-116. For more on the training of prosecutors, see the Zimbabwe Republic Police website available at [http://www.zrp.gov.zw/index.php?option=com\\_content&view=article&id=161:trainings&catid=10&limitstart=1&Itemid=954](http://www.zrp.gov.zw/index.php?option=com_content&view=article&id=161:trainings&catid=10&limitstart=1&Itemid=954), accessed on 16 November 2022.

requirement for prosecutors and magistrates. This requirement should only be waived if the formal justice system adopts TADR, a less complex and problem-solving-oriented approach.

Legal professionals may fail to provide adequate representation without sufficient legal knowledge, resulting in delays and inefficiency in the justice system.<sup>32</sup> To address this issue, law schools should prioritise producing better graduates who become better lawyers. P12 suggested that introducing apprenticeships could enhance legal education. P12's organisation is piloting a programme that deploys law students to serve as judge's clerks or work for local municipal authorities for three years as part of their training. According to P12, this approach will help capacitate judges and improve students' knowledge and skills, directly impacting the quality of legal representation.<sup>33</sup> JSC's researcher hiring efforts<sup>34</sup>, bolstered by development partners, remain inadequate in bridging the justice gap for low-income individuals and small businesses. UNDP funding, for example, provided research assistants for High Court and Supreme Court judges, drawn from top-performing magistrates.<sup>35</sup> This, however, exacerbates the existing magistrate shortage, making the 'promotion' to research assistant counterproductive.

Incorporating ADR into law school curricula is critical to extending access to justice. Participants proposed integrating ADR material into existing LLB courses and establishing standalone ADR degree programmes in the mid-to-long term.<sup>36</sup> Additionally, they suggested that the Law Society of Zimbabwe mandate ADR courses as part of lawyers' annual

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<sup>32</sup> United Nations Department of Peacekeeping Operations 'Primer for justice components in multidimensional peace operations: strengthening the rule of law' 2006 *United Nations* at 39–41. Also see chapter four § 4.4 and 4.4(a).

<sup>33</sup> See chapter one § 1.4.

<sup>34</sup> Malaba CJ 'The role of the judiciary in entrenching constitutionalism' speech delivered on the official opening of the 2024 legal year *JSC* 8 January 2024 at 36.

<sup>35</sup> UNDP 'Evaluation report of the preparatory assistance support to capacity development of the judiciary of Zimbabwe' 2013 *UNDP* 20.

<sup>36</sup> See chapter four § 4.4(a) on MSU having one ADR course with 2 credits on its LLB programme.

registration requirements. These initiatives will foster a culture of TADR within the legal profession.

The fourth wave of access to justice reform emphasises the link between professional responsibility and legal education.<sup>37</sup> Equipping judges, prosecutors, and lawyers with adequate legal education ensures citizens who overcome barriers to entering the justice system receive competent representation.<sup>38</sup> In *Superior IP International Pty Limited v Ahearn Fox Patent and Trademarks Attorneys*<sup>39</sup>, lawyers failed to provide proper representation by neglecting to advise their clients about filing a genuine steps statement as mandated by the Australian Federal Court Rules 2011.<sup>40</sup> Justice Reeves criticised the lawyers' ignorance of the rules and inability to raise objections based on the relevant legal provisions.<sup>41</sup> While the lawyers faced personal and professional consequences for their incompetence, their clients suffered from delayed justice, lost time, and financial losses. When lawyers lack access to justice, it perpetuates the inaccessibility of the justice system.<sup>42</sup>

#### b. Improving access to justice through specialisation

Specialisation in legal practice and dispute resolution is essential to the effective functioning of the formal justice system. Participants suggested that highly technical disputes are better left to sectoral experts such as engineers, among other relevant professionals. P3 shared that judges find it challenging to decide on technical disputes without access to clerks, researchers or *amici*

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<sup>37</sup> Economides 'Reading the waves of access to justice' (1999) 31 *Bracton Law Journal* at 67.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Superior IP International Pty Limited v Ahearn Fox Patent and Trademarks Attorneys* [2012] FCA 282 (23 March 2012).

<sup>40</sup> Federal Court Rules 2011 - Rule 5.03 (Australia).

<sup>41</sup> *Supra* (n39).

<sup>42</sup> See discussion on the fourth wave of access to justice reforms in chapter two § 2.4(a)(iv). See also the *Mutsinze case* (chapter four § 4.7(a)), where *pro bono* lawyers failed to assist an accused person assert his rights to a speedy trial, which partially contributed to a 15-year incarceration without an official judgment.

*curiae* ('friend of the court') who could provide expert advice.<sup>43</sup> One judge expressed frustration at having no one to consult on tax matters, a subject he largely taught himself.<sup>44</sup> This predicament was exacerbated by the fact that a retired tax law judge was now a consultant to most parties appearing before him.

Specialisation has been limited to some legal fields, like family law.<sup>45</sup> However, Zimbabwe's economic challenges make it difficult for lawyers to specialise or turn down cases outside their expertise. Consequently, according to P12 and P9, there is a proliferation of inadequately trained legal representatives and a bench not well equipped to handle certain subjects. The current socioeconomic environment, where judges and magistrates operate mostly without clerks or researchers<sup>46</sup>, paints a dark image of the accessibility of justice. Specialisation exists in name only and does not contribute to expanding access to justice.<sup>47</sup> Market forces play a part in the lack of specialisation. P6 discontinued labour law practice due to its declining profitability, stating that those willing to handle labour cases at reduced rates were not competent practitioners.

It is vital to replicate the success of specialisation achieved in ADR to enhance access to justice. P12 shared how, at the inception of the Arbitration Act, 1996<sup>48</sup> non-lawyers from various professions received training on arbitration. The success of this training led to an invitation to replicate it in Zambia. P12 stated, 'we offered a tailor-made course for them [would-be ADR practitioners] in the law of evidence, law of contract, law of delict (tort). Then we focussed on

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<sup>43</sup> Constitution, s 85(3)(d) provides that the rules of every court should allow a person with specialised expertise to appear as a friend of the court.

<sup>44</sup> Murwira 'Chidyausiku slams lazy judges' *The Herald* 01 October 2016.

<sup>45</sup> See discussion on specialised courts in chapter one § 1.4(a).

<sup>46</sup> Magistrates often depend on court interpreters, who sometimes take on clerical tasks beyond their trained expertise. See Svongoro 'Court interpreter training at the crossroads: Challenges and future prospects for Zimbabwe' (2016) 7 *Mediterranean Journal of Social Sciences* 2 at 110.

<sup>47</sup> Fieldwork revealed challenges in differentiating lawyers serving diverse legal needs. See chapter one § 1.8(a) for participant profiles illustrating limited specialisation.

<sup>48</sup> Arbitration Act, 1996.

award writing.’ If TADR is integrated into the formal justice system, kraal heads, chiefs, and family members assigned roles to resolve disputes could be similarly trained to bring justice closer to the people.

P10 highlighted that prosecutors should not be overlooked in training and specialisation. She said, ‘specialised courts should stretch as far as specialisation within the NPA [National Prosecuting Authority] itself so that the prosecutor is not doing traffic this morning, and, in the afternoon, they are in court for a rape case.’ Specialisation in this context could prevent prosecutors from being overwhelmed by diverse cases. Furthermore, the inherent disadvantage of one-shot litigants, including prosecutors and magistrates without law degrees, can be reduced through specialisation, levelling the playing field against repeat-players.<sup>49</sup>

Chapter one discussed how traditional African societies had specialised dispute resolution systems.<sup>50</sup> Neutral third-parties were trained from birth to resolve specific disputes, known in advance. The formal justice system in Zimbabwe lacks this specialisation, which impedes citizens’ access to justice. Therefore, lessons from TADR can be used to enhance access to justice in Zimbabwe.

### 5.5. Extending access to justice by increasing the number of courts and court officials

Participants suggested constructing more court buildings to overcome geographic barriers to accessing general law courts. P13, a senior government official, mentioned that two magistrates’ courts were being planned in Mabvuku and Epworth (urban councils near Harare)

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<sup>49</sup> Galanter ‘Why the ‘haves’ come out ahead: Speculations on the limits of legal change’ (1974) 9 *Law & Society Review* 1 at 115-119ff.

<sup>50</sup> See chapter one § 1.3.

to supplement the existing three (Rotten Row, Chitungwiza and Mbare).<sup>51</sup> However, this approach presents a paradox: the new courts and officials are based in urban areas, serving only 30 per cent of the population.<sup>52</sup> Even without considering Zimbabwe's limited financial capacity to construct court buildings nationwide<sup>53</sup>, increasing court infrastructure and officials may not sufficiently address the case backlog and other challenges citizens face when entering and navigating the justice system.

Moreover, increasing the number of courts and officials is unlikely to address systemic issues such as complex procedures and incompetent officials. As P6 stated, 'we have never in the history had so many High Court Judges, and Supreme Court Judges and Constitutional Court Judges, but in terms of productivity, we certainly don't seem to be seeing the end results.' P6 was confident that, 'some aspects of Parkinson's law is "[sic]" coming into play here.'<sup>54</sup> P5 shared that current judges hardly hear and hand down more than 50 cases per year on average. However, since he left the bench, he administers a roll of arbitrations larger than the civil roll of a judge. P5 boasted that he hears and hands down over 100 arbitral awards annually, excluding mediations, conciliation, and facilitated negotiation proceedings. The Chief Justice criticised judges for only handing down a single judgment in a judicial year.<sup>55</sup> In contrast to Zimbabwe, an inefficient judge in India disposes of 2 216 cases, whereas an efficient judge manages 5 045 cases yearly.<sup>56</sup>

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<sup>51</sup> One of the courts has since been officially opened since the interview in 2019; see Zinyuke 'President Mnangagwa commissions Epworth magistrates' court' *The Herald* 27 March 2023. At the same time, 19 courts were closed due to staff shortages. See Nemukuyu 'Judiciary in staff shortage: CJ' *The Herald* 28 March 2018.

<sup>52</sup> ZimStat '2022 population and housing census - preliminary report' available at [https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022\\_PHC\\_Functioning.pdf](https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022_PHC_Functioning.pdf), accessed on 23 August 2022.

<sup>53</sup> See chapter one § 1.2.

<sup>54</sup> Parkinson's law is the observation that work expands to fill the time available for completion. The print and electronic media is replete with reports on the JSC recruiting magistrates and judges annually.

<sup>55</sup> Murwira (n44).

<sup>56</sup> Gupta and Bolia 'Efficiency measurement of Indian High Courts using DEA: A policy perspective' (2020) 42 *Journal of Policy Modelling* 6 at 1385.

Empirical data from other jurisdictions<sup>57</sup> suggests that increasing the number of officials and court buildings alone may not necessarily improve efficiency or reduce backlogs, supporting claims that aspects of Parkinson's law may be at play. In Uganda, a backlog of 179 803 cases persisted between 2008 and 2014 despite investments in the judicial system, including higher staffing levels and construction of new courts.<sup>58</sup> A study in Israel that attempted to empirically estimate the relationship between the number of judges and the output of the judiciary found that caseload pressure raises productivity.<sup>59</sup> Interestingly, the study found that increasing the number of judges did not lead to greater output.<sup>60</sup>

The findings indicate that increasing court infrastructure and officials alone will not address systemic issues hindering access to justice. The evidence suggests that the current litigation-based formal justice system may be inherently ill-suited to serve citizens' needs. The Zimbabwean formal justice system appears to be intentionally designed to serve repeat-players who thrive under court delays because of their significant access to resources, which they leverage over under-resourced one-shotters.<sup>61</sup> As discussed in chapter four, the challenge of access to justice is systemic<sup>62</sup>, implying that the formal justice system is fundamentally flawed. ADR and TADR should, therefore, be integrated into the formal justice system to overcome these challenges.

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<sup>57</sup> Kintu and de Waal 'Impact of structure and culture on organizational performance: The case of Uganda's High Court' (2021) 1 *SN Business and Economics* 10 at 3.

<sup>58</sup> *Ibid* at 3-4.

<sup>59</sup> Beenstock and Haitovsky 'Does the appointment of judges increase the output of the judiciary?' (2004) 24 *International Review of Law and Economics* 3 at 351-369.

<sup>60</sup> *Ibid* at 367.

<sup>61</sup> Galanter (n49) at 97. See chapter two § 2.4.

<sup>62</sup> See generally chapter four. See also Maraire 'Systemic barriers and unfairness: Access to justice in Zimbabwe and beyond' (2024, forthcoming) *Revista Direito GV*.

## 5.6. Decentralising the Legal Aid Directorate

The LAD is housed under the Ministry of Justice and has offices only in urban areas<sup>63</sup>, limiting accessibility for rural citizens. P7 and P13 criticised the LAD for its centralised structure, advocating decentralisation.<sup>64</sup> However, this proposal overlooks the financial constraints of a hyperinflationary economy where the government struggles to provide necessities. To put it into perspective, in 2022, the Ministry of Justice received ZWL\$ 22.7 billion (US\$ 209 million)<sup>65</sup>, with an unclear allocation for legal aid. South Africa, in contrast, allocated US\$ 102 million solely to LA<sup>66</sup>, while Sweden's LA budget is US\$ 273 million.<sup>67</sup> Although shoring up LA is desirable, it is unrealistic for Zimbabwe to rely solely on LA to enhance access to justice.

Even with adequate funding, the LAD must recruit many competent lawyers to serve citizens effectively. However, the historical shortage of legal practitioners in Zimbabwe poses a paradox, as the adversarial system depends on the availability of lawyers.<sup>68</sup> Without sufficiently skilled lawyers, the formal justice system resembles a car without a properly functional engine, prone to breakdowns and unable to reach its destination.

While LA can overcome cost and party capability barriers to accessing justice, its effectiveness in countries like Zimbabwe is limited.<sup>69</sup> As nearly half the population lives below the poverty

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<sup>63</sup> See chapter one § 1.5.

<sup>64</sup> ZimStat (n52). Since conducting the interviews, the government announced the intention to devolve the LAD to 30 more districts. Given the population size, and though commendable, it will not solve the access to justice problem. See NA 'Government decentralises free legal aid' *The Herald* 14 May 2023.

<sup>65</sup> As discussed in chapter one § 1.2., Zimbabwe has experienced hyperinflation for over two decades, making the Zimbabwean dollar's value unreliable. The official exchange rate of ZW\$ 105 to USD\$ 1 does not reflect the currency's true value. See the 2022 National Budget speech 'Reinforcing sustainable economic recovery and resilience' presented to Parliament by Prof. Mthuli Ncube, Minister of Finance and Economic Development.

<sup>66</sup> Legal Aid South Africa 'Legal Aid South Africa Annual Report 2017/2018.'

<sup>67</sup> Carlson *The Fundamentals of Swedish Law* (2019) 36. Sweden has a population of 10 million, whilst Zimbabwe has 15 million.

<sup>68</sup> Sithole (n17); Tsanga (n17).

<sup>69</sup> Cappelletti 'Alternative dispute resolution processes within the framework of the world-wide access-to-justice movement' (1993) 56 *Modern Law Review* 3 at 285; Cappelletti and Garth 'Access to justice: The newest wave in the worldwide movement to make rights effective' (1978) 27 *Buffalo Law Review* 2 at 213.

line, relying on an underfunded state for LA is challenging.<sup>70</sup> Even in developed countries like Sweden, LA recipients must pay up to 40 per cent of the legal representation fee, even for minors, except in exceptional circumstances.<sup>71</sup> Given these financial constraints, Zimbabwe should consider other solutions, such as embracing and integrating the currently informal TADR, which offers a cost-effective alternative to traditional LA.

### 5.7. Mainstreaming TADR

This section discusses enhancing access to justice by integrating TADR into the formal justice system.<sup>72</sup> Advocating for the recognition and incorporation of TADR is grounded in its potential effectiveness in resolving disputes involving citizens, businesses, and the state. The section asserts that reforming Zimbabwean law to acknowledge local norms and practices can render the formal justice system more people-centred. By embracing TADR within state law, it contends that justice can be more accessible and outcome-oriented, aligning with citizens' needs, perspectives, and expectations. The subsequent section (5.8) critically examines the limitations of TADR, preventing an overly idealised portrayal of TADR as the sole and flawless approach.

#### a. Embracing TADR for people-centred justice

In Zimbabwe, social structures exert substantial influence in daily life, with individuals often relying on family and clans for survival. Disputes and settlements are inherent aspects of social

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<sup>70</sup> World Bank Group available at <https://www.worldbank.org/en/country/zimbabwe/overview>, accessed on 16 November 2022. See chapter one § 1.5 and chapter four § 4.2.

<sup>71</sup> Muhire, Giansanti, and Schoultz 'Global access to justice project: National report' in Paterson et al (eds) *Access to Justice: Global Access to Justice Project* (2020) 51. See Steytler 'Democratizing the criminal justice system in South Africa' (1991) 18 *Social Justice* 1 at 144.

<sup>72</sup> Though formally recognised in law, customary institutions like the chief's court lack legal authority and are considered informal.

life in different communities.<sup>73</sup> In response to enquiries about enhancing access to justice, participants suggested mainstreaming ADR and TADR. According to participants, this approach would effectively address the population's legal and social justice needs.<sup>74</sup> P10 viewed TADR as 'geographically accessible because it is at [the] community level, uses local language, simple court process...' Despite weaknesses around capacity, participants believed customary processes present options for effective access to normative and culturally sensitive dispute resolution for citizens. P7 praised the traditional justice system, stating, '[i]su [we] as Africans, we have always had a judicial system that worked. The path to justice is already known in advance.' This sentiment echoes the Ndebele dispute resolution system, in which mediators were trained from childhood.<sup>75</sup>

Stewart, Sithole, and Ncube's (eds) ethnographic study revealed negative attitudes towards the formal justice system among citizens.<sup>76</sup> While their research focused on laypersons, this study interviewed legal professionals. Despite this distinction, both studies concur that the formal justice system cannot serve citizens adequately. These findings necessitate justice system reform. However, without integrating TADR, reform efforts could impede intended outcomes, as citizens may persist in perceiving the system as alien.<sup>77</sup> TADR's distinctive feature lies in its ability to address citizens' legal and social justice needs within a unified system,

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<sup>73</sup> Customary dispute resolution aims to settle disputes through facilitation rather than adjudication, seeking acceptable solutions that promote group harmony. For further reading, see Ubink and van Rooij 'Towards customary legal empowerment: An introduction' in Ubink and McInerney (eds) *Customary Justice: Perspectives on Legal Empowerment* (2011) 11. See also chapter four § 6.2(a).

<sup>74</sup> Chapter two § 2.4 explores the gap between citizens' perceptions of justice and access to justice, and the legal system's formal definitions of these concepts.

<sup>75</sup> See chapter one § 1.3 for insights into the Ndebele dispute resolution system.

<sup>76</sup> See generally *In the Shadow of the Law*.

<sup>77</sup> For a discussion on the legitimacy of dispute resolution processes and the justice system, see Brinks 'Access to what? Legal agency and access to justice for Indigenous peoples in Latin America' (2019) 55 *The Journal of Development Studies* 3, at 350 states, 'The problem is not just that the physical installations are remote and the proceedings in a foreign language, but that their indigeneity identifies people as something less than full citizens and the justice that is on offer does not fully match up with their substantive notions of justice.'

concurrently delivering outcomes aligned with their normative conceptions of justice. These characteristics constitute the foundation of TADR's legitimacy.

Participants shared examples highlighting the significance of TADR in Zimbabwean society. P13 illustrated the utilisation of TADR within the family unit, stating, 'in our family unit, if I fight with my wife, we go kwaTete [to an aunt] and that is a traditional dispute resolution mechanism.' According to P5, 'the traditional system is not insignificant in today's world, if you look at Zimbabwe as a nation, 80 per cent of cases are resolved at customary level...and it is not something a scholar should ignore.' P5 also provided examples of disputes addressed through traditional processes, such as divorce, seduction, destruction of crops by animals, and rights infringement.<sup>78</sup>

In one of the few ethnographic cases available in the literature, Brinks<sup>79</sup>, quoting Sieder and Flores, outlines a case of car theft by three boys, which community elders resolved in the presence of 300 people. Years later, the boys' parents expressed gratitude for the rehabilitative and restorative nature of the customary process.<sup>80</sup> P5's identified case types also align with empirical research in Peru and Ecuador, where a minority of disputes settled in customary legal systems lack a normative basis in state law.<sup>81</sup> Despite this, the outcomes of the customary justice system are perceived as 'just' by the parties, contrasting decisions from the formal justice system.<sup>82</sup>

The Australian justice system serves as a compelling model for reform in Zimbabwe. Acknowledgement that the Western-style justice system (including mainstream ADR) failed

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<sup>78</sup> TADR processes deal with many more types of disputes, and these are the only ones P5 mentioned. For example, they deal with stock theft.

<sup>79</sup> The case is first discussed in chapter three § 3.3(d). See also Brinks (n77) at 356.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid at 358.

<sup>82</sup> Ibid.

to meet the legal and social justice needs of the Aborigines led to the incorporation of community and neighbourhood justice centres within Australian law.<sup>83</sup> These centres resolve diverse family, workplace, and interpersonal disputes.<sup>84</sup> As observed in Australia, Indigenous processes fulfil the fundamental objectives of a legal system—ensuring accessibility and socially just results. Zimbabwe can draw lessons from this experience to transform access to justice from a formal to an effective right.

The Australian approach prioritises citizens, minimising obstacles to entering and navigating the formal justice system.<sup>85</sup> This contrasts institution-centred justice programming prioritising formal courts over justice seekers' needs, perspectives, and expectations. For instance, sentencing circles adopted for criminal matters in Australia are conducted in a community setting, aiming to discuss appropriate orders that best promote future safety and well-being.<sup>86</sup> The Organisation for Economic Co-operation and Development (OECD) refer to the Australian approach as people-centred justice.<sup>87</sup> In this context, TADR can potentially improve the quality of justice and how the poor and small businesses access justice.

#### *i. Integrating TADR into the formal justice system*

Legal anthropological research reveals similarities between formal courts and TADR processes. Despite being motivated by restoring relationships, presenting facts through party testimony and questioning witnesses in TADR mirrors the practices found in formal courts. Holleman described traditional dispute resolution in these terms:

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<sup>83</sup> Boulle and Field *Australian Dispute Resolution: Law and Practice* (2017) 93.

<sup>84</sup> *Ibid.*

<sup>85</sup> Ciftci and Howard-Wagner (n9) at 81.

<sup>86</sup> *Ibid* at 82.

<sup>87</sup> Organisation for Economic Co-operation and Development 'Serving citizens framework' (2015) available at [https://read.oecd-ilibrary.org/governance/government-at-a-glance-2015\\_gov\\_glance-2015-en#page2](https://read.oecd-ilibrary.org/governance/government-at-a-glance-2015_gov_glance-2015-en#page2), accessed on 16 November 2022. I will directly refer to the concept of people-centred justice throughout the thesis or by referring to normative expectations or citizens' justice needs.

‘Among the Vaheras, a Shona-speaking ethnic group, the hearing commenced with the complainant stating his or her case in accordance with the Vahera saying that “the one who has eaten the most is the one that first opens the door.” Thereafter, the defendant would do the same, for as long as it took to relay all the grievances and defences. This was followed by the questioning of witnesses and an open discussion of the facts of the case in a process described as “throwing the case to the dogs to chew on.” The hearing was concluded by a restatement of the merits of the case and the pronouncement of judgment.’<sup>88</sup>

TADR aligns with concepts of fair hearing, among other constitutional safeguards, such as the right to an impartial and independent tribunal.<sup>89</sup> Although the presentation of facts in TADR shares similarities with formal court processes, it goes further because its primary goal is to resolve the underlying issues causing the dispute.<sup>90</sup> Like general law courts, TADR upholds natural justice principles such as *audi alterem partem* and *nemo iudex in causa sua*. Embracing the Aristotelian philosophy of treating equals equally and unequals unequally, TADR recognises the injustice in some laws.<sup>91</sup> Without third party intervention, it acknowledges that injustice may persist, emphasising the flexibility of the third party role, distinct from the role of a judge in general law courts. However, as discussed below, TADR has drawbacks, including instances where customary practices in succession have shown bias toward men, potentially disadvantaging women.<sup>92</sup>

TADR is prevalent in Zimbabwe, chosen not out of ignorance but for its cultural appropriateness and accessibility, despite some commentators viewing it as archaic.<sup>93</sup> It is important to highlight the elitist mentality that deems TADR inferior before proceeding. Despite constitutional recognition, legal practitioners, the government, and judicial authorities

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<sup>88</sup> Holleman *Issues in African law* (1974) 5-6, 18-19.

<sup>89</sup> Constitution, s 69.

<sup>90</sup> Bennett *Human Rights and African Customary Law Under the South African Constitution* (1999) 4. By resolving underlying issues, TADR aims to restore harmony; see chapter two § 3.2 and Brinks (n77) at 357.

<sup>91</sup> Hurlbert ‘Defining justice’ in Hubert (ed) *Pursuing Justice: An Introduction to Justice Studies* (2011) 13.

<sup>92</sup> *Magaya v Magaya* SC No. 210-98 - issues from this case have since been rectified through legislation. Also see *Jena v Nyemba* 1986 (1) ZLR 138 (S).

<sup>93</sup> *In the Shadow of the Law* 26.

often overlook or undervalue living customary law, branding TADR as archaic.<sup>94</sup> This label by some participants, akin to a modal response, denies the authenticity of customary issues, dismissing them as radical and rooted in resentment rather than intrinsic justice.<sup>95</sup> Such sentiments illustrate mental colonisation and how issues of transformation have not taken root. Paradoxically, even colonial British courts acknowledged and respected African dispute resolution and legal system.<sup>96</sup>

Interestingly, in Botswana, educated individuals prioritise culturally appropriate institutions over formal state law<sup>97</sup>, echoing the trend in Zimbabwe, where TADR is utilised more frequently than formal courts.<sup>98</sup> This preference may stem from the advantageous role of family members, kraal heads, and chiefs, who excel in dispute resolution as custodians of African norms. Zimbabwean courts acknowledge customary law as a matter of fact, emerging from people's beliefs and practices rather than being dictated by legal specialists.<sup>99</sup>

To avoid analytical bias, it is worth mentioning that TADR may not inherently surpass the general law system, and citizens' preference for TADR might stem from the inaccessibility of general law institutions.<sup>100</sup> This alternative explanation suggests that TADR complements, rather than directly replaces the formal justice system, ensuring a comprehensive understanding and enhanced access to justice rather than a debate on system superiority. Ignoring or side-

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<sup>94</sup> This is also the case in Latin America, see Brandt and Valdivia *Justicia Comunitaria en los Andes: Perú y Ecuador - El Tratamiento de Conflictos: Un estudio de actas en 133 comunidades indígenas y campesinas en Ecuador y Perú* (2006) quoted in Brinks (n77) at 350.

<sup>95</sup> Ibid.

<sup>96</sup> *In re Southern Rhodesia* [1919] AC 211 at para 233-4. See chapter one § 1.3(a).

<sup>97</sup> Schärf 'Non-state justice systems in Southern Africa: How should governments respond?' (Unpublished Paper, *Institute of Criminology*, University of Cape Town, 2003) at 65.

<sup>98</sup> Sibanda 'An analysis of traditional leadership, customary law and access to justice in Zimbabwe's constitutional framework' 2019 *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* at 53.

<sup>99</sup> *Jengwa v Jengwa* 1999 (2) ZLR 121 (H), 128E, *Mutaisi v Muzondo* 1999 (2) ZLR 435 (H), 437.

<sup>100</sup> Brinks' research in Latin America revealed that customary systems fill the legal void left by state institutions in Indigenous regions. He further argues that Indigenous people will continue relying on customary systems because these systems provide a more appropriate, culturally congruent, and context-specific platform for individual Indigenous legal agency (n77) at 358.

lining TADR, as done during the colonial period, would exclude large segments of society from the formal justice system.<sup>101</sup> P10 emphasised the need for better working relations between formal and informal justice systems to enhance access to justice. Integrating TADR within state law, like mainstream ADR, strengthens the rule of law.<sup>102</sup> Australia's recognition of the formal justice system's shortcomings led to comprehensive reforms in criminal and civil justice systems<sup>103</sup>, underscoring the importance of integrating socially appropriate approaches within the formal legal framework.

Regular use of dispute resolution mechanisms depends on public confidence in the system. P14 commented that people often fear and avoid courts due to concerns about legal representation fees. Building public confidence involves integrating TADR within state law, allowing the state to regulate these processes to comply with international human rights standards.<sup>104</sup> Two critical considerations are: (i) TADR integration is essential for enhanced access to justice in Zimbabwe, and (ii) successful integration necessitates alignment with international human rights standards, reflected in Zimbabwe's ratification of various regional and global human rights instruments.<sup>105</sup>

Incorporating local norms into the justice system is critical to making it more people-centred and aligned with normative conceptions of justice. Zimbabwe's legal landscape, influenced by the common law system for over a century, requires changes to coexist seamlessly with existing

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<sup>101</sup> United Nations Secretary General 'UN approach to rule of law assistance' (2008) 3.

<sup>102</sup> Harper 'Engaging with customary justice systems' in Ubink (ed) *Customary Justice: Perspectives on Legal Empowerment* (2011) 32.

<sup>103</sup> See The Criminal Procedure Amendment (Circle Sentencing Intervention Program) Regulation 2003 New South Wales. Also see generally Ciftci and Howard-Wagner (n9).

<sup>104</sup> Scheye 'Pragmatic realism in justice and security development: Supporting improvement in the performance of non-state/local justice and security networks' 2009 *Clingendael - Netherlands Institute of International Relations* at 34, 36.

<sup>105</sup> Zimbabwe is a signatory to several instruments. Notably the African Charter on Human and People's Rights, adopted June 27, 1981; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).

structures. Pouligni's<sup>106</sup> insights emphasise that building the rule of law involves integrating local actors, considering historical contexts, and accommodating diverse cultural perspectives. The formal legal system in Haiti was based on French law and language, with which the rural population had no connection, as they spoke Creole.<sup>107</sup> Local language, practices and norms were subsequently incorporated into the formal system to bridge this gap.<sup>108</sup> This integration rendered the formal justice system more accessible and responsive to people's needs.

In Zimbabwe, integrating local norms into the justice system is crucial for ensuring it is people-centred and responsive to societal needs, safeguarding rights from potential abuse. However, any legal changes must undergo compatibility tests between local practices and constitutional as well as international human rights norms.<sup>109</sup> This compatibility assessment, distinct from the colonial repugnancy test, evaluates whether local practices can be integrated into or operate independently of the formal system. This approach acknowledges that a formal justice system incorporating local norms and practices better serves the needs of the people it aims to protect.

#### b. TADR overcomes socioeconomic obstacles to access to justice

P13 asserted that TADR offers culturally appropriate, faster, cost-effective dispute resolution that is 'close to the people.' According to Brinks<sup>110</sup>, within customary law's community-controlled system, group-based inequalities disappear because legitimacy stems from shared

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<sup>106</sup> Pouligny 'UN peace operations, INGOs, NGOs, and promoting the rule of law: Exploring the intersection of international and local norms in different post-war contexts' (2003) 2 *Journal of Human Rights* 3 at 373 quoted in Bassu 'Law overruled: Strengthening the rule of law in post conflict states' (2008) 14 *Global Governance* 1 at 32.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid.

<sup>110</sup> Brinks (n77) at 350.

identity and communal norms, with peer judgment.<sup>111</sup> This communal approach challenges notions of TADR as archaic.

P13 shared how ‘the traditional system doesn’t require the payment of huge sums of money. *Wayienda nembudzi, huku kudare kwashe* [you would take a goat or chicken to the chief’s court] and that will suffice, and your case would be heard.’ P13 added, ‘they would not be denial of justice if you didn’t have *huku yacho* [the chicken] *kana mbudzi* [or the goat], you would still be heard.’ In contrast, *Newsday* reported the story of a man unable to afford a court order fee, hindering justice despite a favourable ruling.<sup>112</sup> TADR’s advantage lies in demonstrating that justice does not have to be expensive to be accessible.

In the 1980s, Australia established Community Justice Centres, emphasising culturally appropriate, non-legal representation dispute resolution.<sup>113</sup> The Australian model, sensitive to Indigenous languages, norms, and values, demonstrates the benefits of culturally aligned processes—efficient, cost-saving, and preventing escalation.<sup>114</sup> Australia’s approach provides a blueprint for Zimbabwe to enhance citizens’ access to justice.

### c. TADR delivers culturally sensitive and satisfactory justice outcomes

During fieldwork, a prevailing narrative highlighted TADR’s ability to provide more satisfying outcomes than general law courts. P14 stated, ‘funny enough, you find that some of the issues that people have, they don’t really seek a redress or remedy of some sort, but just to air out, maybe their frustrations, but they don’t have that platform.’ According to P14, the Zimbabwe

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<sup>111</sup> Ibid.

<sup>112</sup> Chinhamo ‘Access to justice costly for the poor’ *NewsDay* 30 July 2015.

<sup>113</sup> Williams ‘Cradle of mediation: Community Justice Centres chalk up a quarter century’ (2005) 43 *Law Society Journal* 11 at 74–76.

<sup>114</sup> Mackay and Moody ‘Diversion of neighbourhood disputes to community mediation’ (1996) 35 *Howard Journal of Criminal Justice* 4 at 300.

Human Rights Commission (ZHRC), now encompassing specific mainstream ADR processes, provides a less formal platform for ventilating grievances.<sup>115</sup> Typically, the offending party apologises, and compensation is sought only in rare cases, despite the right and allowance within the ZHRC's ADR system for such claims.

Stewart, Sithole, and Ncube (eds)<sup>116</sup> echoed P14's views. They quoted a woman in Binga who did not seek compensation when she appeared at the chief's court but instead wanted to be heard and for the chief to order the brother to stop and change his offending behaviour.<sup>117</sup> Focussing on resolving underlying issues causing a dispute, TADR meets the justice needs and expectations of parties who must coexist once the dispute is concluded. Integrating TADR within state law provides hope for enhanced access to justice and improved justice outcomes.

In a diverse society with varied legal and social justice needs, ensuring justice for all necessitates a range of dispute-resolution processes. Although informal, TADR has emerged as a culturally sensitive approach to addressing domestic violence, a criminal offence in Zimbabwe carrying potential fines or imprisonment under the Domestic Violence Act, 2007.<sup>118</sup> Collaborative efforts mandated by the Act among the Department of Social Welfare, voluntary organisations, and traditional leaders aim to offer anti-domestic violence counselling.<sup>119</sup> However, financial constraints impede the Act's complete implementation.<sup>120</sup>

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<sup>115</sup> See chapter one § 1.6(b)(ii).

<sup>116</sup> *In The Shadow of the Law* 68.

<sup>117</sup> *Ibid.*

<sup>118</sup> Defined in s 3(1) of the Act as 'any unlawful act, omission or behaviour which results in death or the direct infliction of physical, sexual, or mental injury to any complainant by a respondent and includes the following: physical abuse, sexual abuse, emotional, verbal and psychological abuse, economic abuse, intimidation, and harassment.'

<sup>119</sup> *Ibid.*, s 15. Traditional leaders have special jurisdiction over some matters. They can issue protection orders (a document signed by a magistrate to protect a complainant from harm or the threat of harm, whether physical, emotional, or economic). See also *supra* s 3(2)(c)(i), (ii), (iii) and (iv) and in s 3(2)(d)(i) and (ii).

<sup>120</sup> *Ibid.*, s 16. Mtetwa 'Examining the effectiveness of The Domestic Violence Act, 2007 in Zimbabwe: Police and community perspectives in Bindura' (2017) 5 *Journal of Sociology* 4 at 8.

A significant proportion (80 per cent) of domestic violence cases are withdrawn from general law courts before reaching a final verdict.<sup>121</sup> Various explanations exist for these withdrawals, with some participants suggesting a preference for TADR. This sentiment is exemplified by P4, who recounted her sister's successful utilisation of a combined approach involving mediation by family members and a protection order to safeguard her well-being. P4 highlighted the advantage of involving family members as potential witnesses in future legal proceedings. Studies, including Coker-Appiah's extension of Ghana's nationwide survey findings, affirm TADR's effectiveness in resolving sensitive issues like domestic violence.<sup>122</sup> The recommendation to build upon traditional African remedies and community action groups aligns with the limited options available to women.

When P3 was a provincial magistrate, she used to direct domestic violence cases to TADR by family members due to victims' aversion to the Act's sanctions. Emphasising the importance of addressing underlying issues and offering remedies beyond general law courts<sup>123</sup>, P3 stated that consent judgments<sup>124</sup>, where parties agreed on an outcome, served as deterrents and facilitated reconciliation, aligning with the Act's emphasis on preserving family unity.

Importantly, citizens prefer TADR over general law courts because they respect the institutions and officials.<sup>125</sup> TADR's cultural sensitivity, grounded in community values, consensus-building, and restorative justice, empowers traditional leaders recognised by the Act to resolve

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<sup>121</sup> Mtetwa Ibid.

<sup>122</sup> Nolan-Haley 'Mediation and access to justice in Africa: Perspectives from Ghana' (2015) 21 *Harvard Negotiation Law Review* 59; Coker-Appiah 'Address: Responding to gender violence in Ghana: Traditional and contemporary strategies' *Amanee* 15 March 2001 at 17. For a full commentary, see Bowman 'Transnational feminism in the context of intimate partner violence in Ghana' (2019) 52 *Cornell International Law Journal*.

<sup>123</sup> See the discussion on just harmony in chapter three § 3.2. and chapter four § 4.10. on remedies like restitution that are beyond formal courts and state law.

<sup>124</sup> A decision reached by agreement of the parties to resolve disputes without the court's involvement. It is provided for in Zimbabwe by Order 8 of the High Court Rules, 1971.

<sup>125</sup> Nolan-Haley (n122) at 69-70, 75, 103.

disputes in ways that preserve family integrity.<sup>126</sup> While concerns exist about resolving violent criminal cases using ADR, removing violent acts from the equation allows for ADR. TADR addresses underlying issues in a husband-assault case, while general law courts strictly apply criminal law and impose punishments without considering broader issues. According to P10, this could imprison the husband, leaving the family without a breadwinner, an outcome the wife may not have desired, looking only to stop the violence. The literature confirms that citizens prefer customary systems because they are sensitive to the needs of victims and their families.<sup>127</sup> Although TADR offers a culturally appropriate avenue for justice and reconciliation in domestic violence cases, violent acts should never be condoned.

From the above perspective, reform efforts should focus on creating a conducive environment for resolving underlying issues between parties rather than adding band-aid solutions to a broken system, disconnected from the needs and expectations of the people it seeks to serve. The Zimbabwe formal justice system needs remodelling, and Rwanda's<sup>128</sup> approach to decolonising its justice system offers a partial template for developing genuine African jurisprudence. Rwanda started the process by doing away with all colonial laws and starting from normative conceptions of justice, free from pre-1994 judgments. While it is too early to evaluate the success or failure of the Rwandan approach, it provides a starting point for decolonising African law.

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<sup>126</sup> Dieng 'ADR in sub-Saharan African countries' in Ingen-Housz (ed) *ADR in Business: Practice and Issues Across Countries and Cultures* (2011) 614 argues that TADR processes should be maintained because they promote reconciliation and restorative justice.

<sup>127</sup> See Nolan-Haley (n122).

<sup>128</sup> Binagwaho and Freeman 'Decolonisation of the legal code: The end of colonial laws in Rwanda and a model for other post-colonial societies' available at <https://harvardilj.org/2021/05/decolonization-of-the-legal-code-the-end-of-colonial-laws-in-rwanda-and-a-model-for-other-post-colonial-societies/>, accessed on 16 November 2022.

d. TADR as a comparative tool for court processes

ADR is vital for enhancing access to justice in Zimbabwe, a consensus among participants. P9 stressed its necessity as a benchmark for formal court processes, asserting that an efficient ADR system can highlight the diminishing standards of general law courts. He illustrated this with instances of complex cases swiftly resolved within three months through ADR, contrasting them with the bureaucratic hurdles and slowness of the judiciary. Commenting on the effectiveness of ADR, P9 said,

‘In all three ADR cases I referred to, hmmm it would have been very difficult to define the issues. The wildlife matter, the one party, would have, in theory been able to sue the other party for defamation. It would involve a bruising trial but might have taken two to three years to resolve. And in the interim, the relationship between the two competing organisations would have been severely undermined, and with the resultant degradation of the wildlife strategies being employed on this conservancy. So, whilst in theory, there was a legal option, had they pursued that route, the one party might have won and got damages claim for defamation against the other party, but it would have, at the end of the day put money in lawyers’ pockets but severely undermined the credibility of both organisations who were litigating and as I said, severely undermined their core work.’

Likewise, P12 recounted a case resolved quickly and cost-effectively through ADR. He summarised the proceedings as follows,

‘There was an instance where this happened a few years ago: [company names anonymised] had a dispute which had to do with a formula of how to share the proceeds. When [product anonymised] has been exported, payment just comes in one lumpsum and there was a formula devised in the early 60s as to how the two companies would share the proceeds. Obviously, that formula was long overdue for revision. The two MDs [Managing Directors] came to [organisation anonymised] and said we have a problem, and we would like [organisation anonymised] to assist us find an arbitrator with a legal background but also with financial engineering skills. The [organisation anonymised] gave [name anonymised] as the most suitable. So, they came to see [name anonymised] at 8:30 am and by 9:30 am, they were in [arbitrator name anonymised]’s office, and ten days later, there was an award. That dispute, if it had been taken to court, it would have taken forever. So that can be used as an advert with the parties to say this is what can be achieved.’

The quoted passages underscore the pivotal role of ADR in achieving resolutions that facilitate post-dispute coexistence. Unlike formal court processes, which often escalate hostilities<sup>129</sup>,

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<sup>129</sup> Williams ‘Consensual approaches to resolving public policy disputes’ (2000) 2000 *Journal of Dispute Resolution* 1 at 145.

ADR addresses underlying issues, serving an educational role that fosters insight and compromise, diminishing the likelihood of future disputes.<sup>130</sup> Instances provided by participants showcase ADR's efficiency in resolving conflicts within days or months, starkly contrasting with the protracted timelines associated with state law.<sup>131</sup> This prompts enquiry into the prevailing dominance of general law courts and litigation in Zimbabwe despite their detrimental impact on parties with ongoing relationships.

TADR's effectiveness was evident in P3's court, where the reduced case and trial numbers were attributed to the low recidivism rate among offenders deterred by consent judgments.<sup>132</sup> This success stems from TADR processes and interventions by family members and religious leaders, motivated by a belief in meeting the parties' legal and social justice needs.<sup>133</sup> P3 acknowledged that magistrates might be deterred from accepting this approach, citing concerns about power imbalances and enforceability.<sup>134</sup> Mitigating these risks requires clear guidelines, training, accreditation for TADR practitioners, and oversight mechanisms, discussed further in chapter six.<sup>135</sup>

Religious leaders provided counselling and mediation and encouraged abused women to report cases to the police.<sup>136</sup> These findings challenge unjust criticisms of resolving criminal cases outside general law courts. Religious leaders encouraging victims to report matters to the police after resolving underlying issues exemplifies how non-state institutions can collaborate with

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<sup>130</sup> Kubasek and Silverman 'Environmental mediation' (1988) 26 *American Business Law Journal* 3 at 545. See discussions in chapter three § 3.5(b)(i).

<sup>131</sup> For a discussion on the time taken to conclude cases, see chapter four § 4.8.

<sup>132</sup> The discussion above on Latin America reported similar findings, such as low levels of recidivism because citizens utilised normative justice frameworks.

<sup>133</sup> For a discussion on citizen perceptions of justice including social justice needs, see chapter two § 2.3(b).

<sup>134</sup> Rivera, Sullivan, and Zeoli 'Secondary victimisation of abused mothers by family court mediators' (2012) 7 *Feminist Criminology* 3 at 247. See chapter three § 3.3 and § 3.6 for a discussion on challenges of enforcing consent judgments and other TADR remedies. For TADR critique, see Nolan-Haley (n122) at 76-77.

<sup>135</sup> See chapter six § 6.4., for a discussion on TADR practitioner training, SOPs and codes of conduct.

<sup>136</sup> Chireshe 'Barriers to the utilisation of provisions of the Zimbabwean Domestic Violence Act among abused Christian women in Zimbabwe' (2015) 16 *Journal of International Women's Studies* 2 at 262.

state institutions to resolve disputes, leaving the police and general law courts to handle only the criminal elements. P3 and P4's examples demonstrate how TADR-facilitated out-of-court settlements resolved issues between parties. This illustrates the potential for incorporating families into the formal justice system, giving their decisions legal weight and enabling them to serve as witnesses when necessary. This approach aligns with the prevailing literature indicating that 80 per cent of disputes are resolved outside formal courts.<sup>137</sup> Consent judgments and settlement agreements exemplify such cases.

### 5.8. Limitations and challenges of using TADR to enhance access to justice

It is important to balance perspectives and avoid analytical bias that portrays TADR as the only panacea to overcoming obstacles to access justice in Zimbabwe. Although participants provided examples of TADR's effectiveness in resolving disputes, it may not be appropriate for all types of criminal conduct. There are concerns about secondary victimisation when these cases are resolved through ADR.<sup>138</sup> The Arbitration Act, 1996 already excludes criminal cases from arbitrable matters.<sup>139</sup> TADR offers advantages but also presents drawbacks, which were discussed in greater detail in chapter three.<sup>140</sup> The quality and access to justice are compromised when individuals cannot exercise self-determination and party autonomy, fundamental aspects of ADR.<sup>141</sup>

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<sup>137</sup> United Kingdom Department for International Development 'Non-state justice and security systems' (2004) on how non-state justice system typically deals with 80 per cent of all disputes in most countries; Galanter 'Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society' (1983) 31 *University of California in Los Angeles Law Review* 4 at 28; Pickering 'The art of settlement negotiations' (1988) 62 *Law Institute Journal* 1 at 31; Fulton *Commercial Alternative Dispute Resolution* (1989) 13-15; Faris 'Reconciling alternative dispute resolution and judicial dispute resolution' (1992) 7 *Codicillus* 33 at 14.

<sup>138</sup> Rivera, Sullivan, and Zeoli (n134) at 247. See chapter three § 3.4(a).

<sup>139</sup> *Supra* (n43) s 3(1) and s 4(2).

<sup>140</sup> See chapter three § 3.6.

<sup>141</sup> Noone and Akin Ojelabi (n5) at 112.

Additionally, vulnerable groups may be denied access to justice when cases are handled outside state regulation. The advantage of TADR's integration into social life can prejudice parties not inclined to comply with orders from the family dispute resolution platform.<sup>142</sup> Consequently, living within family and clan structures poses a threat when opposing TADR decisions, as being part of everyday life means that the family and traditional system, like colonialism, can be all-encompassing.

Furthermore, when family members resolve disputes, peace may be prioritised over justice, potentially leading to outcomes that fall short of what the parties, particularly the victims, would receive from state institutions.<sup>143</sup> Research has shown that 'capacity can affect participation, informed decision-making, understanding of the process and the consequences of possible solutions to the dispute.'<sup>144</sup> Consequently, even if a dispute is resolved through ADR, the procedures and outcomes may not be procedurally and substantively just in law.<sup>145</sup> While access to justice is crucial, it cannot or should not be sought at all costs.

#### a. Debates about ADR providing privatised justice

Access to justice is as important as the quality of justice the system provides. Integrating TADR within state law demands adequate safeguards<sup>146</sup> to protect fundamental rights enshrined in the Constitution<sup>147</sup>, such as the right to a fair and public trial within a reasonable time.<sup>148</sup> While

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<sup>142</sup> See chapter two § 1.6(b)(i) societal structures and semi-autonomous social fields that generate rules, coerce, or induce compliance from community members.

<sup>143</sup> Economides (n37) at 66.

<sup>144</sup> Noone and Akin Ojelabi 'Ensuring access to justice in mediation within the civil justice system' (2014) 40 *Monash University Law Review* 2 at 528–563 quoted in Noone and Akin Ojelabi (n5) at 112.

<sup>145</sup> Brinks (n77) at 357 outlines how customary systems often arrive at decisions that may be contrary to state law.

<sup>146</sup> Measures put in place to protect citizens from different kinds of harm.

<sup>147</sup> Constitution, s 69(1).

<sup>148</sup> In *S v Mashayamombe* (HH-596-15), the court stated that the fairness of a trial may be evaluated based on specific instances of fairness given in s 70(1) to (5) as well as other notions of fairness that are reflective of the normative value on which Zimbabwe's constitutional order is founded.

the right to a fair trial is absolute<sup>149</sup>, the right to a public trial is not.<sup>150</sup> Legislation can restrict the right to a public trial<sup>151</sup>, as evident in criminal trials involving child complainants or civil claims concerning child custody heard *in camera* ('in private') to protect the child's anonymity.<sup>152</sup>

Parties engaged in ADR retain their constitutional due process rights, including the right to an impartial adjudicator, the right to present their case, and the right to legal counsel.<sup>153</sup> Often perceived as private, ADR can also be public, as evidenced by court-connected ADR programmes in the United States.<sup>154</sup> Similarly, although seemingly private, arbitral awards in Zimbabwe are registered, endorsed, and enforced through formal courts and can be challenged in superior courts.<sup>155</sup> Given that ADR may be considered public, it can be subjected to constitutional constraints, particularly due process.<sup>156</sup> Viewing ADR as public rather than private justice strengthens the argument for integration within state law. Embracing TADR in the formal system removes the ambiguity in the private versus public debate and positions TADR as part of 'state action.'<sup>157</sup>

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<sup>149</sup> Constitution, s 86(3)(e).

<sup>150</sup> Constitution, s 86(3).

<sup>151</sup> Constitution, s 86(2).

<sup>152</sup> During fieldwork, I observed a case at the magistrates' court, where both a child and their mother entered the courtroom as witnesses to an alleged violent crime. Despite the child being heard *in camera*, the public saw them before and after their testimony, undermining their anonymity and the *in camera* principle.

<sup>153</sup> Constitution, s 69. See Reuben 'Constitutional gravity: A unitary theory of alternative dispute resolution and public civil justice' (2000) 47 *University of California, Los Angeles Law Review* 949 at 953-954.

<sup>154</sup> Reuben *ibid*.

<sup>155</sup> *Supra* (n43), Article 35 provides that an arbitral award shall be recognised and binding upon application in writing to the High Court and becomes enforceable. See *StarAfrica Corporation Limited v Zimbabwe Sugar Refinery Workers Union* [2021] ZWSC 65.

<sup>156</sup> Reuben (n153) at 954.

<sup>157</sup> Reuben 'Public justice: Toward a state action theory of alternative dispute resolution' (1997) 85 *California Law Review* 3 at 609-641.

b. The strength of ADR is in its flexibility: Why formalisation is not the answer

Some participants cautioned against state regulation of TADR, fearing it would introduce bureaucracy, increase costs, and stifle flexibility. P9 expressed concern that the ‘government’s grabby hands’ would lead to ‘levies and councils and a whole array of bureaucrats.’ While some participants acknowledged the need for minimal regulations, they worried that legislative intervention would constrain neutral third parties and hinder the process.

Faris<sup>158</sup> cautioned against state intervention, arguing that it could entrench public mediatory intervention at the expense of private methods’ flexibility. Participants’ views align with existing literature that emphasises ADR’s flexibility as a strength. The risk of increased bureaucracy and costs associated with formalising TADR may hinder rather than facilitate access to justice for the poor and small businesses. Bureaucracy often leads to red tape, duplication of effort, and resource wastage, making it the nemesis of flexibility.<sup>159</sup> However, this is not a concern for TADR because dispute resolution is a public matter.

In Zimbabwe, as in other countries, most disputes are resolved outside the formal legal system.<sup>160</sup> The goal should be to bring informal processes under state law rather than allowing them to operate in the shadows. State action theory provides a framework for mainstreaming TADR in Zimbabwe. When individuals perform functions typically reserved for the state, their actions can be considered state actions.<sup>161</sup> Therefore, a negotiation facilitated by a family

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<sup>158</sup> Faris ‘Deciphering the language of mediatory intervention in South Africa’ (2006) 39 *The Comparative and International Law Journal of Southern Africa* 3 at 428.

<sup>159</sup> See chapter three § 3.6., where Fiss ‘Against settlement’ (1984) 93 *The Yale Law Journal* 6 at 1073, 1075 criticises ADR’s wholesale and indiscriminate institutionalisation.

<sup>160</sup> See chapters one § 1.6(b) and three § 3.2(a)(i).

<sup>161</sup> Reuben (n157).

member acting as a TADR practitioner under a state mandate can produce enforceable outcomes. Integrating such processes into state law is the only way to achieve this.

### 5.9. Three models that may extend access to justice

This section presents three dispute resolution approaches suggested by participants. The first, an indigenised version of the multi-door courthouse approach, involves the ‘clerk’ or intake officer directing cases to appropriate fora depending on the dispute’s nature. It stems from an acceptance that general law courts are only one among many dispute resolution systems. The second model is being piloted in the Family Law Division of the Zimbabwe High Court. It mandates divorcing couples to start with a roundtable discussion before approaching the court. The third model is an adaptation of the dual justice system in Botswana, where statutory law and customary law coexist, each having distinct Courts of Appeals.

#### a. Room 57: Multi-door courthouse with Zimbabwean characteristics

To ensure unfettered access to normative justice, P15 and P16 proposed establishing a new institution, Room 57, separate from the formal court system. P16 stated, ‘...that Room 57 is crucial for ADR to work. You then need to train clerks [intake officers] to filter [screen] cases when they are filed so that not every case makes it to court.’ P16 emphasised the importance of exhausting negotiation and mediation before resorting to court proceedings, aligning with Sander’s<sup>162</sup> multi-door courthouse concept discussed in chapter three.<sup>163</sup> Interestingly, participants, including P16, seemed unaware of Sander’s ‘many rooms’ approach, possibly explaining the slow adoption of such innovations in Zimbabwe.

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<sup>162</sup> Pound Conference Report cited as 70 Federal Rules Decisions (FRD) 79 at 113.

<sup>163</sup> See chapter three § 3.6.

The Room 57 approach provides a practical solution to access to justice challenges in Zimbabwe. P8 highlighted the success of the Pre-Trial Diversion Programme (PTD) for juveniles<sup>164</sup>, where over 3 000 children in seventeen districts underwent the programme between 2016 and 2019.<sup>165</sup> PTD's success led to its inclusion in The Child Justice Bill, currently at the Second Reading in the National Assembly as of March 2023. Including the PTD in legislation demonstrates the importance of using the law for transformative change. Success stories in African countries like Senegal, Nigeria, and Ghana<sup>166</sup> that institutionalised ADR within state law for civil and criminal cases<sup>167</sup>, also serve as examples for Zimbabwe to study and adapt to its local context.

*i. Three-tier system for dispute resolution*

To extend access to justice to citizens, P9 suggested implementing a three-tier system to screen, register, and direct disputes to appropriate fora. P9 stated,

‘...first tier would be to look at dispute resolution...on the understanding that whatever evidence is laid, = is laid without prejudice and a framework to try and resolve a dispute to the satisfaction of both parties. Secondly, to hold out the prospect of if that mediation doesn't work, that they could go to arbitration, either by the same mediator or by an entirely new arbitrator. The third option would be if a mediation doesn't succeed, one then uses traditional [general law court] legal channels and one can litigate.’<sup>168</sup>

Good-faith negotiations can unfold without fear of subsequent prejudice by freeing disputing parties from the constraints of legal technicalities, such as strict rules of evidence. This alleviates access to justice barriers arising from complex procedural rules. The second tier

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<sup>164</sup> Mupfumira ‘Zimbabwe launches the Pre-Trial Diversion Programme’ United Nations International Children's Emergency Fund (2019) available at <https://www.unicef.org/zimbabwe/press-releases/zimbabwe-launches-pre-trial-diversion-programme>, accessed on 16 November 2022. PTD for juveniles is a structured and alternative approach to the formal justice system. It addresses young offenders' unique needs and circumstances, balancing between accountability and rehabilitation.

<sup>165</sup> Ibid.

<sup>166</sup> For a discussion on these countries, see chapter three § 3.6.

<sup>167</sup> Dieng (n126) 615.

<sup>168</sup> In Zimbabwean legal circles, common law is called the ‘traditional’ legal system. This is because there is resistance to TADR processes even among Black African lawyers who cling to British ‘traditions’ like wigs and robes.

aligns with the Australian model under the 2011 Civil Dispute Resolution Act<sup>169</sup>, encouraging parties to genuinely attempt dispute resolution before initiating court proceedings.

P9's proposed second tier is versatile, encompassing negotiation, mediation, conciliation, arbitration, and other ADR processes. This tiered system offers stability and builds confidence for parties, assuring them they can explore alternative methods if initial attempts to resolve a dispute are unsuccessful. Supporters of the tiered approach, aligned with Reuben's<sup>170</sup> perspective on ADR, believed it should lead to cases reaching the apex court on appeal at the parties' request. This approach resonates with Cappelletti's third wave of access to justice reform, expanding the focus beyond formal institutions to include ADR.<sup>171</sup>

Findings from this study and the empirical data from Australia support Reuben's 'unitary theory' of dispute resolution, uniting trial and ADR processes into 'a single system of interrelated dispute resolution processes.'<sup>172</sup> This perspective highlights the mutually dependent relationship between the general law system and ADR. Rather than rivals, these two systems complement each other in dispute resolution. The Room 57 approach aligns in principle with the unitary theory and is a practical and necessary option for resolving disputes in 'many rooms' in Zimbabwe. The Room 57 approach further develops the unitary theory and the multi-door courthouse by incorporating Zimbabwean characteristics, such as involving family members and incorporating criminal matters into the justice system model, detailed in chapter six's analysis of TADR integration into the formal justice system.

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<sup>169</sup> Civil Dispute Resolution Act 2011 No. 17, 2011 (Australia).

<sup>170</sup> Reuben (n153) at 1048. See chapter three § 3.2(a)(ii), which canvasses this idea under the second school of thought of ADR.

<sup>171</sup> See chapter two § 2.4.

<sup>172</sup> Reuben (n153) at 1048.

b. Extending access to justice by replicating the family law pilot programme

Decentralising the justice system was perceived as a strategy for overcoming geographic barriers to access. P10 suggested replicating the Family Law Division of the High Court's pilot programme, wherein court rules mandate roundtable discussions before seeking court intervention. According to P10:

‘When you go to court, and you haven't had the round table conference, the court will actually direct you back because essentially when you go to court you are supposed to present and say we had the roundtable, and this is what we managed to agree or resolve, and this is what we didn't resolve. Or we resolved everything, so we don't need to proceed anymore...’

P10 reported positive outcomes from the pilot programme, with over five thousand clients seeking family law assistance annually. She emphasised the superiority of ADR over general law courts, stating that if they did not use ADR, many clients might not have obtained the orders they did. Despite praising the programme, P10 expressed reservations about its court-embedded structure, suggesting a need for re-evaluation to enhance its pre-litigation introduction. Nevertheless, she affirmed the programme's positive impact, contributing to resolution or reducing court cases.

Australia and Zimbabwe require parties seeking parental orders to attend family dispute resolution (FDR) before commencing court proceedings.<sup>173</sup> Australia went further to make it easier for matters filed to be resolved through mandatory FDR conferences, with the agreements reached having the same legal weight as court orders.<sup>174</sup> According to the Victorian Supreme Court Annual Report,<sup>175</sup> mediation adopts a restorative justice approach, waiving fees to enhance access to justice.<sup>176</sup> Satisfaction among justice seekers resolving disputes through

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<sup>173</sup> Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (Australia).

<sup>174</sup> Ibid at § 64–66, See also Explanatory Memorandum, Justice Legislation Amendment (Access to Justice) Bill 2018, pp. 28–29. Noone and Akin Ojelabi (n5) at 116.

<sup>175</sup> Supreme Court of Victoria, 2016/17 at 46. Annual Report. Melbourne: Supreme Court of Victoria.

<sup>176</sup> Ibid.

mediation was high.<sup>177</sup> Although satisfaction data for the Zimbabwe family law pilot are unavailable, P10's insight highlights positive ADR outcomes.

The Family Law Division pilot, instituted by the former Judge President of the High Court, lacks statutory backing, making it susceptible to change and limiting its long-term viability. P10 acknowledged this vulnerability, recognising that leadership changes could pose challenges to continuity, but highlighted the advantage of administrative decisions in producing immediate results compared to the lengthy law-making process.<sup>178</sup> Replicating the pilot poses funding challenges, especially in Zimbabwe's struggling economy. Decentralising the pilot across the country is daunting due to the limited number of High Courts and the lack of courts in peri-urban and rural areas, perpetuating geographical inaccessibility to justice and exacerbating inequality in access to justice.<sup>179</sup>

#### c. The dual legal system in Botswana and its relevance for access to justice in Zimbabwe

Botswana's legal system comprises customary and received common law. The Court of Appeals is the apex court, and High Courts and magistrates' courts complete the three-tier hierarchy.<sup>180</sup> The customary court structure includes four tiers, led by the Customary Court of Appeals, followed by senior and junior courts staffed by hereditary chiefs or urban presidents.<sup>181</sup> These courts handle criminal and civil matters, reporting to the Ministry of Local

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<sup>177</sup> See generally Sourdin 'Mediation in the Supreme and County Courts of Victoria: A research report' 2009 *Department of Justice* at viii, 122-129.

<sup>178</sup> See chapter six § 6.4. on the seventeen steps required to pass legislation.

<sup>179</sup> ZimStat (n52). Even in areas with circuit courts, these sit only a few times per year.

<sup>180</sup> Schärf (n97) at 63.

<sup>181</sup> Ibid. In Botswana, the Customary Court of Appeals has jurisdiction to enforce the Penal Code and has a direct relationship with the High Court.

Government and Lands, with enforcement through authorised Local Police.<sup>182</sup> Chiefs, sub-chiefs, and headmen are civil servants paid by the central government.

P13 recommended adopting Botswana's dual system in Zimbabwe, providing substantive jurisdiction to traditional leaders. The Botswana system entails the formalised coexistence of customary and general law institutions. In Botswana, the customary system uses TADR, prioritising restitution and restorative justice. This fosters legitimacy and respect for the justice system. In Zimbabwe, a similar dual system can increase access to justice, especially for those living in peri-urban and rural areas. If adopted, P13 stressed the need for legal awareness campaigns to promote institutional respect and judgment adherence.

Empirical evidence from Botswana reveals a preference for TADR over general law courts, even among educated individuals valuing heritage connections.<sup>183</sup> Similar findings in Zimbabwe indicate a preference for traditional processes, showcasing TADR's appropriateness and people's satisfaction with its outcomes.<sup>184</sup> Despite access to general law institutions, individuals in both countries willingly choose customary processes for civil and criminal matters, underscoring TADR's deep-rooted cultural significance. Neglecting this system risks citizens disregarding any justice system that side-lines it.

#### d. Reflections on the three justice system approaches for extending access to justice

The three proposed justice system models emphasise a people-centred approach prioritising citizens' legal and social justice needs. This represents a significant departure from the legal positivist approach, where state institutions prioritise their objectives over those of justice

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<sup>182</sup> Molokomme 'Customary law in Botswana: Past, present and future' in Brothers, Hermans, and Nteta (eds) *Botswana in the 21st Century: Proceedings of a Symposium* (1994) 358. The Local Police Act of 1972 (Botswana).

<sup>183</sup> Schärf (n97) at 65.

<sup>184</sup> See generally *In the Shadow of the Law*.

seekers.<sup>185</sup> Judges and lawyers who want to serve citizens' needs are often constrained by institutional benchmarks that do not reflect citizens' justice expectations. This often leads to a focus on output over quality, as evidenced by the evaluation of judges based on the number of cases disposed of rather than the underlying issues resolved.<sup>186</sup> Similarly, police officers are evaluated based on the number of arrests made rather than the safety and well-being of victims.

In contrast, the proposed models focus on resolving underlying issues rather than merely adhering to formalities or legal technicalities. This emphasis on substance over form has the potential to produce meaningful improvements in people's lives and bridge the gap between the supply and demand of justice in Zimbabwe. By placing citizens at the centre of the justice process, it becomes easier to understand their legal needs and tailor solutions that align with their goals and aspirations. This approach aligns with the United Nations' Sustainable Development Goal 16<sup>187</sup>, which advocates for more accessible and people-centred justice systems.<sup>188</sup>

As Australia's NADRAC noted, dispute resolution processes should result in fair and acceptable outcomes that align with citizen or community interests.<sup>189</sup> These outcomes must be consistent with public and party interests<sup>190</sup>, recognising that the goals and expectations of citizens may not always align with those of the legal system or the law but should be prioritised.

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<sup>185</sup> The Hague Institute for Innovation of Law (HiiL) outlines the justice operational objectives of institutions as efficiency, cost-effectiveness, or outcomes related to public safety goals such as reduced reoffending. HiiL website available at <https://www.hiil.org/>, accessed on 16 November 2022.

<sup>186</sup> Murwira (n44).

<sup>187</sup> United Nations Sustainable Development Goals 'UNDP support to reporting on the global SDG 16 indicators under targets 16.3, 16.6 and 16.7' available at <https://www.undp.org/policy-centre/oslo/undp-support-reporting-global-sdg-16-indicators-under-targets-163-166-and-167>, accessed on 16 November 2022.

<sup>188</sup> According to the HiiL (n185) 6-12, a core principle of the people-centred justice movement is that justice services resolve the problems that people experience fairly and deliver the outcomes they seek.

<sup>189</sup> NADRAC 'The resolve to resolve – Embracing ADR to improve access to justice in the federal jurisdiction: A Report to the Attorney-General. Canberra: Australian Government' *NADRAC* (2009) 80.

<sup>190</sup> *Ibid.*

### 5.10. Conclusion

The findings presented in this chapter suggest a multifaceted approach is required to extend access to justice in Zimbabwe. The participants proposed five initiatives: reforms to substantive law, simplification of procedural rules, capacitation of justice institutions and officials, increasing the number of courts, and devolving the LAD. These are seen as critical steps towards achieving this goal. However, a central theme emerged from the data: the need to simultaneously decentralise the formal justice system and mainstream the currently informal TADR system.

ADR, particularly its informal and normative TADR form, was identified as a solution to the barriers citizens face when accessing the formal justice system. However, it is crucial to carefully consider the criticisms of ADR and TADR and ensure that any dispute resolution system implemented upholds constitutional safeguards and meets international human rights standards, particularly regarding potential gender bias within customary practices identified in the research.

The three proposed justice system approaches – Room 57, the expanded family law pilot, and the Botswana dual system – offer further options for enhancing access to justice. Carefully considering the strengths and weaknesses of each approach is crucial to determining the best fit (or combination) for the Zimbabwean context. Exploring additional ways to extend access to justice beyond the five initiatives and three proposed justice system approaches is necessary. By carefully considering the merits and drawbacks of various initiatives, justice system approaches, and dispute resolution mechanisms, it is possible to establish a more accessible and people-centred system.

The findings from this chapter build on the concept of *Zimbabwean contextualised access to justice* that emerged in the previous chapter. The concept influenced the development of a novel framework in this chapter: *the culturally inclusive access to justice framework for context-specific reform*. This framework, which emerged from the data through inductive analysis, specifically grounded theory, builds upon established access to justice theories while incorporating the unique challenges identified in the Zimbabwean context. It emphasises a multi-pronged approach that addresses systemic and individual barriers to access to justice.

The framework prioritises cultural inclusivity to achieve meaningful access to justice. It advocates for integrating culturally appropriate dispute resolution mechanisms (TADR) within the formal justice system. This aligns with legal pluralism, acknowledging the co-existence of diverse legal systems and the importance of recognising local norms and values. Additionally, the approach further includes process pluralism, viewing TADR as a procedural option in the justice system without imposing the substantive content of the law applied in different circumstances.

Moreover, the framework highlights the need for context-specific reforms that address the systemic flaws identified in the research. The specific challenges identified in Zimbabwe, including the marginalisation of customary law and living customary law, the negative social impact of general law courts, and political interference, necessitate tailored solutions. For instance, simply expanding court infrastructure and personnel might paradoxically only serve urban populations and fail to address core issues like case backlogs and procedural complexities. The framework that emerged from analysing the findings emphasises a more holistic approach integrating TADR within state law.

As discussed in chapter six, implementing tailored solutions for the Zimbabwean context involves developing clear mechanisms for integrating TADR processes within the formal

justice system. Such a theoretical framework goes beyond merely complementing the existing system; it emphasises developing a nuanced approach incorporating TADR within the Zimbabwean access to justice context. The research also highlights the importance of education and training, particularly in TADR, for current and would-be practitioners. Specialisation in legal practice and dispute resolution emerges as a potential solution within the framework. By promoting a culture of TADR within the legal profession and addressing issues like gender bias in customary practices, the framework aims to create a more equitable and responsive formal justice system.

The culturally inclusive access to justice framework offers a novel approach to overcoming access to justice barriers in Zimbabwe by promoting cultural inclusivity and context-specific reforms. This framework contributes to access to justice scholarship, policy, and practice in jurisdictions facing similar challenges. This approach moves beyond a one-size-fits-all model and recognises the need for solutions that resonate with the local socio-cultural context. The culturally inclusive access to justice framework emphasises the need for solutions that deliver normative outcomes that citizens consider fair while preserving social harmony within communities. The findings suggest the framework's potential applicability beyond the Zimbabwean context. It emphasises aligning the justice system with people's way of life, values, norms, and definitions of security, potentially informing reforms in other jurisdictions.

Chapter six will discuss the practical steps to operationalise these proposals, considering constitutional safeguards and international human rights standards. It will consider the role of legal practitioners and other stakeholders in a 'new' normative formal justice system integrated with ADR and TADR. The chapter also outlines the need to continuously evaluate the effectiveness of the formal justice system in providing citizens and small businesses with adequate access to justice.

## CHAPTER SIX

### PAVING THE WAY FORWARD: EMBEDDING ADR AND TADR IN THE FORMAL JUSTICE SYSTEM

#### 6.1. Introduction

This chapter addresses the third subsidiary research question on integrating ADR in its TADR form into the formal justice system. It discusses ways to ensure that the theoretical contributions of this thesis find practical expression in the formal justice system. In summary, earlier discussions and analyses showed the following,

1. Most people in Zimbabwe do not have effective access to justice. This means citizens face challenges before and after entering the formal justice system. These obstacles are aggravated by Zimbabwe's prevailing socioeconomic and political environment.
2. Barriers to access to justice have been challenging to overcome because reform efforts have attempted to tackle them in isolation, even though they are intrinsically connected. These reforms have also overlooked that the current justice system is inherently unfair because it was designed and continues to function contrary to people's way of life.
3. The most practical way to achieve effective access to justice in Zimbabwe is embracing TADR. This entails integrating within the ambit of state law and customary courts currently with symbolic status under the law. The informal TADR processes, which citizens consider socially and culturally appropriate, must also be mainstreamed.

To overcome limitations in establishing consensus among interviewees on the best justice system model for Zimbabwe, I used the Room 57 approach (an indigenised version of the

multi-door courthouse approach) to illustrate the integration process.<sup>1</sup> Consensus-building techniques such as the Delphi Method could have provided a solution, but this was not feasible given my self-funded PhD project's time and cost constraints. The Room 57 model was selected due to its ability to encompass formal and informal dispute resolution processes and the potential to provide justice outcomes that align with citizens' normative values. Though other alternative justice system models exist, I focused my analysis on participants' suggestions and proposals.

The Room 57 approach, as proposed by research participants, prioritises the role of general law courts. This focus could perpetuate the marginalisation of rural communities geographically distant from court infrastructure. The court-centric nature of the approach could be attributed to the fact that the interviewees in this study were drawn from the supply side. While they expressed a desire to enhance access to justice, their training and practice might limit their ability to envision a people-centred justice system.

Consequently, Room 57 needs to be reimagined as a community-based centre in rural areas, in addition to the urban and peri-urban areas discussed in chapter five. These centres could be staffed by trained community members who understand the local context and customs. They would screen cases and guide parties towards the most suitable dispute resolution mechanism, whether it is negotiation (*kutaurirana*), mediation (*kuyananiwa*), reconciliation (*kuregererana*) or adjudication (*kutongwa/kutongeswa*).<sup>1b</sup>

Room 57 would also operate in rural areas using a revolving tier system rather than a linear one. A revolving system mirrors the current TADR system, where a dispute could start within

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<sup>1</sup> See chapter five § 5.9 for a discussion of 'Room 57.'

<sup>1b</sup> The system already exists in practice, albeit informally. See discussion in chapter one §1.3.

the family or at the chief's court. The introduction of Room 57 community centres means citizens would have the option to have a third party screen cases and refer matters to the most appropriate processes, depending on the issues in dispute and the types of parties. Significantly, general law courts would only be used as a last resort.

This revised approach ensures that access to justice is not a privilege limited to those in urban areas or those who can navigate the formal court system. It recognises the value of traditional dispute resolution mechanisms and seeks to integrate them into a broader framework. This integration process creates a more inclusive and nuanced theory of access to justice in Zimbabwe.

Although the justice system models proposed by participants were heuristic and incomplete, they aided in exploration and discovery and provided insights to inform decision-making. Any of the three models suggested by participants in chapter five could have been selected, and the steps to integrate non-state dispute resolution in the formal justice system would have been the same. This would, for instance, entail substantive law reform like amending the Constitution and enacting a statute to serve as the enabling legislation for implementation. Overall, the problem of access to justice in Zimbabwe is complex and multifaceted. While arriving at a definitive solution in a PhD thesis is impossible, the goal was to develop a deeper understanding of the problem and generate insights to inform justice system reform.

This chapter is organised as follows: the following section provides an analytical background to the two process theories, institutional and structuration theories. The third section discusses lessons Zimbabwe may learn from South Africa and Australia regarding the institutionalisation of ADR. The fourth section outlines the steps to integrate ADR into the formal justice system. Some of these steps include ensuring specific language in the enabling statute to avoid ambiguity, establishing a regulatory authority, outlining the required service providers, and the

role of lawyers in the new formal justice system. The fifth section discusses the pilot programme research participants believed was necessary before the widespread adoption of institutionalised ADR and TADR. Perspectives on the methods to evaluate the new system subsequently follow. The final section discusses barriers that may be encountered when institutionalising TADR.

## 6.2. Overview of institutionalisation and structuration theories

This chapter aims to answer the subsidiary research question relating to integrating various proposals for enhancing access to justice. To achieve this, I rely on two process theories<sup>2</sup>, institutional and structuration theories. These theories help us understand the process of embedding TADR within the formal justice system.

### a. Institutional theory

Institutionalisation refers to embedding a belief, social role or mode of behaviour within an organisation, social system, or society.<sup>3</sup> The theory helps identify key variables that influence the research topic and extends knowledge on access to justice. Institutional theory explains, understands, and often predicts the integration process. Institutionalisation involves the trial, regularisation, and formalisation of conflict management alternatives (CMAs), also known as ADR.<sup>4</sup> Trial means experimenting with new techniques for managing conflict in relationships, organisations, and communities.<sup>5</sup> Regularisation refers to how these techniques become accepted into regular use.<sup>6</sup> Formalisation includes codifying and describing new alternative

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<sup>2</sup> A process theory is a system of ideas that explains how an entity changes and develops.

<sup>3</sup> Manring 'Institutionalising conflict management alternatives' (1987) 348 *University of Michigan: Center for Research on Social Organization* at 2; Edelman 'Institutionalising dispute resolution alternatives' (1984) 9 *Justice System Journal* 2 at 135.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

mechanisms through policy statements, statutes, or explicit agreements between parties.<sup>7</sup> These three elements informed the analysis and fed into themes developed from coded interview data. In this study, the elements are adapted based on the collected data and do not follow the same sequential process as in other studies. To illustrate, formalisation through passing legislation is the first step in this study, followed by the ‘trial’ process in the form of a pilot programme. Regularisation does not have a definitive start or end point in this study, and it is accounted for by the frequency with which citizens use the proposed Room 57 approach. In fact, ‘regularisation’ in this thesis is an evaluation tool used to measure the success or failure of the Room 57 approach.

The institutionalisation process can vary in formality and scope depending on one’s goals and perspectives.<sup>8</sup> It involves the trial, regularisation, and formalisation of new dispute resolution processes at individual, intergroup, and organisational levels.<sup>9</sup> Cultural influences and formal structures play a significant role in institutionalisation because institutions restrict individuals’ options but are open to change over time.<sup>10</sup> Institutionalisation is an ongoing and dynamic process that involves various dimensions such as permanent financing, comprehensiveness of roles, breadth of substantive areas, compulsory participation, and geographic scale. The institutionalisation process requires a formalised framework implementing and exploring new dispute resolution processes.

Institutions with a brief history, which have not gained widespread popularity, are less likely to influence action.<sup>11</sup> In Zimbabwe, the formal legal system has been in place for over a century

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<sup>7</sup> Ibid.

<sup>8</sup> Edelman (n3).

<sup>9</sup> Manring (n3).

<sup>10</sup> Barley and Tolbert ‘Institutionalisation and structuration: Studying links between action and institution’ (1997) 18 *Perspectives: Agency and Institutions* 1 at 4. For a discussion on the influence social structures have on individual agency, see chapter two § 2.3(b)(i) and chapter five § 5.7(a).

<sup>11</sup> Ibid at 6.

and significantly influences how the public and justice actors behave. Therefore, any innovation must consider the compatibility<sup>12</sup> of TADR with general law to avoid rejection by stakeholders. This thesis clearly shows how the imposed colonial justice system often clashes with TADR, which most people rely on for justice. Consequently, any effort to decolonise the justice system must seriously consider the issue of compatibility between the two systems.

#### b. Structuration theory

Barley and Tolbert developed a model of institutionalisation as a structuration process.<sup>13</sup> They refer to the process as a sequential model of institutionalisation, synthesising and elaborating notions drawn from Giddens, Berger, and Luckman.<sup>14</sup> Meyer and Rowan<sup>15</sup> drew from Berger and Luckman's work to argue that institutions are socially constructed templates for action, generated and maintained through continuous negotiations. This empirical thesis has theoretical and practical implications for the Zimbabwean justice system. This approach was shaped by structuration theory and complements institutional theory's focus on embedding cultural practices into formal institutions.

Structuration theory explicitly focuses on the dynamics that reproduce and change institutions, which institutional theorists neglect.<sup>16</sup> However, structuration theory provides little guidance on researching how everyday action reproduces an institution.<sup>17</sup> This is mainly because of its abstract formulation, which explains why empirical studies on structuration theory are rare. In

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<sup>12</sup> Discussed below and defined by Rogers *Diffusion of innovations* 3 ed (hereinafter *Diffusion*) (1983) 130 as the degree to which an innovation is consistent with existing practices.

<sup>13</sup> Barley and Tolbert (n10).

<sup>14</sup> Giddens *New Rules of Sociological Method: A Positive Critique of Interpretative Sociologies* (1976); Giddens *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (1979); Berger and Luckman *The Social Construction of Reality: A Treatise in The Sociology of Knowledge* (1967) as quoted in Barley and Tolbert (n10).

<sup>15</sup> Meyer and Rowan 'Institutionalised organisations: Formal structure as myth and ceremony' (1977) 83 *The American Journal of Sociology* 2 as quoted in Barley and Tolbert (n10).

<sup>16</sup> *Ibid* at 112.

<sup>17</sup> *Ibid*.

contrast, institutional theory pursues an empirical agenda that neglects the process of creating, altering, and reproducing institutions. Combining these two theories is essential for an interdisciplinary study that seeks theoretical and practical relevance.

To implement the institutionalisation of TADR in the formal justice system, Tyler's<sup>18</sup> view of setting legal objectives at the justice system level rather than at the individual dispute resolution process level is instructive. When objectives are set at a higher level than individual dispute resolution mechanisms, each mechanism can be designed to support the overarching goal of the justice system.<sup>19</sup> According to Genn<sup>20</sup>, the justice system has four primary goals: enforcing rights and other legal protections, promoting social order and peaceful dispute resolution, communicating and reinforcing societal values and norms, and supporting economic activity. In countries that embrace process pluralism, each dispute resolution mechanism contributes to the attainment of the overall goal of the justice system according to its unique characteristics.

The institutionalisation of ADR depends on the nature of the innovations introduced.<sup>21</sup> The critical characteristics of such innovations include relative advantage, compatibility, complexity, divisibility, and communicability. *Relative advantage* refers to the extent to which an innovation is superior to preceding ideas.<sup>22</sup> *Compatibility* refers to the degree to which an innovation is consistent with existing practices.<sup>23</sup> *Complexity* denotes the level to which an innovation is relatively difficult to understand, and *divisibility* refers to the degree to which an

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<sup>18</sup> Tyler 'The quality of dispute resolution processes and outcomes: Measurement problems and possibilities' (1989) 66 *Denver University Law Review* 3 at 420.

<sup>19</sup> *Ibid.*

<sup>20</sup> Genn 'What is civil justice for? Reform, ADR, and access to justice' (2012) 24 *Yale Journal of Law and the Humanities* at 417. See the discussion on the primary purpose of the legal system in chapter two § 2.4.

<sup>21</sup> *Diffusion* (1983) 124-125.

<sup>22</sup> *Ibid* 126.

<sup>23</sup> *Ibid* 130.

innovation may be tried on a trial basis.<sup>24</sup> Finally, *communicability* refers to the degree an innovation's results can be diffused to others.<sup>25</sup>

The integration of various proposals discussed in chapter five for enhancing access to justice in Zimbabwe relies on institutional and structuration theories. As mentioned above and throughout the rest of this chapter, these theories provide complementary insights into embedding TADR and the dynamics of institutions that are reproduced and changed. For example, institutional theory helps explain how historical developments and decisions have shaped Zimbabwe's legal system. Policymakers need this understanding to integrate ADR and traditional practices while respecting legal traditions. Structuration theory shows that social systems can adapt. Policymakers can use this insight to develop flexible integration policies that evolve with societal norms and needs. By setting legal objectives such as effective access to justice for citizens, including the poor and small businesses at the justice system level, we can design each dispute resolution mechanism to support the overarching goal of the formal justice system.

### 6.3. Enabling Legislation: lessons from South Africa and Australia

Legislation is crucial in ensuring reform of the justice system. Participants believed an enabling statute was necessary to guide the integration of TADR within the formal justice system.<sup>26</sup> The dissenting judgment by Ebrahim JA<sup>27</sup> highlights how legislation is the primary means of legal reform. The judge elucidated the legislature's role, which is to pass laws the judiciary applies and upholds. Although the Judge referred to remedies for unjust laws, his words are relevant

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<sup>24</sup> Ibid 131.

<sup>25</sup> Ibid 132.

<sup>26</sup> See chapter five § 5.7.

<sup>27</sup> See chapter two § 2.3., *Minister of Lands v Commercial Farmers Union* 2001 (2) ZLR 457 (S), 490F-491B.

for this discussion because they reinforce the importance of a firm legislative foundation that can dictate how well dispute resolution functions in Zimbabwe.

An overarching statute is required instead of multiple laws lacking proper focus on dispute resolution within the justice system, incorporating diverse disputes across all legal fields. The enabling statute would also include rural and urban populations. The risk of numerous statutes is spreading the implementation machinery too thinly. For instance, South Africa has approximately fifty statutes with ADR provisions<sup>28</sup>, but (to my knowledge) only one has been institutionalised successfully, the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA innovation achieved the institutionalisation dimensions needed for widespread adoption. These dimensions include nationwide geographic presence and permanent financing of its operations.<sup>29</sup>

The South African Law Reform Commission is developing broader ADR legislation<sup>30</sup>, which, if implemented, could be a template for Zimbabwe. In the meantime, South Africa introduced Rule 41A into the Uniform Rules of Court (Rules) in February 2020, which mandates disputing parties to consider mediation.<sup>31</sup> Rule 41A(2)(a) prescribes that every new action or application filed should contain a notice indicating whether the plaintiff or applicant agrees or opposes the referral of the dispute to mediation.<sup>32</sup> This means that it is now mandatory in South Africa for parties to consider mediation formally. For instance, in *Koetsioe v Minister of Defence and Military Veterans*, the court explained that Rule 41A necessitates a notice and suggests that the

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<sup>28</sup> Labour Relations Act 66 of 1995; The Basic Conditions of Employment Amendment Act 7 of 2018; Protection of Investment Act 22 of 2015; Companies Act 71 of 2008; Rules Board for Courts of Law Act 107 of 1985, among other South African legislation.

<sup>29</sup> Edelman (n3).

<sup>30</sup> SALRC Issue Paper 31 (Project 100D) (2015).

<sup>31</sup> Uniform Rules of Court (Rules) (South Africa).

<sup>32</sup> *Ibid*, Rule 41A(2)(a).

party must have thoughtfully considered the matter before proceeding.<sup>33</sup> This is evident from the requirement that the party provide reasons for their belief that a dispute can or cannot be mediated.<sup>34</sup>

The challenge of the South African model is that the rules define mediation as a voluntary process, which is contradictory. The Room 57 approach overcomes this challenge by approaching ADR from a system-level perspective, encompassing all relevant mainstream ADR and TADR mechanisms. By so doing, the principle promoted is the plurality of dispute resolution mechanisms. Process pluralism allows citizens to be channelled into the most appropriate process that matches the type of dispute, parties and issues involved.<sup>35</sup>

In contrast to South Africa, broad enabling legislation in Australia provided the necessary framework and impetus to drive the process in numerous law fields. The enabling legislation enacted in Australia<sup>36</sup> functioned as an intervention to safeguard against, among other things, power imbalances inherent between parties for several reasons, including lack of information or finance.<sup>37</sup> The Australian Parliament intended to achieve speedy resolution of disputes, using the most appropriate mechanism for diverse disputes. The Civil Dispute Resolution Act of 2011<sup>38</sup> included a provision that strongly encouraged lawyers to advise their clients to file a

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<sup>33</sup> *Koetsioe v Minister of Defence and Military Veterans* 2021 ZAGPPHC 203 (unreported).

<sup>34</sup> *Ibid.*

<sup>35</sup> See chapter three § 3.6.

<sup>36</sup> For example, The Disability Act 2006 (Vic); The Retail Leases Act 2003 (Vic), s 87; Retail Leases Act 1994 (NSW), s 68; Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA); The Farm Debt Mediation Act 1994 (NSW), s 8; Farm Debt Mediation Act 2011 (Vic), s 12; Fair Trading (Farming Industry Dispute Resolution Code) Regulations 2013 (SA), Sch. 1; Farm Business Debt Mediation Act 2017 (Qld).

<sup>37</sup> Akin Ojelabi and Noone 'ADR processes: Connections between purpose, values, ethics, and justice' (2017) 35 *Law in Context* 1 at 15.

<sup>38</sup> Civil Dispute Resolution Act 2011 No. 17, s 9 (Australia).

genuine steps statement.<sup>39</sup> Failure to advise and assist clients to comply with the requirement led to some lawyers facing severe personal and professional consequences.<sup>40</sup>

Throughout this thesis, I have referred to several NADRAC publications. Although NADRAC was a non-statutory body, it provided expert advice to the AG on the development of ADR in Australia. Many of the Australian statutes I referred to in this thesis were informed by NADRAC; the most notable for this thesis is the Legal Services Directions of 2005.<sup>41</sup> These are a set of binding rules issued by the AG, requiring agencies to act as ‘model litigants’ by ‘considering other methods of dispute resolution before commencing legal proceedings...[and] not commencing legal proceedings unless satisfied it is the most appropriate method of dispute resolution.’<sup>42</sup>

To this end, the development of ADR in Australia was broad enough to influence civil and criminal law.<sup>43</sup> Its impact spread to different fields, beyond family, commercial or labour law and did not target only specific types of disputes. The net effect of broad enabling legislation observed from analysing the Australian case is that courts are amenable to changing rules to ensure ADR is genuinely utilised. Judicial officials are empowered to redirect matters to appropriate dispute resolution fora, where necessary, without fear of backlash.<sup>44</sup> Broad enabling legislation may, therefore, be the fundamental driver for a cultural shift towards widespread adoption of TADR in Zimbabwe.

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<sup>39</sup> The steps taken to resolve issues between the applicant and the respondent.

<sup>40</sup> *Superior IP International Pty Limited v Ahearn Fox Patent and Trademarks Attorneys* [2012] FCA 282 (23 March 2012). In the *Koetsioe case* (supra n33), the court was frustrated by the parties’ failure to mediate, which increased costs, going against Rule 41A of the South African Rules of Court that requires mediation.

<sup>41</sup> Replaced by the Legal Services Directions 2017.

<sup>42</sup> The Model Litigant Obligation at s 4(2).

<sup>43</sup> Care Circles, Koori Courts, Circle Sentencing and others in Australia.

<sup>44</sup> Justice Legislation Amendment (Access to Justice) Act 2018 (Vic), See also Explanatory Memorandum, Justice Legislation Amendment (Access to Justice) Bill 2018. Noone and Akin Ojelabi ‘Alternative dispute resolution and access to justice in Australia’ (2020) 16 *International Journal of Law in Context* 2 at 116.

Without express provisions in legislation, ADR may occur too late in the life of a dispute. For instance, although Zimbabwe has pre-trial conference, which is effectively mediation led by a judge, empirical evidence discussed in chapter four suggests it occurs late in the litigation process.<sup>45</sup> This finding aligns with empirical studies conducted elsewhere.<sup>46</sup> Thus, by introducing ADR processes late in the life of a case, parties and the justice system miss out on several benefits of ADR. These benefits include the filing of fewer motions, early settlement of cases, and shorter case disposition time<sup>47</sup>, all of which are vital in Zimbabwe, where citizens and small businesses cannot afford legal services, court fees, and have close ongoing relationships they desire to preserve.

#### 6.4. Integrating ADR within state law: Steps towards implementation

Fieldwork revealed the integration of ADR and TADR into state law as a critical issue. While chapter five addressed participant-suggested strategies to enhance access to justice, diverse opinions arose on the specific process for embedding these proposals within state law. As the researcher, I needed to synthesise these perspectives into a cohesive process of institutionalisation, i.e., operationalise the approach proposed to enhance access to justice. But first, it is important to understand the legislative process in Zimbabwe.

According to P4, previously a legislative drafter in the Ministry of Justice, the legislative process begins with relevant stakeholders conducting a regulatory impact assessment (RIA).<sup>48</sup> The RIA stakeholders evaluate whether the proposed legislation is good or bad. If the

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<sup>45</sup> See chapter four § 4.2.

<sup>46</sup> McAdoo, Welsh, and Wissler 'Institutionalisation: What do empirical studies tell us about court mediation?' (2003) 9 *Dispute Resolution Magazine* at 9.

<sup>47</sup> *Ibid.*

<sup>48</sup> Radaelli and de Francesco 'Regulatory impact assessment' in Baldwin, Cave and Lodge (eds) *The Oxford Handbook of Regulation* (2010) 2 define it as 'a systematic and mandatory appraisal of how proposed primary and secondary legislation will affect certain categories of stakeholders, economic sectors, and the environment.'

conclusion is negative, the process is abandoned. If stakeholders find the proposal beneficial, the next step is to formulate a policy shared with other relevant stakeholders for consultation. Once all stakeholders approve the policy, it is transformed into a Bill presented to the Minister of Justice for sponsorship in the Cabinet. The minister must be lobbied to take ownership of the Bill as the Leader of Government Business in Parliament. Once the Cabinet approves the Bill, the seventeen steps required to pass legislation in Zimbabwe are followed.<sup>49</sup>

a. Language of the enabling statute

Clarity in the enabling legislation is critical to ensure a well-functioning dispute resolution system. According to P3, the enabling legislation should outline the steps disputing parties can take before and after a dispute, with clear obligations on the parties to agree. In P2's experience, 'when you are in a dispute, parties can't agree on anything, they can't agree on an arbitrator typically, they can't agree on which day of the week they will sit down.' P2 further stated 'sometimes people even specify the place it [ADR proceeding] has to happen. That's very helpful, and so institutionalising that aspect, I think, is helpful.' Although P2's example is specific to commercial law, it can be applied to other law fields, including to rural communities utilising the Room 57 centres.

Imprecise language in ADR and TADR statutes is strongly discouraged.<sup>50</sup> Without such clarity, parties may have divergent expectations of the process and potential outcomes, leading to dissatisfaction with ADR and TADR. Disputing parties may interpret imprecise statutory provisions differently. For example, one party might anticipate redress or restitution, while the other expects settlement only.<sup>51</sup> Worse still, if the statutory provision vaguely designates the

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<sup>49</sup> Schedule 5 of the Constitution outlines the method of passing legislation.

<sup>50</sup> Faris 'Deciphering the language of mediatory intervention in South Africa' (2006) 39 *The Comparative and International Law Journal of Southern Africa* 3 at 429.

<sup>51</sup> *Ibid.*

third party/ADR practitioner as a mediator, for instance, but the ‘mediator’ ends up conciliating, there is a possibility that either one party or both will be disappointed by the outcome because of unmet expectations.<sup>52</sup> The dissatisfaction of the parties in the example above is a consequence of confusion, and false expectations created by imprecise statutory language.<sup>53</sup> The language of the enabling legislation in Zimbabwe will be crucial. It must be precise and consistent so that parties and practitioners are certain about the objectives, limits, and benefits of institutionalised ADR and TADR.<sup>54</sup>

Participants suggested that the enabling legislation should provide guidance on using ADR and TADR for dispute resolution, such as when drafting commercial contracts, implementing standard operating procedures (SOPs) and regulations for ADR and TADR practitioners. SOPs for ADR and TADR can include case recording, order issuance, transcript writing, and a code of conduct. Institutionalising such regulations could overcome challenges like practitioner appointments in the new Room 57 approach and provide a new path to justice for rural and urban communities. Missouri’s Supreme Court is instructive on this point. The Court adopted Rule 17<sup>55</sup> in 1989 to promote early, economical, and voluntary settlement of lawsuits. This rule was revised in 1997 to empower individual judges to initiate and sustain ADR referrals.<sup>56</sup> This framework obliges lawyers to inform clients about ADR alternatives, enforces specific qualifications for practitioners, requires the court to be informed of ADR success, and mandates the execution of a written settlement post-ADR.<sup>57</sup> Similarly, in Senegal<sup>58</sup> judges are

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> See chapter five § 5.2., discussing substantive law reform. The statute must avoid similar mistakes to be effective.

<sup>55</sup> Missouri Supreme Court Rule 17.01 (repealed 1997). The revised rule became effective in 1997.

<sup>56</sup> Ibid Rule 17.02(b) and 17.04. See *Afrasia Bank Zimbabwe Limited v Simbarashe Chidakwa* [2015] ZWHHC 177, where the judge relied on subrule 11 of the High Court Rules 1971 to make an order in favour of the plaintiff when the defendant did not appear at the pre-trial conference. The language of the enabling statute can make it mandatory to attempt settling matters without trial, achieving similar success as discussed in (n40) above.

<sup>57</sup> Ibid.

<sup>58</sup> Article 7 of the Civil Code of Senegal.

authorised to attempt resolving disputes through conciliation before proceeding to trial. The evolution of court rules in these jurisdictions, achieved through an iterative process, closely aligns with this study's findings.

b. Establishment of a regulatory authority

Enabling legislation is essential for strong governance structures<sup>59</sup>, ensuring uniformity and fairness. Without governance, standards and norms, the system could be subjective, less visible, and less binding.<sup>60</sup> This could result in reduced confidence in the system among citizens and a belief that the system is unfair.<sup>61</sup> Consequently, negative perceptions of the system will impact citizens' choices regarding whether to use or avoid the system. Strong governance structures, as discussed in the Australian context, focused on monitoring tools implemented through legislated ADR.<sup>62</sup> This was done to protect the Australian system against the potential of selective application by repeat players in a self-serving way.

A regulatory authority for ADR and TADR practitioners, like the Law Society, is necessary to ensure the effective functioning of the institutionalised ADR and TADR system. According to P9, the authority would maintain a register of practitioners and record the number of cases they have successfully resolved to finality. P9 believed that transparency and accountability would be further achieved if the regulatory authority mandated practitioners to record each dispute they facilitated on an online system managed by the regulatory authority. According to P9, this would enable the public to access transcripts from nationwide proceedings, showing settled

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<sup>59</sup> Typically refers to frameworks that reflect an institution's interrelated relationships and other influences – especially rules, procedures, roles, and division of responsibilities.

<sup>60</sup> Ebner and Zeleznikow 'No sheriff in town: Governance for online dispute resolution' (2016) 32 *Negotiation Journal* 4 at 312.

<sup>61</sup> *Ibid.*

<sup>62</sup> See § 6.3.

cases and those that did not settle. Room 57 centres would be crucial in facilitating the administrative elements in urban and rural communities.

An electronic database would solve the challenge of party referrals to ADR practitioners, currently private under the AIMA and CAC registries. Making the selection of practitioners and their allocated cases public through the regulatory authority will allow disputing parties in urban and rural areas to select an ADR and TADR practitioner based on merit. According to P9, a statistical approach can be used to measure the success rate of practitioners. He gave an example of three matters he resolved successfully, pointing to his one hundred per cent record in 2019. The transparency and self-determination achieved through an electronic system controlled by an ADR and TADR regulatory authority would empower disputing parties and improve access to justice. Satisfaction with the process would enhance its legitimacy<sup>63</sup>, even when the outcome is not what one party may have wanted.

#### c. Providers of ADR services in the new justice system

To implement ADR and TADR formally at the community level, stakeholders like traditional and church leaders, district administrators, and councillors, require additional training. According to P13, family members and traditional leaders will likely undertake this task. At the same time, ward councillors, district administrators, and other relevant stakeholders will manage peri-urban and urban areas. The absence of traditional leaders in urban areas requires the involvement of politicians like councillors in dispute resolution, which does not align with the principle of separation of powers. In Botswana<sup>64</sup>, as discussed in chapter five, the responsibility of dispute resolution in urban areas lies with the president of the court rather than

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<sup>63</sup> MacAdoo, Welsh, and Wissler (n46).

<sup>64</sup> Schärf 'Non-state justice systems in southern Africa: How should governments respond?' (Unpublished Paper, Institute of Criminology, University of Cape Town, 2003) at 63.

a traditional leader. Despite the challenges associated with involving politicians in dispute resolution, giving them this responsibility is economical because they already run local municipalities, receive monthly salaries, and live among the people.

In addition, some participants suggested that district administrators and councillors, with adequate ADR training, can be a practical way to enhance access to justice due to their proximity to the people. Zimbabwe has approximately sixty districts and 1 200 wards<sup>65</sup>. Although executing multiple roles poses a challenge of impartiality, it may be addressed through training. Notably, district administrators (DAs) were stripped of their dispute resolution powers in the 1980s<sup>66</sup>, indicating that the office may have been inappropriate for managing disputes at the local and community levels. Reinstating the dispute resolution function requires a deep understanding of why it was removed from DAs in the first place.

#### *i. The role of lawyers in institutionalised TADR*

After enquiring with participants on their perceptions of implementing the proposed dispute resolution system in Zimbabwe, two groups emerged. Some participants strongly opposed the involvement of lawyers in any system that incorporates TADR. In contrast, others believed a legal system could not exist without the direct participation of legal practitioners. In the following discussion, I present and analyse these contrasting viewpoints, beginning with the group that advocated for the involvement of legal practitioners.

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<sup>65</sup> ZimStat '2022 population and housing census - preliminary report' available at [https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022\\_PHC\\_Functioning.pdf](https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022_PHC_Functioning.pdf), accessed on 23 August 2022

<sup>66</sup> Ncube 'Lawyers against the law? Judges and the legal profession in Rhodesia and Zimbabwe' (1997) 14 *Zimbabwe Law Review* at 111. See chapter one § 1.6(a)(i) for a broader discussion on the evolution of the justice system.

*ii. Lawyers should be involved in institutionalised TADR*

The formal justice system is typically the domain of trained lawyers. P9 argued that the legal profession is essential to ADR as knowledge of the law is critical to settling. P9 stated, ‘critical to alternative dispute resolution is an ability to cut through the fog and get to the objective facts and obviously one needs to know the law.’ According to P9, sectoral experts would not know ‘what sort of settlement is possible,’ nor would they ‘be able to explain to the parties that if they don’t settle the matter through the ADR process, what the other legal processes would be.’ P9 expressed that knowledge of the law ‘is usually the most important lever in reaching a settlement by being able to present competing parties with what their alternatives are if the ADR doesn’t work.’ However, this can coerce parties to settle because the lawyer would use the threat of further costs or the stress of litigation to persuade parties to settle, even when the outcome is not to the parties’ satisfaction. It contributes to the ongoing debate on whether court-mandated ADR is coerced ADR, which is paradoxical since mainstream ADR, by design, is a voluntary system.

According to P7, there are instances where lawyers have successfully employed ADR in the formal justice system, such as roundtable discussions that lead to settlement agreements, which are then registered and enforced by the courts. This is consistent with P3’s experience, who relied on consent judgments in domestic violence cases.<sup>67</sup> Nonetheless, the litigants who appeared before P3 did not involve legal representatives but family members as neutral third parties. It is possible that lawyers’ involvement would not have made the process simple, quick, or as effective. Interestingly, the same participant, P7, who supported the critical role of

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<sup>67</sup> See chapter five § 5.7(c).

lawyers in dispute resolution, admitted to charging a US\$ 1 000 consultation fee, which most Zimbabweans cannot afford.

P7 exemplifies the contradictions inherent in both citizens and lawyers, highlighting the complexity of the subject. He admits to financially discriminating against the poor by charging high legal fees but argues for the necessity of lawyers in achieving justice. Furthermore, he defined justice as ‘common sense’, stating that ‘what is common and acceptable to every one of us, that is justice,’ implying a connection to morality and Indigenous value systems in shaping law and justice.<sup>68</sup> His contradiction arises from potentially being bound to the colonial general law system through his training while actively practising indigenous African dispute resolution methods. Thus, he believes in the Western-imposed positivist legal system, from which he earns a living, seemingly disregarding its conflict with or exclusion of the values common among black African citizens. Such views go against the culturally inclusive access to justice framework that emerged from the data in chapter five.

There is a legitimate concern that ADR without lawyers can increase costs for parties if the process fails because parties must pursue legal remedies in formal courts. P7 argued that ‘lawyers have a more important part to play in resolving the disputes than conciliators who are not trained lawyers, because if you can’t come to an agreement, those people [ADR practitioners] can’t take you to court.’ The exclusion of lawyers in the ADR process can also leave parties vulnerable and reliant on ADR practitioners who have a short lifespan on the path to justice and may not be called as witnesses without disputants’ consent. However, the argument neglects that paralegals can be conciliators in labour disputes and represent clients

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<sup>68</sup> See chapter four § 4.3(b).

in the labour court.<sup>69</sup> Significantly, the AIMA and CAC registries have ADR practitioners without legal training but successfully facilitate dispute resolution.

Additionally, the justice system allows non-lawyer prosecutors and magistrates trained at the Judicial College or the Zimbabwe Republic Police (ZRP) Staff College to appear in court.<sup>70</sup> P7 also overlooked that as an attorney, he relies on advocates to represent clients in specific matters. This means that even attorneys often need help to represent clients adequately. Courts often rely on *amici curiae* for specific cases. P9 and P7's views exaggerate lawyers' roles in achieving outcomes that meet the objectives and expectations of parties. According to Genn<sup>71</sup>, the justice system's goal is to communicate and reinforce societal values and norms, and the current system in Zimbabwe that aggrandises lawyers does not achieve this adequately.

Some participants argued that court-appointed mediators or arbitrators who are lawyers have more authority and legitimacy. These participants could not imagine justice being administered outside the court's authority without the presence of lawyers. Interestingly, many participants identified members of the legal profession as significant barriers to access to justice, especially in embedding ADR in the formal justice system.<sup>72</sup> Although some global ADR literature excludes lawyers in some ADR proceedings, lawyers are often present in arbitration proceedings. In some jurisdictions, lawyers are barred from being present in the room<sup>73</sup> and are allocated a breakout room for consultation. Nevertheless, there are legitimate reasons to argue for the involvement of lawyers in any dispute resolution model, not least because there

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<sup>69</sup> Madhuku *An Introduction to Zimbabwean Law* (2010) 135.

<sup>70</sup> Ibid 115-116. For more on the training of prosecutors, see the ZRP website available at [http://www.zrp.gov.zw/index.php?option=com\\_content&view=article&id=161:trainings&catid=10&limitstart=1&Itemid=954](http://www.zrp.gov.zw/index.php?option=com_content&view=article&id=161:trainings&catid=10&limitstart=1&Itemid=954), accessed on 16 November 2022.

<sup>71</sup> Genn (n20).

<sup>72</sup> See chapter four § 4.4., and below § 6.7(a).

<sup>73</sup> Rundle 'A spectrum of contributions that lawyers can make to mediation' (2009) 20 *Australasian Dispute Resolution Journal* 4 at 222.

is a constitutional right to a lawyer in criminal cases. If the Constitution undergoes the amendments discussed in chapter five, and TADR gains formal recognition on par with the general law system, the legal requirement for representation would no longer apply.

One design option used in the past required lawyers to consider ADR as a central part of their litigation planning. In such programmes, lawyers discuss the potential use of an appropriate process with their clients and report the results of that discussion to the court if they fail to resolve all issues in dispute.<sup>74</sup> This approach faces less opposition from lawyers than compulsory ADR referral because lawyers maintain control over the ADR process.<sup>75</sup> For example, the lawyer usually influences the choice of the ADR practitioner and the timing of proceedings. Previous empirical studies found that the institutionalisation of ADR has a higher chance of success when ADR practitioners are selected from a database matching the preferences of legal practitioners representing the parties.<sup>76</sup> The irony though is that lawyers in South Africa and Australia had to be sanctioned for not following the court rules relating to ADR.<sup>77</sup> This means that even after including lawyers in the process, they may impede it through ignorant or deliberate non-compliance.

Nonetheless, this design option assumes the dominance of general law courts and litigation in dispute resolution. In Zimbabwe, where TADR is the dominant form of (informal) dispute resolution, lawyers would play a marginal role. The argument that maintaining the level of complexity in the justice system is necessary falls away when ADR and TADR is introduced as part of state law.<sup>78</sup> This is because it has simple processes that allow individuals to resolve

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<sup>74</sup> MacAdoo, Welsh, and Wissler (n46) at 8.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid* at 9.

<sup>77</sup> See chapter five § 5.4(a) on personal and professional consequences lawyers faced. On the litigation zealotness of lawyers, see chapter four § 4.2(e).

<sup>78</sup> Economides 'Reading the Waves of Access to Justice' (1999) 31 *Bracton Law Journal* at 66.

disputes without (mostly) needing representation. The analogy comparing law, the (American) national religion, with lawyers as the priesthood and the courtroom is a cathedral<sup>79</sup> is only valid within the context of general law, not TADR.

Moreover, considering the evidence presented in this thesis, where lawyers testified to lacking the necessary skills to execute the ADR practitioner role, it is unfathomable that the success or failure of ADR and TADR in Zimbabwe fulcrums on the approval of the self-confessed ill-equipped members of the profession. The weakness in the argument for involving lawyers in institutionalised ADR and TADR is found both in the literature and in the way of life of Zimbabweans, primarily the fact that lawyers are trained in adversarial engagement, which is destructive to ongoing relationships. Exaggerating the influence lawyers and general law courts have in dispute resolution provides simplistic notions of access to justice, particularly in plural cultural and legal societies like Zimbabwe. The culturally inclusive access to justice framework, which emerged in Chapter Five, advocates for a bottom-up approach. This approach empowers citizens to define the law, justice, and access to justice according to their way of life. It contrasts with the current top-down approach, which has colonial roots, by emphasising grassroots involvement.

### *iii. Lawyers should not be involved in institutionalised TADR*

The second cohort of participants opposed involving lawyers in the institutionalised TADR system. They did not think lawyers should be ADR practitioners or parties' legal representatives during ADR proceedings. P1 argued that 'lawyers are dangerous...you need non-lawyers to mediate because you find that our lawyers don't have the best interests of the client at heart when they argue.' Participants confessed their devotion to the aggressive and

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<sup>79</sup> Norgren and Nanda *American Cultural Pluralism and Law* 2 ed (1996).

adversarial nature of litigation. They believed their participation in ADR would only complicate and delay dispute resolution.<sup>80</sup> Institutionalised ADR processes require skilled practitioners who ensure the process and outcome are fair to all parties according to how they define justice. This way of thinking aligns with natural justice and the socio-anthropological definitions of law and justice.<sup>81</sup>

### *Lawyers have inadequate ADR training*

The technical training lawyers receive handicaps their involvement in ADR processes, which require active listening, empathy, and value-creation skills.<sup>82</sup> Resultantly, ADR processes such as mediation take lawyers even further away from the roots of their training.<sup>83</sup> The evidence shows that lawyers are not confident that their training is adequate to prepare them to function competently outside litigation and general law courts. The research findings are consistent with the literature. Therefore, the involvement of lawyers in ADR processes should follow the fourth wave of access to justice reform that emphasises the need to update the law school curriculum to equip law students with the necessary ADR skills.<sup>84</sup> This means that, broadly, lawyers do not and cannot have the qualities required by an exclusively ADR or TADR system. Further research may examine whether providing training to lawyers would upskill them to operate within a TADR system.

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<sup>80</sup> See chapter four § 4.4.

<sup>81</sup> See chapter two § 2.3.

<sup>82</sup> Reuben 'Constitutional gravity: A unitary theory of ADR and public civil justice' (2000) 47 *University of California, Los Angeles Law Review* 949 at 984; Felstiner, Abel, and Sarat 'The emergence and transformation of disputes: Naming, blaming, claiming...' (1980) 15 *Law and Society Review* 3 at 631.

<sup>83</sup> *Ibid.*

<sup>84</sup> Economides (n78) at 67. This point is reinforced by a state institution like Midlands State University with one elective ADR, 2 credit course.

*Technical disputes require sectoral experts*

Some participants questioned the capacity of judges and magistrates to provide adequate access to justice but showed appreciation for the capability of skilled ADR practitioners. Although he advocated for legal practitioner involvement, P9 described a good ADR practitioner as one who makes decisions that respect the law and enable a functional relationship between the disputing parties. Ironically, in P9's mind, there was no doubt 'ADR skills go way beyond the skills, for example, a judge would have.' Technical disputes may require sectoral experts, such as architects, to facilitate ADR processes better than lawyers or judges.

P2 stated that technical disputes require sectoral experts because neither lawyers nor judges are trained to handle such matters. He gave the example of an architectural dispute being best suited for ADR facilitated by an architect, where the ADR practitioner can say, 'we all know what just happened, you looked at these drawings, and you thought that. You assumed wrong, and that's why we are in this position; let's just be honest about it.' A lawyer or a judge, according to P2,

'Would never be able to do that. I would start with the contract. I wouldn't know what business reality they actually exist in. So, yes, I have been in front of mediators who were not lawyers, and they were fantastic. In fact, formidable because they come at an angle that you can't answer as a lawyer because they have so much more knowledge about their particular area.'

This study shows that ADR practitioners with a legal background view justice as derived from applying legal principles. ADR practitioners from ancillary professions such as engineering, social work, or business construe justice differently based on their professional backgrounds.<sup>85</sup>

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<sup>85</sup> Noone and Akin Ojelabi 'Ensuring access to justice in mediation within the civil justice system' (2014) 40 *Monash University Law Review* 2 at 536.

Brassey AJ, first discussed in chapter three in *MB v NB*<sup>86</sup>, praised ADR. The judge expressed displeasure with attorneys who did not present mediation as an option to their clients, which would have limited the fees that the attorneys could recover from their clients. Empirical data in this study resonates with case law and literature, which, in addition to confirming the exclusion of legal practitioners in ADR and TADR, also cements the argument that these systems should be institutionalised through legislation. In fact, Brassey AJ<sup>87</sup> commended the English system (where ADR is obligatory) for profoundly improving the dispute resolution process.

It should be noted that the conception of justice, as understood by ancillary professions, may not satisfy legal requirements. For example, in Australia, it has been argued that ADR practitioners operating under the Mental Health Act (s. 244(5))<sup>88</sup> cannot remain neutral.<sup>89</sup> These practitioners are expected to promote mental health service consumers' well-being.<sup>90</sup> In doing so, ADR practitioners may employ techniques that are not explicitly specified, effectively 'colouring outside the lines.' Consequently, such process flexibility potentially leads to identifying areas of service improvement and aiding the development of ADR.<sup>91</sup> Litigating lawyers would not be able to do so. The Australian approach to ADR practice can contribute to the theory and practice of ADR that Zimbabwe can emulate. It is crucial to address whether ADR or TADR has constitutional safeguards, such as guaranteeing the neutrality of the practitioner and the type of justice that the systems provide. These factors should be considered in the code of conduct and SOP discussed above.

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<sup>86</sup> *MB v NB* 2010 (3) SA 220 (GSJ) at para 60.

<sup>87</sup> *Ibid* para 55.

<sup>88</sup> Mental Health Act, s 244(5) (Australia).

<sup>89</sup> Akin Ojelabi and Noone (n37) at 12.

<sup>90</sup> *Ibid* at 14.

<sup>91</sup> *Ibid*.

As previously discussed, ADR and TADR in Zimbabwe meet constitutional safeguards like the right to a fair hearing. Moreover, questions regarding the nature of justice provided by ADR or TADR are resolved by natural justice principles and socio-anthropological principles of law and justice discussed in chapter two.<sup>92</sup> These principles provide room for normative conceptions of justice, facilitating the design of the justice system. This is also consistent with the sentiments of the former AG of Australia, who remarked that ‘accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system’.<sup>93</sup> In this case, integrating TADR into state law and involving sectoral experts, including family members and other living customary law platforms, to resolve technical or specialised disputes enhances the accessibility of formal justice.

#### d. Framework for citizen participation in the new formal justice system

##### *i. Entering the integrated formal justice system: Opt-in vs opt-out*

Both voluntary and mandatory models of citizen participation can be used in the new justice system with institutionalised TADR. The opt-in principle can be applied to civil cases, where only those who take a specific action to enter the civil justice system participate. This aligns with trends worldwide, where participation is encouraged through legislation<sup>94</sup>, court rules<sup>95</sup> or judicial activism.<sup>96</sup>

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<sup>92</sup> See chapter two § 2.3.

<sup>93</sup> Attorney-General Robert McClelland ‘Foreword’ to the ‘Report of the Access to Justice Taskforce’ September 2009.

<sup>94</sup> For example, in Australia, they passed the Civil Dispute Resolution Act 2011 No. 17, 2011.

<sup>95</sup> For example, in Missouri (n55), the Supreme Court adopted Rule 17 in 1989 entitled ‘Voluntary Dispute Resolution.’

<sup>96</sup> Supra (n33 and n40).

In criminal cases, the model may use an opt-out principle, meaning every citizen participates automatically unless they opt-out. Critics of ADR and TADR may find this model problematic in constitutional matters and cases involving serious crimes.<sup>97</sup> In chapter three, I discussed instances that may be inappropriate for ADR.<sup>98</sup> Although this point seems to contradict the sentiments shared above on ADR being appropriate for all types of disputes, the key factor to consider is that in African traditions, even murder can (and in some communities continues to this day) be subjected to TADR by a chief and their assessors.<sup>99</sup> In *Republic v Mohamed Abdow Mohamed*<sup>99b</sup>, the Kenyan High Court accepted a family-led TADR process for a murder case. The court allowed the application by the family of the deceased to mark the case as settled. It discharged the accused, citing Article 157 of the Kenyan Constitution<sup>99c</sup>, empowering the Director of Public Prosecutions to discontinue criminal proceedings at any stage, as long as it serves the interests of justice.

Furthermore, restitution was/is usually paid by the aggressor or their family to the victim or the victim's family. Nonetheless, some critics may argue that subjecting murder to TADR contradicts the principle of legality and does not align with public policy considerations that prioritise justice, accountability, and the protection of rights. Interestingly, TADR is said to also promote the same rights and values as part of Indigenous people's way of life. An in-depth discussion of this process is beyond the scope of this study and is an area for further research; however, it is an essential detail to highlight. It emphasises a significant difference between the received and imposed common law system and the law practised by Indigenous people.

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<sup>97</sup> Fisher, Vidmar, and Ellis 'Procedural justice implications of ADR in specialised contexts: The culture of battering and the role of mediation in domestic violence cases' (1992) *Southern Methodist Law Review*, 46 at 2117.

<sup>98</sup> See chapter three § 3.6.

<sup>99</sup> See the *Machaya case* in chapter four § 4.10.

<sup>99b</sup> Criminal Case No. 86 of 2011, High Court at Nairobi.

<sup>99c</sup> The Constitution of Kenya, 2010.

This is not to say that one is better than the other because the answer to that question is contextual.

Acknowledging the differences between the systems helps understand why they have often clashed and what ought to be done to ensure compatibility. As discussed in chapter three, TADR is already entrenched in the Zimbabwean justice system.<sup>100</sup> Fundamental changes to Zimbabwe's laws are inescapable and necessary to optimise the integration of TADR into the formal justice system. This includes enacting an enabling statute that redefines ADR and TADR, granting legal authority to resolve disputes formally, thereby contributing to civil and criminal jurisprudence.

The literature suggests that voluntary ADR rarely meets the goal of significant use and suffers from consistently small caseloads.<sup>101</sup> The data show that mandatory ADR programmes have significantly higher rates of utilisation.<sup>102</sup> This high utilisation rate might be attributed to the inherent participation encouraged by mandatory programmes. After all, the law limits available options. The institutional theory outlines that innovations that are successfully adopted must have a high degree of compulsory participation<sup>103</sup>, and mandatory ADR fulfils this institutionalisation dimension for innovations. One would expect resistance to mandatory ADR. However, this is not the case because studies have shown that compulsory referral to ADR does not negatively affect parties' perceptions of procedural justice.<sup>104</sup>

The institutionalisation of TADR in Zimbabwe poses a unique challenge as it appears to be both mandatory and voluntary due to its deep-rooted nature in society. Customary practices of

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<sup>100</sup> See chapter three § 3.3(e).

<sup>101</sup> MacAdoo, Welsh, and Wissler (n46) at 8.

<sup>102</sup> Ibid.

<sup>103</sup> Edelman (n3).

<sup>104</sup> MacAdoo, Welsh, and Wissler (n46) at 8.

resolving disputes, such as relying on the maternal uncle or paternal aunt for marital issues, have been ingrained in the Zimbabwean way of life. This makes it difficult to distinguish where individual agency begins or ends when participating in the TADR system.

Institutional theory suggests that the family's involvement in dispute resolution limits the options individuals are likely to exercise.<sup>105</sup> In addition, structural theorists agree that cultural restrictions can limit available options despite being open to change over time.<sup>106</sup> Therefore, the institutionalisation of TADR in Zimbabwe requires an understanding of the cultural and societal factors that shape the attitudes and behaviours of individuals towards dispute resolution. This can be achieved by developing policies and frameworks or enabling legislation that reflects the needs and preferences of local communities and their involvement in the decision-making process.

Compulsory participation does not affect settlement rates.<sup>107</sup> Research shows that judicial activism increases the voluntary use of ADR by ordering disputing parties to use ADR.<sup>108</sup> When discussing the shortcomings of the pre-trial conference in Zimbabwe in chapter four, P9 outlined how strict judges who adopted a 'thou shalt not pass' attitude towards cases they thought should be settled were often successful. The pre-trial conference crumbled once those judges retired and were replaced by weaker or less strict judges.

Similarly, when discussing the challenging of arbitral awards at the High Court, P12 remarked that in the past, litigious attorneys were disincentivised from advising their clients to challenge awards because the rate of success was low when judges reviewed arbitration matters at the

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<sup>105</sup> See § 6.2(a).

<sup>106</sup> Barley and Tolbert (n10).

<sup>107</sup> MacAdoo, Welsh, and Wissler (n46) at 8.

<sup>108</sup> Ibid.

High Court.<sup>109</sup> It is a logical consequence because the more lawyers and parties are referred to ADR by a judicially active magistrate or judge, the more ADR is entrenched as a necessary step before approaching the courts. Thus, ADR and TADR can be formalised through regular use<sup>110</sup>, making it intuitive for citizens to use the formal justice system. In this instance, lawyers frequently exposed to ADR can be expected to discuss the option with clients. At best, they may recommend the most appropriate process, even if it means excluding themselves from participating. This aligns with the fourth wave of access to justice reform<sup>111</sup>, where lawyers and judicial officers are expected to have access to justice themselves by acquainting with and adhering to the rules.

## ii. *Confidentiality*

ADR provides benefits such as privacy and confidentiality<sup>112</sup>, but these advantages can also be weaknesses. The confidential nature of mainstream ADR proceedings means there is no development of legal precedent because proceedings are secret and held in private unless the disputing parties agree otherwise. Discussions during ADR proceedings remain private, and the contents of disclosed documents cannot be used as evidence if the case proceeds to trial.<sup>113</sup> Confidentiality involves a continuing obligation to respect the privacy decisions of parties during and after the proceedings are completed. This may be challenging for mainstream ADR. Confidentiality is, however, not a problem in TADR because TADR platforms, such as local and community courts, are public. Dispute resolution by family members is, nevertheless, private and like mainstream ADR, it is held in secret, living up to the ChiShona idiom

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<sup>109</sup> Supra (n56).

<sup>110</sup> See § 6.2(a).

<sup>111</sup> Economides 'Reading the waves of access to justice' (1999) 31 *Bracton Law Journal* at 66. See chapter two § 2.4.

<sup>112</sup> For a broader theoretical discussion, see chapter three § 3.5(b)(ii).

<sup>113</sup> In France, the Code of Civil Procedure (CCP) Article 1464 provides that subject to legal requirements, and unless otherwise agreed by the parties, arbitral proceedings shall be confidential.

‘chakafukidza dzimba matenga’ [it is the roof that covers/protects the house].<sup>114</sup> A new dispute resolution approach integrating TADR into the formal justice system must consider these factors.

In France, confidentiality in domestic arbitration is explicitly stated in the law, with the French Court of Appeals supporting discretion as a cornerstone of the process.<sup>115</sup> Australia provides a model for statutory protection of confidentiality through the Commonwealth Evidence Act, 1995<sup>116</sup>, which prohibits using evidence submitted during ADR in subsequent proceedings. In contrast, the Zimbabwe Arbitration Act, 1996 is silent on confidentiality<sup>117</sup>, and the South African Arbitration Act, 1965<sup>118</sup> does not provide automatic confidentiality, although it is implied.<sup>119</sup>

While mainstream ADR in Zimbabwe is private, confidentiality is not an absolute principle. The general belief is that confidentiality is sacrosanct and that arbitrators who share details of the proceedings can be sued. This is not the case in Zimbabwe, but because of the general belief that confidentiality is sacrosanct, any system that attempts to mainstream ADR must deal with privacy and confidentiality, perhaps in the enabling legislation. According to P9, these weaknesses can be resolved by the regulatory authority through a code of conduct and ethical guidelines for practitioners. The regulatory authority can monitor compliance and handle complaints, as the Law Society does with legal practitioners.

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<sup>114</sup> First discussion in chapter four § 4.3(b).

<sup>115</sup> *Aïta v Ojeh* 1986 Revue de L'Arbitrage 583 (Cour d' Appel de Paris, Feb 18, 1986).

<sup>116</sup> Section 131(1), Evidence Act 1995 (Cth) (Australia).

<sup>117</sup> In practise though, arbitrators seem to hold confidentiality as sacrosanct.

<sup>118</sup> Arbitration Act 42 of 1965 (South Africa).

<sup>119</sup> *Hassneh Insurance Co v Mew* [1993] 2 Lloyd's Rep 243 at 246. It was stated that the term's implication ought to be based on custom.

In practise, even though the principles of privacy and confidentiality bind arbitration proceedings, some arbitral awards are challenged upon registration at the High Court in Zimbabwe, which makes them part of the court record and, therefore, publicly available.<sup>120</sup> The solution suggested by P9, establishing a central online database where cases resolved through ADR are recorded and published could lead to the development of ADR theory and practise in Zimbabwe. P9 considered that the ‘most that could be on any database would be to say the type of dispute that was resolved, the type of parties who were the contestants or subject of dispute.’

Additionally, the availability of transcripts from proceedings may reveal practitioners’ best practices and weaknesses. Settlement transcripts can be used as learning tools by other practitioners. Academics, on the other hand, can build theory, for example, explaining from empirical evidence why certain cases are settled and not others or the role of the ADR practitioner in the success of different ADR processes. The combination of regulations through codes of conduct, transparent publication of transcripts from proceedings, and academic writing on ADR can significantly contribute to developing ADR custom, precedent, and analysis. These elements collectively aid in shaping the contents of ADR jurisprudence.

### *iii. Enforcement of settlements*

The outcomes of disputes processed through the Room 57 approach will bind the parties and be enforced like any court judgment. Participants in this study were convinced that for institutionalised TADR to function optimally, parties would have to be bound by enforceable agreements.<sup>121</sup> Following the example of TADR, where the parties do not remunerate the

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<sup>120</sup> For a discussion on public interest and exceptions to the rule in certain matters, see chapter three § 3.3.

<sup>121</sup> See chapter three § 3.3 for a discussion on the enforcement of ADR outcomes.

maternal uncle, paternal aunt, or chief's messenger, the enforcement agent will not demand payment from disputing parties for any service of papers or executing orders. Like the intake officers in the Room 57 approach, these office bearers will be employees of the JSC. Thus, the government would have to provide the funds for operational requirements, such as transportation, to execute their duties.

Current Labour Officers who function as conciliators and arbitrators for employment disputes are government employees, and citizens do not pay for the act of appearing before a Labour Officer.<sup>122</sup> This is a sustainable level of permanent financing described in institutional theory, achieved in South Africa through the CCMA.<sup>123</sup> Therefore, access to justice must be placed within the realm of political competition for public funding.<sup>124</sup> The implication in this context is that the Zimbabwe government, like the Australian and South African governments, would have to budget appropriately for justice in the same way public funds are allocated to areas such as health and other public services.

#### e. Stakeholders needed for the institutionalisation process

The integration of ADR and TADR into state law involves the participation of various stakeholders, each with different roles to play at different stages of the process. Participants identified state and non-state actors as playing complementary roles in delivering justice. However, institutionalisation is a subjective concept, as what may be institutionalised from one perspective may not be considered as such from another.<sup>125</sup> This subjectivity aligns with the

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<sup>122</sup> Madhuku 'The alternative labour dispute resolution system in Zimbabwe: Some comparative perspectives' (2012) 14 *University of Botswana Law Journal* at 31.

<sup>123</sup> Okharedia 'The emergence of alternative dispute resolution in South Africa: A lesson for other African countries' (Unpublished paper presented at the 6<sup>th</sup> IIRA African Regional Congress of Industrial Relations, Lagos 2011).

<sup>124</sup> Moorhead and Pleasence 'Access to justice after universalism: Introduction' (2003) 30 *Journal of Law and Society* 1 at 2-3.

<sup>125</sup> Edelman (n3).

socio-anthropological view of law and justice discussed in chapter two, emphasising the importance of normative values in defining access to justice. Institutional theory recognises that the integration of TADR can take on different forms of formality and scope depending on the jurisdiction.<sup>126</sup> Given Zimbabwe's unique circumstances, its approach to institutionalising TADR must be shaped accordingly.

*i. State actors*

Participants identified different responsibilities for various state actors in embedding ADR and TADR in the formal justice system. As discussed in chapter four, the Ministry of Justice was considered central to initiating the process by drafting and sponsoring the Bill through the Cabinet. As a member of the Cabinet and leader of government business in Parliament, the Minister of Justice would canvass other ministers whose portfolios intersect with the proposed legislation.<sup>127</sup> The AG's office was considered crucial in ensuring that the legislation aligned with international law provisions and conventions ratified by Zimbabwe. In addition, the AG and Minister of Justice were identified as drivers of amending other affected legislation, following the Australian example.

*Ministry of Finance and the Research Advocacy Unit*

The Ministry of Finance would fund the ensuing processes once the enabling legislation was passed. According to P8, the Research Advocacy Unit<sup>128</sup> (RAU) would raise awareness of the new institutionalised TADR system, which requires clear communication to ensure adoption

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<sup>126</sup> Manring (n3).

<sup>127</sup> During the interview, P12 outlined the process undertaken when the Arbitration Act, 1996 was proposed and enacted, which involved twelve relevant ministries.

<sup>128</sup> An organisation that conducts research and advocacy in Zimbabwe, focusing on women, children, and State institutions. The organisation works with academics, civil society, and the government to use its research to bring about policy changes and then raise awareness nationwide for widespread adoption.

by citizens. This aligns with the literature suggesting that its communicability<sup>129</sup> is a crucial characteristic for adopting ADR and subsequent institutionalisation. The effective introduction and implementation of reforms may be impeded if the value cannot be communicated clearly to intended users.<sup>130</sup> Therefore, according to P8, the RAU would work with traditional and church leaders, district administrators, councillors, and other professions to raise awareness of the new dispute resolution model.

### *Judicial Services Commission*

Participants identified the JSC's role in amending court rules to align them with the enabling legislation and the Constitution. The Missouri<sup>131</sup> example outlined above provides a good model for Zimbabwe.<sup>132</sup> The JSC in Zimbabwe is a policy-making body established by the Constitution.<sup>133</sup> According to P3, although Parliament is tasked with making laws, ensuring the laws find expression in the justice system lies with the JSC, which recruits and ensures the discipline of judicial officers. Further, P3 gave an example of the magistrates' court, which lacks a permanent secretariat and thus struggles to maintain consistent conduct among magistrates. While the Magistrates' Court Act, 1931<sup>134</sup> exists, it has not yet been aligned with the 2013 Constitution.

Such governing structures are essential for ensuring a clear path to justice and consistent application of rules and regulations. Other court rules aligned with adopting the Room 57 approach are the Amendment of Rules Regulating the Conduct of the Proceedings of the

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<sup>129</sup> *Diffusion* (1983) 132.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Supra* (n55).

<sup>132</sup> The scope of this thesis did not extend to drafting specific amendments, as the enabling legislation is yet to be enacted. Therefore, the Missouri example serves as a useful guide.

<sup>133</sup> Constitution, s 189.

<sup>134</sup> Magistrates' Court Act, 1932.

Magistrates' Courts of South Africa.<sup>135</sup> There are, therefore, many approaches Zimbabwe may adopt and adapt to suit the country's context. An enabling legislation would put checks and balances in place, ensuring uniform rules, regulated processes, and a system free from abuse.

### *Zimbabwe Republic Police*

The ZRP plays a significant role in the justice system as they are often the entry point for criminal and civil cases. Therefore, the police must receive training on institutionalised ADR and TADR to effectively explain it to the public, thereby meeting the required degree of divisibility and communicability. I have observed that the police resolve disputes (criminal and civil) between parties at the police station through counselling. However, it is unclear from the literature or the Police Act, 1995<sup>136</sup> whether the police provide counselling services as part of their official duty or at the discretion of individual Officers-in-Charge. By utilising the ZRP, the cost barrier to access to justice may be overcome whilst meeting the permanent financing dimension of institutionalisation since the police are already part of the state machinery funded by taxpayers.

Participants suggested that the police should receive training in case management, including screening and directing reported matters to the most appropriate forum for resolution.<sup>137</sup> That is, performing the clerk/intake officer role in Sander's many rooms approach. This is a unique approach to dispute resolution in that it proposes further devolving responsibility for dispute resolution. There is an understanding that police have a wider geographical footprint than courts. Although judicial case management is usually a matter for the courts, P3 argued that

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<sup>135</sup> Amendment of Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa in GN 183 GG 37448 of 18 March 2014 (South Africa).

<sup>136</sup> Police Act, 1995.

<sup>137</sup> United Kingdom Stabilisation Unit 'The UK Government's Approach to Stabilisation A guide for policy makers and practitioners' *United Kingdom Stabilisation Unit* (2019) at 67.

devolving this responsibility to police stations could increase access to justice as they are more accessible and cost-effective.

Further, the police already provide counselling services through the victim-friendly unit and can also be granted authority to issue orders and keep records of cases. The outcomes can similarly be published on the online database P9 suggested, which will further develop TADR jurisprudence. The outcomes would be registered with the courts and enforced upon a magistrate or judge's confirmation<sup>138</sup>, as the High Court does with arbitral awards. However, there are concerns that perceptions of corruption and abuse of power by police may undermine trust in the process. Therefore, the 'new' formal justice system should be transparent and trustworthy to ensure public confidence in its effectiveness. Subjecting police officers who are designated TADR practitioners to the code of conduct and SOPs under the authority of the proposed regulatory body may also be an additional solution.

### *Law schools*

Law schools play a crucial role in institutionalising ADR as they are the gatekeepers to the legal profession.<sup>139</sup> As mentioned in chapter five<sup>140</sup>, participants believed that law schools should adjust their curricula to include more ADR courses and eventually introduce full degree programmes to produce legal practitioners who are less adversarial and more adept in ADR. This will produce a new generation of professionals and help sustain an independent TADR system. Additionally, participants believed that scholars were responsible for writing about

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<sup>138</sup> Ibid.

<sup>139</sup> Of the four law schools in Zimbabwe, three are state-run, hence included herein as a state actor since the President is the Chancellor of all state universities.

<sup>140</sup> See chapter five § 5.4.

ADR, improving the amount of literature on the subject in Zimbabwe, and measuring the system's effectiveness once implemented.

*ii. Non-state actors*

Participants emphasised the need for a consultative process before the institutionalisation of ADR. P11 suggested involving citizens, private businesses, industry associations, NGOs, and other relevant non-state institutions. Stakeholders' buy-in was deemed critical to properly operationalising the resulting outcome from the enabling legislation. Citizens were identified as core stakeholders. According to P11, 'there is no way you can put in place a law meant to govern a particular constituent without consulting that constituent.' By involving citizens at every stage of the process, they can contribute to and feel ownership of the system's design.

The Constitution<sup>141</sup> reinforces the citizens' role in shaping the ADR process, which guarantees public access and involvement in Parliament's legislative and other processes. Parliamentarians have an essential role in ensuring that their constituencies are thoroughly consulted and their perspectives on the justice system are incorporated into the new justice model's design. Therefore, citizens must take the lead if the resulting model is to meet their previously unmet legal and social justice needs.

*Non-Governmental Organisations*

NGOs are essential in shaping the regulatory process and guidelines of the 'new' formal justice system with institutionalised ADR and TADR. One such organisation is the RAU, which can conduct research and draft reports on the new system's effectiveness and develop measurement tools to evaluate its impact on justice for the poor and small businesses. The RAU can play a

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<sup>141</sup> Constitution, s 141.

role in the design and function of the regulatory authority and provide support services to ensure its effectiveness.

NGOs such as the Legal Resources Foundation already provide free legal advice and raise awareness about various legislation. These NGOs may continue to provide expertise in the ADR system. For instance, the Independent Mediation Service of South Africa (IMSSA) led the development of ADR in South Africa.<sup>142</sup> Evidence shows that flexible LA programmes encourage ADR over litigation, reducing the number of cases that go to court.<sup>143</sup>

### *Community leaders and other professionals*

As discussed above, stakeholders such as church leaders, contractors, accountants, and healthcare professionals would require ADR training to be practitioners. Despite the lack of legal recognition, church leaders already engage in facilitated negotiations and mediations. According to P11, traditional leadership involvement is crucial in ensuring that the principles of the law and procedures are implemented. The Ghanaian case highlights the importance of involving traditional leaders in the design of the law, given their significant role in the TADR system.<sup>144</sup> Without their participation, efforts to extend access to justice could be hindered.<sup>145</sup>

### 6.5. The pilot programme: Incremental expansion according to a long-term plan

Implementing reforms that require government funding may not succeed in Zimbabwe due to limited financial resources and other priorities, such as health and education, which are considered more important than justice. With this background, P6 cautioned against the

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<sup>142</sup> Okharedia (n123).

<sup>143</sup> Blankenburg 'The infrastructure for avoiding civil litigation: Comparing cultures of legal behaviour in the Netherlands and West Germany' (1994) 28 *Law and Society Review* 4 at 789-808.

<sup>144</sup> Kirgis 'Status and contracting emerging democracy: The evolution of dispute resolution in Ghana' (2014) 16 *Cardozo Journal of Conflict Resolution* 1 at 124-25.

<sup>145</sup> Ibid.

widespread implementation of any new form of dispute resolution, insisting on a small-scale pilot programme to test its efficiency and effectiveness. According to P6, it was necessary to ‘think of a way of operationalising it to the extent that there is a cost there for financing it. So, maybe it’s something that you would have to do on a graduated basis, to see how it works.’ Although these sentiments are derived from a lack of finance perspective, they find expression in the institutional theory literature.

According to institutional theory, institutionalisation is a change process involving new techniques that displace existing practices.<sup>146</sup> Therefore, establishing a pilot programme is the first step in this change process. According to P2, this crucial step involves selecting a single area of law and a type of dispute. The pilot could, for instance, focus on child custody, stock theft, or building contracts. This is referred to as ‘trial’ or divisibility within institutional theory.<sup>147</sup> Piloting or ‘trailing’ is an important step because introducing a new model requires a change in attitudes and a new skill set. For instance, involving police or court clerks/intake officers in the Room 57 approach requires a shift in attitudes and developing new skills. Similarly, family members whose roles will be recognised by the state will also require a shift in attitudes and new skills.

Therefore, the proposed ADR and TADR innovation must have a piloting process as a core characteristic to test its efficiency and effectiveness.<sup>148</sup> After piloting and testing the efficiency and effectiveness of the ‘new’ formal justice system, a period of iteration is necessary to make changes where required. The next step would be to regularise ADR and TADR by integrating the associated processes into regular and formal use.<sup>149</sup> This integration would involve

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<sup>146</sup> Manring (n3).

<sup>147</sup> Ibid, *Diffusion* (1983) 131.

<sup>148</sup> Ibid.

<sup>149</sup> Manring (n3).

formalising the system through codification and description in a policy statement, statute, and explicit agreements between parties.<sup>150</sup>

Participants suggested that a pilot programme with a narrow focus would allow for immediate implementation of ADR because experts within a particular field could be brought in to settle disputes in that field. The intake officers would record and maintain a case and practitioner database through the regulatory authority. Given the broad spectrum of matters resolved through TADR<sup>151</sup>, the pilot could include criminal and civil test cases, some of which I outlined above. Such small-scale initiatives in specific areas of law should be implemented, taking direction from the broad enabling legislative framework.

P2 commended the United Kingdom's ADR jurisprudence, driven by capital, particularly in the construction and shipping sectors. P2 believed that 'you need those big cases for people to want to take points of principle.' These industries have a significant financial stake, motivating the development of the ADR system. However, this approach to institutionalising ADR through large corporations is elitist and excludes poor citizens who already lack access to the formal justice system in Zimbabwe. The goal should be to extend access to justice to all rather than making it easier for big business. Zimbabwe has already implemented, with relative success, ADR pilots in commercial, family, and labour law through the Arbitration Act, 1996<sup>152</sup> and the Family Law Division of the High Court and the Labour Act, 1985.<sup>153</sup> Although these initiatives have shortcomings, they provide a blueprint for improving access to justice and obtaining outcomes that citizens consider equitable. Significantly, the proposed institutionalised TADR

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<sup>150</sup> Ibid.

<sup>151</sup> See discussion on TADR resolving theft, domestic violence, witchcraft, divorce, and child custody in chapters one § 1.3., and chapter three § 3.3(a).

<sup>152</sup> Supra (n48).

<sup>153</sup> Labour Act, 1985.

model goes beyond these previous pilot programmes because it includes rural communities in formalised dispute resolution.

There is no consensus in the literature regarding the use of mainstream ADR in criminal matters. It is crucial to restate and reinforce that TADR, or the form it takes in other regions with Indigenous people like Latin America, does not differentiate between civil, criminal or administrative law.<sup>154</sup> As discussed in chapter five, one of the primary ways for overcoming barriers to access to justice participants suggested, and expressed in the literature is to mainstream TADR<sup>155</sup>, thereby providing the processes the force of law. In fact, a growing body of literature argues that ADR in the criminal justice system should not be restricted to minor offences like misdemeanours but should be extended to serious offences or felonies, areas where the impact of ADR is most felt.<sup>156</sup>

When crimes offend a person or property, there is usually an underlying relationship, which means the crime is, first and foremost, a rupture of a relationship.<sup>157</sup> In such instances, reconciliation and restoration are paramount over and above punitive punishment because forgiveness is most important when the pain caused by the crime runs deep and the desire for retribution is greatest.<sup>158</sup> It is, therefore, understandable that reconciliation is less critical in situations where the loss is minimal, and third parties can address compensation. What is clear from the findings in this study, in legal practice and the literature, is that the adversarial, accusatory current criminal justice system, founded on retribution, is neither designed nor conducive for reconciliation and forgiveness that leads to restoration.

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<sup>154</sup> See chapters one § 1.8(d), and chapter three § 3.2(b).

<sup>155</sup> See chapter five § 5.7.

<sup>156</sup> Ogbuabor, Nwosu, and Ezike 'Mainstreaming ADR in Nigeria's criminal justice system' (2014) 45 *European Journal of Social Sciences* 1 at 33.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid

The theoretical foundations of ADR are discussed in chapter three, and empirical findings discussed in chapters four and five reveal that ADR is restorative. Through the principle of self-determination (legal empowerment and legal agency), TADR enables parties to generate satisfactory outcomes for themselves and the community. This is crucial in communitarian societies like Zimbabwe, where most people are organised and live along clan lines.<sup>159</sup> History and practice teach us that TADR is an inherent part of the Zimbabwean and, more broadly, the African traditional justice system (criminal and civil, private and public law). This is because TADR is indigenous to Black Africans<sup>160</sup>, home-grown restorative justice and philosophy of law – what Okafo called *grounded law*.<sup>161</sup>

#### 6.6. Evaluating the institutionalised ADR system

Evaluating any innovation is essential as it exposes weaknesses and presents opportunities for improvement. Assessments also reveal successes that can be benchmarked for similar contexts. This is essential to empirically establish the relative advantage of the innovation over the existing formal justice system.<sup>162</sup> P13 believed that ‘you must be able to have a review system that would review the decisions and see how the system is also developing because any justice system must be evolving.’ Institutional theory supports this idea by defining institutionalisation as an ongoing process generated and maintained through continuous negotiations.<sup>163</sup>

According to P13, a review and evaluation system is integral to institutionalisation. It should be contained in the enabling legislation as it would guarantee the integrity of the public dispute

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<sup>159</sup> See discussion on the socio-cultural organisation of Zimbabwean society in chapter one § 1.1.

<sup>160</sup> See chapter three § 3.2(b). See also Ogbuabor, Nwosu, and Ezike (n154) on Nigeria having forms of ADR before the formation of the Nigerian State (pre-colonisation). These processes continue to exist, albeit informally, largely due to the totalising effect of colonialism.

<sup>161</sup> Okafo *Reconstructing Law and Justice in a Postcolony* (2009) 8. As discussed in chapter three § 3.2(a)(ii), the second school of thought argues that referring to ADR as ‘alternative’ in African countries is inappropriate because state law is the ‘new’ system.

<sup>162</sup> *Diffusion* (1983) 131.

<sup>163</sup> Barley and Tolbert (n10) at 3.

resolution process and ensure its evolution. The most significant promises of institutionalised ADR are ‘opportunity’ and ‘process integrity.’<sup>164</sup> Brazil says ‘opportunity’ is the promise to serve justice seekers and process integrity ensures the public’s trust in the system because confidence in the system is the most crucial asset that the system possesses.<sup>165</sup> Thus, ‘Room 57’ must embed a promise to citizens that the system will enhance their trust rather than undermine or diminish it.<sup>166</sup>

The enabling legislation can establish a review system to assess Room 57 rural and urban intake officers and ADR or TADR practitioners. P10 suggested surveys with disputing parties to evaluate the ‘new’ formal justice system. Bussin<sup>167</sup> made a similar point: in assessing the Room 57 model, all stakeholders should be consulted, and their input should be requested throughout the evaluation process. Bussin further suggested that stakeholders should be asked to provide ideas for change in the system.<sup>168</sup> This connects with the culturally inclusive access to justice framework that emerged from the data in chapter five.<sup>169</sup> It is vital to evaluate the impact of TADR on dispute resolution and citizens’ satisfaction with the process and outcomes. The current formal justice system has not met citizens’ needs, leading to a reliance on informal TADR. Institutionalised TADR, which derives legitimacy from citizen participation, must be objectively evaluated to build trust and encourage more effective utilisation. Client satisfaction is relevant to dispute resolution because it fosters citizens’ respect for justice delivery institutions.

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<sup>164</sup> Brazil ‘Court ADR 25 years after Pound: Have we found a better way?’ (2002) 18 *Ohio State Journal on Dispute Resolution* 93 at 95-96.

<sup>165</sup> *Ibid* at 97.

<sup>166</sup> *Ibid*.

<sup>167</sup> Bussin ‘Evaluating alternative dispute resolution programmes: The ends determine the means’ (1999-2000) 22 *The Advocates’ Quarterly* 460 at 472.

<sup>168</sup> *Ibid*.

<sup>169</sup> See chapter five § 5.7.

To illustrate the point above, an evaluation report of the Canadian Judicial Dispute Resolution system found that 96 per cent of lawyers were repeat users, and over 80 per cent of lawyers and clients had each completed five proceedings.<sup>170</sup> The system's regular use in Canada shows its effectiveness, reinforced by lawyers who advise clients to use the system. Australia's legislatively mandated ADR system also provides an example of consistent monitoring of new processes, which could be adopted and customised in Zimbabwe. The evaluation system will enable the identification of areas that require improvement and those with the most significant impact. Ultimately, this will lead to a robust, more effective system that meets citizens' legal and social justice needs.

a. Measure the number of cases settled and frequency of use

Measuring the success of a new system designed to enhance access to justice is challenging<sup>171</sup>, especially when the system is yet to be established. However, participants shared their views on measuring the success or failure of institutionalised TADR in Zimbabwe. They identified two key indicators of success: the settlement of individual cases and sustained demand for the system over time.

To measure the success of individual case settlements, P1 suggested tracking the number of cases resolved through the new system compared to those going through the courts over five years.<sup>172</sup> For accurate comparison, cases with similar characteristics should be selected. P10 suggested that if a significant number of the 15 000 cases her organisation handles each year

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<sup>170</sup> Brooke 'Improving excellence: Evaluation of the judicial dispute resolution programme in the court of Queen's Bench of Alberta' *Evaluation Report* (2009) at 162.

<sup>171</sup> Tyler (n18) at 422-423.

<sup>172</sup> Mention of 5 years seemed arbitrary and not specifically based on any one reason. It appears to be a sufficiently long enough time to evaluate a project in the same sense that a Presidential term is five years.

are resolved through the new system, it would be evidence of success. Conversely, if many disputes still go to trial, it will indicate failure.

Measuring the settlement rate and number of cases going through the system to evaluate the success of ADR innovation is a widely accepted practice.<sup>173</sup> According to Bussin, one of the objectives of ADR is to settle disputes, making settlement rates the most obvious measure of success.<sup>174</sup> Moreover, many settled disputes also justify the existence of institutionalised TADR within the formal justice system. This aligns with the communicability element of institutionalisation, as the success or failure of the innovation can be diffused to others by demonstrating the number of settled cases.

On the other hand, P10 argued that the success or failure of institutionalised ADR should not be evaluated solely by the number of settled or unresolved cases. P10 believed that disputes have multiple contentious issues, and ADR or TADR processes are meant to address these underlying issues. When ADR and TADR are integrated into the formal justice system, the process will follow a modified unitary theory of dispute resolution (discussed in chapters three and five).<sup>175</sup> The unitary theory envisions parties progressing through a system that includes negotiation, mediation, conciliation, arbitration, or trial. The modified theory based on the Room 57 revolving tier system means the intake officer would triage disputes, referring them to the most appropriate process. If certain issues remain unresolved after one process, they are returned to the intake officer, who will refer the matter to another mechanism for resolution. This revolving tier system modifies the unitary theory by eliminating the rigid continuum and sequential order. It adapts the theory to the Zimbabwean context by incorporating TADR, a

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<sup>173</sup> Bussin (n167) at 464, 482-484. See Tyler (n18).

<sup>174</sup> *Ibid.*

<sup>175</sup> See chapter 3 § 3.2, and chapter 5 § 5.9.

system (along with specific mechanisms) that already exists at the grassroots level but lacked a theoretical foundation until now.

P10 provided an example of parties who may have ten contentious issues at the beginning of the dispute and may resolve four issues during negotiation among themselves. The parties may resolve two issues during mediation facilitated by a family member and the remaining two during conciliation facilitated by a village head or ward councillor. Suppose the parties cannot agree on these last two issues. In that case, they will proceed to arbitration facilitated by a chief or district administrator and abide by the arbitrator's decision, which may be challenged only in accordance with the Arbitration Act, 1996 provisions.<sup>176</sup> Should such ADR interventions fail, P9 emphasised that citizens should have recourse to general law courts.<sup>177</sup> Having recourse to formal courts after failed ADR or TADR is also accounted for in the unitary theory of dispute resolution.<sup>178</sup> The most significant consideration when applying the modified unitary theory (revolving tier system rather than rigid and sequential continuum) in Zimbabwe is how to handle arbitral awards since, under the Arbitration Act, 1996 these cannot be appealed. Such challenges can be addressed through substantive law reform, which is discussed in chapter five.

Significantly, the process, which follows the unitary theory, has already been implemented in many jurisdictions. In Canada, mediation has become an essential step in litigation.<sup>179</sup> According to McAdoo, ADR is so embedded within the American formal justice system that 'there is nothing "alternative" about ADR...it is a routinely expected step for most civil litigation.'<sup>180</sup> Adopting the Room 57 approach following the modified unitary theory would

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<sup>176</sup> Supra (n48) s 4(2)(b).

<sup>177</sup> See *Sande (nee Nyamangunda) v Sande* [2012] ZWHHC 134 for the effectiveness of the pre-trial conference in reducing the number of issues in dispute.

<sup>178</sup> Reuben (n82).

<sup>179</sup> Jacobs 'Deal mediation: Settling disputes before they arise' *The Lawyer's Weekly* 18 September 2009 at 10.

<sup>180</sup> McAdoo 'All rise, the court is in session: What judges say about court-connected mediation' (2006-2007) 22 *Ohio State Journal on Dispute Resolution* 377 at 386-387.

allow ADR and TADR to achieve the objectives of the justice system and the normative expectations of the parties with each resolved issue.

The unitary theory has demonstrated success, with over 80 per cent of issues causing the dispute resolved through ADR, thereby enabling parties to continue relationships amicably.<sup>181</sup> Therefore, success is not measured by the final resolution of the entire dispute but by the resolution of each underlying issue.<sup>182</sup> Zimbabwe can learn from other countries how to diffuse innovation results to citizens and communicate them effectively. Effective communication will ensure that citizens adopt the innovation into regular use.

Some participants stated that mainstream ADR has a pre-determined stage in the dispute when the ADR processes are supposed to start, meaning that cases proceed to court if ADR fails. This argument is simplistic, however, because the success or failure of ADR can be measured by the number of issues resolved, not just the number of cases settled. After all, when the tiered Room 57 approach reduces the number of issues in a dispute, it makes the court's job easier, leaving the magistrate or judge to deal with only a few remaining issues. Brassey AJ adopted this view in the *MB v NB case*, where the judge stated that the parties would have benefited from mediation, even if they had to go to court to resolve the few outstanding issues.<sup>183</sup>

#### b. Continued demand for the system as an evaluative tool

P11 believed that success would depend on the frequency with which citizens and small businesses utilise the Room 57 system. The institutionalisation of ADR and TADR will be achieved when the systems are regularly used and justice seekers and practitioners instinctively

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<sup>181</sup> Brooke (n170) at 184.

<sup>182</sup> This pragmatic measurement surpasses current assessments of judicial officials or police, which often prioritise case disposal or arrest numbers over victim safety. See chapter § 5.9(d).

<sup>183</sup> Supra (n86).

resort to Room 57 to resolve disputes.<sup>184</sup> According to institutional theory, institutionalisation is achieved when new individual attitudes, skills, and forms of existing or new relationships, including organisational mechanisms for implementing Room 57 processes, are fully integrated. Failure of the institutionalisation process will be apparent if the same types of disputes continue to be filed in court without first going through Room 57.

To measure success, it is crucial to raise sufficient awareness so that citizens make informed choices. Settlement rates provided by ADR organisations in Australia reveal that 70 to 80 per cent of cases submitted to ADR are settled.<sup>185</sup> Similarly, in Canada, 89 per cent of cases are resolved using court-connected ADR, with 81 per cent resolving all issues in the dispute.<sup>186</sup> These results are consistent with ADR literature that claims an 80 per cent success rate.<sup>187</sup>

The success of integrating TADR into the formal justice system can be evaluated based on the level of its adoption by citizens, small businesses, and other institutions. Currently, general law courts hold a monopoly on formal dispute resolution, leading to the popular notion of ‘I will see you in court’ or ‘I want my day in court.’ Participants suggested that if institutionalised ADR becomes the voluntary default or go-to system for dispute management and resolution within five years, it will signify its success and public acceptance. It is important to highlight that this view takes for granted that most disputes are currently resolved outside general law courts.

Institutional and structuration theories provide valuable insights for developing a framework to assess ADR innovation. These theories highlight the interconnectedness of institutions, individual behaviours, and cultural norms, which shape decision-making and institutional

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<sup>184</sup> Manning (n3); MacAdoo, Welsh, and Wissler (n46) at 8.

<sup>185</sup> Productivity Commission ‘Access to justice arrangements: Inquiry report’ (2014) 288.

<sup>186</sup> Brooke (n170) at 184.

<sup>187</sup> Jacobs (n179).

design.<sup>188</sup> Institutions define the boundaries of individual choices, but they can evolve through social negotiation and change.<sup>189</sup> Therefore, a holistic assessment of ADR innovation should incorporate these theoretical perspectives because they help understand how ADR fits within the broader context of legal systems and societal dynamics.

Institutions that have gained widespread popularity are more likely to influence action.<sup>190</sup> According to participants, this is exemplified by the popularity of arbitration clauses in contracts in Zimbabwe. This illustrates the impact of institutions that have gained widespread popularity on the formal justice system. For instance, according to P12, the CAC became profitable within two years of its establishment due to the number of commercial disputes settled through the centre. It is worth noting that between 1996 and 1998, the CAC was the only registry available in Zimbabwe and, therefore, had a monopoly. In rural communities where TADR is already popular, institutionalising it is likely to maintain its widespread use. This avoids the challenges that may arise in introducing ADR or TADR to urban areas or integrating it with mainstream processes.

A comprehensive approach to evaluation entails acknowledging that institutionalisation occurs at the individual, intergroup, and organisational levels, differing in complexity and degree of required change.<sup>191</sup> A fair evaluation of an integrated justice system that includes TADR must consider all five dimensions of institutionalisation.<sup>192</sup> As discussed above, Australia, South Africa, Canada, Ghana, and the United States provide a blueprint for using the five dimensions to evaluate the institutionalisation of ADR in the formal justice system.

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<sup>188</sup> Barley and Tolbert (n10) at 3.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid at 6.

<sup>191</sup> Manring (n3).

<sup>192</sup> The five dimensions were discussed in § 6.2. and weaved throughout the chapter.

South Africa's CCMA provides a template for the institutionalisation process by fulfilling several dimensions. First, it has permanent financing, ensuring sustainability.<sup>193</sup> Second, ADR has a comprehensive role in resolving disputes, indicating that it is not just an alternative but a fundamental component of the formal justice system. Third, it covers a vast geographical scale, almost the entire country. Fourth, courts have helped ensure participation in ADR before approaching them.<sup>194</sup> Fifth, although the CCMA covers labour matters as the primary substantive area, Ghana, and Australia's legislated ADR extends to various fields of law.<sup>195</sup>

Combining the lessons learned from these jurisdictions will be helpful for Zimbabwe. Importantly, failure to consider the dimensions of institutionalisation leads to an incomplete evaluation of institutionalised TADR. Nonetheless, the success or failure of institutionalised ADR should be judged based on the actual cost of a formal justice system with poor dispute resolution processes that produce outcomes citizens do not consider fair and, therefore, ultimately avoid.

#### 6.7. Barriers to institutionalising ADR

The findings reveal that legal practitioners pose a significant obstacle to the institutionalisation of ADR and TADR in Zimbabwe. Legal practitioners wield considerable influence over the institutionalisation of ADR and TADR as the primary stakeholders in the legislative process. The participants in this study consisted of prominent attorneys, judges, parliamentarians, political leaders, government ministers, NGO practitioners, and religious figures, highlighting

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<sup>193</sup> Okharedia (n123). IMSSA attempted to operate alongside the state-backed CCMA since 1995 and faced financial challenges by 2000. Debts from unpaid services and diminishing donor funding led to its closure in November 2000 with a R5 million debt, including R3 million owed to its panellists. The redundant need for paid services amid the state's free provision led to dwindling employer and union support.

<sup>194</sup> *Supra* (n33 and n40). There are many cases where courts in South Africa and Australia have reprimanded attorneys for failing to advise clients to use ADR.

<sup>195</sup> See § 6.3. See also Alternative Dispute Resolution Act, 2010 (Act 798) (Ghana).

the significant influence of lawyers in Zimbabwe. Thus, the successful institutionalisation of ADR and TADR in Zimbabwe requires the involvement and support of legal practitioners. Introducing new ways of managing and resolving disputes is complex, and anticipating potential challenges is crucial for practical implementation – adding to the empirical and theoretical contributions of this thesis to the body of access to justice knowledge. Below, I discuss obstacles to reform efforts participants identified.

a. Legal practitioners and judicial officials

Lawyers were perceived as an obstacle to access to justice reform.<sup>196</sup> P1 stated that ADR is a laughable subject among colleagues in private practice and at the University of Zimbabwe. He commented that due to his advocacy for ADR, many of his private practice colleagues accuse him of secretly planning an early retirement and founding an ADR firm is his escape plan. It seems in P1 colleagues' minds, that no rational or self-serving lawyer can advocate for a system that has the potential to function without their collective involvement. Fear of reduced income was the main reason for resisting reform efforts introducing ADR and TADR in Zimbabwe.

One of the fundamental characteristics of lawyers is their tenacity to resist implementation of reform efforts until they are assured a role in the new justice system created by the reforms.<sup>197</sup> Judges, like lawyers, may also feel that the institutionalised TADR system reduces their formal authority and monopoly of hearing and resolving disputes. The legal positivist doctrine, dominating Zimbabwe's formal justice system, positions lawyers as prophets selling salvation in the courtroom.<sup>198</sup> Consequently, allowing other prophets into the cathedral is strictly prohibited and jealously guarded.

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<sup>196</sup> See chapter four § 4.4.

<sup>197</sup> Auerbach *Justice Without Law?* (1984) 109.

<sup>198</sup> *Ibid* 9.

Lawyers in other jurisdictions have attempted to resist access to justice reform and the introduction of ADR.<sup>199</sup> However, in South Africa and Australia, judicially active judges who consistently referred cases back to ADR when lawyers tried to evade or engage in bad faith have helped ensure the institutionalisation process forges ahead.<sup>200</sup> These judges have also meted out personal and professional punishments to lawyers who did not take ADR seriously.<sup>201</sup> These measures may be adopted in Zimbabwe to strengthen an institutionalised ADR and TADR system.

As discussed in chapters four and five, a general lack of awareness about mainstream ADR within the legal profession may lead to resistance towards its integration into the formal justice system. Moreover, participants argued that providing justice without lawyers or judges violates individuals' rights to legal representation and a fair hearing. South Africa provides guidance on this point. Rule 37(6) of the Uniform Rules of Court mandates mediation without making it mandatory to settle.<sup>202</sup> Although the rule makes mediation mandatory, it does not infringe on the right of access to court as the South African Constitution provides.<sup>203</sup> Citizens can turn to litigation in court if they do not settle through ADR. Importantly for this thesis, legal representation as a fundamental right is a positivistic construct, which may not hold in plural legal and cultural societies such as Zimbabwe. Accordingly, the role of legal counsel may not be as significant in institutionalised TADR.

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<sup>199</sup> Supra (n33 and n40).

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Rule 37(6) of the Uniform Rules of Court in South Africa.

<sup>203</sup> Constitution of the Republic of South Africa, s 34.

### b. Policymakers

The successful institutionalisation of TADR relies heavily on the political will of government bureaucrats. While the Ministry of Justice and other departments play central roles in the integration process, bureaucrats who perceive the enactment of the legislation as added workload without corresponding salary increases may block their efforts. The resulting resistance can hinder the process or even lead to complete failure. It is, therefore, essential to secure the buy-in of bureaucrats to ensure the success of the Room 57 innovation.

### c. Public perception

Citizens are the primary users of the justice system and, therefore, the most important stakeholders in enhancing access to justice. However, the success of mainstreaming TADR is dependent on public perception of its effectiveness. P7 believed that citizens might resist using ADR without legal representation and judges because they might perceive ADR as trivialising their issues. Thus, it is crucial for stakeholders tasked with raising awareness of institutionalised ADR and TADR to ensure citizens understand that they are already using these processes informally and without the force of law. The complexity or degree to which the innovation is relatively easy or difficult to understand will play a critical role in accepting and adopting the new justice system model. Having established that even lawyers do not have a firm grasp of mainstream ADR and associated processes, it is important to educate them first to avoid resistance. The public should then be educated on the benefits of a justice system incorporating culturally appropriate platforms with the force of law.

P11 emphasised that ‘for one to access something, you need to know that there is that something. You need to know that you yourself have a right to access that something.’ According to P11, it is vital to make citizens aware that access to justice is a right, not just a

privilege for the wealthy. In Australia<sup>204</sup>, the provision of triage and advice services and the suggestion of ADR by legal professionals to clients, significantly supported the delivery of culturally appropriate and accessible ADR. Similarly, in Ghana<sup>205</sup>, the judiciary has been at the forefront of supporting ADR through public education. These examples highlight the importance of proactive public education campaigns in overcoming this barrier and ultimately achieving wider adoption of formalised TADR in Zimbabwe.

## 6.8. Conclusion

This chapter thoroughly examined the potential for integrating TADR into Zimbabwe's formal justice system, focusing on the practical application of the Room 57 approach. This approach serves as a tangible model for integration, offering a solution to the country's barriers to access to justice.

The chapter commenced with an analytical background of two process theories: institutional theory and structuration theory. This foundation illuminated the importance of setting overarching legal objectives for the justice system, with each dispute resolution mechanism designed to support these goals. The analysis highlighted the need for broad enabling legislation to facilitate the institutionalisation of TADR. Following the theoretical grounding, the chapter detailed the steps in integrating TADR into the formal justice system. These steps encompassed ensuring unambiguous language within the enabling statute, establishing a regulatory authority to oversee Room 57 centres and TADR practitioners, and defining the required service providers within the new system. The chapter also emphasised the role of

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<sup>204</sup> Productivity Commission (n185) 302.

<sup>205</sup> Daily Graphic '131 courts observe alternative dispute resolution week' *Daily Graphic* 5 July 2019.

lawyers in this new landscape, recognising the diverse perspectives on their involvement and the potential impact they can have.

The chapter then addressed the necessity of a pilot programme, as emphasised by research participants. This programme would serve as a crucial testing ground, rigorously evaluating the efficiency of the new dispute resolution system with plural methods before full-scale implementation. Subsequently, the chapter discussed potential methods for assessing the success of the institutionalised TADR system, such as tracking the number of cases resolved through the new system compared to general law court proceedings over five years.

The penultimate section acknowledged potential barriers to institutionalising TADR, including resistance from legal practitioners and public perception of its effectiveness. The chapter emphasised the importance of raising public awareness about institutionalised TADR and educating the public about its benefits to encourage widespread adoption - acknowledging that most citizens are already using the system and associated mechanisms, although without state recognition.

This chapter employed grounded theory within the inductive analysis framework to analyse interview data concerning mainstream ADR and TADR integration within Zimbabwe's formal justice system. The analysis significantly contribute to understanding access to justice in the Zimbabwean context, aligning with existing theories like institutional theory, structuration theory, and the unitary theory of dispute resolution by highlighting the importance of legal frameworks, adaptability, and interconnectedness of dispute resolution mechanisms. It further challenges a rigid interpretation of institutional theory by advocating for a nuanced approach incorporating pilot programmes and stakeholder involvement. More importantly, the research expands access to justice theories by demonstrating the potential of TADR as a powerful tool for enhancing access, particularly for the poor and small businesses.

These findings pave the way for the emergence of a new theory focused on integrating traditional and formal dispute resolution mechanisms in post-colonial African contexts. This theory delves into the unique challenges (chapter four: Zimbabwean contextualised access to justice concept) and opportunities (chapter five: the culturally inclusive access to justice framework for context-specific reform) of leveraging traditional (African) practices within a reformed legal system. Focusing on issues like cultural appropriateness, capacity building, fairness within TADR, and the development of a hybrid model, this new theory can inform future research and policy decisions to create a more inclusive and effective justice system in Zimbabwe and across Africa.

Lastly, chapter six presented a detailed and insightful examination of integrating TADR into Zimbabwe's formal justice system. It offers valuable insights and practical recommendations for policymakers, legal practitioners, and other stakeholders involved in this process. The findings and discussions within this chapter significantly contribute to the body of knowledge on access to justice and dispute resolution in Zimbabwe, offering a promising direction for future research and policy development. The following chapter concludes the thesis by synthesising the key insights, outlining the recommendations, and areas of future research.

## CHAPTER SEVEN

### CONCLUSION

#### 7.1. Introduction: Context

Chapter one<sup>1</sup> established Zimbabwe's unique socio-legal landscape, which is not just a backdrop but a crucial factor in understanding the challenges of access to justice. This landscape is characterised by a centralised government, a plural legal system (common law, legislation, and customary law), and a significant rural population.<sup>2</sup> It highlighted the tension between the constitutional right to access justice and the reality faced by many Zimbabweans, particularly the poor and small businesses, who find the formal justice system expensive, geographically inaccessible, slow, and culturally inappropriate.<sup>3</sup>

This thesis has focused on citizens' access to justice, an understudied (empirically and theoretically) field in Zimbabwe. The primary question this study sought to answer was, *how can the right of access to justice be effectively realised by all citizens, including the poor and small businesses in Zimbabwe?* The historical context highlighted the imposition of British colonial law, which continues to influence the contemporary legal framework. Despite legislative changes since independence in 1980, including constitutional recognition, the extent to which the right of access to justice is fulfilled in Zimbabwe remains a matter of contention.

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<sup>1</sup> See chapter one.

<sup>2</sup> Zimbabwe National Statistics Agency (ZimStat) '2022 population and housing census - preliminary report' available at [https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022\\_PHC\\_Functioning.pdf](https://www.zimstat.co.zw/wp-content/uploads/2022/08/2022_PHC_Functioning.pdf), accessed on 23 August 2022. This is a preliminary report and so for previous census data, please see ZimStat '2012 census report' available at <http://www.zimstat.co.zw/wp-content/uploads/publications/Population/population/census-2012-national-report.pdf>, accessed on 11 May 2018.

<sup>3</sup> See chapter one § 1.1.

After outlining the historical context and contemporary legal environment obtaining in Zimbabwe in chapter one, I began the enquiry in chapter two by exploring the theoretical underpinnings of law, justice, and access to justice globally and within the Zimbabwean context.<sup>4</sup> The literature demonstrated the dominance of legal positivism in Zimbabwe, prioritising formal enforceability over customary practices and potentially creating a disconnect between the law and citizens' experiences. The existence of a vibrant living customary system alongside the formal justice system presents a further challenge. It was clear from the literature that investigating the potential for harmonisation between these two systems is crucial to understanding how to improve access to justice and better serve the needs of Zimbabwean society.

Furthermore, the concept of social justice was identified in the literature as a significant factor influencing access to justice in Zimbabwe.<sup>5</sup> Effective access requires institutions that translate legal rights into tangible realities for citizens. The literature made it clear that scholars and policymakers must grapple with how far to push towards achieving equality in access to justice and which obstacles to prioritise at any given time.

Building upon the groundwork laid in chapter two, I explored the theory, principles, and practical applications of ADR and TADR, within the Zimbabwean context in chapter three. The analysis encompassed philosophical debates surrounding ADR, its advantages and limitations as a standalone dispute resolution system, and specific ADR processes like negotiation, mediation, and arbitration. I highlighted the importance of a 'multi-door courthouse' approach, emphasising the need to match dispute types with the most appropriate resolution methods. While the literature demonstrates ADR's effectiveness in resolving

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<sup>4</sup> See chapter two.

<sup>5</sup> Stewart, Sithole and Ncube (eds) *In the Shadow of the Law: Women and Justice Delivery in Zimbabwe* (2000).

disputes, it acknowledges that ADR is not a one-size-fits-all solution. Litigation and general law courts remain essential to a just and equitable formal justice system because international human rights law underscores the importance of ensuring access to courts. Therefore, the literature emphasises the need for a balanced approach that integrates ADR alongside other dispute resolution mechanisms, such as general law court processes, to create a more comprehensive and accessible justice system.

This research adopted a socio-legal approach, recognising the complex interplay between law and society. This interdisciplinary approach acknowledges that law operates within a social context and must reflect, define, shape, and be shaped by fundamental social values. Qualitative methods were deemed most suitable for comprehensively exploring the lived experiences of access to justice in Zimbabwe. Eighteen legal professionals from diverse backgrounds, including government departments, the judiciary, the legislature, private practice, academia, and NGOs, were interviewed using a purposive sampling technique to ensure representativeness within the legal community. In-depth, semi-structured interviews provided rich data on the challenges and potential solutions surrounding access to justice.

Additionally, ethnographic observations at various court levels offered valuable first-hand insights. Grounded theory guided the thematic analysis of interview transcripts, court observations, and relevant literature. This iterative process ensured the emergence of key themes from the data without imposing preconceived notions. Triangulation mitigated potential bias by cross-checking findings with existing literature and multiple data sources. This process ensured the accuracy and trustworthiness of the findings and interpretations.

The methodological decisions ensured this thesis could address critical theoretical and empirical gaps in the literature by examining the contemporary obstacles that prevent citizens in Zimbabwe from accessing and navigating the formal justice system. These methods allowed

for the emergence of valuable insights into overcoming access to justice barriers, paving the way for a more people-centred approach that extends its reach to urban and rural communities, including the poor and small businesses. Given the new insights generated, this thesis provides policymakers with a more detailed understanding of the necessary steps required to implement the proposed ways of overcoming barriers to access to justice in Zimbabwe. Practitioners benefit from new perspectives (including introspection on their role in the justice system) on the system in which they are operating and a better understanding of how they are a barrier to justice and access to justice – but more importantly, what or how they can contribute to enhancing the accessibility of formal justice in Zimbabwe, particularly for the poor and small businesses.

This chapter synthesises the research's core findings and analytical insights, and what they suggest about the broader question of achieving effective access to justice for citizens in Zimbabwe.

## 7.2. Synthesis of key insights

Given the limited scholarly literature on access to justice in Zimbabwe, this research started with the question: *what factors, if any, impede effective access to justice in Zimbabwe?* This initial subsidiary research question provided a foundation for the study and a detailed analysis of the obstacles citizens face when entering and navigating the Zimbabwean formal justice system. The discussion in this thesis revealed that most citizens in Zimbabwe do not have effective access to justice, owing to the numerous impediments on the path to justice. The main barriers include prohibitive costs, the physical and social distance of citizens from justice officials and institutions, human and capital incapacity of justice officials and institutions, and complex substantive and adjectival law. The socioeconomic and political environment in

Zimbabwe further exacerbates the situation for most citizens and small businesses who cannot navigate the justice system without the assistance of legal practitioners.

Pluri-legal inequalities in a country with a plurality of legal and cultural traditions compound the obstacles to access to justice. The effect of pluri-legal inequality in Zimbabwe has led to insurmountable obstacles on the path to justice for most citizens. Consequently, even when citizens overcome barriers to entering the justice system, they face further challenges, such as a foreign language, because general law courts remain largely colonial. The research revealed that the formal justice system in Zimbabwe is inherently unfair to citizens because it is designed contrary to their way of life – while disputing and settlement is part of a way of life. Consequently, most citizens refrain from using the formal justice system in favour of the culturally appropriate TADR system.<sup>6</sup> More importantly, the outcomes citizens obtain from the formal justice system do not meet their expectations as they are devoid of normative cultural values such as reconciliation and restitution. In other words, citizens do not perceive outcomes from the current justice system as fair and consequently avoid using state institutions.

The analysis went beyond just identifying barriers. It also highlighted the disconnect between access to court and access to justice. Grounded theory was a powerful tool for uncovering these nuances, establishing the foundation for theoretical contributions of the thesis in chapter four. Chapter four builds upon the initial concept (the *Zimbabwean contextualised access to justice*) and demonstrates its ongoing development through the analysis presented in chapter five and chapter six. It acknowledged existing access to justice scholarship but identified the unique challenges of Zimbabwe, particularly the marginalisation of customary law and the negative

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<sup>6</sup> Sibanda 'An analysis of traditional leadership, customary law and access to justice in Zimbabwe's constitutional framework' 2019 *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* at 53.

social impact of formal courts. Political interference was another crucial discovery, suggesting a potential new concept within access to justice theory.

For the research to have practical and theoretical relevance, the second subsidiary research question asked: *how can access to justice barriers be overcome in Zimbabwe?* Building on the identified barriers, chapter five explored solutions for overcoming them. Participants proposed a multi-faceted approach, including legal reforms, simplified procedures, capacity building for legal institutions, increased court accessibility, and a decentralised LA system. However, a central theme emerged – the simultaneous decentralisation of the formal justice system and mainstreaming of the TADR system. Chapter five emphasised the need for careful implementation to address potential gender bias within living customary practices and ensure adherence to human rights standards.

Three proposed justice system approaches offered further options: Room 57, the expanded family law pilot, and the Botswana dual system. Chapter five culminated in the development of a novel framework – *the culturally inclusive access to justice framework for context-specific reform*. This framework emphasised a multi-pronged approach addressing systemic and individual barriers. It prioritises cultural inclusivity by integrating TADR within the formal system, acknowledging the value of customary law and living customary law, including local norms and values. This framework further developed established access to justice theories by highlighting the need for context-specific reforms that address unique challenges like the marginalisation of customary law and political interference.

The evidence suggested that to extend access to justice or increase the number of citizens using the formal justice system and achieve outcomes citizens consider normatively fair, embracing ADR in its TADR form within the ambit of official state law is important. Doing so means the concepts of justice and access to justice must be defined normatively rather than the current

positivist approach. This means that the views of justice seekers should be considered when designing the justice system rather than reflecting the needs or operational objectives of justice officials and institutions. Thus far, the formal justice system in Zimbabwe has continued to reflect colonial values and the needs of legal practitioners and colonial justice institutions, more than 40 years after independence.

Given the identified barriers and proposed solutions to enhancing access to justice in Zimbabwe, the third research question concerned itself with paving the way for the implementation of solutions by asking: *how can proposals for enhancing access to justice find practical expression in the formal justice system?* Chapter six offered a futuristic path to extending access to justice as suggested by the research participants. It focused on the practical application of the Room 57 approach as a model for integrating TADR within the formal justice system in Zimbabwe. However, the model should not be viewed as the exclusive and final solution to the challenges of access to justice in the country because it is heuristic. The chapter discussed the theoretical foundation using institutional and structuration theories<sup>7</sup>, emphasising the importance of clear legal objectives and broad enabling legislation.

Additionally, the chapter outlined a step-by-step process for integration, including clear legal language, establishing a regulatory body, and defining service providers. It acknowledged the crucial role of lawyers and emphasised the importance of a pilot programme to rigorously evaluate the new system's effectiveness before widespread adoption. The chapter acknowledged potential barriers to institutionalising ADR and TADR, including resistance from legal practitioners and public perception of its effectiveness.

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<sup>7</sup> See chapter six § 6.2.

Chapter six further contributed to access to justice knowledge and theory by proposing new insights and theory demonstrating the integration of traditional and formal dispute resolution mechanisms in post-colonial African contexts. It emphasised cultural appropriateness, capacity building, and fairness within TADR and developed a hybrid model for a more inclusive and effective justice system.

In sum, this thesis contributes to access to justice methods, epistemology, and theory in several ways. It is the first qualitative study using a socio-legal approach from the supply side of the justice system, providing new empirical evidence. It highlights the context-specific challenges faced in Zimbabwe, particularly the marginalisation of customary law and the negative social impact of formal courts, allowing the Zimbabwean contextualised access to justice concept to emerge. It further proposes a novel framework, the culturally inclusive access to justice framework, emphasising a multi-pronged approach integrating TADR within the formal system. This framework argues for a shift from a positivist approach to a normative one, prioritising the views of justice seekers in designing the formal justice system. Finally, this thesis proposes a theory focused on integrating traditional and formal dispute resolution mechanisms in post-colonial African contexts, emphasising cultural appropriateness, capacity building, fairness within TADR, and a hybrid model for a more inclusive and effective formal justice system.

### 7.3. Limitations and future directions of access to justice research in Zimbabwe

While offering a comprehensive exploration of access to justice in Zimbabwe, I acknowledge several limitations. Firstly, reaching a definitive consensus among interviewees regarding the optimal justice system model for Zimbabwe proved challenging. While the Room 57 approach was a valuable illustration of the integration process, employing consensus-building techniques

like the Delphi Method<sup>8</sup> could have provided more comprehensive insights. However, time and cost constraints inherent to a self-funded PhD project prevented pursuing this alternative. Although I selected the Room 57 approach for its ability to encompass formal and informal dispute resolution processes and its potential to provide justice outcomes that align with citizens' normative values, I acknowledge that other alternative justice system approaches exist. The focus on participants' suggestions, proposals, and space constraints may have limited exploring different approaches.

The analysis relied heavily on direct quotes to capture the participants' perspectives. While this approach offers rich qualitative data, risks overrepresenting certain participants if their responses were more articulate or provided more vivid examples. This could potentially create the impression that the research relied on a limited number of voices, even if other held similar views.

The model developed based on the Room 57 approach is inherently heuristic. Since the model does not yet exist in practice, in-depth analyses of numerous factors were impossible, limiting the ability to evaluate its effectiveness comprehensively. This limitation is inherent in qualitative studies that develop models, as resources are often expended before arriving at a model, necessitating a follow-up study to test the model.<sup>9</sup> Furthermore, the study was designed to be exploratory, not descriptive or explanatory. This meant that creating a model, though informed by the research participants, became a limitation because models are typically

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<sup>8</sup> A group communication process that aims to achieve a convergence of opinion on a specific real-world issue. See Chia-Chen Hsu and Brian A. Sandford 'The Delphi Technique: Making Sense of Consensus' (2007) 10 *Practical Assessment, Research and Evaluation Journal* 1.

<sup>9</sup> Creswell *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* 3 ed (2011) 73, 176, 198, 210; Corbin and Strauss *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* 4 ed (2015); Charmaz *Constructing Grounded Theory* 2 ed (2014).

explanatory. I overcame this limitation by developing a process model emerging from the data and informed by the two process theories, institutional and structuration theories.

Fourthly, the dearth of scholarly literature on access to justice, ADR, and TADR in Zimbabwe necessitated reliance on sources from other jurisdictions, notably South Africa, Ghana, the United States, and Australia. While these sources have functional value and introduce a body of knowledge that has the potential to develop and enhance the formal justice system in Zimbabwe, the lack of local sources forced a reliance on extraneous (in some instances) literature, making the thesis a consolidation of access to justice, ADR, and TADR sources from various jurisdictions. It is important to emphasise that this is not a comparative study and material from other countries was used more as a tool to illustrate examples Zimbabwe may draw from rather than in the strict comparative law sense.

These limitations notwithstanding, the thesis contributes significantly to the discourse on access to justice in Zimbabwe by identifying barriers, proposing solutions, and developing a novel framework for context-specific reform. Future research could build on this work by exploring alternative justice system models, conducting empirical studies to evaluate the effectiveness of the proposed models, and expanding the body of literature on access to justice, ADR, and TADR in Zimbabwe.

a. Future directions of access to justice research in Zimbabwe

This thesis has explored the complexities of access to justice in Zimbabwe, highlighting the potential of integrating TADR within the formal justice system. While this research offers valuable insights, several areas warrant further investigation:

Firstly, the issue of information dissemination, a gap identified by Tsanga in 1996<sup>10</sup>, persists. When implementing the model presented in this thesis, further research should be conducted to ensure citizens are aware of and will utilise the new system. This would build on the analysis presented in this thesis on the *communicability* of institutionalised innovations.

Secondly, the theory and philosophy of TADR warrant further exploration. The research agenda was set in a recent publication I authored for the *Journal of African Law*.<sup>11</sup> I critique the wholesale adoption of Western ADR processes in African jurisdictions for its ineffectiveness in enhancing access to justice, primarily because these models often fail to adequately incorporate local norms and values.<sup>12</sup> The field of TADR, although it has existed in practice among locals for time immemorial, is still in its nascent stages of development in theoretical underpinnings. This relative lack of theoretical maturity has led to an overreliance on Western perspectives in analysing ADR or TADR practices in African countries. Further research is needed to develop a robust theoretical framework for TADR that is grounded in African contexts and values. This would contribute to a more nuanced understanding of TADR and its potential for enhancing access to justice in Africa.

Thirdly, the role of lawyers in an exclusively ADR or TADR system presents another area for further research. While lawyers play a vital role in the formal justice system, their suitability within an exclusively ADR or TADR system requires further investigation. Further research can explore the feasibility and potential benefits of providing targeted training to lawyers, equipping them with the necessary skills and knowledge to navigate and contribute effectively within a TADR-integrated formal justice system.

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<sup>10</sup> Tsanga *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* (1996).

<sup>11</sup> Maraire 'The pursuit of an appropriate dispute resolution philosophy for Africa' (2024, forthcoming) *Journal of African Law*.

<sup>12</sup> *Ibid.*

Fourthly, this thesis emphasises the inextricable link between social justice and access to justice in Zimbabwe. Further research should delve deeper into this relationship, exploring how access to justice initiatives can be designed and implemented to promote social justice and address systemic inequalities effectively. Additionally, examining the optimal balance between promoting equality in access to justice and prioritising the resolution of specific types of disputes would be valuable.

While this thesis contributes significantly to the discourse on access to justice in Zimbabwe, it also opens up several avenues for further study. By pursuing these areas of further research, scholars and policymakers can better understand the complexities of access to justice in Zimbabwe and contribute to developing more effective and inclusive justice systems in the country and beyond. Lastly, future research may focus more precisely on people-centred justice, where lawyers, judges, and legal institutions do not deliver the justice they assume people want. Instead, they should ask what citizens want from a formal justice system and what types of justice outcomes (favourable or unfavourable results) would satisfy their normative vision of justice.

#### 7.4. Final thought

The key takeaway is that any justice system model seeking to provide justice that is ‘close to the people’ should not differentiate between legal and social rights. In other words, it should be inclusive and incorporate ADR and TADR, which most citizens are familiar with and habitually utilise to resolve their disputes. This research provides a comprehensive analysis of access to justice in Zimbabwe. It identified significant barriers, proposed solutions, including the integration of TADR, and developed a novel framework (culturally inclusive access to justice framework) for context-specific reform. Furthermore, it contributed to access to justice

theory by proposing a new sub-theory that integrates traditional and formal dispute resolution mechanisms in post-colonial African contexts.

The analysis offers valuable insights for policymakers, legal practitioners, and stakeholders involved in reforming and working towards a more just and equitable system in Zimbabwe and potentially across Africa. This thesis underscores the importance of a nuanced and contextual approach that considers the specific socio-legal context of Zimbabwe while drawing upon established access to justice theories and incorporating local customs and norms. By acknowledging the multifaceted nature of barriers to access to justice and proposing a framework for integrating TADR, this thesis offers a roadmap for creating a more inclusive and effective justice system in Zimbabwe and potentially across Africa.

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## APPENDICES

## Appendix 1: Consent form

## INFORMATION SHEET AND CONSENT FORM

**Title of study:** Towards a model for effective justice delivery: extending access to justice through integrating state law with socially appropriate systems / dispute resolution mechanisms.

**Principal researcher:** Wesley Maraire

**Institution:** University of Cape Town

**Background:** You are being invited to take part in a research study. Before you decide to participate in this study, please take the time to read the following information carefully. Please ask the researcher if there is anything that is not clear, and you need more information on.

**Purpose of this study:** The research is for academic purposes in fulfilment of the requirements for a Doctor of Philosophy degree but will likely result in a publication either as journal articles or a book. The purpose of the proposed research is to explore the efficacy of embedding appropriate dispute resolution (ADR) mechanisms within the formal legal structure, although independent from the judicial system as a way of improving access to justice in Zimbabwe.

**Voluntary Participation:** Your participation in this study is voluntary. It is up to you to decide whether or not to take part in this study. If you do decide to take part in this study, you will be asked to sign a consent form. If you decide to take part in this study, you are still free to withdraw at any time and without giving a reason. You are free to not answer any question or questions if you choose. This will not affect the relationship you have with the researcher. The researcher will send you an electronic questionnaire, which will be the method of communication throughout the anticipated 3 rounds of questionnaires. In order to verify the results of the questionnaires, the researcher will conduct an in-person interview. An audio device will digitally record the interview and if you do not feel comfortable being recorded, the researcher will respect your wish and use a field diary.

**Anonymity and confidentiality:** Every effort will be made by the researcher to preserve your anonymity. Neither your name nor the name of your employer will be divulged in the dissertation and any publication. Furthermore, that interview transcript and notes will be kept confidential and will be seen only by my supervisor and myself. At the stage of writing up the findings, I will reach out to you again to find out if you wish to remain anonymous in the final report as the report will have practical relevance to the legal landscape in Zimbabwe.

**Risks:** The risks of this study are minimal. You may decline to answer any or all questions and you may terminate your involvement at any time if you so choose.

**Benefits:** There will be no direct benefit to you for your participation in this study. However, I hope that the information obtained from this study may inform policy makers and other relevant institutions about access to justice. I will provide you with an executive summary of the report.

**Person to contact:** Should you have any questions about the research or any related matters, please contact my supervisor, Prof. Mohamed ~~Palcker~~. Ph: 021 650 5611. E-mail: [mohamed.palcker@uct.ac.za](mailto:mohamed.palcker@uct.ac.za). You can also contact me on mobile: +263 737 745 983. Email: [wesley.maraire@gmail.com](mailto:wesley.maraire@gmail.com).

**Consent:** By signing this consent form, I confirm that I have read and understood the information and have had the opportunity to ask questions. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving a reason and without cost. I voluntarily agree to take part in this study.

Signature \_\_\_\_\_

Date \_\_\_\_\_

*'If you have concerns about the research, its risks and benefits or about your rights as a research participant in this study, you may contact the Law Faculty Research Ethics Committee Administrator, Mrs Lamize Viljoen, at 021 650 3080 or at [lamize.viljoen@uct.ac.za](mailto:lamize.viljoen@uct.ac.za). Alternatively, you may write to the Law Faculty Research Ethics Committee Administrator, Room 6.28 Kramer Law Building, Law Faculty, UCT, Private Bag, Rondebosch 7701.'*

## Appendix 2: Interview guide

### Interview questions

1. What is the historical background to dispute resolution in Zimbabwe?
2. What are the institutions of justice delivery available currently in Zimbabwe?
3. How efficient is justice delivered in Zimbabwe and is it accessible to all?
  - a. (You may choose to focus on a particular area of law e.g. civil, commercial or administrative).
  - b. What are the areas that are working well in the delivery of justice in Zimbabwe?
  - c. What are the most significant barriers to access to justice in Zimbabwe?
  - d. What factors do you consider to be the most significant in improving access to justice in Zimbabwe?
4. What mechanisms of ADR exist in Zimbabwe, legal and institutional frameworks?
5. Do you think ADR currently contributes to justice delivery or access to justice in Zimbabwe?
6. How can ADR help in achieving the rule of law objectives?
7. Do you think it is important to entrench / embed / institutionalise ADR in legal or statutory framework in Zimbabwe?
  - a. If so, why and if not, why not?
8. Who are the key stakeholders and what role will they play in embedding ADR in the formal legal system in Zimbabwe?
9. What process is Zimbabwe likely to follow in embedding, professionalising, and formalising ADR as part of State jurisprudence?
10. What factors stand to impede the institutionalisation of ADR in Zimbabwe?
11. How will success or failure of ADR institutionalisation be measured and evaluated?
12. What can Zimbabwe learn from jurisdictions that have successfully implemented the use of ADR in extending access to justice such as South Africa, U.S.A, Australia?

## Appendix 3: Ethical clearance certificate

**Faculty of Law****Research Ethics Committee**

Private Bag X3 ▪ Rondebosch ▪ 7701 ▪ South Africa  
 Room 6.29 ▪ Kramer Building ▪ Middle Campus  
 Tel: +27 021 650 3080 Fax: +27 021 650 5660 Fax2Email : 086 572 1093  
 E-mail: [lamize.viljoen@uct.ac.za](mailto:lamize.viljoen@uct.ac.za)  
 Internet: [www.law.uct.ac.za](http://www.law.uct.ac.za)

30 April 2019

**Mr Wesley Maraire (MRRWES001)**

c/o Department of Private Law  
 Level 4, Faculty of Law  
 Kramer Law Building, UCT

Contact detail/s: Mobile: +263737745983 or via email: [wesley.maraire@gmail.com](mailto:wesley.maraire@gmail.com)

Dear Mr Maraire

**Re: Clearance Process Report for L0110-2019: "Towards a Model for Effective Justice Delivery: Extending Access to Justice through Integrating State Law with Socially Appropriate Systems / Dispute Resolution Mechanisms"**

Thank you for your revised application submitted. The Law Faculty's Research Ethics Committee very much appreciates the considerable effort put into the documentation.

This study has been carefully considered and confirm that all ethical issues have been adequately addressed.

**Ethics clearance is hereby granted as of 26 April 2018 for a period of 12 months** and is subject to renewal for another 12 months.

Please note that any material changes to the proposal will need to be cleared as an amendment.

*Please do quote reference number above on all communication to the committee.*

With best wishes,

Signed by candidate

**Associate Professor Kelley Moulton**  
**REC Chair: LAW**

*The clearance timeframe is for 12 months, please note that if a renewal/extension is required thereto an official request needs to be made to the REC administrative office at least 2 months prior to the expiry date to avoid any ethical misconduct.*

cc: Prof Mohamed Paleker (Supervisor: RDL Dept, UCT)