

**The value of
pre-colonial conflict resolution
methods in addressing sexual violations
committed in internal conflict situations in
Zimbabwe**

by

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Declaration

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Dedication

I would like to dedicate this thesis to my immediate family

Beatrice Maisva and **Farai Maisva**,

who were my anchors through their undying support and encouragement during my studies.

I write this thesis in honour of my late father **Chaka Cuthbert Maisva**,

whose love for education and knowledge modelled my academic aspirations and would be proud of this achievement.

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Abstract

The study considers the development of jurisprudence in conflict resolution with reference to pre-colonial African law in addressing sexual violence against women. The motivation for this investigation stems from the inadequacies of the present legal system in Zimbabwe to redress sexual violations perpetrated against women in the internal ongoing political conflict. The aim of the study is to garner insights from African traditional justice mechanisms in conflict resolution in determining their value in addressing sexual violations against women in Zimbabwe. This investigation of present-day Zimbabwe as a product of colonialism and imperialistic tradition explores its contribution to the loss of African values that shape the current approaches in addressing sexual violence. The socio-political, economic and cultural landscape of Zimbabwe post-independence mimics the political ontology under colonialism. The adopted governing principle of constitutionalism and its post-conflict justice initiatives adopted at independence until the present perpetuate coloniality. The existing conflict in the coexistence structure of Western and pre-colonial African law in conflict resolution is a foregoing challenge in the present legal system in Zimbabwe that prompts new thoughts in post-independent Zimbabwe.

The aim of the study is to propagate the re-imagination of the present law and approaches to sexual violations against women from Zimbabwe's political conflict that disrupts post-colonial Zimbabwe. The present study invokes the task of recalling the pre-colonial African philosophy of Ubuntu in conflict resolution in the re-imagination of an alternative jurisprudence. The task of re-envisioning jurisprudence in the resolution of conflict-related sexual violence offers a liberating viewpoint that counters the Western domination and marginalisation of African indigenous knowledge in post-conflict justice initiatives in Zimbabwe. The study investigates the pre-colonial African philosophy of law and justice interpretation in conflict resolution to analyse and evaluate the challenges of the present conflicting existence of the two legal systems and the challenge this poses in addressing conflict-related sexual violence in Zimbabwe. The study explores the possibilities of integrating Western and pre-colonial African

philosophy and systems in conflict resolution on sexual violence arising in internal conflict situations. To that end, the study proposes an integrating approach in resolving conflict-related sexual violations that assumes Ubuntu epistemology as the jurisprudence that might bridge the jurisprudential challenges and gaps in the lack of approaches on sexual violations against women in Zimbabwe.

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Acronyms and Abbreviations

CCJPZ	Catholic Commission of Justice and Peace in Zimbabwe
DRC	Democratic Republic of Congo
GPA	Global Political Agreement
ICC	International Criminal Court
LRA	Lord's Resistance Army
MDC	Movement for Democratic Change
MDC-T	Movement for Democratic Change – Tsvangirai
NCA	National Constitutional Assembly
NGO	Non-government organisation
NPRC	National Peace and Reconciliation Commission
ONHRI	Organ of National Healing, Reconciliation and Integration
SADC	Southern African Development Community
UNESCO	United Nations Educational, Scientific and Cultural Organization
ZANLA	Zimbabwe African National Liberation Army
ZANU	Zimbabwe African National Union
ZANU PF	Zimbabwe African National Union Patriotic Front
ZAPU	Zimbabwe African Peoples Union
ZEC	Zimbabwe Electoral Commission
ZIPRA	Zimbabwe People's Revolutionary Army
ZNA	Zimbabwe National Army
ZRP	Zimbabwe Republic Police

CHAPTER 1

Introduction

1.1 Research problem

Zimbabwe's political history over the past two decades has been marred by internal conflict as a result of political unrest.¹ Incidences of violence increase during periods of elections and have been characterised by human rights violations including sexual violence.² Politically motivated rape and sexual violence crimes have been standard features in Zimbabwe's political history dating back to the liberation war of independence.³

The aim of this doctoral study is to investigate the pre-colonial African conflict resolution mechanisms in addressing sexual violence crimes arising from the conflict. This investigation is prompted by the growing problem of violence against women and the failure of the delivery of justice to victims of sexual violence by the inherited Western legal systems that operate in Africa today. The changes to the pre-colonial African legal system of Zimbabwe were augmented in 1891 when the British High Commissioner's proclamation on 10 June declared the law applicable in the territory of Southern Rhodesia as Roman-Dutch and English common law.⁴ These Western systems of law since the proclamation became an indispensable part of the Zimbabwean legal system.⁵ Further changes occurred in 1923 to the legal landscape of Southern Rhodesia that entrenched colonial laws and systems in Zimbabwe as a British colony. These significant enactments had permanent effects on how pre-colonial African legal systems continue to operate in matters of conflict in present-day Zimbabwe. Furthermore, these inherited formal legal systems operating in most African states cannot be the only ideal

¹ Reeler 2009:3–4.

² Research and Advocacy Unit 2011a or b:9.

³ As the abuses are perpetrated in the name of the ruling party Zimbabwe African National Union-Patriotic Front (ZANU PF), there is no political will to prosecute leaving the survivors with nowhere to turn to. Non-government organisations (NGOs) have spent the better part of the last twenty years fighting to end impunity for these human rights abuses. Amnesty International 2002:4.

⁴ Madhuku 2010:19–20.

⁵ Madhuku 2010:19–20.

and functional mode of ensuring justice for victims of sexual violence and survivors of gross human rights violations committed on a large scale. These inherited legal systems are failing to adequately provide justice for victims and survivors of crimes of a sexual nature. As a result of this, there has been a growing movement in the African feminist and the African philosophical world for the adoption of African knowledge and the unearthing of African systems that were marginalised by colonialism to provide African solutions to African issues.⁶ This thinking calls for the investigation of authentic African local knowledge in all spheres of the African way of life including justice.⁷

This study investigates Zimbabwe's political history, its indigenous cultural practices in conflict resolution and those of other African countries that have undergone similar experiences. This is useful in discovering their adopted approaches in addressing conflict-related sexual violence crimes. Finally, this study probes the question, of whether integration of formal western legal systems with African pre-colonial modes of conflict resolution could provide justice, harmony and long-lasting solutions that are tangible, well-understood and appeal to the demands of sexual violence victims.

1.2 Research questions

I address the following research questions to respond to the research problem as formulated above:

- 1) What are the main differences between Western and pre-colonial African concepts of law and justice?
- 2) What were the pre-colonial modes of conflict resolution practised in African societies and Zimbabwe in particular, that addressed sexual violence crimes as a result of internal conflict?
- 3) How were these pre-colonial resolution methods affected by the colonial administration and by the government of Zimbabwe post-independence?

⁶ Tamale 2020:10; Wiredu 2004:14–15.

⁷ Tamale 2020:20–21.

- 4) What is the current approach in Zimbabwe to redressing conflict-related sexual violence?
- 5) Is there a possibility of integrating pre-colonial modes of conflict resolution and the existing western legal systems in providing African justice for conflict-related sexual crimes?

1.3 Motivation

The present study is evoked by the central problem of the lack of serious theoretical engagement in African legal philosophy in matters related to conflict resolution. The main challenge of the study is the limited sources on precolonial African dispute resolution methods on conflict and sexual violence. More so the study seeks to investigate conflict-related sexual violence considering the failures of Zimbabwe's government in addressing sexual violence that normally results in its political fraternity. The worldwide social domination of western groups in formerly colonised nations was translated into the legal fraternity of such nations including Zimbabwe. The social dominance of white ideological methodology referred to as "white logic and white methods came to dictate and mould the canon of jurisprudence and legal theory."⁸ The white ideological methodology represents its worldviews, perspectives and background of Western European culture.⁹

The effects of the colonial encounter translating into the domination, distortion and replacement of African legal philosophy in conflict resolution adversely affected how violations including those of a sexual nature are addressed. The implications of this account and specifically its perpetuation into the present and the effects of Western legal philosophical domination have left African legal philosophy under-theorised.¹⁰ It has been taken for granted as a settled or insignificant matter in conflict-related matters such as sexual violence. In this study I explore the extent to which colonial legacy influence the redress of sexual violence committed against women during times of

⁸ Modiri 2017:5.

⁹ Modiri 2017:5.

¹⁰ Mills 1998:98; Modiri 2010:4; Murungi 2004:519–521; Tamale 2020:7.

internal political conflict. I raise the question if the Zimbabwean Constitution as a Western style document is in tension with the communal orientation in African customary law. I investigate if a communal orientation of Ubuntu law and justice is more advantageous to women who have suffered sexual violence during internal political conflict. I explore also if the problems with constitutional redress to women as victims of sexual violence from internal political conflict can be attributed to the approaches of bodies such as the National Peace and Reconciliation Commission (NPRC).

I investigate if the unearthing of African pre-colonial legal systems in conflict resolution may be a valuable avenue to address sexual violence crimes resulting from Africa's internal political conflicts. Examples are replete in Africa of nations ensued by conflict that reverted to their pre-colonial practices of conflict resolution in order to remedy the disharmony created by conflict either due to colonial independence and post- colonial internal conflicts. Rwanda is one such an example that in responding to the 1994 genocide internally opted to adopt its pre-colonial conflict resolution practice commonly known as the Gacaca process.¹¹ The Gacaca process was applied to crimes perpetuated against women that were sexual in nature.¹² Rwanda in dealing with sexual violence resulting from the 1994 genocide, rape and sexual violence prior to 2008 was handled by the Rwandan National Courts.¹³

Amendments in 2008 were made to incorporate Gacaca as a competent traditional court structure to try cases of sexual violence.¹⁴ More specifically the change to Gacaca law assigned competency to Gacaca to try most remaining category 1 crimes which in the majority were rape and sexual torture.¹⁵ During the initial stages of Gacaca court proceedings affected women and other community members including perpetrators could publicly raise cases of sexual violence at Gacaca hearings. Kaitesi notes that in

¹¹ The gacaca court system was based on Rwanda's oldest conflict resolution model (traditional gacaca) and was meant to combine "local conflict resolution traditions with a modern punitive legal system." Some of the core features of traditional gacaca were continued in modern gacaca. Republic of Rwanda, Gacaca Courts in Rwanda (Kigali: National Service of Gacaca Courts, 2012)

¹² Kaitesi, *Genocidal Gender and Sexual Violence*, 64.

¹³ The amendment to the law in 2008 gave authority for Gacaca Courts to try matters related to rape and sexual violence. Republic of Rwanda National Courts No 13/ Article 1.

¹⁴ Republic of Rwanda Organic alw No 13/2008.

¹⁵ Initially, category 1 crimes were tried at Rwanda's national courts, until an amendment to the law in 2008 assigned competency to Gacaca courts to try the majority of the remaining category 1 cases, see Republic of Rwanda, Organic Law No. 13/2008, article 1. Rafferty 2018:100-101.

the early years of the Gacaca hearings a great deal was spoken about sexual torture.¹⁶ Many women testified and their cases were discussed publicly at the gacaca hearings.¹⁷ The Rwandan government in recognising the potential dangers on victims and survivors of the retraumatisation of Gacaca initiated significant changes to the law to better protect women's confidentiality and support during the process.¹⁸ As opposed to usually public Gacaca proceedings all trials that included charges of sexual violence were held in camera, security and trauma counselors accompanied the victim –survivors.¹⁹ The nature of the process was rooted in restorative traditional justice. Another important tool to foster reconciliation were special procedures for confessions, guilty pleas, repentance and apologies specified in Gacaca law.²⁰ The Gacaca court system was based on Rwanda's oldest conflict resolution model (traditional Gacaca). The approach adopted in dealing with sexual violence resembled a combination of local traditional resolution traditions with a modern punitive legal system.²¹

The nature of the approach is an example of how legal integration for countries battling in restructuring legal pluralistic societies could construct their approaches in dealing with conflict related sexual violence. While Gacaca incorporated restorative elements aimed at promoting reconciliation scholars argue that the retributive elements of the court system far outweighed and may have hampered reconciliation a key tenet of the traditional Gacaca system.²² Uwigabye states that "restitution was not given the priority it needed to promote reconciliation"²³ An important obstacle affecting the reconciliation process was the lack of compensation for personal injury of genocide generally the Gacaca had only limited provision in relation to reparations.²⁴ The Gacaca court

¹⁶ Kaitetsi 2014: 210.

¹⁷ Kaitetsi 2014: 210.

¹⁸ Rafferty 2018:100.

¹⁹ Rafferty 2018:101.

²⁰ Republic of Rwanda, Organic Law No. 40/2000, article 54. These procedures had been adopted and slightly amended from Republic of Rwanda, Organic Law No. 08/96, articles 4-9. For confessions to be considered by gacaca, defendants had to 1) give a detailed description of the confessed crime, 2) disclose any accomplices and 3) apologise for the offense(s) committed. Gacaca prescribed that apologies had to "be made publicly to the victims in case they ... [were] still alive and to the Rwandan Society," Republic of Rwanda, Organic Law No. 16/2004, article 54. Rafferty 2018:99.

²¹ Rafferty 2018:97.

²² Herrmann 2012: 96. Uwigabye 2013:276.

²³ Uwigabye 2013: 276-277. Rafferty 2019:99.

²⁴ These provisions mainly applied to lower level crimes and consisted of symbolic reparations and compensation for loss of property, including monetary compensation and unpaid labor. Waldorf 2009:17-18.

systems in relation to sexual violence did not enable reparations for victims and survivors which has often been critiqued by a number of audiences, including genocide survivors, scholars and aid organisations.²⁵ Sexual violations victims were however sidelined so as to become strangers in the process just as they are in the current justice system. Delving on precolonial knowledge systems in seeking a plausible alternative to the knowledge gaps in the present jurisprudence entails recognition of precolonial Africa customs practices and way of life. A pertinent aspect that ought to be addressed in understanding the structure and operation of pre-colonial Africa's gender structure. This is important as the study is primarily concerned with the redress of sexual violations in precolonial Africa. Hence the standing of women in these societies would provide a broader understanding on the cultural and accepted practices with regard to women.

In precolonial Zimbabwe women among the Shona were excluded from land ownership although they could and did invest in livestock, the proceeds of their own skilled labour in nonagricultural pursuits.²⁶ Women were economically active in the agricultural sphere as well as production of crafts, control over grain stores.²⁷ They however did not control means of production in agriculture and metallurgy but provided the labour required for these occupations. Cultural practice of *roora / lobolo* dowry was one of the major reasons for pre-colonial African women's lack of direct control on means of production.²⁸ This translated to mean that the family product lay in the dowry which not only transferred rights in a woman's labour and reproductive capacity from her own family to that of her husband, but also protected her family for this loss.²⁹ They possessed great knowledge of their indigenous knowledge systems that was passed from generation to generation.³⁰ Though there were visible demarcations in the division of labour women were not on the receiving end but played a complementary role in precolonial Africa. Holleman comments that women as property owners in precolonial Africa experienced more difficulty than men in increasing their authority through property accumulation.³¹

²⁵ Uwigabye 2013:277. Herrman :96-97 Rafferty 2018:99.

²⁶ Cheater 1986: 66.

²⁷ Cheater 1986: 66.

²⁸ Cheater 1986:66.

²⁹ Cheater 1986:66

³⁰ Nyoni *et al.* 2020:292

³¹ Holleman 1952: 352.

For these reasons, it is possible to regard women in pre-colonial society as comprising an equivalent to the class of labour in industrial systems of production.³² This class similarity helps to explain other features of women's positions in the pre-colonial system. In at least some situations in pre-colonial Zimbabwe, which extended into colonial times women's roles were not only differentiated but included those of religious and political authority, notwithstanding their general exclusion from areas of secular decision-making reserved for men.³³ Precolonial women in Zimbabwe were custodians of the spiritual world and without women no ritual for the appeasement of the dead was done.³⁴

It is contended that precolonial women in Zimbabwe held complementary positions to men although patrilineal and patriarchal kinship structure predominated these societies.³⁵ This patriarchal structure it is acknowledged has had devastating effects on women in Africa. Though there are debates on its origins, patriarchy is now an embedded culture in African societies with hazardous consequences on women's status, economic independence, subjection to violence and decision making.³⁶ The complications that women encounter from political conflict have common roots and can be traced back to the patriarchal values embedded within society.³⁷ In such societies, women are deemed to be incapable of handling power, responsibility, and taking charge of affairs and incapable of making decisions that are binding to all.³⁸ Patriarchy over generations has portrayed women as less intelligent, incompetent than their male counterparts.³⁹ This perception of women is reinforced through male dominated institutions and patriarchal societies which internalised the idea that women are inferior. This therefore creates in some instances in society tolerance and normalisations of violence against women where these patriarchal perceptions of women are deeply

³² Cheater 1986:71.

³³ Cheater 1986:71.

³⁴ Nyoni *et al.* 2020:292.

³⁵ Nyoni *et al.* 2020:290.

³⁶ I Know Politics 2014. The Patriarchal Barrier to Woman in Politics. <https://www.iknowpolitics.org/en/knowledge-library/opinion-pieces/patriarchal-barriers-women-politics>. Accessed 02/12/ 2020.

³⁷ I Know Politics 2014. The Patriarchal Barrier to Woman in Politics. <https://www.iknowpolitics.org/en/knowledge-library/opinion-pieces/patriarchal-barriers-women-politics>. Accessed 02/12/ 2020.

³⁸ I Know Politics 2014. The Patriarchal Barrier to Woman in Politics. <https://www.iknowpolitics.org/en/knowledge-library/opinion-pieces/patriarchal-barriers-women-politics>. Accessed 02/12/ 2020.

³⁹ Report of the Special Rapporteur on Violence against Women its Causes and Consequences on Violence against Women in Politics. A/73/301. 6 August 2018. P 6.

embedded.⁴⁰ Stereotypes such as connecting men with interaction in the public sphere and women with the private domestic sphere of the family are still present today.⁴¹ These have adversely impacted the status of women in society with the end result of mistreating women during conflict periods.⁴² In situations where conflict arises, victory of the enemy is identified by attacking the women belonging to that community.⁴³

To fully comprehend the current status of sexual violence and related violence resulting from conflict in Zimbabwe, I engage in an elaboration of the history of Zimbabwe to provide the background and context of the study on the history of violence focusing on sexual violence against women in times of political conflict. The cycles of violence that I discuss include the pre-colonial state encounters, the war of liberation against British white minority rule, the *Gukurahundi* genocide of the 1980s,⁴⁴ the chaotic and violent land redistribution programme of 2000⁴⁵ and the large displacements associated with electoral violence in 2000, 2002, 2008 and 2019.⁴⁶ These identified epochs of violence in Zimbabwe provide some understanding of the present-day state of affairs in the political, economic and social spheres. The political history of Zimbabwe from pre-colonial times provides a synopsis of the problem of violence. The synopsis reveals the consistent practice of failing to redress politically related sexual violations against women by the successive regimes that have governed Zimbabwe.

1.4 Historical context

1.4.1 Pre-colonial Zimbabwe plateau

Prior to the arrival of Europeans, African societies were complex with their own political, economic and social systems.⁴⁷ The societies were neither primitive backward nor static

⁴⁰ Report of the Special Rapporteur on Violence against Women its Causes and Consequences on Violence against Women in Politics. A/73/301. 6 August 2018. P 6.

⁴¹ Report of the Special Rapporteur on Violence against Women its Causes and Consequences on Violence against Women in Politics. A/73/301. 6 August 2018. P 6.

⁴² Report of the Special Rapporteur on Violence against Women its Causes and Consequences on Violence against Women in Politics. A/73/301. 6 August 2018. P 6.

⁴³ Brownmiller 1975:17.

⁴⁴ Catholic Commission for Justice and Peace in Zimbabwe (CCJPZ) 1997:43–44.

⁴⁵ Raftopolous 2009:211.

⁴⁶ Tshuma 2019:15.

⁴⁷ Dawson 2011:144.

as is commonly said of African nations.⁴⁸ These societies were rather complicated and dynamic with institutions worth defending.⁴⁹ The historical founding of Zimbabwe as a nation is described as marked by violence and unresolved conflicts.⁵⁰ It is characterised by defeat overthrow and tyranny over many decades.⁵¹ The routine sequence of the political history of Zimbabwe has been plagued with cycles of progress and then longer and often intractable conflict.⁵² A number of states emerged and fell including the Mapungubwe Kingdom whose capital was Great Zimbabwe around the eleventh century⁵³ Around 1450–1760 the Mutapa Empire existed and it was followed by the rise of the Rozvi State around the seventeenth century.⁵⁴

Under differing titles, violent clashes and numerous battles ensued between the Ndebele and the Shona from 1840 up to 1900.⁵⁵ That violence precedes both the advent of the Ndebele and colonialism and is undisputable as evinced by the names of the kingdoms that existed on what Beach⁵⁶ referred to as “the highland between the Zambezi and the Limpopo Rivers,” now Zimbabwe. Mutapa⁵⁷ (1450–1902) and Rozvi⁵⁸ (1690–1830) are just two such examples of the kingdoms which preceded modern-day Zimbabwe. The arrival of Mzilikazi in 1834 from the Zulu Kingdom conflict⁵⁹ and subsequently the pioneer column in 1890 only amplified rivalry in an already violent and aggressive setting.⁶⁰ The Nguni composed of two major groups, the Ndebele and the Gaza Nguni led by Mzilikazi, arrived and settled permanently in the southwestern and

⁴⁸ Dawson 2011:144.

⁴⁹ Dawson 2011:144.

⁵⁰ Tshuma 2019:14

⁵¹ Benyera 2014:159.

⁵² Benyera 2014:159–160.

⁵³ Pikirayi 2013:26.

⁵⁴ Pikirayi 2013:26

⁵⁵ Beach 1986:634.

⁵⁶ Beach 1994:7.

⁵⁷ “Mutapa is comes from the Shona word *kutapa*, meaning to enslave. According to oral history the Portuguese traders converted the title to Munhumutapa, meaning the owner or Lord of the conquered land.” Benyera 2014:159.

⁵⁸ “Rozvi comes from the Shona word *kurozva*, meaning a way of dispossessing someone in an absolute manner. The names depict the characters of the subsequent rulers who raided to obtain wealth and women, enslaving men for military purposes. “Rozvi as a name depicts a scenario in which once a group of people were raided they were left with no women, soldiers or livestock, which, according to Mudenge, were the cornerstone of pre-colonial wealth.” Mudenge 1974:25.

⁵⁹ The leader of the Matabele, who were an offshoot of the Zulu Kingdom, which were at that time ruled by Shaka. He was former military commander, who broke away from the rulership of King Shaka in an attempt to start his own dominion. Mazarire 2010: 31–34.

⁶⁰ Mazarire 2007:2.

southeastern parts of Zimbabwe.⁶¹ The relationship between the Shona, who were residing in the northern parts of the Zimbabwe plateau, and their new indigenous neighbours was not so cordial.⁶² There were intermittent raids and counter-raids that commonly took place amongst these groups. Mazarire states that “it is clear that the Nguni introduced a new system of “feudal parasitism” made possible by the threat of military force.”⁶³ “Neither of these groups believed in conflict against their subjects, nor was it realistic given their numbers. The use of violence however became a useful means of adapting to the new way of life.”⁶⁴

The historical epoch of colonialism in pre-colonial Zimbabwe was the catalyst event that significantly affected the political, social, cultural and economic way of life.⁶⁵ The colonial encounter with pre-colonial Zimbabwe is dated 1888; Zimbabwe from that point on formally became a colonial state when the British South Africa Company led by Cecil John Rhodes obtained mining concession rights from King Lobengula, the leader of the Ndebele people who resided towards the southern parts of the country.⁶⁶ This initiative to approach Lobengula was possible because Rhodes persuaded Britain to grant him a Royal Charter against protests by King Lobengula.⁶⁷ The granting of the Royal Charter facilitated the white settler group known as the Pioneer Column protected by the British South Africa Police to journey north from South Africa raising the Union Jack at Fort Salisbury, now known as Harare the capital city of present-day Zimbabwe.⁶⁸

A violent uprising by the Ndebele and Shona arose against the British South Africa Company in 1896 forming the basis of mass nationalism and future imaginings of an independent Zimbabwe.⁶⁹ It is widely believed among scholars that the factors that contributed to the uprising by the local people were based on the view that the presence of white settlers had brought about the outbreak of natural disasters like rinderpest,

⁶¹ Mazarire 2009:2.

⁶² Muchemwa *et al.* 2013:147.

⁶³ Mazarire 2009:31.

⁶⁴ Mazarire 2009:31.

⁶⁵ Ndlovu-Gatsheni 2009:43–44.

⁶⁶ Ndlovu-Gatsheni 2009:43–44.

⁶⁷ Ndlovu-Gatsheni 2009:46.

⁶⁸ Ndlovu-Gatsheni 2009:46.

⁶⁹ Beach 1980:1.

⁶⁹ Ndlovu Gatsheni 2009:59.

drought locusts and settler brutalities including forced labour, rape, looting and early colonial imposition such as the 1894 hut tax.⁷⁰ The nature of the political economy among the Ndebele and Shona as Mangani elaborates was such that there was a heavy reliance on land and cattle as primary commodities.⁷¹ Cattle were particularly important as they provided a link between communities and families through trading and the paying of dowry as a bride price.⁷² The subsequent arrival of the white settlers in large numbers escalated the theft of land and cattle and the imposition of hut tax among other things, causing the Ndebele and Shona to revolt.⁷³

The establishment of colonial rule brought about new forms of struggles for the local indigenous groups and racism disparaged Africans to the borders of life in Rhodesia.⁷⁴ The period was characterised by evictions of Africans from their fertile lands to accommodate the large influx of white immigrants who had failed to secure much of the gold that was in demand.⁷⁵ In a bid to regain their lost land heritage the Africans fought back but were conquered in the First Chimurenga/Umvuleka.⁷⁶ This war of liberation took place between 1896 to 1897 and it is estimated that 8 000 people were killed.⁷⁷ The colonial government and its structures intended to consolidate power by politically and economically subjugating and dominating the majority of Africans.⁷⁸ To consolidate its ill gotten economic and political privileges, the colonial state used violence and tyranny as its major weapons and pillars.⁷⁹ Blake states that the large arrival of European immigrants in the new colonial state changed the sexual politics in the colony.⁸⁰ The imbalance of having more white males than white females caused trouble as white men sought sexual satisfaction; forced and voluntary among indigenous populations.⁸¹ According to Ndlovu-Gatsheni, both Shona and Ndebele indigenous groups of

⁷⁰ Ndlovu-Gatsheni 2009:49.

⁷¹ Dawson 2011:145.

⁷² Dawson 2011:145.

⁷³ Dawson 2011:145.

⁷⁴ It is the name given to Zimbabwe in 1895 by Cecil John Rhodes upon establishing the British South African Company in its territory in 1890. Kaarsholm 1990:160–161.

⁷⁵ Muchemwa *et al.* 2013:147.

⁷⁶ Ranger 1967:23.

⁷⁷ Ranger 1967:23.

⁷⁸ Frederikse 1990:126.

⁷⁹ Frederikse 1990:126.

⁸⁰ Blake 1977:119.

⁸¹ Blake 1977:119.

Zimbabwe complained about the harassment and rape of women by white police officers.⁸² It is recorded that Chief Makoni complained to the Anglican missionary Frank Edwards that white raiders were sexually abusing Shona women.⁸³ Furthermore, the patriarchal and male-dominated Rhodesian society was intolerable to any sexual relations between European women and African men.⁸⁴ The obsession with protecting white women from being sexually attacked by black men became known as the black peril.⁸⁵ This ideological thinking saw the enactment of laws that criminalised interracial sexual relations.⁸⁶ In 1903 the Colonial Legislative Council approved measures that governed issues of sexual relations between black and white races.⁸⁷ In that regard, the Immorality and Suppression Ordinance Act made it a criminal offence for sexual relations between African men and white women. However, no penalty was legislated for sexual encounters between white males with African women.⁸⁸

White women undertook efforts to fight this hypocrisy through the Rhodesian Women's League, but to no avail.⁸⁹ Relations between white males with black African women were never criminalised therefore affairs between these two groups were common.⁹⁰ There have been analyses conducted on colonialism and its effects on gender in colonised lands.⁹¹ In trying to understand the ever-growing problem of sexual violence in conflict and its intensity during and post colonialism in Africa, South America and African Americans in the diaspora have attributed this pandemic to the colonial conquest.⁹² The colonial concept of race and the historic processes of segregation played a significant role in epistemic violence, and physical and structural violence in the un/gendering of subjects within and across diverse spatial and temporal domains.⁹³ African sociologist and South American scholar, namely Oyewumi and Lugones respectively, have argued that "sexualisation accompanied, permeated and coloured

⁸² Ndlovu-Gatsheni 2009:62.

⁸³ Ndlovu-Gatsheni 2009:62.

⁸⁴ Ndlovu-Gatsheni 1995:16–22.

⁸⁵ Ndlovu-Gatsheni 1995:16–22.

⁸⁶ Blake 1997:158.

⁸⁷ Ndlovu-Gatsheni 1995:10–15.

⁸⁸ Ndlovu-Gatsheni 1995:10–15.

⁸⁹ Ndlovu-Gatsheni 1995:16–22.

⁹⁰ Ndlovu-Gatsheni 1995:16–22.

⁹¹ Oyewumi 1997:121.

⁹² Murungi 2004:521.

⁹³ Isoke 2016:741.

the colonial project of racialising the so-called people of colonised nations,”⁹⁴ Oyewumi expressed concern over “the dominance of Western thinking in African knowledge production and gender relations among Yoruba people in Nigeria.”⁹⁵ Such a concern also applies to other colonised African nations. Research on this concern by Oyewumi established that the British colonial administration in Africa advanced the superiority of settlers over natives and at “the same time in one seamlessly interwoven bureaucratic system” created a superiority of men over women.⁹⁶ Isoke, like Oyewumi, agrees that two fundamental processes and strategies were inherent in the European colonisation of Africa for the establishment of that system.⁹⁷

The first and most thoroughly documented of this superiority status was achieved through the colonial processes of racialisation. A system defined as the “ongoing process of marking, categorising and reproducing human differences through the uneven distribution of life opportunities within specified geographic space-time continuums.”⁹⁸ The second identified process was the entrenchment of the inferiorisation of females. These two processes, racialisation and the inferiorisation inherent in colonial ideology were inseparable and became entrenched in the colonial situation.⁹⁹ The application of these processes on gender thereby culminated in the relegation of African women to the bottom-most rung of the colonial hierarchy.¹⁰⁰ The categorisation of indigenous and native groups degraded colonised women and became crucial to the colonial sexual racial ordering in all spheres of African indigenous life.¹⁰¹ The subjection of women were effected into the newly established colonial public sphere.¹⁰²

African scholars empathetically stated that while race and racism in “the Western colonisation process were integral in the systematic inferiorisation of the conquered and this paved the way for violence, conquest, slavery and subjugation as central elements

⁹⁴ Lugones 2007; Oyewumi 1997:124–125.

⁹⁵ Oyewumi 2002:1–1.

⁹⁶ Oyěwùmí 1997:121.

⁹⁷ Isoke 2016:741.

⁹⁸ Isoke 2016:741.

⁹⁹ Oyěwùmí 1997:152

¹⁰⁰ Oyewumi 1997:153.

¹⁰¹ Oyewumi 1997:121, 153, 123.

¹⁰² Oyewumi 1997:121, 153, 123.

of European global expansion.”¹⁰³ Segregation was achieved by the application of violence.¹⁰⁴ African and South American authors support the notion that colonisation played a substantial role in the perpetration of sexual violence in indigenous communities through the undermining of their traditional values and protective practices against sexual violence.¹⁰⁵

1.4.2 Zimbabwe’s liberation war

The grand changes that were taking place to Zimbabwe’s pre-colonial African structure in the political, economic, legal and social structures due to colonialism led to action being taken by both the colonial government and the Africans. Africans became disgruntled with how the Rhodesian Patriotic Front¹⁰⁶ was supported by the European immigrants and exhibited signs of entrenching itself within their borders by establishing a legacy of placing elite survival above economic survival.¹⁰⁷ The Europeans residing then in Rhodesia supported the Rhodesian Patriotic Front for the sole purpose of securing themselves against the idea of African majority rule which led to their declaration of independence from Britain.¹⁰⁸

The 75 years of British colonial rule were disrupted by the white-minority Southern Rhodesian government led by Ian Smith which discarded the title “Southern” in 1964 and declared a Unilateral Declaration of Independence¹⁰⁹ from the United Kingdom on 11 November 1965.¹¹⁰ Events in Africa played a catalyst role in influencing the political changes in the country. The 1960s witnessed East and West African nations gaining independence from colonial rule.¹¹¹ The ripple effect of this change created a new breed of radicalised African nationalists in southern African countries that were still under

¹⁰³ Mbembe 2017:20–21.

¹⁰⁴ Mbembe 2017:17–19.

¹⁰⁵ Oyewumi 1997:121.

¹⁰⁶ “In 1961, Ian Smith established the Rhodesian Front and attracted white-supremacist support. The campaign promises of independence from Britain with a white minority government, a surprise victory was won by his party in 1962.” Encyclopaedia Britannica n.d.

¹⁰⁷ Chitiyo 2004:28.

¹⁰⁸ Ellert 1989:3.

¹⁰⁹ It was “a Statement adopted by the Cabinet of Rhodesia on 11 November 1965 proclaiming that Rhodesia, a British territory in southern Africa that had governed itself since 1923, now regarded itself as an independent sovereign state.” Sanger n.d.

¹¹⁰ Chiweshe 2016:14.

¹¹¹ Muchemwa *et al.* 2013:147.

white colonial rule.¹¹² In Zimbabwe, the African nationalist parties, the Zimbabwe African Peoples Union (ZAPU) and Zimbabwe African National Union (ZANU) decided to wage a war using military means in an outcry against the political arrogance of the Rhodesian Patriotic Front officials.¹¹³ In response to the settler government's total determination against any form of majority rule, as expressed in Ian Smith's Unilateral Declaration of Independence in 1965, the Zimbabwe African National Liberation Army (ZANLA) was formed.¹¹⁴ The Unilateral Declaration of Independence was envisioned to embed white rule in the probable future. Volunteers from all walks of life among the indigenous Zimbabweans were willing to join the armed struggle against the Smith regime to establish majority rule.¹¹⁵

The violence that was waged by the African nationalists was not only targeting the colonial state, but inter- and intra-clashes were so grave that at some point it threatened the revolution itself.¹¹⁶ According to Muzondidya, "this violence can be linked to the role that colonialism played in planting seeds for ethnic rivalry. Colonialism all over Africa set into motion the politicisation of African identities."¹¹⁷ To rally moral and material support for waging the war, African nationalists used the issue of land as a strategy for recruiting young Africans to their cause.¹¹⁸ This support for their cause was not only achieved through persuasion, but the guerrillas also used both persuasion and coercion as strategies.¹¹⁹ As the majority of the Rhodesian population was based in rural areas, rural folks bore the brunt of the violence on two fronts.¹²⁰ The Rhodesian Security Forces, the armed wing of the Rhodesian Police and the Army accused the civilians of supporting terrorists.¹²¹ On the other front, the guerrillas accused the very same rural folk of betraying them to the Rhodesian Security Forces and were labelled sellouts of the revolution.¹²²

¹¹² Muchemwa *et al.* 2013:147.

¹¹³ Sithole 1978:38.

¹¹⁴ Chung and Kaarsholm 2006:78.

¹¹⁵ Chung and Kaarsholm 2006:78.

¹¹⁶ Chung and Kaarsholm 2006:78.

¹¹⁷ Muzondidya *et al.* 2007:278.

¹¹⁸ Muzondidya *et al.* 2007:278.

¹¹⁹ Mamdani 2008:18–19.

¹²⁰ Kriger 1992:23.

¹²¹ Kriger 1992:23.

¹²² Kriger 1992:23.

The war was brutal and the Rhodesian Army committed human rights violations¹²³ within Rhodesia and neighbouring countries such as Zambia and Mozambique where the black national liberation movement base camps had been set up.¹²⁴ Torture and other human rights violations¹²⁵ during the liberation war of the 1970s were well documented by the Catholic Commission of Justice and Peace in Zimbabwe (CCJPZ), Amani Trust and Amnesty International.¹²⁶ The human rights violations reports showed that the security forces of the Rhodesian government were responsible for the atrocities committed during the conflict. Research from other NGOs reported that the guerrilla movement was not exempt from such accusations.¹²⁷

According to Dzimbanhete, guerrilla misconduct during the war of liberation included killing, harassment, beating civilians, improper relations with women, in-house fighting and holding *pungwe* (all-night political mobilisation meetings) at places which compromised the safety of civilians.¹²⁸ Mtisi *et al.* note that a gender struggle also played itself out in the camps. There is increasing evidence that female guerrillas and ordinary women were sexually exploited during the struggle.¹²⁹

Chung¹³⁰ substantiates this by alluding that sexual assault was prevalent in the camps and women guerrilla fighters and refugees were at times exposed to considerable harassment and abuse by male commanders and were expected to provide services as “warm” blankets.¹³¹ This was prevalent in the camps despite warnings by highly regarded spirit mediums whose opinions played a significant role in spelling out the law

¹²³ It is estimated that the guerrilla war “claimed 60 000 lives and displaced about 15 million people by 1979. Many were displaced from their homes into “protected villages”, others had been turned into refugees mostly in Zambia, Botswana, Mozambique and Zambia; 100 000 had been injured.” Bastick *et al.* 2007:67.

¹²⁴ Huyse and Salter 2008:35.

¹²⁵ “Rhodesian regime from 1972 went on a brutal counter insurgency campaign and psychological warfare to target African people, using methods such as torture, detention, collecting fines, burning villages, shooting of unarmed civilians, confiscating cattle and forcibly removing people to protected villages.” Statement by Sister Janine McLanglin at the Economic Sanctions against Rhodesia. 1979:8.

¹²⁶ Statement by Mr Smart, Head of Africa Research for Amnesty International on Rhodesia in 1979 reported human rights violations by Rhodesian government. Policy such as detention without trial and torture reports were frequent and consistent over the years by police and special branch and security forces. Increased use of detention, death sentences imposed and executions took place despite grossly inadequate legal procedures. Amnesty International 1979; United States 1979.

¹²⁷ Reeler 2009:3–4.

¹²⁸ Dzimbanhete 2018:112–113.

¹²⁹ Mtisi *et al.* 2009:160.

¹³⁰ A Chinese immigrant who was born in Zimbabwe in the early 1940s, who joined the liberation war in the 1970s and became the Education Minister in Mugabe’s government after independence.

¹³¹ Chung and Kaarsholm 2006:200.

and conduct of the guerrillas.¹³² Mitsi *et al.* add that in Matabeleland in the southern part of Zimbabwe in Nkayi and Lupane rural communities, elderly men found the guerrillas a source of great concern because they occasionally entered into involuntary relationships with women.¹³³ The young guerrilla fighters were reported by their leaders as especially difficult to control and were often chided by their leaders about their behaviour towards women.¹³⁴ The young guerrillas were often told that the pursuit of women was not why they were there.¹³⁵ These rules on sexual behaviour Chung states were generally obeyed by rank and file but were disregarded by many of the top leaders.¹³⁶ Consensual and non-consensual sexual relations commonly occurred between the ZANLA, guerrilla fighters and rural teenage girls.¹³⁷ These girls were commonly referred to as *vana chibwido* and they worked and assisted the liberation fighters.¹³⁸

Sexual services were demanded by senior commanders from some of the young women guerrillas who had joined the liberation struggle in their thousands.¹³⁹ Some of the women chose to attach themselves as wives to the leaders and some bore children from these temporary unions.¹⁴⁰ The women who did not bear children were regarded as girlfriends. Loyalty was demanded of these women by the guerrilla leaders as expected of wives, but the leaders were free to have women in all the camps.¹⁴¹ Most times these women did not enter these casual unions freely but were forced into them.¹⁴² In the communities, Dzimbanhete further states, it was not unusual for teenage girls to be involved in love affairs with the comrades.¹⁴³ Sexual transgressions by the liberation fighters involved having consensual sex with either civilian married women or teenage girls.¹⁴⁴ However, women were reluctant to speak about their experiences and

¹³² Chung and Kaarsholm 2006:200.

¹³³ Mitsi *et al.* 2009:161.

¹³⁴ Mitsi *et al.* 2009:161.

¹³⁵ Mitsi *et al.* 2009:161.

¹³⁶ Chung and Kaarsholm 2006:125.

¹³⁷ Dzimbanhete 2015:53.

¹³⁸ Dzimbanhete 2015:53.

¹³⁹ Chung and Kaarsholm 2006:125.

¹⁴⁰ Chung and Kaarsholm 2006:125.

¹⁴¹ Chung and Kaarsholm 2016:126.

¹⁴² Chung and Kaarsholm 2016:126.

¹⁴³ Dzimbanhete 2015:53, 55.

¹⁴⁴ Dzimbanhete 2015:53, 55.

what they witnessed taking place in the camps because of the fear of judgment and its bearing on their moral standing later in life.¹⁴⁵ Recently a senior government official, the current Defence Minister, Oppah Muchinguri admitted to being a victim of politically motivated rape during the liberation war.¹⁴⁶ She acknowledged that rape was and is used to weaken and punish women during war and other political conflicts, limiting female participation whether as candidates or voters.¹⁴⁷ The long-protracted war, which reflected the defeat of the Rhodesian government by the African nationalists, finally ended with the Lancaster House Constitutional Talks brokered by the British government in 1979.¹⁴⁸

1.4.3 Lancaster House Constitutional negotiations

There was increasing international pressure to end the brutal war between the Rhodesian regime and the major liberation movement parties composed of ZANU PF and ZAPU.¹⁴⁹ At that time, Ian Smith's regime had conceded some power to Bishop Abel Muzorewa who was a leader of a black civilian government.¹⁵⁰ He had been elected by a non-racial election that the liberation movement did not recognise and participate in.¹⁵¹ The war, therefore, did not stop as a result of the non-recognition by the liberators of this nominal government. In 1979 a conference was held in Great Britain at Lancaster House and the leaders of the warring sides attended. Robert Mugabe and Joshua Nkomo represented the Patriotic Front, and a delegation from Muzorewa included Ndabaningi Sithole and Ian Smith.¹⁵²

Negotiations were held and an agreement was signed; a constitution that would govern the new state was adopted which culminated in a ceasefire agreement.¹⁵³ The Lancaster House Agreement paved way for a new Zimbabwe based on majority rule

¹⁴⁵ Dzimbanhete 2015:53, 55.

¹⁴⁶ <https://www.pazimbabwe.com/politics-24991-video-oppah-muchinguri-reveals-raped.html>

¹⁴⁷ Bardall *et al.* 2018.

¹⁴⁸ Muchemwa *et al.* 2013:148.

¹⁴⁹ Mtisi *et al.* 2009:166.

¹⁵⁰ Bloomfield *et al.* 2003:36.

¹⁵¹ Bloomfield *et al.* 2003:36.

¹⁵² Bloomfield *et al.* 2003:36.

¹⁵³ Bloomfield *et al.* 2003:35.

and a golden opportunity for a new post-colonial Zimbabwe.¹⁵⁴ It granted the white Zimbabweans significant white minority rights, and strict and detailed protection of commercial farmland.¹⁵⁵ According to Raftopolous, this policy adopted for the new Zimbabwe, detailed the difficulty ahead of rebuilding the nation.¹⁵⁶ The policy agreement set out to “dissipate the fears of the white minority and international community while consolidating ZANU PFs determination to control and extend the reach of the state to provide the resources for the improvement of the majority of the people.”¹⁵⁷ The language of reconciliation was a “generous and inclusive invitation for old antagonists to join the emerging nation.”¹⁵⁸ Kagoro states “that the final document produced from the talks was warped and reflected the compromise between the colonial power and the nationalists.”¹⁵⁹

The colonial power seized the opportunity to protect the white farmers’ economic interests.¹⁶⁰ The nationalists accepted the agreement, understanding its structural defects in the hope of rectifying them in the near future when they would gain full political power.¹⁶¹ The *General Amnesty Ordinance of 1980* pardoned all the warring parties of the conflict, and crimes committed by both the nationalist guerrillas and the Rhodesian forces went unpunished.¹⁶² The reconciliation extended by Mugabe exhibited a top-down, exclusivist and elitist posture, which left out the actual victims of the violence.¹⁶³ Muzondidya alludes to the same and adds that “the reconciliation attempt was a superficial gesture¹⁶⁴ as it focused on the white-black binary, “yet the monstrous and vigorous nature of the conflict required a holistic and all-encompassing approach.”¹⁶⁵ Tekere stated that the only reason he was opposed to the reconciliation

¹⁵⁴ Muchemwa *et al.* 2013:149.

¹⁵⁵ The major high points of the Lancaster House Conference settlement were “that the minority white population was allowed to retain 20 of the 100 seats in Parliament for at least seven years.” Mtisi 2009:165. Chung and Kaarsholm 2006:246.

¹⁵⁶ Raftopolous and Mlambo 2009:XII–XIII.

¹⁵⁷ Raftopolous and Mlambo 2009:XII–XIII.

¹⁵⁸ Raftopolous and Mlambo 2009:XII–XIII.

¹⁵⁹ Kagoro 2004:236.

¹⁶⁰ Section 16(1) set in place a ten year limitation on the future government’s ability and power to acquire land compulsorily for state purposes and Section 52 placed a prohibition of 10 years on the amendment of the Declarations of Rights. *The Lancaster House Constitution of Zimbabwe, 1979.*

¹⁶¹ Kagoro 2004:236.

¹⁶² Bloomfield *et al.* 2003:37.

¹⁶³ Bloomfield *et al.* 2003:37.

¹⁶⁴ Kriger 2003:2.

¹⁶⁵ Muzondidya 2004:213.

that Mugabe extended at independence was that it had never been discussed before.¹⁶⁶ The general problem of lack of justice in post-colonial Zimbabwe was in the founding of the new state.¹⁶⁷ The shaky foundation of independent Zimbabwe covered unsettled disputes and prejudices that were a century old; these were carried over into post-independent Zimbabwe.¹⁶⁸ A culture of intolerance for political plurality, diversity and accountability for wrongs perpetuated against its citizens was set as a foundation for the new nation.¹⁶⁹ This became evident shortly after independence when post-colonial conflicts started with the Intumbane uprisings that led to the *Gukurahundi* massacres from 1982–1986 and continued with the successive elections held in 2000, 2002, 2008 and 2018.¹⁷⁰

1.4.4 Post-independence violence and impunity

Though Zimbabwe was free to govern itself since its attainment of independence from white rule, violence was not absent in this new state.¹⁷¹ The armed wings ZANLA and ZIPRA of the two main political parties ZANU PF and ZAPU¹⁷² that brought liberation to Zimbabwe often competed for territory and support. They frequently fought and killed each other before independence and this suspicion of each other continued in the new state.¹⁷³ This led to *Gukurahundi*¹⁷⁴ massacres that took place in the southern part of the country, namely the Midlands and Matabeleland between 1982 and 1986. To silence opposition, Mugabe's regime conducted counter-insurgency operations against dissidents who had been ex-guerrillas in the war of liberation by unleashing the army in

¹⁶⁶ Tekere 2007:55.

¹⁶⁷ Muzondidya 2004:175.

¹⁶⁸ Muzondidya 2004:175.

¹⁶⁹ Muchemwa *et al.* 2013:149.

¹⁷⁰ Muchemwa *et al.* 2013:149.

¹⁷¹ Nyathi 2004:63–64.

¹⁷² "In 1963, controversies led to a split within Joshua Nkomo's ZAPU, then the main movement and the rival group, ZANU that was set up by Ndabaningi Sithole. Robert Mugabe became its leader in 1966. Initially the split was not based on ethnic or regional differences or composition, but gradually it became significantly tribal in nature because ZANU and ZAPU campaigned and recruited in different areas – ZAPU mainly in Matabeleland, ZANU in the Shona-populated areas. The rift deepened into serious conflict between the armed wings of the two movements – the ZIPRA linked with ZAPU whilst the ZANLA was the armed wing of ZANU. ZIPRA and ZANLA differed in outlook, training and ideology." Eppel 2004:44.

¹⁷³ Nyathi 2004:64.

¹⁷⁴ In the local Shona language, "it refers to the first rains that wash away chuff left from the previous seasons. In Matabeleland, civilians believed they were themselves the chuff or rubbish that had to be washed away as Mugabe had given this name to the Fifth Brigade who were responsible for most of the atrocities in the region, at their passing out parade in December 1982. "This became the name of the military operation in the Matabeleland and Midlands provinces." Eppel 2004:59.

the region.¹⁷⁵ During this conflict, thousands of civilians disappeared and were beaten, killed, raped and tortured. The Fifth Brigade Unit of the Zimbabwe National Army (ZNA) committed these violations.¹⁷⁶

Crimes of a sexual nature were reported widely in Matabeleland during *Gukurahundi* massacres. Women and young girls were subjected to physical torture and rape.¹⁷⁷ Women were also forced to become sexual slaves to members of the Fifth Brigade.¹⁷⁸ Women were reportedly forced to climb trees, spread their legs and the Fifth Brigade soldiers would insult their genitals and simultaneously beat them.¹⁷⁹ Sharp objects were inserted in their private parts and they were subjected to genital mutilation. This period was followed by an agreement to end the hostilities.¹⁸⁰ This brought about unity and eventually led to the formation of a one-party state. All those responsible for the heinous crimes committed during the conflict were not held to account.¹⁸¹ The Chihambakwe Commission was set up to investigate the allegations of gross human rights violations but to date, the report was never published.¹⁸² The political period that followed this violence in the early 1980s was characterised by peace. However significant changes were taking place in the economic and social sectors of the country.

1.4.5 Post-2000 economic crisis and election violence

By 1997, the Zimbabwean economy was exhibiting signs of failure.¹⁸³ This situation was attributed to the government's economic policies and the introduction of the Economic Structural Adjustment Programme.¹⁸⁴ Corruption was rampant within government structures and the people of Zimbabwe were dissatisfied with ZANU PF governance.¹⁸⁵ Davies states that the early 1990s saw some growth in the economy of Zimbabwe and by 1996 there appeared to be a possibility that the Economic Structural Adjustment

¹⁷⁵ CCJPZ 1997:69–70.

¹⁷⁶ CCJPZ 1997:69–70.

¹⁷⁷ CCJPZ 1997:69–70.

¹⁷⁸ CCJPZ 1997:69–70.

¹⁷⁹ In 1987 the Unity Accord signed by the ruling party ZANU PF and ZAPU led by Joshua Nkomo. Moyo 1991:83.

¹⁸⁰ In 1987 the Unity Accord signed by the ruling party ZANU PF and ZAPU led by Joshua Nkomo. Moyo 1991:83.

¹⁸¹ CCJPZ and Legal Resources Foundation 1997:43.

¹⁸² CCJPZ and Legal Resources Foundation 1997:43.

¹⁸³ Reeler 2009:4.

¹⁸⁴ Reeler 2009:4.

¹⁸⁵ Reeler 2009:4.

Programme was bearing fruit.¹⁸⁶ In 1997 a reversal of the positive trend was evident in the economy, marking the start of the current economic and political crisis in Zimbabwe.¹⁸⁷ The reversal in the positive economical trend is attributed to the government of Zimbabwe's involvement in the Democratic Republic of Congo (DRC), an initiative attempt by the Southern African Development Community (SADC) to stabilise the security situation.¹⁸⁸ The engagement in the DRC offered some economic opportunities for the government of Zimbabwe as it encouraged entrepreneurs to penetrate the DRC market. The cost of involvement in the DRC drew negatively on the country's economic reserves and contributed to the failure of the structural adjustment programme.¹⁸⁹ A result of the failing economic policy and decisions such as the payment of enormous unbudgeted payments to the now rebellious war veterans by President Robert Mugabe had a spiralling effect and affected the value of the Zimbabwe dollar, which led to its crash.¹⁹⁰

This led to the 1998 food riots, which were sparked by the rising cost of living, inflation of basic goods and services, the decline in the standard of living for the majority and the devaluation of the local currency.¹⁹¹ The political situation and state of the economy continued to decline. In 1999 a new opposition party was formed called the Movement for Democratic Change (MDC) which was the strongest opposition to the ZANU PF post-independence.¹⁹² In 2000, general parliamentary elections were held and it was acknowledged that they were the most violent elections since 1980, but it was soon eclipsed by the 2002 presidential election.¹⁹³ Overshadowed by land invasions and nationwide political violence, the ZANU PF maintained power with "a significantly

¹⁸⁶ Davies 2004:32.

¹⁸⁷ Davies 2004:32.

¹⁸⁸ Raftopolous 2009:202.

¹⁸⁹ Raftopolous 2009:203.

¹⁹⁰ Reeler 2009:4.

¹⁹¹ The government of Zimbabwe responded to the riots by using brutal force against its citizens using the police and army. Reports revealed that beating, torture and arrests were indiscriminately used to anyone suspected of taking part in the riots. Zimbabwe Human Rights NGO Forum 1998:34-40.

¹⁹² Raftopolous and Savage 2004:204-205.

¹⁹³ According to Reeler, "The 2002 election was more acrimonious and violent than the previous one and, because there was an expectation of widespread irregularities, monitoring of the process was far more diligent than in 2000. The 2002 election itself became mired in multiple controversies, especially relating to the many legal challenges and the changes to the laws and regulations governing the elections, which continued right up to the start of the poll." Reeler 2009:6.

reduced majority and a forfeiture of its previous two-thirds majority in parliament since 1980.”¹⁹⁴

Citizens of Zimbabwe were by this time demanding a new constitution. Land invasions of white-owned farms began when the draft constitution was rejected by the masses in the constitutional referendum of 2001.¹⁹⁵ Human rights violations were reportedly orchestrated by government sponsored youth militias and war veterans in the takeover process of white-owned land.¹⁹⁶ Violence and terror between the rival political parties reached their peak between 2000 and 2008 when “ZANU (PF) increasingly utilised state agencies, war veterans and militia during election campaigns.”¹⁹⁷ Hundreds of opposition party activists and supporters, mainly from the Movement for Democratic Change –Tsvangirai (MDC-T), were killed in the 2000, 2002 and 2008 elections.¹⁹⁸ Thousands were displaced, raped and subjected to all forms of sexual assault. The intensity and aggressiveness of the violence resulted in the discrediting of the 2008 run-off presidential elections.¹⁹⁹ The volatile situation in the country brought international pressure on the Government of Zimbabwe. As a result of mediation by the former South African President, Thabo Mbeki and the SADC, the ruling ZANU PF party and the opposing MDC factions²⁰⁰ signed a Global Political Agreement (GPA) on 15 September 2008.²⁰¹

The discontentment by the masses, the socio-political opposition and the intensified prospects of losing the 2008 general election, prompted ZANU PF to resort to sexual violence to maintain political control.²⁰² The main victims of sexual violence were alleged MDC-T supporters.²⁰³ These violations were perpetrated by “youth gangs, war

¹⁹⁴ Reeler 2009:6.

¹⁹⁵ Kagoro 2004:154,144–145.

¹⁹⁶ Reeler 2009:6.

¹⁹⁷ Sachikonye 2011a:3.

¹⁹⁸ Chiweshe 2016:16–17.

¹⁹⁹ Chiweshe 2016:16–17.

²⁰⁰ The MDC led by Morgan Tsvangirai was formed in 1999. In 2005 it split into the MDC led by Tsvangirai and the MDC led by Arthur Mutambara. The reasons for the party splitting are believed to be infiltration by the government of Zimbabwe and failure to agree on whether MDC should participate in the 2005 Zimbabwe Senatorial Elections. [https://en.wikiredia.com/wiki/Movement_for_Democratic_Change_\(prior_to_2005\)](https://en.wikiredia.com/wiki/Movement_for_Democratic_Change_(prior_to_2005)) Accessed 28 May 2021.

²⁰¹ Machakanja 2016:2.

²⁰² Hodzi 2012:2–3.

²⁰³ Hodzi 2012:2–3.

veterans, state security agents and supporters of the ZANU-PF.”²⁰⁴ The systematic rape that took place during the 2008 elections is generally believed to be a continuation of previous violence perpetrated against members of the opposition MDC in preceding election years.²⁰⁵ The majority of the perpetrators were party supporters and apparatus of Mugabe’s government.²⁰⁶ According to AIDS-Free World, “the resort of state security agents to commit sexual violence against civilians suggests that it was a centrally organised campaign rather than spontaneous and random acts.”²⁰⁷ This pattern was repeated in almost all provinces of the country reinforcing suspicion that it was centrally organised.²⁰⁸ In the GPA of 2008 between the ZANU PF government and the opposing political parties, provision was made for the establishment of the Organ of National Healing, Reconciliation and Integration (ONHRI). Its mandate was to deal with the violence that had been a feature of politics in Zimbabwe. To date, no concrete measures have been taken to address sexual violence-related crimes that resulted from the political conflict.²⁰⁹

The displacement of Robert Mugabe’s rule in Zimbabwe since independence in November 2017 seemed to have brought about a glimmer of light in the political realm. The new leadership in the ZANU PF that took over under the leadership of Emmerson Mnangagwa promised under a new dispensation, a new Zimbabwe which was open for business.²¹⁰ The new dispensation quickly returned to its old tricks as can be seen in the 2018 general elections. On 20 July 2018 general elections were held in Zimbabwe and a delay in the announcement of the results brought about tension in the country. On 1 August 2018 youths in the city of Harare marched demanding the announcement of the election results.²¹¹ The supposedly “new dispensation” deployed hundreds of soldiers and anti-riot police across Harare.²¹² Soldiers on foot indiscriminately beat

²⁰⁴ Hodzi 2012:3.

²⁰⁵ Reeler 2009:31.

²⁰⁶ A Solidarity Peace Trust report revealed that “ZANU-PF youth committed 83 per cent of crimes while state agents- the Zimbabwe Republic Police (ZRP), the ZNA and members of the Central Intelligence Organization committed 18 per cent.” Reeler 2008:31; AIDS-Free World 2009:13, 10; Research and Advocacy Unit and Zimbabwe Association of Doctors for Human Rights 2010:2.

²⁰⁷ AIDS-Free World 2009:10, 17.

²⁰⁸ AIDS-Free World 2009:10, 17.

²⁰⁹ AIDS-Free World 2008:10–17.

²¹⁰ Human Rights Watch 2019.

²¹¹ Human Rights Watch 2019; Zimbabwe Human Rights NGO Forum 2018:3-4.

²¹² Human Rights Watch 2019.

anyone in sight; later the police confirmed the shooting death of six people.²¹³ Other violations reported during the period 1–9 August 2018 included extra judicial killings, gunshot wounds, assaults, rape and sexual assault.²¹⁴ These incidences of violence in August 2018 became evident of the fact that Mnangagwa’s leadership branded as the “new dispensation” was no different from Robert Mugabe. In 2019, two years after Mnangagwa assumed power, a price hike in the cost of fuel by his regime sparked a two-day national stay-away.²¹⁵ On the second day of the stay-away, reports emerged that members of the ZNA and the ZRP were ransacking homes in high-density areas, assaulting and arresting young men.²¹⁶ Violence erupted in mostly high-density suburbs and rural areas as the military and ZANU PF activists pursued opposition activists.²¹⁷ They accused the young men of participating in the stay-away and barricading roads prohibiting citizens from going to work.²¹⁸

Reports revealed that during the raids conducted by the security agents in the homes, women were once again subjected to rape and sexual violence.²¹⁹ The Zimbabwe Human Rights NGO Forum reported about seventeen cases of rape and other forms of violations of a sexual nature during this stay-away period.²²⁰ In all rape cases, perpetrators were members of the army collaborating with the police. There were further reports of violations such as torture, abductions, displacements, assault and inhuman and degrading treatment.²²¹ The use of sexual violence and rape in Zimbabwe during political contests has been reported dating back to pre-and post-independence. Since 2000, there has been a significant increase in the number of such incidence reports.²²² The government of Zimbabwe’s response to this crisis by sending the army to bring the situation under control is a significant trait that the government of Zimbabwe employs when dealing with dissent within the political realm. Muchemwa states that this response is reflective of three important things: First the use of violence as a tool

²¹³ Zimbabwe Human Rights NGO Forum 2018:3–4.

²¹⁴ Zimbabwe Human Rights NGO Forum 2018:3–4.

²¹⁵ Zimbabwe Human Rights NGO Forum 2019: 3–4.

²¹⁶ Zimbabwe Human Rights NGO Forum 2019: 3–4.

²¹⁷ Zimbabwe Human Rights NGO Forum 2019: 3–4.

²¹⁸ Zimbabwe Human Rights NGO Forum 2019: 3–4.

²¹⁹ Zimbabwe Human Rights NGO Forum 2019:14.

²²⁰ Zimbabwe Human Rights NGO Forum 2019:14.

²²¹ Zimbabwe Human Rights NGO Forum 2019:4–5.

²²² Research and Advocacy Unit 2011a:9.

against the perceived enemies by the ZANU PF regime is a deeply rooted and entrenched colonial tactic to silence perceived enemies of the state.²²³ This observation is supported by Chung who states that “the culture and political polarity that leads to violating and killing of opposition members has its roots in the colonial settler heritage.”²²⁴ Second, it has become evident that the post-Zimbabwean state is characterised by a lack of tolerance for political diversity and dissent. The state of Zimbabwe in dealing with dissent relies heavily on force and a narrow interpretation of citizenship and national unity.²²⁵ Third, it has exposed the observations by earlier scholars that the reconciliation extended in 1980 was only applicable to the racial issue, as all other issues affecting the nation today were and continue to be regarded as insignificant to warrant any attention from the regime. Furthermore, the government of Zimbabwe harbours a culture of intolerance to criticism, polarity and plurality in the political arena.²²⁶

From the above political history of Zimbabwe, there is a general pattern that is exhibited by the Government of Zimbabwe when it relates to accountability for crimes committed against its citizens. The ZANU PF government responds to allegations of human rights violations by enacting amnesty laws that prohibit the investigation and prosecution of such violations.²²⁷ While the government has in recent times responded to this gap in accountability on conflict-related sexual violence crimes, it has asked women who have been victims of crimes of a sexual nature to report to the police. In the lead-up to the elections in July 2018, the Commissioner General of Police stated that his office is ready to investigate politically motivated cases of sexual violence and that survivors should come forward, especially those from 2008.²²⁸ This should be the normal procedure but because the rapes and sexual violations have been committed by state agents, the victims are reluctant to report them. The reluctance to report by victims

²²³ Muchemwa *et al.* 2013:150.

²²⁴ Chung and Kaarsholm 2006:165.

²²⁵ Muzondidya 2009:176.

²²⁶ Muchemwa *et al.* 2013:150.

²²⁷ Amnesty International 2000:6.

²²⁸ Commissioner General Matanga was speaking at the Women's Coalition of Zimbabwe launch of a project on violence against women in elections VAWIE in partnership with Zimbabwe Peace Project, Zimbabwe Women Lawyers Association with support from International Federation of Electoral Systems and the Canadian Embassy. This launch was in July 2018.

stems from the fact that perpetrators of such violations are part of the system where victims of sexual violence are supposed to seek the necessary support and redress.²²⁹ Reports by the victims of these violations have stated that soldiers who are cited as perpetrators threatened victims with death if they reported the rapes. In some instances, the perpetrators were reported to have bragged that they will not be held accountable even if the women dared to report.²³⁰ Post-election violence in August 2018 and January 2019 reinforced the fact that the government does not take politically motivated violence cases seriously.²³¹ Security agents act in a manner that exhibits that they are accorded immunity for crimes committed against citizens during election periods. This has culminated in a situation where the nation has become polarised when it relates to political matters.²³² Since the economic and political crisis began, Zimbabweans have split into two political parties, namely, ZANU PF and the MDC, with ZANU PF seen as the perpetrators of violence and the MDC as the victims.²³³

The political history of Zimbabwe reveals that there is an entrenched culture of impunity within state-sponsored militias²³⁴ and other state agencies such as the police, army, and the Central Intelligence Office. This culture of impunity extends to supporters of the ruling ZANU PF and the government has “thwarted the prosecution of perpetrators by controlling the police, undermining the independence of the judiciary,²³⁵ and using direct threats and the issuing of legislation to further their agenda.”²³⁶ It is evident that since independence, ZANU PF members are immune to prosecution and this stance has continued throughout its political history. Since the political crisis in Zimbabwe began and the subsequent formation of the country’s first political opposition, the MDC, Zimbabwe has remained trapped in constant and perpetual cycles of conflict, violence, and disputed and inconclusive electoral results.²³⁷ The ZANU PF’s ideology regards

²²⁹ Zimbabwe Human Rights NGO Forum 2019:20.

²³⁰ Zimbabwe Human Rights NGO Forum 2019:18.

²³¹ Zimbabwe Human Rights Commission 2019:9.

²³² Zimbabwe Human Rights NGO Forum 2019:20.

²³³ Zimbabwe Human Rights NGO Forum 2019:20.

²³⁴ Amnesty International states that, “as an underhanded arm of the state, these informal “militias” are comprised of supporters of the ruling ZANU-PF party, members of the Zimbabwe National Liberation War Veterans Association and unemployed rural youths, sometimes press-ganged into their activities.” Amnesty International 2002:2–3.

²³⁵ Goredema 2004:101–102.

²³⁶ Amnesty International 2002:6.

²³⁷ Tshuma 2019:16.

violence as a necessary element of addressing political and social differences. It will resort to violence to solve problems that threaten its power base. This has inadvertently left Zimbabwe today as a fractured and broken society.²³⁸ The persistent use of methods such as torture, harassment, threats, intimidation and sexual violence to silence dissenting voices has become familiar weapons of choice for the government of Zimbabwe. These forms of violence have been deployed by all the successive administrations in Zimbabwe pre- and post-colonialism to quell dissent and any form of opposition.²³⁹ The status quo will continue unless representatives of the past and present construct a different approach to the crisis that maps a path that is inclusive and tolerant.

1.5 Method and theoretical approach

The imperative of this study is to research the possibility of adopting pre-colonial African legal systems in addressing conflict-related sexual violence in Zimbabwe. The general problem that has plagued Zimbabwe in times of conflict has been the targeting of women's bodies and the general failure to redress sexual violations that result from the conflict. This has been a common feature from the colonial era and is prevalent in post-colonial Zimbabwe.

The theoretical approach of this research is guided by African philosophy and African feminist theories on the radical thinking and adoption of African philosophy in situations of conflict resolution on conflict-related sexual violence. The engagement with African philosophy is important as it advances the growth of theories ingrained in Africa. That has the prospect of working towards the unshackling of the African intellectual landscape from the dominant Western culture and philosophy. It is hoped that the ultimate result of reliance on African philosophy will motivate the decolonisation of African minds in dealing with conflict issues that plague its continent presently. The scepticism surrounding African philosophy and value systems sends a message that Africans need to revitalise their value systems. They need to discover their nature of being, their theory of knowledge and recuperate their lost dignity. As Mapaire notes,

²³⁸ Tshuma 2019:17.

²³⁹ Cameron 2018:42–43.

“the recognition of traditional and socio-cultural normative systems as legal inputs that promote reconciliation, social justice and rebuilding of African communities in disturbed and battered societies is instrumental in achieving sustainable African integration.”²⁴⁰

The conceptual framework of the research is further guided by African feminist theories. African feminist theories expose how the colonial project racialised indigenous nations and left behind the desolation of the racialised body. The argument advanced in this research adopts the scholarly work done by Oyewumi, Lugones, Mendoza and Gqola who all argue gender is intertwined with the colonial racism project.²⁴¹ The gender dimension resulting from racism in colonial and post-colonial eras cannot be fully understood without unearthing the link between gender and racism. Central to the colonial project was the “sexual exploitation and the objectification of black women by colonial powers coupled with the demonisation of black male sexuality as bestial.”²⁴² These constructions of black sexuality were not historical mistakes but were key to the workings of colonial power. To address the problems of sexual violence, the understanding of colonialism and the nature of the sexual racial wound it created is critical. Furthermore, the recognition of this notion is a central key to unlocking the question of decolonisation.²⁴³

Decolonial theory is instrumental to this research as it advances the notion that those perceived as inferior must radically challenge colonising discourse and must make space for alternative imaginations of the world. This is the on-going call that has been heralded by African philosophers in all spheres of African life to address the inherited modern systems operating in Africa today.

²⁴⁰ Mapaire 2011:150.

²⁴¹ Oyewumi in her book *The Invention of Women: Making an African Sense of Western Gender Discourses* (1997) states that “We can determine two pivotal and intertwined processes ingrained to European colonisation of Africa. The first and more thoroughly documented of these processes was the racializing and the attendant inferiorization of Africans as the colonized, the natives. The second process ... was the inferiorization of females. These processes were inseparable, and both were embedded in the colonial situation.” Oyewumi 1997:151, 153, 152.

Maria Lugones argues in response to Quijano that “gender is as central to the colonial power project as race.” Lugones, 2010:748; Mendoza, 2016:102.

Gqola asserts that the “Western patterns were violently enforced in ways that were extremely and holistically disruptive, and that turned any deviation from the Western sexual norm into a source of embodied racialised sexualised shame for the colonised.” Gqola 2015:40.

²⁴² Coetzee and Du Toit 2017:1, 8.

²⁴³ Coetzee and Du Toit 2017:1, 8.

The argument developed in the study is that there is a general lack of appreciation in Zimbabwe's current legal system of the importance of pre-colonial African legal philosophy as symbolic and material in how law and justice are lived, understood and theorised.²⁴⁴ This situation presents itself in this manner in Zimbabwe due to historical encounters with colonialism, the colonial institutions of racial segregation and oppression and the post-colonial changes that the country is grappling with.²⁴⁵ This historical epoch of colonialism in Zimbabwe's history has significantly informed the background of all the literature on post-independent law and jurisprudence thereby resulting in the replacement of all forms of literature related to pre-colonial African philosophy legal systems and its philosophies on law and justice.²⁴⁶ This has significantly affected how conflict-related sexual violence is addressed. Western ideologies and methodologies represent the worldviews, perspectives and background of colonialism and thus further perpetuating their interest in their post-colonial Africa.²⁴⁷

This threatens the call for radical thinking in African legal philosophy and conceptual frameworks in disciplines such as law and justice in conflict resolution, decolonisation and black liberation as found in struggles of black consciousness tradition.²⁴⁸ Research into the history of Zimbabwe, which is elaborated on in the motivation section of the study, substantiates the preposition that there was and is "widespread importation and coverage of foreign and mostly white European theories into the legal systems."²⁴⁹ This western methodological intrusion brought by colonialism inadvertently resulted in other traditions such as African philosophy, critical race theory, cultural studies, black feminism, postcolonial studies, Latin American decoloniality, the Black Arts movement and Afro-Caribbean failing to form the core definitive canon of post-independent African nation.²⁵⁰ It is therefore not surprising that African legal philosophy operational in African countries such as Zimbabwe continues to function under the labels and status propagated by colonialists. Whereby colonialists labelled and relegated pre-colonial

²⁴⁴ Modiri 2010:4.

²⁴⁵ Modiri 2010:4.

²⁴⁶ Modiri 2017:4.

²⁴⁷ Modiri 2017:5.

²⁴⁸ Modiri 2010:4.

²⁴⁹ Modiri 2010:4.

²⁵⁰ Modiri 2017:7.

African philosophy as insignificant, a relic of the past that warranted no further significant recognition.²⁵¹ One can safely assume that from colonial interpretations of pre-colonial African legal systems on matters including conflict-related rape and sexual violence, pre-colonial African legal philosophy and methodology were perceived as incapable of resolving such crimes.²⁵² In the establishment of Western legal systems and institutions by colonial governments through their observation of African legal systems, there was a deliberate move to treat all sexual violence crimes as matters to be solely handled by the new established formal Western court systems.²⁵³

It is further contended that to deal with the glaring problem in addressing conflict-related violence in Zimbabwe, the call by African philosophers for Africans to embark on a journey of embracing its philosophies in resolving conflicts are relevant and significant. An outcry has been heralded by African scholars and other scholars from continents that underwent colonialism for a gradual shift from relying on the culture, philosophy and knowledge of colonialism. Such African scholars include Wiredu,²⁵⁴ Murungi,²⁵⁵ Biko,²⁵⁶ Ramose,²⁵⁷ Nzegwu,²⁵⁸ Tamale,²⁵⁹ Amadiume²⁶⁰ and South American scholars such as Lugones and Mignolo²⁶¹ have been instrumental in the call for colonised nations to unearth their knowledge and cultural practices untainted by the colonial encounter.²⁶² The unearthing of indigenous knowledge propels such nations from the perils of colonial domination. The call by African scholars is motivated by the paradoxes that exist in Africa's post-colonial conflicts, the increased instability and the magnitude of violations including those of a sexual nature. This includes the western domination in knowledge methodology and practice in conflict resolution.

²⁵¹ Modiri 2010:4–5.

²⁵² Benson and Chadya 2005:599.

²⁵³ Benson and Chadya 2005:608.

²⁵⁴ He insinuates in many of his writings that decolonising Africans does not necessarily undo Western philosophies, cultures and traditions that have been integrated into the African thought system through colonialism. Instead, they should thoughtfully accept that colonialism is part of their historicity and given this “doubly” significance, Africans should choose what works for them best. Wiredu and Oladipo 1995:23; Wiredu 1998:27

²⁵⁵ Murungi 2004:522–523. Wiredu 2004, A.

²⁵⁶ Mngxitama *et al.* 2008:192.

²⁵⁷ Mkwanzanji and Ramose 2005:161.

²⁵⁸ Nzegwu 2018.

²⁵⁹ Tamale 2020:18–22, 41.

²⁶⁰ Amadiume 1997: viii–viii, 2–4, 136,159,183.

²⁶¹ Mignolo and Escobar 2013:22–32. See also Quijano 2000:343

²⁶² Lugones 2007:179–203; Lugones, 2010:748, 743.

1.6 Structure

The structure of the research is divided into six chapters. It includes the current chapter which as an introduction outlines the research problem, the research questions, the motivation, the background and the structure of the research. Five chapters provide the substantive arguments of the study with a conclusion that reflects the summary of the substantive arguments of the research. The chapters are structured in the following manner:

In **Chapter Two**, I explore the fundamental differences that exist between Western philosophy and pre-colonial African philosophical concepts of law and justice considering the overarching research problem that investigates pre-colonial African mechanisms of conflict resolution in addressing conflict-related sexual violence. I investigate the pre-colonial African law founding principle and the philosophy that guided pre-colonial African societies

In **Chapter Three**, I explore pre-colonial African models of conflict resolution practised in African societies. I investigate the structure of pre-colonial African societies, their legal systems and the methods used to respond to sexual violations resulting from conflict. I also investigate the impact of colonialism on Africa and its pre-colonial legal systems in resolving sexual violence due to the fundamental role that colonialism had in transforming the African structures and its legal systems. I also explore the colonial conquest strategies in subjugating Africa using law and violence to develop the argument.

In **Chapter Four** I investigate the effects of colonialism on the pre-colonial African system and how colonial changes affected the post-colonial approaches to dealing with conflict-related sexual violence. I analyse the current philosophical culture and approaches in modern-day Zimbabwe's legal system in addressing violations perpetrated against women that result from conflict.

In **Chapter Five**, I explore the possibility of integrating African pre-colonial models of conflict resolution and the Western legal system imposed by colonialism in African

countries due to the subsequent dualisation of the legal systems that colonialism established in Zimbabwe. This chapter explores the conceptual notions of law that are dominant in post-colonial Zimbabwe and how this impacts the resolution of conflict-related sexual violations against women.

In Chapter Six, I conclude the research findings of the preceding chapters and provide recommendations on how the issue of addressing sexual violations using pre-colonial traditional justice mechanisms in Zimbabwe can be a viable option.

CHAPTER 2

African concept of law

2.1 Introduction

Chapter 2 aims to respond to the research question that investigates the differences that exist between the Western and African pre-colonial legal systems' concept of law and justice. I focus on the mainstream approach to Western law and do not delve into critical approaches within Western law that for example challenge the insistence on individualism and instrumental rationality.

The study does not attempt to portray precolonial Africa as an 'ideal' system that addressed all conflict arising in its societies through Ubuntu law. Ubuntu and a precolonial African system of law, like all systems have gaps and flaws, some of which may place women in vulnerable and potentially harmful circumstances, also in instances of addressing conflict related sexual violence. These shortcomings are embedded in the conceptual framework of Ubuntu epistemology on the nature of being, communitarianism and the patriarchal structure of precolonial African societies.

The investigation into the difference between the two legal systems' concepts of law and justice is in the context of conflict resolution for sexual violence and rape committed against women during internal political conflict in Zimbabwe. The investigation into the Western and pre-colonial African philosophy is prompted by the assumption that the two worldviews on law and justice are fundamentally different. The chapter investigates the customs of pre-colonial African systems to determine how pre-colonial African societies were governed and maintained law and order. After reflecting on the customs of pre-colonial African system structures, the African philosophical principle of law and justice is explored to ascertain whether fundamental differences with Western notions exist. Lastly, the chapter explores Africa's pre-colonial founding principle of Ubuntu.

2.2 Myths and ideologies

The purpose of the investigation into pre-colonial African law and Western jurisprudence is to rescue African jurisprudence from the doldrums of being tested against European legal systems. When matters arise that pertain to legal systems in African societies the result in most instances is to categorise African legal systems in the common law legal systems that originate from Europe. The aim of delving into the conceptual differences between these legal systems is not in an attempt to transport the dictates and philosophies of European legal systems onto African law. It is my argument that contrary to colonial beliefs in its encounter with pre-colonial African legal systems, Africans had functioning legal philosophies and systems that framed their thoughts on conflicts that arose in their communities. The mystical forms and perceptions of the Western colonisers have shadowed pre-colonial legal systems.¹ The erroneous worldview perception of pre-colonial Africa can be reduced to propositions that Africans had no functional legal system before European contact.² This chapter aims to investigate pre-colonial African legal philosophy and jurisprudence that formed the basis for the administration of justice.

Colonial ideology in its encounter with indigenous African societies claimed that if Africans claimed to have a history and past, such histories were undocumented and lacked philosophical and intellectual significance.³ This colonial reasoning led to the alienation of pre-colonial African legal systems based on myths and ideologies rooted in Eurocentrism.⁴ This Eurocentric ideology was aimed at classifying colonised countries as less developed and forcing these countries' legal, economic, religious and familial structures to conform to Western standards.⁵ These structures were classified as underdeveloped, uncivilised and irrational. Eurocentric perceptions of these cultures have been theorised as political and ideological propaganda whose intention was to degrade and "desecrate the essence and existence of African realities."⁶

¹ Idowu 2005:52.

² Idowu 2005:52.

³ Idowu 2005:52.

⁴ Mohanty 1994:71.

⁵ Mohanty 1994:71.

⁶ Mohanty 1994:71.

Postcolonialism Eurocentric perceptions and worldviews can be seen and have been imposed on the African legal systems, exhibiting what is referred to as the northbound gaze.⁷ According to Ramose, the northbound gaze is where the gaze of the scholarship is fixated on the north; “it is a supplicating gesture, seeking validation and assimilation into the terms and protocols of Western epistemological paradigms.”⁸ The northbound gaze looks to Europe for theoretical approval of its assumptions.”⁹ This current situation has plagued former colonies of the West.

The unwritten nature of pre-colonial African philosophies and culture attracted substantial criticism resulting in Africans labelled as intellectually inferior to the Western countries. Kadiatu opines that anthropologists and ethnographers, as colonial agents regarded it appropriate and politically convenient to propose that pre-colonial Africa was absent of text.¹⁰ This notion of the absence of text in traditional Africa, to their colonial minds, classified the inhabitants of that era to be absent of self-consciousness and self-knowledge.¹¹ The use of terms such as “savages” by the colonisers to describe pre-colonial Africans is at the root of the whole Eurocentric misconception that sought to deny knowledge of traditional African philosophies.¹² As Mungwini reasons, “it is these invented myths which need to be deconstructed to allow African traditions to make their contribution to the global knowledge landscape.”¹³ Furthermore, the diagnosis of illiteracy of Eurocentrism in other societies points directly towards a scripto-centric worldview, which denotes a state of orality as a state of nature. This ascription of literacy according to Kadiatu was often politically motivated as it placed such communities designated as such to be “occupying a blank and negative space outside history.”¹⁴ These Western European perceptions, theories and criticisms of pre-colonial African legal philosophies and systems, I argue, are the basis on which pre-colonial African jurisprudence are not adequately accorded its rightful position in the philosophical reflection on the nature of its law.

⁷ Ramose 2000:48–49.

⁸ Ramose 2000:48–49.

⁹ Zegeye and Vambe 2011:98.

¹⁰ Kadiatu 1998:19.

¹¹ Kadiatu 1998:19.

¹² Kadiatu 1998:19.

¹³ Mungwini 2019:32.

¹⁴ Kadiatu 1998:19.

The misconception that this study, drawing on and joining many other voices, seeks to dispel is the prevailing assertion that Western jurisprudence is the true reflection of what law and justice should be.¹⁵ Justice is a matter of circumstance and is conditional, but certainly, it is society's perception of what is just that might be different.¹⁶ It can be argued therefore that what is just in African societies might not be in other societies.

While most indigenous theorists would concede to the fact that the African society had its own mode and means of social control to which they attribute their customs to be law, Western writers deny that pre-colonial African indigenous systems of social control contained legal elements.¹⁷ The main argument proposed by most of these writers was that the primitive arrangement of savage indigenous people should be dignified with the modern Western European law status.¹⁸ Presently the argument is leaning towards the avoidance of misunderstanding the social controls employed in African societies by applying legal concepts that reflect the practice of very different societies.¹⁹ To both these approaches, what is imperative is, in a meaningful sense, to speak of law in the study of pre-colonial African societies and most importantly to provide a comparison to the law of modern Western societies that is prevalent in most colonised African states.²⁰

To provide a platform pre-colonial African philosophy needs to speak in its untainted form of its own philosophies related to conflict resolution. These myths capture the "heart and substance of the dilemma that African jurisprudence is plagued, in a world" that is under the influence of globalisation and European values.²¹ I therefore further argue that this comparison between the concepts of African and Western jurisprudence is to advance the idea that African societies would have been better in terms of justice and its administration if allowed to grow in line with their own traditional laws and customs. The investigation into the development of English common law reveals it as a law that grew out of the notion of common sense and the dictate of natural law.²² This is

¹⁵ Olaniran 2016:19

¹⁶ Olaniran 2016:19-21.

¹⁷ Fadekemi 2010:1.

¹⁸ Roberts 1976:663; Adegoke 2010:2.

¹⁹ Roberts 1976:663.

²⁰ Elegido 1994:124.

²¹ Idowu 2005:53.

²² Elegido 1994:124.

a dictate emanating from that society. Based on this reasoning it is therefore unfounded to view African jurisprudence as less jurisprudential than the Western jurisprudence.

2.3 Pre-colonial African customs as law

My investigation into pre-colonial African customs functioning as law in this subsection, responds to the research question that explores the different concepts between Western and pre-colonial African legal systems. The investigation into how pre-colonial African customs became sources of law provides an in-depth understanding of their philosophical worldview in the regulation of conflict in such societies. This brings a further understanding of the fundamental differences between the Western and African systems on practices that were relegated to the realm of law, that governed its subjects, maintained law and order and resolved conflicts arising in their respective communities. In undertaking this analysis of pre-colonial customs functioning as law this undergirds the argument that differences in pre-colonial African practices from the accepted European norms should not be regarded as inferior or incapable of achieving that which the Western system is capable of accomplishing.

2.3.1 When does custom become law?

As stated by Bhalla, the law as a body of rules, norms and principles for human behaviour, concerns itself with maintaining order, harmony and the administration of justice.²³ In the strictest sense, law deals with social life issues, as it “touches on tangible and real societal experiences within the understanding of every ordinary person belonging to that society.”²⁴ In that respect, Africa’s concept of law is an integral part of the culture and “an instrument of maintaining social equilibrium with emphasis placed on distributive justice rather than formal justice as espoused by Western legal philosophy.”²⁵ The nature of law in pre-colonial Africa was customary and unwritten, having its sources in the practices and norms of the people.²⁶ A number of scholars have put arguments against the existence of laws in the form of customs in pre-colonial

²³ Bhalla 1990:1–2.

²⁴ Bhalla 1990:1–2.

²⁵ Elias 1962:1.

²⁶ Ndulo 2011:88

traditional African societies forward. It has been proposed that African legal systems lacked legislatures, formal courts and specialised legal officers.²⁷ Pre-colonial African legal systems were said to lack efficient sanctions, means of enforcement, and unconstrained exercise of power by chiefs. Their councils or popular assemblies were regarded to be contrary to the irregular application of rules that are characteristic of Western law.²⁸

To establish whether there existed social controls in pre-colonial African legal systems it is imperative to analyse what influences a practice to be accorded the status of being regarded as a law in a particular social setting. For a practice to be regarded as a law, it is influenced by factors such as customs, local manners, physical environment and laws that conform to the spirit of the society.²⁹ A custom becomes law itself and becomes an instrument of social control because it has gradually evolved from the society it seeks to govern.³⁰ Several schools of legal thought have acknowledged the law's relationship to culture. One such school of thought proposed by Nunn, states that "law is the creation of a particular type of culture."³¹ Law is a developing social institution whose origin is owed to social convention rather than man's nature.³² Laws arise spontaneously and gradually with no constituted authority to declare them or safeguard them. Societies follow them because they have been upheld and observed in the past.

The above definition by Nunn provides the necessary elements for a practice or custom to be constituted as law. When one analyses pre-colonial African legal systems, it becomes evident that such traits were present in these societies. Olawale writes extensively on the existence of African kingdoms, empires and chieftainships that had a "well-structured social life and a system of rules to which everybody had to owe some reasonable allegiance."³³ In pre-colonial African philosophy, the law could not be disconnected from the culture of the people in that it was built into the life of Africans

²⁷ Elegido 1994:125.

²⁸ Elegido 1994:125.

²⁹ Nunn 1997:324–325.

³⁰ Nunn 1997:324–325.

³¹ Nunn 1997:323–324.

³² Adegoke 2010:3.

³³ Elias 1962:1–2.

since it permeated all spheres of their lives.³⁴ Laws in African conceptual thought were rules of custom, which were not mainly concerned with the apportionment of right, but were considered as an instrument of social harmony in the society.³⁵ The core tenets of pre-colonial African law emphasised “collective responsibility, respect for the elderly, collective rights and respect for long-established institutions.”³⁶ In contrast to the Western concept of law, Africans believed customs were norms that dictated the moral conduct reflective of the spirit of a people that evolved through the usage and practices of a people.³⁷ In Western thought, juristic laws are legal norms of social conduct created by jurists. It is important to note that for customary laws to be accorded judicial recognition that is binding, such customs evolved over time from initially bare customs, which had to pass the test of enforceability.³⁸ Though they might not have been created by jurists they were regarded as norms of legal conduct, which were at par with juristic laws.³⁹

I propose that African jurisprudence reflects the idea that laws are “known, functioning, regulative systems personified in unwritten but widely accepted traditions and practices in the form of covenants and customs.”⁴⁰ The general character of African law as embodied in the “customs and practices of the people has become the object of pertinent criticism, but it bears some of the striking qualities and features of the African mind.”⁴¹ Customs bear out, “the nature of ontology that is not only reminiscent of the past but also a qualifying ego of the African future.”⁴² Besides, it incorporates the moral ideals that are relevant in any meaningful discussion of the legal tradition in Africa. Thus, customs that governed pre-colonial African societies were defined as “rules of custom, morality and religion that the indigenous people of a given locality regarded as enforceable,” either by the central political system or by other authorities in cases of very serious forms of misconduct.⁴³ The pre-colonial African legal systems covered

³⁴ Elias 1962:1.

³⁵ Elias 1962:1.

³⁶ Ocran 2006:467–468.

³⁷ IJioma n.d.

³⁸ Ndulo 2011:88

³⁹ Ndulo 2011:88.

⁴⁰ Olaniran 2016:319.

⁴¹ Olaniran 2016:319.

⁴² Olaniran 2016:319.

⁴³ Ocran 2006:467.

disputes where at least one of the parties to the dispute was a member of that ethnic grouping.⁴⁴ In situations where matters were less serious, social units such as the family were equally instrumental in conflict resolution. Thus, African pre-colonial society's customs were a powerful means of social control.⁴⁵ The conflict resolution platforms of pre-colonial Africa embraced the idea of restorative justice.

2.3.2 Restorative justice

Restorative justice as a concept in pre-colonial African communities demonstrates the potential of restorative justice as an intervention in dealing with criminal matters and its role in working to achieve community goals.⁴⁶ By doing so, this concept “defies the objectification of retributive justice in modern criminal justice systems, which renders retributive practices as an obvious or self-evident response to crime.”⁴⁷ The restorative nature of the pre-colonial African community's corrective practices demonstrates that they echoed the underlying traditional values thereby effectively responding to a crime before the inception of formal criminal justice systems used in Africa today.⁴⁸ The fact that restorative justice resonated with cultural values in these traditional communities rendered them acceptable and effective at governing conduct.⁴⁹

The cultural, traditional values and the socio-economic systems made restorative practices appropriate to most forms of crimes.⁵⁰ The centrality of community unity was reified as a truth together with other rationalities; the truth rendered restorative justice an acceptable practice that played a role in preserving community unity.⁵¹ The involvement of family members of the wrongdoer and the wronged party are such examples that reaffirmed the communal ties. Truths produced in particular contexts played a role in dictating what practices were acceptable.⁵² The belief that the land was

⁴⁴ Ndulo 2011:88.

⁴⁵ Shah n.d.

⁴⁶ Kinyanjui 2009:1.

⁴⁷ Kinyanjui 2009:1.

⁴⁸ Kinyanjui 2009:1.

⁴⁹ Kinyanjui 2009:16.

⁵⁰ Kinyanjui 2009:16.

⁵¹ Kinyanjui 2009:15.

⁵² Kinyanjui 2009:15.

divine and the intrinsic cohesion of the community for survival were central truths.⁵³ Kinyanjui states that, “the individuals were dependent upon the community to derive benefits from the land. The land was not only collectively owned, farming which was the main economic activity, demanded communal working.”⁵⁴ Therefore, in pre-colonial Africa, the nature of its justice system and subsequent restorative practices that esteemed harmony were vital in maintaining socio-economic balance and harmony.⁵⁵

2.3.3 African customary law

African scholars have established that pre-colonial African indigenous societies had their own ideas of right and wrong framed in a sophisticated system and concept of law. The grand African scholarly research conducted by Cheikh Diop and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) on the pre-colonial political social administrative structures of African kingdoms and empires that existed, further substantiates Africans having had their functional systems in all aspects of their lives. This included the tracing of black people as a race on the African continent from time immemorial until recently.⁵⁶ Elias acknowledged the existence of social control in traditional African societies that closely resembled modern legal systems.⁵⁷

African scholars embarked on these projects to authenticate African history and dispel the misconceptions and myths that surrounded African people and their heritage brought about by the colonial encounter imposed by European powers. The predominantly informal nature of these African traditional social systems has led many to allege that they were not effective, yet it is evident that social control was exercised through customs, religion, tradition, folklore, morals and ridicule.⁵⁸ It is evident from the above analysis that pre-colonial Africa was replete with socio-political, administrative and legal systems that operated and regulated the African people's lives. Pre-colonial African law was the indigenous law of various ethnic groups in Africa. The pre-colonial African legal systems were largely ethnic in origin and usually operated within the area

⁵³ Kinyanjui 2009:15.

⁵⁴ Kinyanjui 2009:15.

⁵⁵ Kinyanjui 2009:15.

⁵⁶ Diop 1981.

⁵⁷ Elias 1962:1.

⁵⁸ Abebe 2020; Alemika *et al.* 2009: 2; Mugumbate and Chereni 2019:29.

occupied by a particular ethnic group. The African continent was vast and constituted by different groupings. There was no single form of a uniform set of customs prevailing thus reference to pre-colonial African law is the blanket description of the many different legal systems of those societies.⁵⁹ There is general acceptance among African scholars, however, that post-colonial African customary law in operation in most African groups today is not pure pre-colonial African customary law. Political motivations have shaped the present African customary laws and social conditions thereby rendering them distorted versions of the original.⁶⁰ These distorted versions of present African customary law are a by-product of interactions between African customs and colonial rule.⁶¹ The alienation of African customary law from its indigenous communities began with the colonial policy of indirect rule when pre-colonial African indigenous legal systems were forcibly co-opted to receive Western European legal systems.⁶² The contemporary criminal justice practices of many African states today, as noted by many scholars have been influenced by the previous colonial administrations. However, indigenous African people had functional traditional methods of administering justice, customs and measure of control that regulated their societies prior to colonisation.⁶³

2.4 Founding principle of African law

Pre-colonial African customs as explained above functioned as laws that governed various African groups on the continent. Pre-colonial African customs were regarded and operated as the law that governed the lives of their societies, functioning as sanctions of conduct as well as providing guidelines on conflict resolution. To gain more insight into the governing practices and principles of the African legal systems, it is significant to explore the principle of Africa's philosophy of law that provided the foundational philosophical framework in the functioning of pre-colonial African society's conflict resolution systems. The aim of this section is to investigate the pre-colonial African principal philosophy of law that provided the basis of their concept of law and justice in conflict resolution. The analysis of African laws' founding principles that

⁵⁹ Ndulo 2011:88.

⁶⁰ Ndulo 2011: 87–88.

⁶¹ Ndulo 2011:88.

⁶² Bennett 1991:18.

⁶³ Alemika *et al.* 2009: 2.

moulded pre-colonial African societies responds to the research question of whether there are differences in the conceptual framework of law and justice from the Western legal system.

2.4.1 Nature of pre-colonial African societies and Ubuntu

Although indigenous African societies are not a homogenous group, there are similarities in their concept of religion, philosophy of life and culture.⁶⁴ They may hold similar views and understanding of the concept of God, how they view the universe and concepts of life and death.⁶⁵ There is however a philosophical concept that guided pre-colonial African communities and continues to guide post-colonial African communities.⁶⁶ This philosophical concept is known as Ubuntu or Hunhu.⁶⁷ Ubuntu/Hunhu comprises and influences the worldview of black populations of sub-Saharan Africa, which has been diffused from generation to generation through “observation, experience, language and art.”⁶⁸ Ubuntu/Hunhu has existed in African oral tradition since time immemorial, largely unwritten hence the term orature, having been passed through the spoken word it thrived in communities where it was practised or lived.⁶⁹

Ubuntu philosophy as a “rich tradition and a lived experience forms part of the African culture.”⁷⁰ It reveals the values and normative expectations or requirements on African people’s behaviour that are drawn from African tradition.⁷¹ Tracing its origins, Ubuntu/Hunhu is a concept that has been operational among the southern, central and eastern people of Africa called the Bantus.⁷² The people called Bantu originated from

⁶⁴ Chivaura 2007:230.

⁶⁵ Chivaura 2007:230.

⁶⁶ Mangena n.d.

⁶⁷ Mugumbate and Chereni state that “in Angola, it is known as *gimuntu*, Botswana (*muthu*), Burkina Faso (*maaya*), Burundi (*ubuntu*), Cameroon (*bato*), Congo (*bantu*), Congo Democratic Republic (*bomoto/bantu*), Cote d'Ivoire (*maaya*), Equatorial Guinea (*maaya*), Guinea (*maaya*), Gambia (*maaya*), Ghana (*biako ye*), Kenya (*utu/munto/mondo*), Liberia (*maaya*), Malawi (*umunthu*), Mali (*maaya/hadama de ya*), Mozambique (*vumuntu*), Namibia (*omundu*), Nigeria (*mutunchi/iwa/agwa*), Rwanda (*bantu*), Sierra Leone (*maaya*), South Africa (*ubuntu/botho*), Tanzania (*utu/obuntu/bumuntu*), Uganda (*obuntu*), Zambia (*umunthu/ubuntu*) and Zimbabwe (*hunhu/unhu*). It is also found in other Bantu countries not mentioned here.” Mugumbate and Chereni 2019:28–29.

⁶⁸ Mugumbate and Chereni 2019:27.

⁶⁹ Gikandi 2003:10.

⁷⁰ Mugumbate and Chereni 2019:29.

⁷¹ Chuwa 2014:48.

⁷² Samkange and Samkange 1980:35–36.

central Cameroon and eastern Nigeria that share a lingual heritage of Bantu languages comprised of hundreds of indigenous ethnic groups. They trekked southwards and eastwards in the Congo and from there turned out to occupy the whole of now Bantu Africa.⁷³ The result of the Bantu migration produced a dynamic population explosion and they trekked southwards. A cultural revolution was born, introducing to the region the use of iron tools for agriculture, weapons for hunting and military purposes.⁷⁴ Their superiority of knowledge in farming and hunting permeated most of the people they encountered.⁷⁵ As a result, there are similarities in culture, language, physical features and social customs in the communities they came across.⁷⁶ Reference to the term Hunhu/Ubuntu according to early written texts dates back to 1850.

The identified common understandings associated with the term were human nature, humanity and humanness.⁷⁷ African philosopher Magobe Ramose acknowledges Ubuntu/Hunhu as a philosophy and a lived experience of Africans that have a past, is relevant in the present and is a project for the future.⁷⁸ Masitera concurs with Ramose and elaborates that Ubuntu is neither a historical nor a hypothetical situation.⁷⁹ The application of Ubuntu in the present and future implies that it is a worthwhile project that has practical implications for different facets of human life in the realms of social, political and legal systems.⁸⁰ The historical trekking and revelation of Ubuntu as a philosophical heritage among Bantu Africans oust the colonial ideology that Africa had no history or past to accord its status to be a worthwhile jurisprudential status. Ubuntu is the foundational principle of pre-colonial African customs that functioned as sanctions on behaviour and the maintenance of law and order in pre-colonial Africa.

Pre-colonial African laws are not documented, but are recorded and committed to memory in the collective memory and consciousness of all in the relevant society.⁸¹

⁷³ Samkange 1971:163–164.

⁷⁴ Samkange 1971:164.

⁷⁵ In the lands that the Bantus occupied they found the land inhabited by hunters and gatherers like Pygmies, Bushmen and Dorobo pastoralists like the Hottentots and the Tatog. Samkange 1971:164.

⁷⁶ Samkange 1971:164–165.

⁷⁷ Chasi 2021:2.

⁷⁸ Ramose 2014:121.

⁷⁹ Masitera 2018:110.

⁸⁰ Masitera 2018:110.

⁸¹ Olaniran 2016:278.

That is why an average African society is heavily communal. Olaniran on the lack of written forms of law emphasises that “absence of written law in pre-colonial African furthers the communal feelings and belonging in that a law breaker was assisted and counselled by members of that communal setting.”⁸² This further disputes the European distorted view of African customs and laws as unwritten in nature and equates them as lacking validity as a form of social control. Thereby according to it status that is not worthy of jurisprudential relevance, which was extended to the owners of that philosophy.

Scholars have accorded the Bantu African philosophy of Ubuntu/Hunhu different interpretations in trying to bring about a better concept of the African worldview. Dolama identifies it as the moral philosophy of the Bantu people of Africa that provides the fundamental ontological and epistemological category of African thought.⁸³ Ramose and Chilisa view the Ubuntu framework as a philosophical assumption about the nature of reality and the way of knowing and forming ethics and values.⁸⁴ Samkange in his analysis of the African thought and worldview attributes the high mental and moral features and the well-planned social and political organisation that infiltrated the pre-colonial way of life to the African philosophy that he called Hunhuism/Ubuntuism.⁸⁵ He elaborated this concept to be a philosophy that sets the minimum premium on human relations.⁸⁶ Ubuntu as a philosophy commonly premised on “collective relational ideals and human excellence, forms part of the knowledge.”⁸⁷ It is the guiding wisdom of how African communities operate socially and politically in conflict resolution, religion and all other spheres of their day-to-day lives.⁸⁸

2.4.2 Ubuntu in conflict resolution

In the analysis above, Ubuntu/Hunhu is pre-colonial Africa’s base and guiding principles of the various aspects of life in pre-colonial African societies. In conflict resolution,

⁸² Olaniran 2016:278.

⁸³ Dolamo 2014: 216.

⁸⁴ Ramose 1999:65.

⁸⁵ Samkange and Samkange 1980:53.

⁸⁶ Samkange and Samkange 1980:53.

⁸⁷ Mugumbate and Chereni 2019:27.

⁸⁸ Mugumbate and Chereni 2019:2.

Ubuntu was the principle that provided the philosophical framework in pre-colonial Africa in defining the concept of law and how justice was administered. The philosophical tenets of Ubuntu/Hunhu have been adopted and propagated as a “social and political thought in conflict resolution.”⁸⁹ Its principles have provided the guiding framework for the resolution of conflict among indigenous African groups.⁹⁰ Ubuntu/Hunhu, as a concept, has been utilised in conflict resolution in recent times.⁹¹ Ubuntu is an instrumental principle in all spheres of African life, and used in the liberation framework during the fight for freedom from colonial rule.⁹² Ubuntu/Hunhu can play the same conflict resolution function on violations of a sexual nature perpetrated on women in conflict situations.

African nations’ fight for liberation from colonial rule was grounded on restoring the African’s identity.⁹³ The idea of restoring the philosophy of Ubuntu premised the concept of decolonisation. Nations such as South Africa, Namibia and Zimbabwe evoked this concept in bridging the gap that existed between indigenous Africans and their colonisers.⁹⁴ The liberation framework emphasised virtues such as ownership of inheritance, ancestral land, possession of that which was lost through colonialism, liberty, self-determination, respect, justice, cohesion, forgiveness and communalism.⁹⁵ As Ramose rightfully points out, the achievement of political independence did not spell the end of Ubuntu. While Ubuntu as a philosophy had a past, it continues to be relevant in the present and the future of Africans.⁹⁶ In the African philosophical worldview, Ubuntu justice means what must be seen to be done and a person cannot be a person if they do not own their inheritance in the form of land, or property while their identity is continually violated.⁹⁷

⁸⁹ Dolamo 2014:216–217.

⁹⁰ Mugumbate and Chereni 2019:30.

⁹¹ Mugumbate and Chereni 2019:30.

⁹² Mugumbate and Chereni 2019:30.

⁹³ Mugumbate and Chereni 2019:30.

⁹⁴ Mugumbate and Chereni 2019:30.

⁹⁵ Mugumbate and Chereni 2019:30.

⁹⁶ Ramose 1999, 2014, 2001.

⁹⁷ Mugumbate and Chereni 2019:30.

2.4.3 Ubuntu and communitarianism

Ubuntu is the pre-colonial African principle of living among the Bantu people across Africa. Ramose links Ubuntu as the root of the African tree of knowledge and connects this principle to the African concept of being.⁹⁸ The individual referred to as *Munhu* or *Umntu* in Shona and Zulu respectively, is the “creator of knowledge and truth in concrete areas such as politics, religion and law.”⁹⁹ Kagame asserts the same by stating that, “Ubuntu is a philosophy of being which permeates and plays itself out in all educational divisions of life.”¹⁰⁰ A being, according to this philosophy is endowed with senses and spontaneous movement of birth, growth development and death. The fundamental foundation of that cycle is life itself.¹⁰¹ In his summary of the African identity, Mbiti states that what happens to the individual in the community happens to the whole group and that which the community experiences, affects the individual.¹⁰² This points to the interconnectedness of the maker of the law who is the being to the surrounding community he comes into contact with. Hunhu/Ubuntu claims that individuals should always act in manners that enhance the well-being of family and community.¹⁰³

As Ubuntu forms the base knowledge of relational interaction it places expectations and practices on individuals, families and communities on how they should interact with each other and the surrounding environment. This forms the basis of Ubuntu's philosophy as law.¹⁰⁴ This interconnectedness of Ubuntu philosophy is fundamentally derived from the Bantu rule of action, which is blood. This concept is best elaborated by the ethic called *Ukama*¹⁰⁵ among the Shona and the *Ujamaa* among the Swahili speaking people found in East and Central Africa.¹⁰⁶ The noun for *Ukama* is *Hama*, meaning relative by blood or by marriage. However, among the Shona people and

⁹⁸ Ramose 2001:2.

⁹⁹ Ramose 2001:2.

¹⁰⁰ Kabago 2004:235.

¹⁰¹ Kagame 1956:171–172.

¹⁰² Mbiti 1969:106.

¹⁰³ Mugumbate and Chereni 2019:33.

¹⁰⁴ Mugumbate and Chereni 2019:33.

¹⁰⁵ The word *Ukama* according to Murove means “relationships or an understanding of reality in terms of relatedness. The noun for *Ukama* is *Hama*, meaning relative by blood or by marriage. When it is *Ukama* it becomes an adjective which means being related or belonging to the same family, which means being related or belonging to the same family.” Murove 1999:10–11.

¹⁰⁶ Mugumbate and Chereni 2019:33.

some other African cultures, there is also an understanding that *Ukama* is not restricted to immediate family ties or blood ties.¹⁰⁷ The adoption of titles that reflect close family ties is thereby extended to people who are not blood relations as a way of expressing kinship.¹⁰⁸ The sharing of the common heritage activates rights and duties, they are extended to all and there is an expectation to avoid all that causes evil amongst the common group and the community at large.¹⁰⁹ The African thought and worldview interprets life as the duty of reinforcing the interests of the whole group.¹¹⁰ As interconnectedness is a central feature of Ubuntu, it seeks to promote solidarity among community members. Members of the community working, thinking and acting together for the common achieve this.¹¹¹ In other words in the African thought society members are urged to work collectively for their own good. The African worldview of personhood is viewed from the reality of the community they live in.

The reality of the community thus takes precedence over the individual's life history. According to the African view, the definition of person(s) is not "some isolated stationary value of rationality, will or memory."¹¹² Masolo gives a different dimension of the concept of African communitarianism.¹¹³ This dimension of communitarianism is elaborated as a concept where a being is rooted in his experience of the world. "It is the way the African subject feels and thinks in union, not only with other people around him, but also with all other beings in the universe such as God, animals, trees or pebbles."¹¹⁴ Accordingly, as Ramose states, person(s) is intimately linked to the encompassing universe composed of the physical, metaphysical and the human universe in the sense of the community.¹¹⁵ In African thought, personhood is not given at the commencement of one's life but it is attained after the individual is well along in society having learnt the community's social rules and undergone the incorporation rituals. According to Menkiti,

¹⁰⁷ Murove 2007:189.

¹⁰⁸ "Persons without blood ties can adopt terms like grandfather, grandmother, mother, father, sister, brother, cousin, uncle, daughter in law or son in law, father in law and mother in law towards each other." Mugumbate and Chereni 2019:33.

¹⁰⁹ Mugumbate and Chereni 2019:33.

¹¹⁰ Gyekye 1992:101–102.

¹¹¹ Chuwa 2014:48.

¹¹² Menkiti 1984:172.

¹¹³ Masolo 2001:489.

¹¹⁴ Masolo 2004:489.

¹¹⁵ Ramose 1999:65.

the older the individual gets the more of a person they become.¹¹⁶ Thus, the more a person exhibits the principle of Ubuntu as a person and to others; they are regarded as the true symbol of Ubuntu wisdom. Having understood the argument of Ubuntu law on communitarianism I am cognisant that there are certain embedded elements in this approach that could be to the detriment of women. It is my contention that an approach steeped in Ubuntu law because of its overemphasis of communitarian values could be harmful specifically to women but also to victims of sexual violence.

The priority of African traditional thought in contrast to Western thought therefore emphasises the greater surrounding wholeness over that of human individuality. The manifestation of human individuality into self-awareness, which is situated within as forming a part of the greater environing wholeness, is through their human reasoning powers.¹¹⁷ Having said that, this does not mean individuality is absent in African jurisprudence. Ramose provides an understanding of African jurisprudence and its relation to the notion of individuality.¹¹⁸ He emphatically states that human individuality is not denied in African Ubuntu philosophy, as critics would allege.¹¹⁹ Human individuality in African law is not denied as a philosophical assumption on the nature of reality nor is it analytically limited. Individualism, a characteristic of Western culture and the legal system is discouraged in Ubuntu philosophy largely because it encourages disconnectedness among community members. African thought regards disconnectedness as disharmony.¹²⁰ As Masitera asserts, Hunhu/Ubuntu, therefore, is anti-egoistic in nature; “it dissuades person(s) from pursuing their own good without regard for others in their surrounding family and the community at large.”¹²¹

The African worldview of individuality, unlike Western thought, prioritises “the community through which a community member comes to know both their individual self and the all encompassing world around.”¹²² This places importance on the foundational role that the community is seen to impart to the human individual as the moulder and

¹¹⁶ Menkiti 1984:173.

¹¹⁷ Ramose 1999:65.

¹¹⁸ Ramose 1999:64.

¹¹⁹ Ramose 1999:64.

¹²⁰ Masitera 2018:110.

¹²¹ Masitera 2018:110.

¹²² Ramose 1999:64.

definer that eventually leads to the individual understanding themselves.¹²³ This further reflects the principles of interconnectedness and communitarian nature of an African concept of law and Ubuntu philosophy of law when contrasted with the Western philosophy of law. Bantu solidarity and their belief in the vital communion between family, clan and the rest of the community are explained further in the Bantu concept of *Ubumwe* translated as oneness.¹²⁴ It embodies the common principle of participation where each member of such an entity is expected to strive towards the safety and preservation of the whole.¹²⁵ In view of the above, in the African philosophical worldview, the individual is a product of the community and the community is a product of the individual.¹²⁶

Thus, the Western scholars' concept of communitarianism emphasises the individual's participation and dependence on the community for their sense of self, freedom, moral development and agency.¹²⁷ Their view, in other words, is that the institutions and practices of which they are part mould individuals; their rights and obligations originate from these same institutions. Thus, the authority of the individual is the final and only source of group authority, while the role of the community is only a collective –“a sheer grouping whether close or loose of the wills and powers of individual persons.”¹²⁸ This Western view of the individual is elaborated by Kant's proposition that however unholy man can be, he is holy in himself.¹²⁹ In Western thought, the individual is therefore the one that determines what they become, a sharp contrast to that of the African concept of being and their relation to the envioning community.¹³⁰

Accordingly, MacIntyre paints a picture that depicts how survival for the individual in Western thought is perceived. In Western thought, good pursued by individuals cannot be understood outside the context of historical traditions.¹³¹ “A living tradition is a historically extended socially embodied argument, which is in part about the goods that

¹²³ Chuwa 2014:48.

¹²⁴ Mulago 1972:116.

¹²⁵ Mulago 1972:116.

¹²⁶ Ramose 1999:64–65.

¹²⁷ Masolo 2004:486.

¹²⁸ Masolo 2004:487.

¹²⁹ Kant 1949:70.

¹³⁰ Wolff 1950:70.

¹³¹ MacIntyre 1984:222.

constitute that tradition.”¹³² This means that “the criteria for reasonableness for justifying moral values and what is viewed as justice and its practical illustrations are founded in tradition.” As a result, there are different types of practical rationalities in the Western worldview.¹³³

The investigation above reveals that Ubuntu is the root of African philosophy and knowledge in all spheres of African people. It is the founding philosophy in the concept of who a person is, and how they relate to the community and surrounding environment. According to the African philosophy of law, the being is the maker of the law through the being's relationship with the environment with an intended outcome of those relations bringing about good for all and social harmony. Conflict within the African setting is seen as promoting disharmony, a situation that is shunned in the African worldview. Therefore, situations of continued conflict go against the very grain and makeup of Ubuntu's philosophy of law and communitarianism.

Ubuntu is a principle among Africans that is alive and played a significant role in rebuilding the African national project and identity, which was distorted by the advent of colonialism. African nations that had undergone European colonisation by bridging the gap to African independence further embarked on the restoration processes. The principles of Ubuntu while having a past among pre-colonial African societies, have found relevance that has seen its useful application in resolving not only conflicts of colonialism on the African continent but also conflicts in the day-to-day lives of Africans today. It can significantly bridge the gap to redressing violations against women's bodies that arise in conflict situations.

2.4.4 Ubuntu and sexual violence resolution

One of the central aims of the study is the adoption of the African principle of law commonly known as Ubuntu to be incorporated into redressing conflict-related sexual violence in Zimbabwe. Rwanda offers insights as a precedent from their past for Zimbabwe on how Ubuntu principles can be invoked in the resolution of conflict-related

¹³² MacIntyre 1984:222.

¹³³ Masolo 2004:488.

sexual violence. I engage Rwanda as an example for Zimbabwe being acutely aware of the differing historical contexts of the two conflicts, the scale and magnitude of the nature of atrocities in the Rwandan 1994 conflict and the ongoing political conflict in Zimbabwe. By invoking Rwanda's traditional method of conflict resolution known as *Gacaca* in redressing sexual violence it is the precedent from the past that demonstrates the possibility of resolving such matters in the post-conflict reconstruction in Zimbabwe.

The inclusion of Rwanda as an example in adopting Ubuntu in the resolution of conflict-related sexual violence is based on Hinton's idea of connecting *Gacaca* and Ubuntu; an idea termed the Ubuntu–*Gacaca* paradigm.¹³⁴ Hinton postulates that “Ubuntu provided a springboard for the development of the *Gacaca* system of restorative justice as practised in post-conflict Rwanda.”¹³⁵ *Gacaca* as a conflict resolution platform is indigenous to pre-colonial Rwanda.¹³⁶ It is a depiction of similar processes that developed over decades in Africa as a whole including in “Northern Uganda *Mato Oput*,¹³⁷ the *Gadaa* system practised by the Oromo in Ethiopia¹³⁸ and in Somaliland among the *Guuirt*.”¹³⁹ In Kinyarwanda *Gacaca* means “justice on the grass.”¹⁴⁰ *Gacaca* is a traditional Rwandan Court system where community members “sit on the grass to settle their disputes communally.”¹⁴¹ In pre-colonial Rwanda matters related to “land, property, marital and other interpersonal disputes were resolved in the *Gacaca* courts.”¹⁴² The hearings in the *Gacaca* courts are by custom held outdoors and the system places large emphasis on voluntary confessions and apologies by wrongdoers.¹⁴³ The coming into effect of the *Gacaca* state run jurisdiction in 2002, the

¹³⁴ Hinton 2015:392.

¹³⁵ Hinton 2015:392.

¹³⁶ Costello 2016:11.

¹³⁷ *Mato Oput*, “the drinking of a bitter herb from the *Oput* tree is a detailed ceremony that is conducted during reconciliation among the Acholi of northern Uganda. The resolution of the conflict is symbolised by conflicting parties drinking a bitter herb from the same pot.” Costello 2016:11–12.

¹³⁸ The *Gadaa* is a system “of age grade classes that succeed each other in assuming political and social responsibilities. A complete *Gadaa* cycle consists of five age-grades. The authority held by the elders is derived from their position in the *Gadaa* system.” Oromiyaa 2000.

¹³⁹ The *Guuirt* is “the highest level council of elders in Somaliland and the highest traditional authority. The council is headed by clan leaders or Sultans, and each council consists of a body of elders that represent the lineages in the clan.” Hinton 2015:394.

¹⁴⁰ Costello 2016:11.

¹⁴¹ Costello 2016:11.

¹⁴² Hinton 2015:394.

¹⁴³ Hinton 2015:394.

state of Rwanda undertook what President Paul Kagame states “as the only way forward.”¹⁴⁴ The law that set up the *Gacaca* jurisdiction was passed in 2000¹⁴⁵ and an amendment in 2004, “to prosecute thousands of genocide suspects by means of a decentralised community-based system of courts inspired by the local traditions.”¹⁴⁶ Lederach states that “comprehending conflict and developing appropriate models of handling it must necessarily be grounded in, and must reverence and draw from, the cultural understanding of a people.”¹⁴⁷ In 2008, the Rwanda government decided to utilise this pre-colonial system of conflict resolution to try perpetrators of sexual violence from the 1994 genocide.¹⁴⁸ It is difficult to estimate accurate statistics on the use of rape and sexual violence against women in Rwanda during the 1994 Genocide.¹⁴⁹

This difficulty in providing the statistics is expanded by the African Union, which stated, “since rape was widely regarded as shameful for the victim, it was often enveloped in secrecy. As a result, compiling statistical evidence on rape during the genocide is difficult. However, there is no question that it was used as a systematic tool ... to wipe out the Tutsi population. According to testimonies given by survivors, we could conclude that practically every female over the age of 12 who survived the genocide was ... [a] direct [victim] of rape or other sexual violence, or [was] profoundly affected by it ... most survivors reported the belief that rape was the norm for virtually all women during the genocide.”¹⁵⁰

¹⁴⁴ Interview with Paul Kagame, President of Rwanda (July 16, 2002) (cited in *Gacaca Jurisdictions: Interim Report of Observations June 10–Aug. 8, 2002*), available at <http://www.fas.harvard.edu/ursocstud/rwanda/introduction.html#ftn4> (accessed on 24 October 2004) [hereinafter *Gacaca Jurisdictions*]. See generally the official web site of the Republic of Rwanda at <http://www.rwandal.com/>.

¹⁴⁵ *Organic Law No. 40/2000 of 26/01/2001* “setting up “Gacaca jurisdictions” and Organising Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994,” available at www.inkiko-gacaca.gov.rw/texteslegaux.html

¹⁴⁶ *Organic Law No. 16/2004 of 19/6/2004* “Establishing the Organisation, Competence and Functioning of Gacaca courts Charged with Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between October 1, 1990 and December 31, 1994,” available at www.inkiko-gacaca.gov.rw/

¹⁴⁷ Lederach 2005:10.

¹⁴⁸ In May 2008, “parliament passed *Organic Law 13/2008*, which moved all Category 1 (serious offences) to the jurisdiction of Gacaca, with the exception of organisers of the genocide and suspects who occupied government positions at the prefecture level or higher” (Republic of Rwanda 2008).

¹⁴⁹ “Most estimates for the number of women during the genocide in Rwanda range from 250 000 and 500 000 women were raped during the Rwandan genocide in 1994.” Brouwer and Chu 2009:11; Amnesty International, 2004:3; United Nations, Economic and Social Council 1996. “The country lost approximately ten per cent of its population and many of the survivors suffered from the traumatic experience.” Moghalu 2005:17.

¹⁵⁰ African Union 2000:149.

“The use of sexual violence in Rwanda was infamous because of the organised propaganda ... the very public nature of the rapes and the level of ruthlessness directed towards women.”¹⁵¹ There is no doubt that opportunistic rape occurred, scholars agree that “sexual violence during this period in Rwanda was not simply an example of the chaos and lawlessness that results from wartime but was also intentionally used as a tactic to further the genocidal objective of eliminating the Tutsi ethnic group.”¹⁵² While the intention in the Rwandan case of using rape and sexual violence was to eliminate a particular ethnic group, a similar pattern can be identified in Zimbabwe’s political conflict. The government of Zimbabwe uses rape and sexual violence during political conflict to eliminate, instil fear, punish and silence members of the opposition groups.

Accordingly, Hinton postulates that Ubuntu indigenous philosophy and the *Gacaca* traditional justice process in Rwanda are connected as the philosophical principles of Ubuntu and inherent in the pre-colonial *Gacaca* model of resolving conflict. These principles include humaneness, dignity, restoration of the equilibrium, reparations, forgiveness and reconciliation. Ubuntu stresses “the need for understanding but not for vengeance, a need for reparation but not for retaliation, and a need for forgiveness but not for victimisation.”¹⁵³

Gacaca’s traditional conflict resolution system stresses “a need for restorative justice, not retributive justice, a need for forgiveness, not vengeance, a need for rehabilitation, not expulsion, a need for conversation, not agitation, a need for reconciliation, not division, and a need for sustainable peace, not protracted war.”¹⁵⁴ Based on this analysis as Hinton asserts, the Ubuntu and *Gacaca* paradigms have universal inferences for sustainable peace in post-conflict societies including that of Zimbabwe.¹⁵⁵ A range of “rational, economic, legal and social objectives inspired the decision to utilise *Gacaca* to try genocide crimes.”¹⁵⁶ The decision to include sexual crimes within its

¹⁵¹ Brouwer and Chu 2009:17.

¹⁵² Costello 2016:15.

¹⁵³ Interim Constitution of South Africa Act 200/1993.

¹⁵⁴ Hinton 2015:397.

¹⁵⁵ Hinton 2015:392.

¹⁵⁶ Bolocan 2004:355.

jurisdiction was compelled by the desire to accelerate genocide trials.¹⁵⁷ Tharicisse Karugarama, who was the Attorney General of Rwanda, stated that “the primary motive for transferring sexual crimes to *Gacaca* was to enable the system to deal with the bulk of genocide cases that remained unresolved.”¹⁵⁸ Ninety per cent of the cases reassigned to *Gacaca* at this time involved sexual violence.¹⁵⁹ Between 2008 and 2010, 6 608 cases of sexual violence were tried through the *Gacaca* system.¹⁶⁰ In acknowledging of the shortcoming within the *Gacaca* law and process, the 2008 *Gacaca* law embraced certain measures for hearing cases of sexual violence and protections in place for survivors of sexual violence.¹⁶¹ Taking cognisance of the conservative culture of the Rwanda society and the stigma attached to rape and sexual violence, which would be potential barriers to testifying.¹⁶² Sexual violence survivors could submit their testimonies to the *Gacaca* courts in writing rather than through public hearings.¹⁶³ “All formal proceedings concerning cases of sexual violence were to be held in camera, behind closed doors, to protect the witnesses’ privacy.”¹⁶⁴

The *Gacaca* experimented on women-only courts; this entailed courts in which one judge heard a survivor's testimony and reported to the full *Gacaca* court.¹⁶⁵ The idea of incorporating the *Gacaca* system as an approach to addressing conflict-related sexual violence attests to several factors in relation to pre-colonial traditional justice systems in conflict resolution processes. First, the *Gacaca* jurisdiction on redressing sexual violence represents one of the “boldest and most original legal-social experiments ever attempted in the field of post-conflict justice”.¹⁶⁶ By creatively combining retributive and restorative approaches, “the *Gacaca* courts represent a unique opportunity to seek justice in an open accessible and participatory fashion.”¹⁶⁷ It attests to the dynamism of African traditional justice platforms having the ability to adapt to the prevailing socio-

¹⁵⁷ Amick 2011:35.

¹⁵⁸ Amick 2011:35.

¹⁵⁹ Haskell 2011:113.

¹⁶⁰ Morris 2014:36.

¹⁶¹ Costello 2016:38.

¹⁶² Costello 2016:38.

¹⁶³ Brounéus 2008:72. Costello 2016:40.

¹⁶⁴ Republic of Rwanda 2008:16.

¹⁶⁵ Morris 2014:36.

¹⁶⁶ Bolocan 2004:355–356.

¹⁶⁷ Bolocan 2004:356.

economic changes brought about by modernism.¹⁶⁸ Second, African traditional justice systems and practices are not both static and ancient in that their philosophical values have no relevance for integration with the prevailing Western legal systems. The result of the consideration to adopt *Gacaca*, a distinctly Rwandan pre-colonial practice, has now been instrumentalised and infused with some Western ideas about justice.¹⁶⁹ Hinton postulates that “from an ideological viewpoint, *Gacaca* emphasised the Rwandan government’s need to promote culturally relevant approaches to reconciliation.”¹⁷⁰ The *Gacaca* courts were henceforth “resuscitated in Rwanda as an indigenous form of restorative and transitional justice.”¹⁷¹

2.4.5 Ubuntu's concept of law and justice

Above I unpack Africa’s founding philosophy of law that provides the grounding for the conceptual framework of the African worldview. Understanding the African philosophy of law and justice responds to the research question of whether there are fundamental differences between the Western and African legal systems’ conceptual framework and function. It is acknowledged by various African philosophers that the concepts of law and justice in Western and African thought significantly differ thus affecting the outcome of conflict resolutions. Embarking on the analysis of Ubuntu’s concept of law and justice assists in determining whether this assertion by African scholars is plausible and substantial. Exploring the differences in Western and African thought on law and justice provides the basis for my argument. The argument is that the adoption of African traditional legal mechanisms in conflict-related sexual violence may be a viable avenue in tackling the failures and inadequate measures in redressing conflict-related sexual violence under the administration of Western legal systems. I thereby begin investigating the concept of law under the auspices of Africa’s pre-colonial principle of Ubuntu.

¹⁶⁸ Bolocan 2004:356.

¹⁶⁹ Hinton 2016:394.

¹⁷⁰ Hinton 2016:395.

¹⁷¹ Hinton 2016:395.

2.5 Ubuntu law

The basis of African law is Ubuntu, which relates to the philosophical family atmosphere, empathy and kinship among and between the different indigenous people of Africa.¹⁷² It is the body of legal rules applicable to a particular Bantu grouping at a specific time or place.¹⁷³ Murungi acknowledges that the construction of African jurisprudence is founded on the communal connotation of being a person embedded in the community; in essence, this is the basis of pre-colonial African law.¹⁷⁴ The general name for the body of thought on law, namely the nature, scope, functions and limitation is called jurisprudence.¹⁷⁵ In African societies and some non-African societies, personhood is social hence; “African jurisprudence is part of the social anthropology in which social cohesion is an essential element.”¹⁷⁶ The central focus in all fields of African law is the preservation and promotion of social cohesion.¹⁷⁷

To get a full appreciation of what African law is, it is important not to qualify it according to the law as it is perceived in the mainstream Western legal thought but as it is conceived in the African thought processes. The traditional approach to western law is based on the acknowledgement and effective protection for rights and liberties of individuals. There are however significant exceptions on this matter.¹⁷⁸ Western scholars view African law as non-existent because African philosophy’s definition of law is the recognition of group rights. The Western school of thought perceives group rights as contradicting the necessity to recognise and protect the rights and liberties of individuals.¹⁷⁹ To the Western thought process, this African thought of law is deduced to mean that group rights precede and supersede the individual.¹⁸⁰ In traditional Western thought, the individual unaided defines the self or person he is to become and as evidenced above, the African view is that the community plays a central role in the

¹⁷² Ramose 1999:81.

¹⁷³ Ramose 1999:81.

¹⁷⁴ Murungi 2004:522.

¹⁷⁵ Olaniran 2016:20–21.

¹⁷⁶ Murungi 2004:522–523.

¹⁷⁷ Murungi 2004:522–523.

¹⁷⁸ M'Baye 1974:130.

¹⁷⁹ M'Baye 1974:130.

¹⁸⁰ M'Baye 1974:130.

individual's attainment of full personhood.¹⁸¹ Accordingly, Menkiti criticises the Western thought concept of a person as narrow in that a person is anyone who has a soul, rationality, will or memory while the African view accords a person the maximum definition that could be given to a person.¹⁸² The nature of man in the Western view is abstract, presents features of a lone individual and proceeds to make it the defining and essential characteristic a person should possess.¹⁸³ The African view of a person denies defining a person using "the physical and psychological characteristics of the lone individual rather the definition of a man is accorded by the community."¹⁸⁴ The African view of a person in relation to his community is summed by John Mbiti as "I am because we are, and since we are, therefore I am."¹⁸⁵ Ramose echoes the same sentiments as Mbiti and asserts that the basic principle of Ubuntu constitutional law or *Abantu* law is that "a person is a person because of other people."¹⁸⁶ Mutuality in the concrete form of gratitude, protection and respect for the individual and self-preservation is the primary meaning of this principle.¹⁸⁷

Menkiti adds that the African understanding of human society adopts collectiveness in the absolute truest sense.¹⁸⁸ When Mbiti uses "we" in his statement above, the word "we" referred to here is not an additive "we" but a thoroughly fused collective "we."¹⁸⁹ It is the recognition of the source of the person's own humanity.¹⁹⁰ While the traditional Western understanding of human society is viewed as constituted by human groups the African view asserts "ontological independence to human society and moves from society to individuals while the Western view moves from individual to society."¹⁹¹ This understanding of the two worldviews on personhood and their relation to the community makes it clear why Africans "tend to be structured around the requirements of duty while mainstream Western societies tend to be structured around the postulation of individual

¹⁸¹ Abraham 1962:20–21.

¹⁸² Menkiti 1984:171.

¹⁸³ Menkiti 1984:171.

¹⁸⁴ Menkiti 1984:171.

¹⁸⁵ Mbiti 1970:141.

¹⁸⁶ Ramose 1999:81.

¹⁸⁷ Ramose 1999:81.

¹⁸⁸ Menkiti 1984:179–180.

¹⁸⁹ Mbiti 1970:141.

¹⁹⁰ Mbiti 1970:141.

¹⁹¹ Menkiti 1984:179–180.

rights.”¹⁹² In the understanding of the African, priority is given to duties that individuals owe to the complete whole and their rights. Regardless of what the rights could be, the rights are secondary to the exercise of their duties.¹⁹³ The notion of mutuality in Ubuntu jurisprudence coincides with some Western theories on mutuality in obligations. The above assertions on mutuality and personhood in relation to the community in Ubuntu law go against the dominant traditional Western jurisprudence. There are exceptions however within the various Western philosophies regarding these concepts. The tradition of obligations is also embedded in Western jurisprudence. In the dominant Western thought, the world functions in surroundings where specified rights of individuals are seen as a precursor to the organisation of society.¹⁹⁴ The government is regarded as the protector and guardian of these individual rights.¹⁹⁵

Ramose states that though the African view of the person is in the collective, the authority of the law is found in the individual.¹⁹⁶ For the law to be alive it must be present in the *Umntu* or *Munhu*, the law is considered to govern the person who is alive, and without that, the law that governs a person cannot arise.¹⁹⁷ Living beings are the originators of the law and the law is a product of the living as they lay down the norms and rules in specific responses to particular experiences.¹⁹⁸ This is so because the African communal life revolves around the principle that supernatural forces protects all life. These latter forces constitute the base of African law. The metaphysical structure ensures communication among the three levels of being which are comprised of the “living, the living dead (supernatural forces) and the yet-to-be-born.”¹⁹⁹ The African thought believes that enhancement and harmony achieved by the living of the law invoke from the ancestors in the metaphysical world a nod of approval to all.²⁰⁰ The foundation of law in Ubuntu philosophy views the being as an indivisible whole connected to the three levels of beings. The belief is that there is an ongoing dialogue

¹⁹² Menkiti 2004:325

¹⁹³ Menkiti 2004:324–332.

¹⁹⁴ Menkiti 2004:324–332.

¹⁹⁵ Menkiti 2004:324–332.

¹⁹⁶ Ramose 1999:96.

¹⁹⁷ Ramose 1999:96.

¹⁹⁸ Ramose 1999:96.

¹⁹⁹ Ramose 2000:2.

²⁰⁰ Ramose 1999:96.

with the metaphysical.²⁰¹ Bantu law according to Ubuntu philosophy is postulated as a response to the question of individual and communal survival. The authority of the law rests in the first place upon its acknowledgment of self-defence as an absolute individual and collective right.²⁰² The authority of the law thereby is legitimised and commands compliance only if it protects and reverences the right of self-preservation in practice.²⁰³ Ramose emphatically states that this reasoning is the basis of what he terms “Ubuntu constitutional law.”²⁰⁴ The assertion by critics that African law as being unwritten therefore assuming it to be non-existent falls away. The fact that Ubuntu constitutional law or *Abantu* law is largely unwritten, cannot be interpreted as the law being unknown among its subjects nor is it a reflection that it is no longer observed amongst the relevant communities.²⁰⁵ The interpretation from this line of thought, one could conclude that the individual or community relationship is one of reciprocal reliance. The individual spells and maintains his rights surrounded by the atmosphere of the communal life and spirit.²⁰⁶

At the same time, the continuity of the community is enriched by the type of mutuality it receives from the free and unimpeded temperaments of rational individuals within its territory.²⁰⁷ Within this kind of mutual bond, individual life is not only enhanced but it derives ambition and worth.²⁰⁸ As M’Baye posits, “African law only offers a prospect to live under the protection of the community of men and spirits for the individual; there are no individual rights; the individual has no role to play in legal associations; and that it is only in rare situations that the individual is treated as a legal subject in African law; only the ‘personage’ is taken into serious consideration.”²⁰⁹ In the African philosophy of law, individuals have no rights as framed in the traditional Western concept of law. What is evident in African law is that while no legal rights exist, the subject in African thought has individual responsibility. If the individual has no rights within African jurisprudence,

²⁰¹ Ramose 1999:97.

²⁰² Ramose 1999:97.

²⁰³ Ramose 1999:97.

²⁰⁴ Ramose 1999:97.

²⁰⁵ Ramose 1999:97.

²⁰⁶ Olaniran 2016:281.

²⁰⁷ Olaniran 2016:281.

²⁰⁸ Olaniran 2016:281.

²⁰⁹ M’Baye 1974:144.

what then do we make of the idea of punishment hinted at under African law.²¹⁰ For example, when a person(s) commits a crime, they are penalised for the offences committed within the ambits of the law operational in that society.²¹¹ The rights of protection that they enjoyed in the relevant communal sense cease to exist for a period of time.²¹² The punishment is applied to them and the implication of this is that what was considered rights, previously, cease to be rights because of the breach in the communal life.²¹³ However, whether in discipline or outside the scope of discipline what is significant in these interfaces is the place the individuals weld in the community.²¹⁴ As argued by Dlamini, “in African law, the individual bears primary liability for wrongs committed, while the other members of his group may, in certain circumstances, bear secondary liability.”²¹⁵ In his words, this applies when “someone is acting in *loco parentis* or is liable to contribute for the offences of the wrongdoer.”²¹⁶

The Western view of the law, on the other hand, has juristic thinking, which is abstract, but African law recognises different bodies of rules that are evoked in different social and legal contexts. To explain this in relation to the criticism that African law is unwritten, and lacks libraries and legislative status. In African thought, a library is not viewed as a “complete and acceptable substitute for vigorous involvement in the being through their existence among people.”²¹⁷ The human being in African thought is the library where truth first surfaces before it is conveyed to the abstract, which is in this instance the library.²¹⁸ Thinking, therefore, precedes thought.²¹⁹ Vansina supports this view by stating that “oral tradition found in African societies shows at the very least that any supposed lack of writing is not synonymous to lack of thought; written work is actually in a sense a symbol of illustration of thought.”²²⁰ Kizerbo refers to the above sentiment by stating that “it would be wrong to condense the civilisation of the vocalised

²¹⁰ Olaniran 2016:281.

²¹¹ Olaniran 2016:281.

²¹² Olaniran 2016:281.

²¹³ Olaniran 2016:281.

²¹⁴ Olaniran 2016:281.

²¹⁵ Dlamini 1997:72.

²¹⁶ Dlamini 1997:72.

²¹⁷ Ramose 1999:91.

²¹⁸ Ramose 1999:91.

²¹⁹ Ramose 1999:91.

²²⁰ Vansina 2006:142.

word to a simply negative absence of writing and to perpetuate the inborn contempt of the literate for the illiterate.”²²¹ This is tantamount to ignorance in one’s understanding of oral civilisations. Societies that operate on oral speech recognise that not only is it a means of daily communication but also a means of “preserving the wisdom of ancestors.”²²² It is an attitude not to be equated with Western thought that would interpret it to be a lack of skill.²²³ The unwritten nature of African laws authenticates the nature of African communalism.²²⁴ The orality of African law must not be viewed as a condition defining and characterising the absence of literacy, but it should be seen instead as a “potential and bountiful ground overflowing with writing potentials.”²²⁵

Equally important is to take cognisance of the relation between the tongue and pen that Ngugi Wa Thiong’o points out.²²⁶ He stresses the supremacy of the pronounced word by affirming that the “pen imitates the tongue.”²²⁷ His analysis is that the pen is a clerk to the tongue, and it draws pictures of the spoken.²²⁸ “The pen utters the already spoken and if we are to cultivate knowledge, philosophy, and all the other arts in Africa through African languages then we have to heed to the African tongues and what they are saying.”²²⁹ It is therefore unfounded to fail to accord African law its rightful place as a useful tool in the jurisprudential realm based on the assertion that it is unwritten.²³⁰ To illustrate the value of oral narrative and as a source of philosophy, Bell points our attention to the “village palaver in the African traditional setting” for scholars to see philosophy at work. To that end, Bell states:

One needs not search far for narrative situations that force critical dialogue in the African context; these are evident in the very nature of village life. A property dispute is brought before elders and debated for the sole reason that justice may be served. When concerns of illness or a community crisis arise a diviner or healer is called or a council is convened. The village model in Africa is a model of free discourse for the purpose of making good judgments and for doing justice for

²²¹ Ki-Zerbo 1981:667; Mungwini 2019:37.

²²² Vansina 2006:142.

²²³ Vansina 2006:142.

²²⁴ Olaniran 2016:278.

²²⁵ Derrida 1976:39.

²²⁶ Ngugi Wa Thiong’o 2013:159.

²²⁷ Ngugi Wa Thiong’o 2013:159; Mungwini 2019:37.

²²⁸ Mungwini 2019:37.

²²⁹ Ngugi Wa Thiong’o 2013:159.

²³⁰ Ngugi Wa Thiong’o 2013:159.

individuals and the community. These narrative situations force dialogue and give rise to human reflection and they are far from uncritical. Each dialogical situation has earmarks of the Socratic enterprise; each is formative of the values characteristic of that community; each reflects the existential texture of human life; each dialectically serves to move a community from injustice to justice, from wrong to right, from brokenness to wholeness, from ignorance to truth.²³¹

Bell emphasises that observing how African traditional conflict resolution platforms are at play substantiates the notion that one needs to research the raw nature of a culture to fully understand how its thought processes flow and function.²³² Such a mindset provides one with a platform to view the system at play objectively. It assists in the removal or change perspectives of stereotypes attached to that particular system or philosophy. It provides an objective view of the matters at hand that are being considered.

The value attached to oral tradition can only be understood by the meaning attached to the unspoken word in African societies.²³³ The great fountains of oral heritage are persons who are called 'traditionalists'; they are referred to as the memory of Africa and the best witnesses.²³⁴ They are the master initiators in a particular branch, "the smiths, the weavers, the hunters, the fishermen and possessors of complete knowledge of the tradition in all aspects of life."²³⁵ The heritage is not lost but harboured "in the memory of the last generation of great depositories that is the living memory of Africa."²³⁶ Memory in oral tradition was extremely advanced and the connection between man and word is strongest, "where text is non-existent, man is bound to the word he articulates."²³⁷

Pre-colonial African tradition as evidenced above depended on the worth and veneration of the spoken word.²³⁸ In African traditions south of the Sahara, the spoken word had beyond its essential moral value, a consecrated character associated with its celestial origin and with occult forces placed in it.²³⁹ The weight and authenticity placed

²³¹ Bell 1989:373, Mungwini 2019:34–35.

²³² Bell 1989:373; Mungwini 2019:34–35.

²³³ Hampate 1981:172.

²³⁴ Hampate 1981:172.

²³⁵ Hampate 1981:172.

²³⁶ Hampate 1981:166.

²³⁷ Hampate 1981:167.

²³⁸ Hampate 1981:167.

²³⁹ Hampate 1981:167.

by African societies on their oral tradition and the spoken word can be equated to the value and weight placed on legislatures and written constitutions found in the Western legal systems.²⁴⁰ Mugwini adds that, “distinct from the written text, which is fixed and without change, oral dialogues are active and prone to collective adaptation; they inhabit the spatial space of the moment and are in that sense steadily attached to the imminence of the present and open to the imagination of change.”²⁴¹

2.6 Western conceptualisation of law and justice in conflict resolution

I provide a brief synopsis of the nature of the philosophical worldview of law and justice as conceived in Western legal thought. I embark on providing the analysis of Western conceptualisation of law and justice from a conflict resolution perspective. To develop the argument I provide the history of the development of Western law as this has a bearing on the nature of its form presently. The historical context in European nations during the industrial revolution revolutionised the nature, function and manner in which law are interpreted presently. Embarking in the origins of legal science and the European movement to order laws into systematic codes stems not merely from a past interest in legal codes, but rather to expose how their occurrence demonstrates “a move in the essence of law itself, namely the dawn of positive law as the core of all contemporary law.”²⁴²

It is an important gesture to undertake because it provides a further understanding of the operational processes of conflict resolution from a Western lens. The present state of modern jurisprudence in the world emerged fully in the seventeenth and eighteenth centuries. The historic event of scientific categorisation that was centred in Germany from the seventeenth century through the late eighteenth century was both an effect and a cause for the increased instrumentation of law as will.²⁴³ The initiative by central Europe to codify laws was the indispensable result of the shift in the nature of Western

²⁴⁰ Mungwini 2019:35.

²⁴¹ Mungwini 2019:35.

²⁴² Berkowitz 2005:1.

²⁴³ Berkowitz 2002:10.

law into an invention of science.²⁴⁴ At the same time this classification of scientifically providing explanations for law, advanced the makeover of law from an ethical entity into a procedural object.²⁴⁵ Pre-industrialisation in Europe, looking at for example the English common law system, a law was by tradition publicised in societies in the verdicts.²⁴⁶ The practice was quite different in other parts of Europe where the tradition of lawgiving and constructing laws known through text can be traced back to ancient Roman times.²⁴⁷ It was only at the end of the seventeenth century however, “that science and scientific legal categorisation emerged as a third and different way of knowing the law.”²⁴⁸ The historical interest in legal codes in Western civilisations and its emergence prompted a shift in the nature of law itself, namely spelling the birth of positive law as “the essence of modern law.”²⁴⁹ According to Leibniz, “legal codification from its theoretical basis embodies the utmost striving for legal positivism as a clear, sure and coherent manifestation of valid law.”²⁵⁰ The growth of codes in the wake of the scientific revolution was “an extension of the scientific coercion to safeguard the understanding of law through scientific control.”²⁵¹

This era in Western civilisation is explained through a concept called “dare to know” which became the object and organising category from the eighteenth century into the present-day modern jurisprudential setting.²⁵² It became the revolutionary spirit permeating all fields of disciplines including knowledge, science culture and law.²⁵³ This era also referred to as the “age of reason,” supported the notion “that the world could only be understood through the arduous application of scientific enquiry and research as opposed to looking back to religious, moral and mystifying forces.”²⁵⁴ Thus, the

²⁴⁴ Berkowitz 2005:10.

²⁴⁵ Berkowitz 2005:10.

²⁴⁶ Berkowitz 2005:1.

²⁴⁷ Berkowitz 2005:1.

²⁴⁸ Max Weber’s (1864–1920) influence as a sociologist, philosopher and jurist is staggering. Alongside Marx and Durkheim, he is considered one of the founding fathers of the new science of sociology in the nineteenth century. As a philosopher, his theorisations of the processes of rationalisation and disenchantment that are associated with the rise of modernity were crucial. Politically he was one of the founders of the Liberal German Democratic Party after the Great War, and he played a key role in the drafting of the democratic *Weimar Constitution of 1919*. Berkowitz 2005:1; Veitch *et al.* 2018:71.

²⁴⁹ Berkowitz 2005:1.

²⁵⁰ Berkowitz 2005:1.

²⁵¹ Berkowitz 2005:2.

²⁵² Veitch *et al.* 2018:1.

²⁵³ Veitch *et al.* 2018:1.

²⁵⁴ Veitch *et al.* 2018:1.

seventeenth and eighteenth centuries' change in the jurisprudential mindset of Western civilisations transformed Western law from a metaphysical religious communal tradition to a new manner of thinking that was based on rationality.²⁵⁵ This new age of reasoning stated that "rules and procedures discoverable by science in nature could in turn be useful to the understanding and abolition of societal difficulties such as disease, famine and poverty."²⁵⁶ Western institutions and concepts influence the present modernity and progress in all disciplines of human life and progress is achieved through this new Western philosophical thought.²⁵⁷ The dawn of modernism marked "an attempt to disrupt the past: to interrupt the authority of tradition, fantasy and unsuspecting conformity to the way things are."²⁵⁸ It is regarded as a new freedom to challenge what had beforehand been taken "as certain and unchallengeable, and it led in turn to far-reaching changes in systems of political, social and legal organisation."²⁵⁹

Through the auspices of colonialism, non-Western nations inherited the modern jurisprudence that is heavily influenced by Western modernity.²⁶⁰ It is deduced from the foregoing that Western law in its earlier form was traditional in nature, influenced by religion, and uncritical in its relation to things and society until the "age of reason" and the scientific revolution. Thus, Western law in its earlier forms bore similar elements to pre-colonial African law. The age of reason gave birth to codification, which was rendered positive in that it revealed law as the will. Western law became at this point in history written law, codified in legislation and expressed through judicial precedence, thus marking this feature as one of the major fundamental differences to the nature of pre-colonial African law. The critical age of reason and scientific interpretation of knowledge and culture bore the new modern jurisprudence based on the concept of Western modernity influenced by Western culture. This modernity in jurisprudence formed the basis for how Western institutions and disciplines in the economic, social and legal structures would function.

²⁵⁵ Veitch *et al.* 2018:1.

²⁵⁶ Veitch *et al.* 2018:1–2.

²⁵⁷ Veitch *et al.* 2018:1–2.

²⁵⁸ Veitch *et al.* 2018:1.

²⁵⁹ Veitch *et al.* 2018:1.

²⁶⁰ Veitch *et al.* 2018:1.

2.6.1 Western concept of law

The development of Western law in Western civilisations from its traditional nature to its present modern form is analysed above using the historical developments of the seventeenth and eighteenth centuries. Jurisprudence in its modern form emerged from a traditional European culture, which was traditionally superstitious and uncritical of conformity. This development in Western Europe's jurisprudence moulded non-Western cultures' legal systems to operate and function on modern Western precepts. I proceed in the analysis of the notion of law in conflict resolution, as it is understood in the Western conceptual framework. This is premised on the research question that determines whether fundamental differences exist between Western and African law. In exploring law as a concept, I refer to modern law or jurisprudence as it developed in Western civilisations and how it is framed presently. In referring to the term modern states it relates to Western and non-Western states that have law and their legal system operating dominantly.

Anglo-American law commonly known as common law is a body of customary law based upon judicial pronouncements exemplified in reports and decided cases, serving as a precedent or applied to situations not covered by statutes.²⁶¹ Its foundation lies in England as the common law courts of England has administered it since the middle Ages.²⁶² From it advanced the kind of legal system now established in the United States of America and most former British colonial nations.²⁶³ Under the common law legal system, courts decide and report its decision concerning the matters arising in particular cases. Such cases become part of the body of law and can be used in later cases involving similar matters.²⁶⁴ In other European nations, however, their legal systems derive from civil law tradition, which is different from the common law legal system.²⁶⁵ This is the essence of the foundation of Western law as it is presently known.

²⁶¹ Kiralfy n.d.

²⁶² Kiralfy n.d.

²⁶³ Kiralfy n.d.

²⁶⁴ Kiralfy n.d.

²⁶⁵ Kiralfy n.d.

Attempts to provide definitions for law in Western legal thought have resulted in countless theorists proposing law as falling into several categories. Natural lawyers such as St. Thomas Aquinas have suggested and defined “law as involving principles of justice and right.”²⁶⁶ They assert that “the major representative character of law is its ethics, impartiality and fairness.”²⁶⁷ Law demarcated as a traditional rule system recognised by governments aligns with Hart and other legal positivists.²⁶⁸ They ground their designation on the existence of a legal system that comprises of “practical rules (primary rules) and laws governing how those rules are made (secondary rules) without regard for the impartiality of the law.”²⁶⁹

Law defined as comprising of important customs and traditions that command social life is represented by anthropologists and sociologists such as Eugen Ehrlich²⁷⁰ and Bronislaw Malinowski who focused on “customary law and living law.”²⁷¹ They disregard the idea that law must consist of a controlled legal system and in its place ascertain that the dominant rules by which individuals accept in social interfaces count as law.²⁷² Three key themes in these proposed concepts of law are identifiable: the first regards the normative value of law, the second is the organised form of law and the third is the role of law.²⁷³ In the modern state, the law is defined as “the fixed guidelines governing the behaviour of man in society, social associations,²⁷⁴ or more fully, the fixed of

²⁶⁶ According to St. Thomas Aquinas, “law is part of mores, because morality is separated into individual morality, law and “practical matters”, such as economics. The primary character of the law is mainly a negative one; it cannot challenge the values of the natural law, which is the moral law.” “Because law itself must be virtuous, on the other hand, law is not vested to prevent all evil, or to achieve the good under all circumstances” SUMMA THEOLOGICA, II. II., quaest. 58, art. 1. This definition is taken from Digest, I, SUMMA THEOLOGICA, I. II., quaest. 92, art. 1; quaest. 96; art. 2. Chroust and Collins 1941:28–29.

²⁶⁷ SUMMA THEOLOGICA, II. II., quaest. 58, art. 1. This definition is taken from: Digest, I, SUMMA THEOLOGICA, I. II., quaest. 92, art. 1; quaest. 96; art. 2. Chroust and Collins 1941:28–29.

²⁶⁸ Hart 1961; World Bank 2017:89.

²⁶⁹ Hart 1961; World Bank 2017:89.

²⁷⁰ According to Ehrlich, however, “associations are not only ethnic communities, but all groups of people who, in their relations with one another, recognise certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them – whether they are families, religious organisations, clubs, companies, professional or social classes, or even states. Living law is not only – possibly inconsistently – applied statutory or case law, but it can refer to rules that need not have anything to do with the set, legitimised and enforced norms of the state. The state is only one of many social associations that are not afforded any priority whatsoever with regard to the emergence of effective legal rules. The centre of gravity of legal development lies therefore, as Ehrlich writes in the foreword to his main work not in legislation, nor in juristic science, nor in judicial decision, but in society itself.” Ehrlich 2002:ix.

²⁷¹ Malinowski 1936.

²⁷² Ehrlich 2002:37, 39.

²⁷³ World Bank 2017:84.

²⁷⁴ Litre 1863.

instructions prescribed on the members of society so that their social relationships escape the unpredictability and the violence of the individuals and conform to the dominant ethic.”²⁷⁵ Advocates of legal positivism opinion law as a social occurrence where humanity institutes the rules to direct its functioning and to categorise the economic or political relations of the general public composing it.²⁷⁶ From the above descriptions of modern law, it appears that like African indigenous law, both aim at assuaging social associations through the rules they impose on members of their societies.²⁷⁷ In other words, like modern law, African indigenous law had a very central social purpose despite criticism for not being written.²⁷⁸ This leads to the assumption that African indigenous law is as vital as modern law as it played a significant role in the ordering of social relations.²⁷⁹

2.6.2 Modern Western law features

The identifiable features of modern law are comprehended fully by engaging in the analysis of its historical development to its present state. Legal modernity strands of development are rationality and formality.²⁸⁰ The modern legal structure is characterised by the rationalisation of law, which is the generalisation in its elaboration (logical sublimation and deductive rigour).²⁸¹ The enactment of law increases the formalisation of law that in a sense becomes autonomous from systems of religious and political power.²⁸² Hence, this describes the subjection of political power to the forms of legal rationality freeing the individual from traditional forms of power based on superstition, religion through the development of universal norms and rational administration of justice.²⁸³ Summers states the formal character of law is formal and sometimes self-

²⁷⁵ Hart and other legal positivists, “who ground their interpretation on the existence of a legal system that is composed of substantive laws (primary rules) and laws administering how those rules are established (secondary rules), without regard for the fair-mindedness of the law. Under this lens, evil legal systems count as law, but customary law and international law, which lack centralised enforcement systems, are not considered fully legal”. World Bank 2017: 84; Hart 1961:1-2.

²⁷⁶ M'Begniga and Guang 2017:189.

²⁷⁷ M'Begniga and Guang 2017:189.

²⁷⁸ M'Begniga and Guang 2017.

²⁷⁹ M'Begniga and Guang 2017:189.

²⁸⁰ Veitch *et al.* 2018:78.

²⁸¹ Weber 1968:882; Summer 1992:242.

²⁸² Weber 1968:882.

²⁸³ Weber 1968:882.

governing of the substantive content of the law.²⁸⁴ According to Weber, the development of modernity thus establishes a particular kind of “connection between formal legal reasonableness and political power,” which is combined in legal form.²⁸⁵ The creation of a law of general validity and universal application in modern thinking is regarded as an achievement. It is regarded as giving people security of expectations.²⁸⁶ The legal system of the contemporary state is universal within its territory superseding all local laws and privileges based on status and special jurisdictions.²⁸⁷ Formal rational law achieves its ideal expression in the form of a code. The laws must be published in advance in a form that can be understood by all subjects and merely applied by judges and other legal officials who are formally independent of the sovereign.²⁸⁸ The conduct of the state and its officials are exposed to legal controls and so become more predictable.

There exists within the modern state a developed, sophisticated and specialised type of reasoning that requires that those interpreting and applying the law receive professional training.²⁸⁹ Modernity brought about the specialisation of skills spelling the formality that is recognisable in Western legal systems in their thought and operational processes.²⁹⁰ This is the scenario because, in the later development of modernity, new disciplines emerged in which the creation of knowledge became progressively diverse and specialised.²⁹¹ These disciplines became inventions of modernism and the production of knowledge and dissemination were separated up into particularly expert units.²⁹² The origination of new divisions of knowledge, each with its own modes of investigation and substantiation, meant the rise of experts at the cost of generalists.²⁹³ On the one hand, these experts track the developments in modern society connected with the notion of

²⁸⁴ Formal attributes of the law, Summer states, “as the level of comprehensiveness of the rule, the extent to which it is conclusive to the degree of its generality, the existence of any justified fiat, and the degree of the reserves of expression which includes, for example, whether the law is written, how far it draws on a specialised vocabulary, and so on”. Summer 1992:242, 246.

²⁸⁵ Weber 1968:882.

²⁸⁶ Weber 1968:882.

²⁸⁷ Veitch *et al.* 2018:78.

²⁸⁸ Veitch *et al.* 2018:78.

²⁸⁹ Weber 1968:882.

²⁹⁰ Veitch *et al.* 2018:14.

²⁹¹ Veitch *et al.* 2018:14.

²⁹² Veitch *et al.* 2018:14, Weber 1968:882.

²⁹³ Veitch *et al.* 2018:14.

functional diversity.²⁹⁴ In tackling legal problems in modern legal systems, the approach is to see these as individual cases that are resolved systematically through the identification of legal relevant facts and subsuming them within abstract legal norms.²⁹⁵

One of the identifiable features of modern law is its relative independence from politics, although the modern bureaucratic state is itself dependent on a particular legal form.²⁹⁶ In modern day states, the law pursues critical governance roles, through law and legal institutions it serves to regulate the conduct of persons and institutes so economic and social policies transform into tangible results.²⁹⁷ Law delineates the organisation of government by checking power by instituting and dispensing authority and power amid government actors and between state and citizens.²⁹⁸ Law assists to order disputation by providing the substantive and technical grip required to uphold accountability, address conflict peacefully and modify the rules.²⁹⁹ The resolution of cases, this is accomplished by focusing on the combination of law facts and the excluding the consideration of factors such as moral values or social status.³⁰⁰ The general result of the secularisation of law is that it is separated from the sphere of ethics.³⁰¹

Henceforth the development of legal modernity disturbed the connection between law, reason and justice when spiritual enlightenment and the demanding sacredness of a tradition and its carriers lost their dynamism.³⁰² The positivity of formal law meant that it could not be restrained by particular content and limited by no other ethical and moral principles.³⁰³ It further translated to mean that legal changes from that historical point going forward were an immanent feature of law itself.³⁰⁴ It is now contained in both the idea and the historical development of formal rational law that there are forms of specialisation and autonomy from other spheres of values and social life.³⁰⁵

²⁹⁴ Veitch *et al.* 2018:14.

²⁹⁵ Weber 1968:882.

²⁹⁶ Kiralfy n.d.; Weber in Veitch *et al.* 2018:73.

²⁹⁷ World Development Report 2017:83.

²⁹⁸ World Bank 2017:83.

²⁹⁹ World Bank 2018:83.

³⁰⁰ Weber 1968:867.

³⁰¹ Weber 1968:867.

³⁰² Weber 1968:867.

³⁰³ Weber 1968:867.

³⁰⁴ Veitch *et al.* 2018:79.

³⁰⁵ Veitch *et al.* 2018:79.

2.6.3 Individualism in Western philosophy

Senghor states that, “Africans have always presented a worldview that directly opposes traditional Western thinking.”³⁰⁶ Accordingly, Senghor elaborates that European philosophy is fundamentally “inert, impartial and dichotomic; it is, in fact, dualistic, in that it makes a distinction between body and soul, matter and spirit.”³⁰⁷ European belief is founded on individualism and antagonism to analysis and conflict.³⁰⁸ In contrast to this view, the African perceives the world beyond the diversity of systems, “as a profoundly transcending, yet unique, reality that pursues synthesis.”³⁰⁹ In elaborating on the nature of how both philosophies view the world, Senghor states “The African is, of course, mindful of the exterior world, to the physical notions of beings and things. It is precisely because he is more so than the white European, because he is sensitive to the concrete qualities of things – shape, colour, smell, weight, etc. – that the African regards these items merely as signs that have to be construed and surpassed in order to attain the reality of human beings.”³¹⁰

The writings of Kant and Locke originated the notion and pre-eminence of the individual and the concept of individual rights.³¹¹ This can be drawn in the official documentation and constitutions of American and French uprisings and these notions have since controlled legal philosophy in the west.³¹² Locke’s theory of the social contract denotes the definitive design of the current liberal legal theory.³¹³ It is not surprising based on this background that the prevalent contemporary liberal concepts of justice focus on the extension of individual freedom subject to the boundaries, which are essential to protect such liberty. The concept of law in Western modern legal thought is premised on the notion of individualism.³¹⁴ The Western world, Senghor perceives to be an “individualistic culture in comparison to the collective identity of African cultures with a somewhat singular concern for oneself and the small group of people close to

³⁰⁶ Senghor 1994:30.

³⁰⁷ Senghor 1994:30.

³⁰⁸ Senghor 1994:30.

³⁰⁹ Senghor 1994:30.

³¹⁰ Senghor 1994:30–31.

³¹¹ Freeman 1984:379–381.

³¹² Freeman 1984:379–381; Veitch *et al.* 2018:24–25.

³¹³ Veitch *et al.* 2018:24.

³¹⁴ Senghor 1994:30.

oneself.”³¹⁵ In the Western individualist culture, emphasis is placed on “liberation, attainment, autonomy, high levels of rivalry and pleasure.”³¹⁶ In collectivist cultures such as that of Africa, the emphasis is on “interdependence, harmony family security, social hierarchy cooperation and low levels of competition.”³¹⁷ Based on new disciplines of knowledge propelled by the European Industrial Revolution, individualism and uniqueness were the new distinctive features of the new category of individual.³¹⁸ Emancipation of the individual and their regulation is protected by legal regulation, through forms of newly conceived individual natural and human rights.³¹⁹ The individual in Western thought is located as the basic unit of society and society is understood to be formed by a collection of individuals whose worth is assured by the law in the form of individual legal rights.³²⁰

The differences in the philosophical outlooks of the Western and African philosophies on the nature of being and relationships influence how conflict resolution is approached and administered. Walker notes this difference by stating that, European Western culture in conflict resolution is radically different from African indigenous cultural notions in the resolution of conflict.³²¹ This glaring difference exists between indigenous and non-indigenous concepts of what it entails to be human, how human associations are interpreted and how conflicts are to be administered.³²² In contrast to the communal nature of indigenous African societies, the dominant Western societies tend to be individualistic.³²³

These non-communal societies “tackle conflict methodically and require undeviating, deterministic clarifications of existing conflicts.”³²⁴ Senghor states that, “equilibrium and the congruence of African culture, of black social order, is grounded both on the community and on the person, and in which, because it was founded on discourse and

³¹⁵ Senghor 1994:30.

³¹⁶ Schoeman 2013:297.

³¹⁷ Schoeman 2013:297.

³¹⁸ Veitch *et al.* 2018: 14.

³¹⁹ Veitch *et al.* 2018:15.

³²⁰ Veitch *et al.* 2018:15.

³²¹ Walker 1999:17–18, 24.

³²² Walker 1999:17–18, Walker 2004:531.

³²³ Hofstede 1984:167.

³²⁴ Walker 2004:530.

mutuality; the group had primacy over the individual without overwhelming him, but permitting him to flourish as a person.”³²⁵

For example, African indigenous approaches “embrace families, elders, ancestors and the natural world, following the rhythms and cycles of the right time.”³²⁶ Western centred resolution methods focus on “securing a settlement, placing emphasis on the needs of individuals and follow a firmly prearranged undeviating order.”³²⁷ The processing of conflict in the Western worldview is likely to emphasise analytical problem-solving of discrete solutions.³²⁸ Whereas indigenous worldviews of indigenous cultures, reveal a collectivist approach to conflict and its resolution in which affiliates keep each other informed on conflict situations.³²⁹ This analytical linear style of the prevailing Western models of conflict resolution contrasts starkly with the cyclic and interrelated networks that embody the African indigenous system of conflict transformation.³³⁰ In Western law, the model of individual accountability has formed the bases of modern human rights law and the national laws of states.³³¹ Through globalisation, which influenced the development of international law, individual accountability has now advanced to recognise the existence of the duty to prosecute at international and national levels for crimes resulting from inter- and intra-conflicts.³³²

2.6.4 Modern Western law’s concept of justice

Above I explore the Western modern law foundational features by providing the historical development from traditional Western law into the current modern form as it is known. The analysis reveals legal modernity developed from a traditional worldview into one of rationality and formality.³³³ This means that modern legal states are characterised by a subjection of political power to the forms of legal rationality freeing the individual from traditional forms of power based on superstition, religion through the

³²⁵ Senghor 1994:31.

³²⁶ Walker 2004:532.

³²⁷ Walker 2004:532.

³²⁸ Barnes 1994; Walker 2004:530.

³²⁹ Barnes 1994; Walker 2004:530.

³³⁰ Walker 2004:530.

³³¹ Bolocan 2004:357.

³³² A general elaboration of the duty to prosecute gross human rights abuses equating to *jus cogens* crimes under international law see Bassiouni 2002:26; Bolocan 2004:357.

³³³ Veitch *et al.* 2018:78.

development of universal norms and rational administration of justice.³³⁴ To develop the argument and conceptualise the Western philosophy of law and justice, I engage Western scholarly theories by Aristotle and Rawls, notions of law and justice in Western cultural legal thought.

The preservation of order and to do justice are not only regarded as primary legal principles that support specific ethical assumptions in Western law.³³⁵ Law and social customs in general are often regarded as the main goals of the law.³³⁶ These standards may be regarded as authentic standards, which validate the presence of a legal order.³³⁷ The starting point of legal reasoning in Western law is that elements of “justice, rationality, generality, impartiality and certainty are regarded as distinct precise claims of justice that form an integrated system of values.”³³⁸ Over the years several ideas on the theory of justice have been established. The pre-eminence of the individual and the concept of fairness has played a central role in most of these theories and it is in this sense that the contrast between Western and indigenous jural postulates reveals itself most explicitly.³³⁹ The concept of justice according to Aristotle is often used as a framework for examining different concepts of justice.³⁴⁰ He underscored the nexus between “justice and equality and distributive and corrective justice.”³⁴¹

The theory of justice by modern Western philosopher John Rawls is used when distinguishing the Western notion of justice from African justice. The concept of justice by Rawls is seen as an unbiased occurrence, which entails the preservation of a balance between contending prerogatives.³⁴² Conceptually it is a set of principles “that

³³⁴ Weber 1968:882.

³³⁵ Hahlo and Kahn 1973:25–26; Van Niekerk 1995:164.

³³⁶ Hahlo and Kahn 1973:25–26; Van Niekerk 1995:164.

³³⁷ Cotterrell 1983:87–88.

³³⁸ Hahlo and Kahn 1973:31–35.

³³⁹ Van Niekerk 1995:165.

³⁴⁰ Freeman 1984:456–357.

³⁴¹ “Distributive justice is concerned with the just distribution of benefits and burdens and involves the relationship between the society and individuals. It comprises the principle that equals should be treated equally and unequals unequally (which principle presupposes a fundamental right to equality).” “Corrective justice is directed at the restoration of the equilibrium by redressing unfair distribution. The former entails political or social justice, whilst the latter comprises justice administered by the courts.” The concept of equality in justice is also incorporated in the Ulpian concept of justice evinced in the *Corpus Iuris Civilis: iustitia est constans et perpetua voluntas ius suum cuique tribuens*. Justice is the constant and unceasing will to give everyone his due (D 1 1 10; see also Inst 1 1 1 pr). See Genn *et al.* 1991:194–195; Clark 1987:61–64.

³⁴² Rawls 1971:3–22.

assign rights and duties defining the fitting separation of social benefits and dissemination of encumbrance, which is indispensable for social collaboration.”³⁴³ Western justice principles are derived from an imaginary idyllic original position of parity in which free and composed people approve on the philosophies that should position the society.³⁴⁴ This reasoning prompts individualistic and self-centred individuals to appreciate the obligation of societal control to confine undue self-indulgence and maintain order in society.³⁴⁵ The agreement is the coherent way to institute such social control. The Western principle of justice states that each person should have an equivalent right to the most far-reaching basic liberty harmonious with similar liberty of the other.³⁴⁶ The social and economic inequalities should be prescribed in order that they are both rationally expected to be to everyone’s benefit and attached to locations and offices open to all.³⁴⁷

The fundamental liberties are “fundamental rights that all people have, including political liberty, freedom of speech and assembly, liberty of conscience and thought, freedom of the person, right to personal property, and freedom of arbitrary arrest in accordance with the rule of law.”³⁴⁸ In the attainment of equality, persons of similar skills, abilities and motivation should be afforded equal opportunities.³⁴⁹ Enclosed in the second principle of justice is the difference principle, which requires that “disparities be organised to the utmost value of the least advantaged.”³⁵⁰ Rawls points out that “for a theory of justice to be convenient, it must be general, universally applicable, publicly known, capable of imposing order on contending entitlements, and it must have definiteness.”³⁵¹ In Rawls’ theory in typically Western liberal approach, the individual is bestowed a principal role and individual independence takes primacy over the greater good shared by the community.³⁵² The African indigenous laws’ preliminary points for

³⁴³ Rawls 1971:3–22.

³⁴⁴ Rawls 1971:3–22.

³⁴⁵ Van Niekerk 1995:167.

³⁴⁶ Rawls 1971:60–67; Heyns 1985:29–31.

³⁴⁷ Rawls 1971:60–67.

³⁴⁸ Van Niekerk 1995:165.

³⁴⁹ Heyns 1985:30–34; Uoyd 1984:356–367.

³⁵⁰ Heyns 1985:30–34; Uoyd 1984:356–367.

³⁵¹ Rawls 1971:130–136; Genn *et al.* 1991:202.

³⁵² Rawls 1971:166; Van Niekerk 1995:166.

juridical rationality are different and this makes the concepts of law and justice in an indigenous context very different to Western concepts.

This difference is not only in the general concepts of justice put forward by Western scholars' proposed theories such as Rawls.³⁵³ Rather in the Western concept of justice "the individual take supremacy over the collective good and is equally apportioned a central role."³⁵⁴ This is not consistent with the most central postulate of African indigenous law, namely "harmony of the collective, in which the collective good takes primacy over individual claims."³⁵⁵ The collectivism in African indigenous law should not be regarded as an entity separate from its component members.³⁵⁶ To accord, the absolute primacy of collectivism over the individual good does not reflect this concept in the right framework as indigenous law has other mechanisms to protect the dignity of the individual.³⁵⁷

2.6.5 Western administration of justice

The conceptual notion in the administration of Western justice is founded on three principles, namely equality, fairness and access.³⁵⁸ Western justice is largely legal justice infused with elements of morality and the result of legal action is not reliant on the moral integrity of the parties but on the logic of technical rule of law and procedure.³⁵⁹ The Western administration of justice and its conceptual framework is the dominant philosophy in the present legal system in Europe and formerly colonised nations. The dominant idea of administering justice is founded on the notion of retributive justice. Retributive justice assumes "wrongdoing primarily as a deed against the government and a violation of its laws."³⁶⁰ The ethic of the dominant legalistic justice system emphasises obedience to moral principles presumed to be partly reflected in the law.³⁶¹ It perceives criminality as law breaking and harm against the state and liability as

³⁵³ Rawls 1971:504–512.

³⁵⁴ Rawls 1971:504–512.

³⁵⁵ Van Niekerk 1995:169.

³⁵⁶ Van Niekerk 1995:169.

³⁵⁷ Van Niekerk 1995:169.

³⁵⁸ Olaniran 2016:319.

³⁵⁹ Olaniran 2016:319.

³⁶⁰ Bolocan 2004:361.

³⁶¹ Stovel 2003:2.

a punishment for flouting the law.³⁶² Legalistic justice regards justice largely as procedural impartiality and applicable penalty for the crime by impartial adjudicators.³⁶³ This is in sharp contrast to the African philosophy on justice that is premised on restorative justice, which accepts “that individuals are relational beings who need to live communally with others and view law-breaking as a violation of another person.”³⁶⁴ The harm thus caused not only infringes the victim and those close to him but also constructs rifts between the community and both the victim and the wrongdoer.³⁶⁵ This approach foresees offences as damaging of human relations that creates obligations to make things right, and justice as a collaborative process that involves victims, offenders and the whole community in a search for solutions that promote restoration, reparation, resolution and reassurance.³⁶⁶

The notion of justice in traditional African societies is to unite the society and is different from the European system, which is to accord blame to the guilty party and award or commend the other.³⁶⁷ In modern jurisprudence, justice is seen as “a set of values for assigning rights and duties in the basic institution of society and defining the applicable dispersal of benefits and social collaboration”³⁶⁸ The concept of justice in this context means balancing contending rights while a concept of justice is a set of correlated values for recognising the relevant reflections, which determine the sense of balance.³⁶⁹ A just state of affairs in Western justice thought is that in which each individual has precisely those benefits and encumbrances that are due to him.³⁷⁰ The Western and African legal systems recognise the social nature of man that inspires them to live in a community. The perception of interconnectedness between the individual and the community is reflected by Aristotle where he postulates that “man is by nature a social animal; an individual who is unsocial naturally and not accidentally is neither beneath our notice or more than human.”³⁷¹ Society is something in nature that precedes the

³⁶² Stovel 2003:2.

³⁶³ Stovel 2003:3; Bolocan 2004:362.

³⁶⁴ Stovel 2003:3.

³⁶⁵ Bolocan 2004:362.

³⁶⁶ Zehr 1990:181; Stovel 2003:3–4.

³⁶⁷ Olaniran 2016:19.

³⁶⁸ Rawls 1971:4,10.

³⁶⁹ Rawls 1980.

³⁷⁰ Miller 1976:20.

³⁷¹ Miller 2022. Schoeman 2013:294–295.

individual.³⁷² In both the African and Western legal system philosophy, there is recognition that existing in a society leads to conflicting interests necessitating the need for the administration of justice.³⁷³ This is reflected as the historical basis for the development of judicial administration. With the rise of the modern state, and the progression of the power of the state, judicial administration fell solely into the hands of the state.³⁷⁴ The state began to act like an adjudicator to assess on matters of accountability and impose penalty the individuals.³⁷⁵ The concept of public enquiry and punishment became a reality. In this regard, all offences committed in that particular state are offences committed against the relevant government.³⁷⁶ All manners of redress for such offences are obtained through the relevant legal and justice state institutions.

Thus, the modern judicial administration is a natural consequence to the progression in the power of the sovereign state and such power is conferred in the court and other acknowledged bodies.³⁷⁷ The rendering of justice to the society members is through the courts and must always be in accordance with the law.³⁷⁸ It must be noted that justice is not always rendered by the courts.³⁷⁹ Judges are not policymakers but purely interpreters of the law, in the same vein, “the duty of the judge is administer the law enacted by the legislature; the duty of the court is not to remedy defects in the law.”³⁸⁰ Hence, in the contemporary state, justice is ordered according to law and is commonly considered as implying respect of fixed rubrics.³⁸¹

One clear distinction that exists between the African and Western legal systems is in terms of the classification of law into criminal and civil law in the Western legal system.³⁸² This distinction in the classification of these two legal systems only aids the

³⁷² Schoeman 2013:295.

³⁷³ Olaniran 2016:88.

³⁷⁴ Olaniran 2016:88.

³⁷⁵ Olaniran 2016:88.

³⁷⁶ Olaniran 2016:88.

³⁷⁷ Olaniran 2016:88.

³⁷⁸ Olaniran 2016:88–89.

³⁷⁹ Olaniran 2016:88–89.

³⁸⁰ Salmond 1907:18

³⁸¹ Salmond 1907:18

³⁸² Kenyatta 1975:225.

misconception in both of their philosophical ideas of law and justice.³⁸³ The Western legal system categorises conflict or offences against the state and conflict arising among individuals³⁸⁴. In relation to the redress of offence and conflict committed within the state, there are clearly demarcated lines and procedures that must be observed in approaching the requisite institutions for redress for the injury or harm arising from the conflict.³⁸⁵ In African legal systems, this categorisation found in Western law by distinguishing between criminal and civil law is meaningless. The aim of African law is to regulate the behaviour of its community members and maintain balance for the greater good of all.³⁸⁶ The whole objective is to uphold communal well-being by integrating the conflicting interests of differing people. The varied law and procedures as well as the difference between civil and criminal law have developed with the European culture with nothing in common with African cultures.³⁸⁷ Driberg on this point observed that, “the principles are alien both in growth and in sentiment and thus cannot be used to explain the bases of the primitive legal theory for it will be misleading to do so.”³⁸⁸

The administration of justice is less sophisticated in African legal systems than under that of the Western legal system. Western views of law and procedure misunderstand the non-specialist character of group-orientated indigenous cultures into which category African cultures fall.³⁸⁹ The real danger of this approach lies in the fact that indigenous law does not dovetail into Western definitions of law and may thus be measured as custom and not law.³⁹⁰ Due to the close connection between “law, custom, religion and other social standards in indigenous cultures, anthropologists and jurists alike have often felt obligated to consider that these civilisations are lawless societies overseen by the authority of custom alone.”³⁹¹ The absence of physical compulsion and approved institutions to impose norms as well as the absence of the concept of state and formal policymakers in a narrow Western sense has been regarded as further indicators

³⁸³ Olaniran 2016:93.

³⁸⁴ Kenyatta 1975.

³⁸⁵ Kenyatta 1975.

³⁸⁶ Kenyatta 1975:225

³⁸⁷ Driberg 1934:231; Olaniran 2016:94.

³⁸⁸ Driberg 1934:231; Olaniran 2016:94.

³⁸⁹ Van Niekerk 1995:34.

³⁹⁰ Van Niekerk 1995:34.

³⁹¹ Van Niekerk 1995:34.

pointing to the absence of law in indigenous societies.³⁹² The paraphernalia associated with Western legal systems is the existence of prisons, police and other enforcement machinery and agencies that operate in modern states as mechanisms of enforcing the law.³⁹³ In the African philosophy of law according to Driberg, religious sanctions are the nearest equivalent of the Western punitive justice.³⁹⁴ “This tremendous relic, remote but ever present, is in itself a very compelling force in fortifying due regard for the law.”³⁹⁵ These religious sanctions give African law sufficient authority to dispense with the mechanics of enforcement.

In the Western administration of justice, the chief duties of rulers and institutions of law enforcement are to seek out crime to punish it.³⁹⁶ They stand outside of society and police the state. In African society, it is not the duty of the chief in a general sense to seek out a crime and punish it.³⁹⁷ Rather, it is the duty of the community member owing to the issue of collective responsibility, to report any breach of public law of which the chief should thereupon take cognisance.³⁹⁸ The character of African laws is that nothing is rigid or unchanging in them, though the changes may appear to proceed at a very slow rate.³⁹⁹ The character of modern Western law is the rigid administration of codes, for if the intention to murder is present, whatever the complicated spiritual and social impulses that formed that intention, no sentence other than death is possible.⁴⁰⁰

The Western legal system of justice is modelled as a punitive model of justice.⁴⁰¹ In essence, Western law under its legal system creates offences and has the propensity to create criminals, in contrast to African law that aims at maintaining equilibrium.⁴⁰² The nature of the Western legal system deals with conflict as a deterrent or rather organised under the penal theory. Hence, in Western legal philosophy offences are categorised

³⁹² Allott 1967:7–12; Van Niekerk 1995:34.

³⁹³ Driberg 1934:237.

³⁹⁴ Driberg 1934:166 Olaniran 2016:97. See Van Niekerk 1995:34;

³⁹⁵ Driberg 1934:166 Olaniran 2016:97. See Van Niekerk 1995:34;

³⁹⁶ Driberg 1934:242.

³⁹⁷ Driberg 1934:241.

³⁹⁸ Driberg 1934:242.

³⁹⁹ Driberg 1934:241.

⁴⁰⁰ Driberg 1934:243.

⁴⁰¹ Omale 2006:52–53.

⁴⁰² Olaniran 2016:94.

under this viewpoint.⁴⁰³ In the breaking of state law or the arising of conflict, in Western legal thought, the motive is to punish the transgressor for the abrogation of state law.⁴⁰⁴ The motive and intent are premised on the notion of retribution and revenge.⁴⁰⁵ This is contrary to African law whose motive in this regard is the restoration of the social disequilibrium brought about through conflict.⁴⁰⁶ Hence, the concept of law and justice in both these systems is opposed in their approach to resolving conflict. The most noticeable divergence is that Western law is penal or retributive towards conflict while African law is restorative and conciliatory in its handling of conflict within its communities.⁴⁰⁷ In Western legal thought, the offence committed by state members is committed against the state, whereas in African law the offence is committed against the individual, family or community.⁴⁰⁸

The sophisticated nature of the Western legal system is designed to ensure the stability of the society and maintenance of law and order.⁴⁰⁹ The less sophisticated nature of the African legal system seeks in the same vein to ensure the stability of the society and through maintenance of the equilibrium.⁴¹⁰ It is evident that despite their divergent contrasting view on law and justice, both legal systems have one common aim to maintain order within their societies and ensure that conflict is resolved. The nature of their societies heavily influences the worldview philosophical framework of these two legal systems' approach to conflict resolution.⁴¹¹ Western modern society is a European culture that is based on individualist assumptions while African society is based on the collectivist organisation.⁴¹²

2.6.6 Language and law in African and Western legal thought

A fundamental difference has been identified between the language of the law in African legal thought and that of Western legal thought. According to Ramose, the influence of

⁴⁰³ Omale 2006:52.

⁴⁰⁴ Llewellyn and Howse 1999:3; Omale 2006:56.

⁴⁰⁵ Omale 2006:56.

⁴⁰⁶ Olaniran 2016:93.

⁴⁰⁷ Olaniran 2016:94.

⁴⁰⁸ Olaniran 2016:94.

⁴⁰⁹ Olaniran 2016:94.

⁴¹⁰ Olaniran 2016:94.

⁴¹¹ Olaniran 2016:94.

⁴¹² Olaniran 2016:94.

Western language has been used to disintegrate the reality of life in *Abantu*.⁴¹³ This influence has resulted in some principles becoming law by themselves just by how it is uttered.⁴¹⁴ The rule *first come first serve* for example, is a Western rule of life; it is a radical incursion to the Ubuntu principle that the *Abantu* have been living with from time immemorial.⁴¹⁵ This Western rule of life that states *first come first serve* when juxtaposed against Ubuntu law is impractical, the exact opposite and attacks the very foundation of Ubuntu law.⁴¹⁶ This is so because the *Abantu* are communal in their practice as previously alluded to above and their belief system is premised on sharing equally and amicably having due regard to age.⁴¹⁷ The Bantu way of life that the author is affirming is that to understand Ubuntu thought and language a rheomode interpretative approach must be adopted in understanding how the law is divided.⁴¹⁸

This rheomode approach views the law as something that is not linear but can be viewed in many ways to reach one goal.⁴¹⁹ The suggestion is that this view focuses on participation and continuity of the action by being rather than the action itself. The rheomode principle considers the application process of the law as meeting the end. One must therefore view the application of the law as solely depending on how the law came to be formulated.⁴²⁰ This point highlights the proposition to understand the culture of the given society to have a comprehensive understanding of their worldview. Language plays a significant role in understanding the mindset of a group of people.⁴²¹ It is intrinsically linked to and is a portrayal of the prevailing culture of the relevant people.⁴²² The African philosophical view of the universe is holistic, meaning it speaks against fragmentation of being through language; it defines the African philosophic understanding of being as wholeness.⁴²³ It can be said that Ubuntu law is “flexible, unformalised, reasonable and linked to morality.”⁴²⁴ African law reflects the practised

⁴¹³ Ramose 1999:88.

⁴¹⁴ Ramose 1999:88.

⁴¹⁵ Ramose 1999:88.

⁴¹⁶ Ramose 1999:82.

⁴¹⁷ Ramose 1999:82.

⁴¹⁸ Ramose 1999:83.

⁴¹⁹ Ramose 1999:85.

⁴²⁰ Ramose 1999:86.

⁴²¹ Ramose 1999:86.

⁴²² Ramose 1999:86.

⁴²³ Ramose 1999:46–47.

⁴²⁴ Olaniran 2016:319.

custom and morality; it incorporates the moral ideals that are relevant in any meaningful discussion of the legal tradition in Africa.⁴²⁵ The customary nature of African law is thus a vital facet of African ontology. The ontological African view displays the “thin line of delineation between the purview of the legal and the purview of the moral in African philosophy.”⁴²⁶ Whereas the positivist strain in Western jurisprudence holds “a isolated relationship between law and morality, African jurisprudence not only sees both law and morality as intimate but also posits that laws have a moral framework, which makes them inseparable.”⁴²⁷ It should be noted that not all Western philosophies on law hold this similar position. The reservoir of African jurisprudence is large enough to include divine laws and positive law; custom provided such laws to promote and preserve the vital force that is life. In African philosophical thought, what is considered “ontologically goodwill is therefore accounted as ethically good and at length assessed as juridically just.”⁴²⁸

The flexibility of Ubuntu law speaks to the notion that it is “law without a centre.”⁴²⁹ Such is the case because Ubuntu's philosophy holds that being is a continuous completeness rather than a limited whole.⁴³⁰ Ramose asserts that “this concept of the legal subject not being the centre of the law is because the law in the African worldview consists of rules of behaviour confined in the flow of life.”⁴³¹ This impression that life is a steady flow and flux means that it cannot be determined beforehand that certain legal rules have an irrevocable claim to exist permanently.⁴³² This unveils the claim that Ubuntu law is reasonable even though it is informal. In this essence, Ubuntu law can be described as “dynamology in search of justice, which is the restoration of the equilibrium.”⁴³³ The rheomode character of Ubuntu's philosophy of law is explained further by M'Baye as being consistent with the requirement of attunement to being.⁴³⁴ This he interprets to mean Ubuntu law as having a combination of rules of behaviour, which are contained in

⁴²⁵ Olaniran 2016:319.

⁴²⁶ Olaniran 2016:319.

⁴²⁷ Olaniran 2016:321.

⁴²⁸ Okafor 1984:157,164.

⁴²⁹ Ramose 2000:3.

⁴³⁰ Ramose 2000:3.

⁴³¹ Ramose 2001:3.

⁴³² Ramose 2001:3.

⁴³³ Ramose 2001:3.

⁴³⁴ M'Baye 1974:139.

the flow of life.⁴³⁵ This rhythmic nature of African Ubuntu is the regard of law as a lived experience.⁴³⁶ While the “Western legal person is compelled to live in or within the law, the African legal person by contrast submits to the imperative to live by the law.”⁴³⁷ The difference between these schools of thought is that the Western view of law accentuates the existence of a non-concrete image of the human state to be applied according to the dictates of the context.⁴³⁸

The philosophy of African law can thus be summarised as positive law written in a format that is not negative, unlike Western law. It is positive in that it is in attunement with the being and the flow of life and rhythm to sound, the so-called being must do.⁴³⁹ Its fundamental intention and purpose, unlike Western law, is not to create criminals but it seeks to direct individuals on how they ought to behave towards each other. This is due to the nature and purpose of African law, which is the maintenance of the equilibrium. The maintenance of equilibrium is the whole objective of African *Abantu* law and the penalties of this law are directed not against specific infringements but to the restoration of this imbalance.⁴⁴⁰ The original concept of law in pre-colonial African societies was perceived not as an object for self defence against the opponent as it is in the Western legal systems, but it is seen as a prospect given to all to survive under the protection of the order of the cooperative community.”⁴⁴¹

The constant search for truth in the African concept of law points to another difference that exists between the African legal system and the Western legal system. The African concept of law is that law is a continually lived experience and never reaches a point that one can emphatically state that they have arrived; it does not reach a point of finality.⁴⁴² In the quest by the being for attunement, truth is to be constantly searched for and found.⁴⁴³ This is the rheomodic nature of African law that Ramose describes

⁴³⁵ M'Baye 1974:139.

⁴³⁶ Ramose 1999:92.

⁴³⁷ Ramose 1999:92.

⁴³⁸ Ramose 1999:92.

⁴³⁹ Driberg 1934:231.

⁴⁴⁰ Driberg 1934:231.

⁴⁴¹ Mokgoro 2012:321.

⁴⁴² Ramose 1999:95.

⁴⁴³ Ramose 1999:95.

above.⁴⁴⁴ Truth in the traditional African setting was primarily moral and not rational or epistemological as in Western philosophy.⁴⁴⁵ In the African culture, the one who knows all things is God the creator and He decrees morality. In other words, for the Africans, “the value of truth derives from the African value of religion, which involves the fear of God.”⁴⁴⁶ This concept is elaborated by Mbiti’s famous statement that “Africans are notoriously religious and religion permeates all aspects of their life so fully that it is not easy or possible to isolate it”.⁴⁴⁷ African religion was not a pastime affair, neither was it a part-time preoccupation but a full-time personal encounter with the Divine.⁴⁴⁸

The significance of religion and the sacred is the value of truth and justice.⁴⁴⁹ God is believed as being responsible for meting out justice in the African worldview.⁴⁵⁰ The African communal life revolves around the principle that mystical forces, the living dead, protect all life, which is the metaphysical aspect of Ubuntu law.⁴⁵¹ These supernatural forces determine justice, and it is declared on their behalf by the living, who is in authority.⁴⁵² The purpose of these supernatural forces is to reinstate accord and support the preservation of peace.⁴⁵³ This is premised on African jurisprudence, which concerns itself primarily with personhood and the promotion of social cohesion. Justice mitigates this element of social cohesion as justice defines a human being as a human being.⁴⁵⁴ Justice emanates from the social nature of the human personality, which governs his interactions. The quest for justice of Ubuntu law is not engrossed on the world of mystic forces; instead, it is directed immediately toward “the world of the living and yet-to-be-born.”⁴⁵⁵ Therefore, the application of justice primarily concerns itself being directed towards the physical realm of the existing. In this sense, it is different from Western legal thought, which stresses the abstract.⁴⁵⁶ In other words, truth and justice are valued

⁴⁴⁴ Ramose 1999:83.

⁴⁴⁵ Inameti 2013:316.

⁴⁴⁶ Inameti 2013:316.

⁴⁴⁷ Mbiti 1969:1.

⁴⁴⁸ Asouzu 2004:253.

⁴⁴⁹ Inameti 2004:317.

⁴⁵⁰ Inameti 2004:317.

⁴⁵¹ Ramose 2001:2.

⁴⁵² Ramose 2001:2.

⁴⁵³ Ramose 2001:2.

⁴⁵⁴ Murungi 2004:523.

⁴⁵⁵ Ramose 2001:2–3.

⁴⁵⁶ Ramose 2001:2–3.

because they are derived from the nature of God Himself who is concerned about society's moral order and harmony.⁴⁵⁷

2.7 Ubuntu and justice

To address the underlying research problem of accountability towards conflict-related sexual violence the study investigates the differences between the Western conceptualisation of justice and the pre-colonial African conception of justice. Ubuntu, as previously alluded to, is the African philosophical principle that undergirds African law and the subsequent legal systems that meted out justice when conflict arouse. The analysis of the pre-colonial African concept of justice provides a narrative on how pre-colonial African legal systems righted scenarios that had become unbalanced or disturbed the equilibrium of individuals, communities and the environment resulting from the conflict. I argue in the thesis that justice exists in both formal and informal, namely pre-colonial African legal systems. Therefore, the following questions are addressed in the analysis below. What was regarded as justice in pre-colonial African philosophy? Why is justice important? How did the concept of justice relate to conflict resolution in pre-colonial African legal systems and how was justice dispensed in those societies?

2.7.1 Concept of justice in pre-colonial African legal systems

The notion of justice when it is evoked in most instances is typically linked to the Western notion of equality.⁴⁵⁸ This conceptual default reasoning is a direct result of the colonial encounter with indigenous systems and the subsequent overriding of such systems by the Western legal philosophy culture and practices.⁴⁵⁹ I contend that caution ought to be exercised in assimilating a blanket meaning of justice as equality because interpretations of the concept of justice are capable of various interpretations and are highly dependent on the worldview one is speaking from.⁴⁶⁰ In the same manner, whenever the concept of justice is brought to view institutions on where to obtain it, it is

⁴⁵⁷ Inameti 2013:318.

⁴⁵⁸ Olaniran 2016:25.

⁴⁵⁹ Olaniran 2016:25.

⁴⁶⁰ Olaniran 2016:26.

instantly linked to the Western courts of law.⁴⁶¹ Though justice is often interchangeably used with law, this stems from the concept that law is an instrument of social, economic and political control that is geared towards justice.⁴⁶² Many scholars have argued that justice exists in both formal and informal ways. Justice in the formal sense possesses striking similarities with law.⁴⁶³ The concept of justice under Ubuntu's philosophy of law is often intermingled with the concept of right, grounded upon doing the right thing. The aim of justice in the African philosophy of justice is eliminating disharmony among people in a community.⁴⁶⁴ Put differently, both concepts are used interchangeably. The concept of justice is tied to the universal claim of giving one his due and ensuring that it is reciprocated.⁴⁶⁵ From this belief, the idea of justice flows and is regarded in African thought to be giving to another what is owed to them.⁴⁶⁶ In other words, the notion of justice and rights means the same thing.

Even though the end of every justice pursuit or delivery is to enable one to attain or benefit from the enjoyment of some fundamental rights, justice and rights both mean different things in Western jurisprudence.⁴⁶⁷ The general ethical requirement of respect for persons in the definition of personhood states "that those who are capable of a sense of justice are owed the duties of justice."⁴⁶⁸ To be accorded this status of deserving the duties of justice, one must possess the capacity for moral personality, only then is morality considered essential to our sense of ourselves as persons.⁴⁶⁹ The abrogation of the accepted moral rule gives rise not only to a sense of guilt but also to a feeling of shame.⁴⁷⁰ The point here is that once morality is understood as an essential component of what it means to be a person, the agent is then bound to feel incomplete in violating the moral code. This provokes in the individual a sense of shame with its usual intimation of deformity and incompleteness.⁴⁷¹

⁴⁶¹ Olaniran 2016:25.

⁴⁶² Olaniran 2016:26.

⁴⁶³ Olaniran 2016:26.

⁴⁶⁴ Masitera 2018:114.

⁴⁶⁵ Inameti 2013:317.

⁴⁶⁶ Ramose 2000:1.

⁴⁶⁷ Inameti 2013:321.

⁴⁶⁸ Ramose 2000:1.

⁴⁶⁹ Rawls 1971:505-506.

⁴⁷⁰ Rawls 1971:445.

⁴⁷¹ Rawls 1971:445.

The Ubuntu understanding of justice is premised on the Ubuntu philosophy of law, which views justice as the restoration of equilibrium.⁴⁷² Ubuntu justice aims, as previously stated, at achieving harmony and social cohesion and balancing out the distorted equilibrium brought about through deviance from the Ubuntu law and morality.⁴⁷³ Generally, social deviance or an offence in the African worldview is regarded as sickness and for this reason, therapy is always necessary to remedy the ailment.⁴⁷⁴ Injustice in African legal thought is not a matter of an individual flouting a law that they are to uphold; imposed either by other persons or by the group of individuals acting on behalf of the state.⁴⁷⁵ In the African sense, injustice is the individual's failure to be themselves or a violation of the duty of the individual to be a social being.⁴⁷⁶ As Murungi states, "the African truth is that a human being is a human being as social being."⁴⁷⁷ Jurisprudence, therefore, has no meaning apart from the human, social and political contexts, as being human is the sphere of African jurisprudence.⁴⁷⁸

The promotion of human well-being is a concerted and reciprocated effort, where those more able in some domains ought to assist those less able.⁴⁷⁹ In its moral definition, communitarianism pronounces the belief in the principle of practical selflessness as a key social virtue.⁴⁸⁰ It recognises and encourages sharing with others as an essential characteristic of human life.⁴⁸¹ To Africans, according to Masolo, the social order related to its ethic would be the best way of living for humans.⁴⁸² Humans sacrifice for each other and make a conscious decision to forgo something for the benefit of another human being.⁴⁸³ This points to the idea of interdependence as a fundamentally human mode of life, and it is seen to be the natural inclination of human nature.⁴⁸⁴ In African thought, this is the essence of a being. Living the law is giving to others what is due to

⁴⁷² Ramose 2001:2

⁴⁷³ Masitera 2018:116

⁴⁷⁴ Murungi 2004:522.

⁴⁷⁵ Murungi 2004:523.

⁴⁷⁶ Murungi 2004:523.

⁴⁷⁷ Murungi 2004:523.

⁴⁷⁸ Murungi 2004:523.

⁴⁷⁹ Masolo 2004:494.

⁴⁸⁰ Masolo 2004:494.

⁴⁸¹ Masolo 2004:494.

⁴⁸² Masolo 2004:494.

⁴⁸³ Masolo 2004:494.

⁴⁸⁴ Masolo 2004:494–495.

them as human beings. In so doing, one is pursuing and actualising the demand for justice.⁴⁸⁵ Ubuntu justice according to pre-colonial African customs and tradition in conflict resolution is conciliatory in nature with the sole aim of restoring peace and harmony between members.⁴⁸⁶ This stands in stark contrast to the Western legal system's approach to justice, which is adversarial, repressive and retributive.⁴⁸⁷ Their conflict resolution processes reflect the communalistic nature of these societies in promoting group interest and group solidarity. This is mirrored in the African dispute resolution processes whose quest for the restoration of peace between litigants rather than an “all-out victor and an all-out loser situation,” which is characteristic of Western legal systems litigation processes.⁴⁸⁸ In very drastic nuances, concession is the epitome of social relations when interactions between communities have fragmented.⁴⁸⁹

The ideals of conciliation, reconciliation and compromise, are instruments and purposes of pre-colonial African law.⁴⁹⁰ These are unique phenomena of African life forming integral parts of its culture and traditions. These ideals are and have always had their significance in African social legal and corporate life.⁴⁹¹ The socio-ethical context that lies in the African socio-political economy is activated, measured and assessed together in the quest for a form of resolution and settlement.⁴⁹² The ideals of conciliation, reconciliation and compromise spell the agenda of peace in any intra- or inter-communal clashes.⁴⁹³ Abraham acknowledges these fundamental ideals of pre-colonial African justice principles as lacking in Western penology.⁴⁹⁴ Abraham, speaking on these ideals of African life opinioned that “in Western penology the lawbreaker is penalised without making restitution. On emerging from prison, he is reconciled to neither himself, the victim nor society.”⁴⁹⁵ This aspect of African law and justice undergirds another aspect that is fundamentally different from the Western conceptual

⁴⁸⁵ Masolo 2004:494–495.

⁴⁸⁶ Mokgoro 2010:321.

⁴⁸⁷ Mokgoro 2010:321.

⁴⁸⁸ Mokgoro 2010:321.

⁴⁸⁹ Mokgoro 2010:321.

⁴⁹⁰ Olaniran 2016:312.

⁴⁹¹ Olaniran 2016:312.

⁴⁹² Olaniran 2016:312.

⁴⁹³ Mokgoro 2010:321.

⁴⁹⁴ Abraham 1975; Olaniran 2016:311.

⁴⁹⁵ Abraham 1975; Olaniran 2016:313.

view of justice and its philosophy. It reflects the notion that law in the African conceptual framework in the administration of justice is not an instrument of coercion but an instrument of conciliation. It fundamentally contradicts the adversarial nature of law in the Western philosophical thought on justice that places importance on searching for either the adversary or the winner.⁴⁹⁶ In the African law system, it is incomprehensible and unjust to state that a crime is too old to be arbitrated.⁴⁹⁷ This is one of the fundamental differences between the African legal system and that of the Western system. In the Western legal system, a crime can be extinguished based on the principle of the statute of limitation, which states that a crime can prescribe with time.⁴⁹⁸ M'Baye commenting on the Western legal system's philosophy of prescription of a crime concurs that the Western legal system's concept of prescription is unknown in African law.⁴⁹⁹

In Ubuntu law, the concept of prescription is alien to its philosophical framework and thus this concept and practice of prescription are viewed as a grave injustice, as the historic violation lingering in the memory of the injured can never be erased with passing time.⁵⁰⁰ Memory in the victim's philosophy of law upholds the idea that memory cannot be buried based on the principle that the passage of time cannot cancel an injustice nor does it change into justice.⁵⁰¹ An injustice cannot be buried as nothing can be hidden from the mind. There is nothing that memory cannot reach, touch or recall.⁵⁰² Memory is the weapon of those whose equilibrium has been distorted by violence.⁵⁰³ It is further premised on the idea that time cannot change the truth in the African belief system, as the search for truth must be constantly considered each time truth becomes known.⁵⁰⁴

⁴⁹⁶ Olaniran 2016:312.

⁴⁹⁷ Ramose 2001:3.

⁴⁹⁸ Ramose 2001:3.

⁴⁹⁹ M'Baye 1974:147.

⁵⁰⁰ Ramose 2001:3

⁵⁰¹ Ramose 2012:23

⁵⁰² Ramose 2012:23.

⁵⁰³ Ramose 2012:23.

⁵⁰⁴ Ramose 2012:23.

In the discovery of truth, obstacles may not be placed in the revelation and discovery of this truth.⁵⁰⁵ This is one of the fundamental reasons why judicial decisions are not authoritative in Ubuntu law as it is in the Western legal systems. In African law, questioning decisions made must be done at all times.⁵⁰⁶ The basis of historical justice in Ubuntu law is captured as debt or fraud, which can never be extinguished until the balance of the equilibrium has been restored despite the passing of several generations.⁵⁰⁷ It further substantiates or emanates from one of the tenets of African justice, which is truth. The truth will always be the truth, and nothing can obscure the truth from what it is. This trend of obstruction of truth is something that Western legal systems tend to allow.⁵⁰⁸ Political settlements are typical agreements that Western law has the potential to create and enforce by enacting legislation to support such processes that have the potential of obscuring the truth. Such processes have had the potential of stifling and obstructing the truth about the nature and type of those who bear the ultimate responsibility for the conflicts.⁵⁰⁹ This practice in pre-colonial African law as indicated above is alien, especially when violations that have caused disequilibrium because of conflict are not initially dealt with. In other words, the violator of the moral African code must stand before the administrators of the legal system and have the matter heard based on the truth before the reconciliation and restitution processes take place.

This is one of the important conceptual frameworks where the mechanism of pre-colonial African justice operates and differs from the Western legal systems. This aspect of justice in pre-colonial African philosophy in conflict resolutions posits it as an important factor that renders it a potentially viable system in addressing the sexual violations that women endure during conflict. The post-independence precedent set by most African countries in their transition from colonial rule has been characterised by a failure to enact laws based on the African conceptual notion of Ubuntu justice that specifically points to reconciliation. This trend can be traced to Zimbabwe's post-

⁵⁰⁵ M'Baye 1974:147.

⁵⁰⁶ M'Baye 1974:147.

⁵⁰⁷ Ramose 2001:3.

⁵⁰⁸ Ramose 2001:3.

⁵⁰⁹ Ramose 2001:3.

independence Acts of Parliament⁵¹⁰ enacted in dealing with internal related conflict. While there is the acknowledgement that violence was prevalent during the colonial era and the continuation that has engulfed the country post-independence; the manner and tone of the enacted legislation in trying to bring about the restoration of the imbalance caused by conflicts goes against the liberation of truth.⁵¹¹ There is “a prohibition of retroactive punishment for acts committed in the past when at the time it was not legally punishable,” an inherent principle found in the Western concept of law.⁵¹² This, as Ramose states, can be equated as an implicit prior exclusion of criminality and responsibility.⁵¹³ As previously alluded to, the African concept of justice is linked to reconciliation, which is a standard feature of Ubuntu’s concept of what law should achieve.⁵¹⁴ Thus, the omission of justice in these legislative acts equates to the abolition of justice in the substantive form for victims of sexual-related crimes over all epochs of internal conflict in Zimbabwe. The attempt to erase in advance the quest to pursue justice is vital to the struggle for liberation from the loss of dignity and humanity that violence imposes on its victims.

This can be equated to the continuation of enslavement and denial of being recognised as a wholesome being.⁵¹⁵ Such a scenario is elaborated by Ramose and he equates this attempt of denying justice as appealing for tyranny.⁵¹⁶ Whether this denial of justice is cunning in nature or inadvertent to obliterate it in advance from the process of reconciliation is an “impermissible travesty of natural and historical justice.”⁵¹⁷ An appeal to the internal and external dimensions of pre-colonial African justice could help unpack the reason why the current situation in Zimbabwe in relation to the redress of internal conflict sexual violence crimes has not yielded favourable results. The internal dimension of justice, which is truthfulness, obligates one to recognise and accept that it is impossible to jump one’s shadow.⁵¹⁸ It is the demanding of oneself at first instance to

⁵¹⁰ The Unity Accord of 1987 and The SADC initiated Thabo Mbeki brokered 2009 Global Political Agreement in Zimbabwe.

⁵¹¹ Soyinka 1999:31.

⁵¹² Ramose 2012:21.

⁵¹³ Ramose 2012:21.

⁵¹⁴ Ramose 2012:21.

⁵¹⁵ Ramose 2012:21.

⁵¹⁶ Ramose 2012:21.

⁵¹⁷ Ramose 2012:21.

⁵¹⁸ Ramose 2012:21–22.

be “truthful and honest in the quest for justice to the extent of placing one’s survival and life at risk.”⁵¹⁹ The external dimension, therefore, means this ought to be extended to one’s relation with others. The practice of justice demands everything of the subject without any exception. The extent to which life and limb were sacrificed for the attainment of independence in Zimbabwe is the extent to which justice for sexual violence crimes committed must be extended.⁵²⁰ In its concrete historical form, the practice of justice demands not only that we give our abilities and talents but also demands that we give for our lives and even that life itself.⁵²¹

The above analysis acknowledges that Ubuntu justice is the reconciliation of broken relationships that have been brought about by conflict. In the quest to invoke Ubuntu law and justice to conflict-related sexual violations as a further dimension to reconciliation are necessary. An important trait of reconciliation that should be considered is a concept called reconfiliation, which is interpreted to mean bringing together or granting or reclaiming the right to sonship or daughtership into family fellowship with others.⁵²² The granting of fellowship or claiming of one’s right to being a son or daughter of a community requires recognition.⁵²³ This recognition demands continual active participation and engagement, the deliberate and constant removal of all obstacles in the quest of promoting the well-being of everyone in the family including oneself.⁵²⁴ The polarity and division and the failure to provide Ubuntu justice to victims of sexual violence present in Zimbabwe because of the internal political crisis can be equated to the denial to recognise the one who has been violated and their inherent right of fellowship with others. The perpetuation of the status quo, which is the failure to provide adequate Ubuntu justice for conflict-related sexual crimes against women, is a deliberate and continuous attempt to place obstacles in the well-being of the sons and daughters of Zimbabwe. Tapping in the rich pre-colonial African philosophy in restoring peace and harmony and reconfiguring the thought processes towards this new dimension to reconciliation will be beneficial for victims of sexual violence of the ongoing

⁵¹⁹ Kung 1968:36.

⁵²⁰ Ramose 2012:21.

⁵²¹ Ramose 2012:22.

⁵²² Ramose 2012:35.

⁵²³ Bujo 1998:29–32.

⁵²⁴ Ramose 2012:35.

conflict in Zimbabwe. There are important virtues inherent in the concept of reconfiliation that are necessary components in restoring broken fellowship brought about by conflict. These virtues include the endorsement of the equal dignity of all human beings and being gender sensitive; this will recoil any retribution from the feminist world.⁵²⁵

The intimate connection that reconfiliation has to the African ethical dimension of community and its filial nature to engagement makes it an indispensable tool for conflict resolution and the reconstruction of harmonious relations.⁵²⁶ Reconfiliation adds a dimension to the conciliatory and intergrating thrust of reconciliation by accentuating the equal self-worth of persons who need to be reconciled.⁵²⁷ As Ramose emphatically states, the ultimate aim of law and justice in the African worldview is the liberation of the human being from the disequilibrium brought about by conflict.⁵²⁸ This means that human conflict must be treated as an appeal to the reconfiliation of human beings by recognising the other as a brother or a sister by promoting their well-being instead of killing them softly or instantly.⁵²⁹ The description above is the African community's definition of justice and the lived experience of Ubuntu's philosophy of law. Embarking on this type of reasoning in the modern-day African setting, might provide a potentially viable route that violence and all its institutions can be overcome.

2.8 Linking Ubuntu law and sexual violence

The analysis of the differences between Western and African law in conflict resolution unearths the foundational values and philosophies of both these legal systems to determine which system would offer an African-targeted and effective intervention for sexual violence in Zimbabwe. The main thrust of the study argument is the proposal that addressing conflict-related sexual violence in Zimbabwe should be directed by the agency of Africans characterised by an Ubuntu-based systems epistemology. Considering the nature of the political conflict, and the trauma women have endured,

⁵²⁵ Obinna 2003:2.

⁵²⁶ Ramose 2012:35.

⁵²⁷ Ramose 2012:35.

⁵²⁸ Ramose 2001:2.

⁵²⁹ Ramose 2012:36.

the understanding of law based on Ubuntu might offer better responses to these challenges women face from sexual violence arising in conflict. The analysis of the differences between Western and African law assists in the argument for integration, which is premised on the development of a targeted and effective intervention for redress. In achieving this purpose, the study argues that creative integrative approaches and networks should be adopted. The intersection of sexual violence in conflicts inflicts physical, emotional and psychosocial trauma that merit greater holistic attention from all relevant disciplines.⁵³⁰ The adopted approaches in the redress of conflict-related sexual violence in Zimbabwe have historically and presently been dominated by the imposition of Western philosophy and systems. In the contemporary world, there are proposed approaches to developing a decolonised jurisprudence in conflict resolution. These approaches are adopting prevailing Western epistemology, creating a completely separate African indigenous jurisprudence or adapting Western principles to coincide with local epistemology.⁵³¹ I argue that the latter approach of adaption and integration is the most promising for women subjected to sexual violence arising from the conflict in Zimbabwe. The analysis of integration I unpack in detail in Chapter 5.

Below, I explore how the understanding of law based on Ubuntu will respond to addressing conflict-related sexual violence. In developing the argument, I begin to address the impact of conflict-related sexual violence on women and the greater community and the changes Western based conflict resolution methods offer to sexual violence. Following that, I analyse how an African justice perspective of dealing with sexual violence from internal conflict may be feasible under Ubuntu law epistemology. I use Ubuntu epistemology on conflict resolution and the concept of reconfiliation to substantiate the argument to address sexual violence under Ubuntu law.

2.8.1 Effects of sexual violence and conflict on women

Women in Zimbabwe have experienced the intersecting violence of conflict and sexual assault, compounded by two of the most severe traumas. They are exceptionally hard

⁵³⁰ Downs 2016:2.

⁵³¹ Downs 2016:2.

hit by the stresses of conflict and their trauma often goes unnoticed by society.⁵³² This situation is prevalent, whether the conflict is in Western or non-Western nations.⁵³³ Sexual violence is a manifestation of pre-existing societal gender imbalances and suffering during wartime is often distributed in gendered ways.⁵³⁴ Gender inequality devalues women's daily experiences so that the most traumatic events of their lives take place outside the realm of socially validated reality; women's experiences become unspeakable.⁵³⁵ This increases their reluctance to report and thus their chances of pursuing any form of redress legally or otherwise.⁵³⁶ Rape and sexual violence are the trauma that magnifies the realities of power, as the perpetrator uses violence to prove with force to the victims that they are helpless and even subhuman.⁵³⁷

The use of sexual violence in conflict is a tool used to subjugate women and children, emasculate men, and humiliate entire communities through psychosocial trauma.⁵³⁸ It is a tool used to subjugate, instil fear, alienate and sow seeds of division within the family and the greater community. Although various peace accords have been reached, political instability continues in Zimbabwe where the government has a monopoly on violence by controlling state institutions complicit in political violence. This lack of political protection has led to rampant violence and suffering, including sexual violence against women. Women survivors of politically motivated rape articulate the deep effects of these violent events and how their traumas continue to manifest in their present lives.⁵³⁹

2.8.2 Challenges of Western-based conflict resolution methods on sexual violence

In developing strategies for tackling issues related to conflict resolution such as sexual violence, Western-based methods are the starting point as they are already entrenched as the dominant operating system. However, their Euro-centrism and limited cross-

⁵³² Herman 1997:8.

⁵³³ Herman 1997:8.

⁵³⁴ Leatherman 2011:17–18; Downs 2016:51.

⁵³⁵ Herman 1997:8.

⁵³⁶ Herman 1997:8–9.

⁵³⁷ Spitz 2006; Downs 2016:6.

⁵³⁸ Downs 2016:6.

⁵³⁹ AIDS-Free World 2009; Zimbabwe Human Rights NGO Forum 2019.

cultural relevance make them far from sufficient for African approaches to healing and reconciliation.⁵⁴⁰ Western legal systems' approach to conflict resolution as a whole has been a Euro-American enterprise and no large-scale effort to re-evaluate it from a post-colonial African perspective has been undertaken. Note that current Western legal approaches to conflict have undoubtedly led to significant steps towards post-conflict justice in Zimbabwe. Despite the efforts, these Western approaches to conflict resolution are not immune to criticism from a cross-cultural and Afrocentric perspective. It is important to note at this point that these current Western conflict resolution approaches to sexual violence are not the last word on redress, healing and reconciliation in Africa.⁵⁴¹

The most foundational criticism of Western conflict resolution approaches to sexual violence confronts the epistemology that underlies it.⁵⁴² The deep flaw in modern Western legal thinking is the assumption of universality and objective reality, and claiming instead that all human perception and knowledge is subjective, relative and contextual. It is established but not always stated explicitly that science (which influenced the state of modern jurisprudence heavily) "cannot produce pure forms of knowledge unaffected by the knowers' place in historical time and geographical space."⁵⁴³ Culture is not an add-on to include in research analysis but the fundamental basis of human knowing.⁵⁴⁴ The culture and epistemology from which we view the world deeply influence the knowledge and system frameworks we create; "the worlds in which different societies live are distinct worlds, not merely the same world with different labels."⁵⁴⁵ This stark reality prompts questions of epistemology to ground any analysis attempt in the post-modern age.⁵⁴⁶ The impact of culture on epistemology is deep, meaning that there is a large possibility that Western theories and knowledge are not recognisable to other cultures, although Western knowledge has largely been dispersed uncritically as though it is.⁵⁴⁷ Value systems and paradigms drive any exploration,

⁵⁴⁰ Downs 2016:18.

⁵⁴¹ Downs 2016:18.

⁵⁴² Downs 2016:23.

⁵⁴³ Christopher *et al.* 2014:653.

⁵⁴⁴ Shweder 1991:362.

⁵⁴⁵ Shweder 1991:362.

⁵⁴⁶ Marfo 2011:141.

⁵⁴⁷ Marfo 2011:141–143; Downs 2016:23–24.

implying that the facts that emerge from human explorations are not value-free.⁵⁴⁸ Modern legal thought in conflict resolution is influenced by cultural norms, values and social processes just as much as those values norms and social processes that have shaped the culture of Africa and Asia.⁵⁴⁹ Objectivity, mechanistic processes and scientific methods are the building blocks of Western epistemology.⁵⁵⁰ This foundational unit is the rational human individual, making individualism one of its preeminent values.⁵⁵¹ Modern Western thought is described as the breaking of complex reality into pieces, the creation of categories and the pursuit of knowledge by taxonomy revealing a tendency toward sterile, reductive analysis of human life.⁵⁵² Furthermore, it is based on the rationalism and objectivity of the scientific revolution and the enlightenment, which has major consequences for all theories that emerge from it.⁵⁵³ The faith that the West places in objectivity forget that science, like art, is only one of many “metaphors through which we strive to know the world and ourselves”.⁵⁵⁴

The modern Western scientific paradigm that undergirds conflict resolution operates from this positivist epistemology. This modern legal science ignores folk psychologies defined as a set of meanings concerning psychological life that is shared by a social group.⁵⁵⁵ These heavily present folk psychologies in African philosophy functional under Ubuntu law are forged within specific cultural webs of meaning and they contain beliefs about human identity, self, social relations, human behaviour and acceptable norms.⁵⁵⁶ However, they are not often explicit and they underlie all individual thought processes and prescribe a certain moral vision of what should be.⁵⁵⁷ Although not often made explicit, moral visions tacitly influence every scientific and psychological theory ever developed, whether in the United States or Africa.⁵⁵⁸ The topics that are researched and how the findings are interpreted are determined by cultural values. Thus, Western

⁵⁴⁸ Capra 1996:11.

⁵⁴⁹ Downs 2016:24.

⁵⁵⁰ Downs 2016:24.

⁵⁵¹ Downs 2015:24.

⁵⁵² Lederach 2005:43.

⁵⁵³ Downs 2016:24.

⁵⁵⁴ Lewis *et al.* 2000:230.

⁵⁵⁵ Christopher *et al.* 2014:648.

⁵⁵⁶ Christopher *et al.* 2014:648.

⁵⁵⁷ Christopher *et al.* 2014:648.

⁵⁵⁸ Downs 2016:26.

research is overwhelmingly concerned with issues related to Western social realities, instead of those that are most pertinent to Africa.⁵⁵⁹ Western legal thought approaches problems from a mechanistic, cause-and-effect viewpoint, often focusing on a narrow aspect of a problem that misses the large, complex and systematic issues that are crucial to understanding.⁵⁶⁰

A further challenge with Western epistemology is its individualist core in modern legal thought, which limits its ability to address social problems in societies with a communal orientation like Zimbabwe and the rest of Africa.⁵⁶¹ Christopher *et al.* elaborate this by stating that this individualist orientation is based on a Cartesian belief in the ultimate centrality of “I” the thinking subject.⁵⁶² This notion is challenged by the idea that the rational mind is not separated from society but is inextricable from it: humans are fundamentally embedded in and constituted by social practices that are always already imbued with meaning.⁵⁶³ This approach integrates well with African epistemology. The complex realities in Africa today resist the reductionism present in Western thought calling for a deeper and more systematic approach, which would be beneficial for adoption in addressing conflict-related sexual violations.⁵⁶⁴ These mechanistic and individualistic orientations mean that modern jurisprudence approaches to the resolution of conflict often miss the interconnected networks and the interdependency of systems over time and in a relational context.⁵⁶⁵ This interdependency is crucial for addressing African psychosocial life.⁵⁶⁶

The operation of Western modern law where culture is viewed as a mere exterior mitigating variable with the individual as the core entity of exploration is inherited from the individualist and radical objective paradigm of Western science.⁵⁶⁷ It is accepted that nothing in the social world or what is mistakenly thought of, as an inner self exists apart

⁵⁵⁹ Downs 2016:26.

⁵⁶⁰ Downs 2016:26.

⁵⁶¹ Downs 2016:26.

⁵⁶² Christopher *et al.* 2014:650.

⁵⁶³ Christopher *et al.* 2014:650; Downs 2016:26.

⁵⁶⁴ Downs 2016:26.

⁵⁶⁵ Sexton, 2012:63. Downs 2016:27.

⁵⁶⁶ Downs 2016:27.

⁵⁶⁷ Christopher *et al.* 2014:651.

from culture.⁵⁶⁸ If there is truth in this viewpoint, then the way conflict resolution is approached in Zimbabwe and Africa, as a whole needs a complete re-evaluation. An approach to healing for sexual violence survivors in Zimbabwe must be critically aware of the centrality of culture and questioning of the Western dominant philosophy.

2.9 Ubuntu law for redress of conflict-related sexual violence

In the above section, I analyse the challenges Western based conflict resolution methods and approaches in responding to sexual violence resulting from internal conflict. Identified challenges are that Western epistemology, which is individualistic in forming modern legal thought, is limited in its ability to address social problems in societies with a communal orientation like Zimbabwe and the rest of Africa. The modern scientific nature of conflict resolution, which is positivist in nature, ignores African philosophical psychologies under Ubuntu law, which has specific cultural webs of meaning.⁵⁶⁹ These resonate with different aspects of human identity and other accepted norms, which have a moral vision of what should be. The mechanistic and individualistic orientation of Western thought means that modern jurisprudence approaches to the resolution of conflict often miss the interconnected aspect of African networks and the interdependency of systems over time and in a relational context.⁵⁷⁰ Based on these challenges, I explore the argument why Ubuntu law as an African epistemology is important in redressing sexual violations resulting from conflict. This is central to the research problem, which is the ongoing inability of the legal system in Zimbabwe to address sexual violations arising from internal conflict. I engage Ubuntu as an African epistemology and its principles and values on the resolution of conflict to develop the argument.

Ubuntu is a Pan-African moral and social idea that has its roots in the large Bantu language grouping with equivalent terms in many African languages.⁵⁷¹ Among African Bantu groupings who are guided by the African epistemology of Ubuntu, the idea of

⁵⁶⁸ Marfo 2011:140.

⁵⁶⁹ Christopher *et al.* 2014: 648.

⁵⁷⁰ Sexton 2012:63.

⁵⁷¹ Nyengele 2014:4–14.

integrity as a whole is universal amidst the diversity of the continent.⁵⁷² Humans need each other to be human, an idea that is embodied in Desmond Tutu's phrase "a person is a person only through other persons"⁵⁷³ Ubuntu is both a positive and normative statement, offering both a description of reality and with morality guiding how humans ought to live.⁵⁷⁴ According to Ubuntu law, humans are inextricably connected to each other and their communities, and individuals cannot be separated from relationships or defined without them.⁵⁷⁵ In other words, "I am because we are" connection, interdependence, and relationships are the fundamental features of reality.⁵⁷⁶ To comprehend the concept of humanity, Ubuntu compels humans to treat each other with respect and compassion including those that are different.⁵⁷⁷ Bangura's opinion is that African hospitality is a valuable principle embodied in the outlook of others, such as a stranger and foreigners.⁵⁷⁸ The web of African relationships extends to strangers, outsiders extending to the living and the dead.⁵⁷⁹ African spirituality is intertwined with the moral primacy of relationships, with an emphasis on the right relationships with others.⁵⁸⁰

The essence of being human according to Ubuntu law is linked to empathy for others, human love and healing.⁵⁸¹ In African philosophy, social experience is fundamentally moral, something that Ubuntu law conveys deeply.⁵⁸² Ubuntu is considered the *Soul of African society*,⁵⁸³ and therefore, to provide African justice, healing and reconciliation for women survivors of sexual violence in Zimbabwe these issues cannot be addressed without incorporating an African epistemology based on a moral vision of Ubuntu.⁵⁸⁴ Conflict and the trauma that it inflicts on victims and survivors of sexual violence are inherently divisive and create mistrust and violence among communities that were once

⁵⁷² Nyengele 2014:4–14.

⁵⁷³ Tutu *et al.* 2010:15.

⁵⁷⁴ Downs 2016:37.

⁵⁷⁵ Downs 2016:38.

⁵⁷⁶ Nyengele 2014:4–16.

⁵⁷⁷ Bangura 2011:239.

⁵⁷⁸ Bangura 2011:239.

⁵⁷⁹ Bangura 2011:239.

⁵⁸⁰ Downs 2016:39.

⁵⁸¹ Edwards 2014:10; Mungai and Pease 2009:39–50; Nyengele 2014:4–16.

⁵⁸² Van Dyk and Nefale 2005:64.

⁵⁸³ Van Dyk and Nefale 2005:64.

⁵⁸⁴ Downs 2016:39.

strongly connected by traditional bonds.⁵⁸⁵ In Zimbabwe, the political conflict and the trauma of this violence have created polarisation affecting social relations among community members where the violence has been rife.⁵⁸⁶ Sexual violence also creates deep social ruptures, as one major effect on survivors can be their marginalisation and break with the family and community.⁵⁸⁷ Victims and survivors of the trauma associated with sexual violence often experience social shame and disconnection, a reaction that is incredibly damaging in African communities where social ties are of the utmost importance.⁵⁸⁸ Rape and sexual violence have especially strong effects on relational capacity and these violations can sever a victim's interpersonal trust and trust in the social world.⁵⁸⁹ Sexual violence violates the individual and community's Ubuntu foundation.⁵⁹⁰

Specific examples on how precolonial African system could potentially address sexual violence under Ubuntu law is expounded on by Magara.⁵⁹¹ The study's consideration was how *Mato Oput*, a traditional mechanism from Northern Uganda could assist in addressing sexual violence arising from conflict. Magara states that Traditional Justice Mechanisms provide a justice avenue for survivors of sexual violence which combines both restorative and retributive aspects of justice.⁵⁹² They do not only focus on punishing the perpetrator but empowers the victim through the concept of acknowledgment by the perpetrators that they have committed a crime or caused harm; repentance through asking for forgiveness and taking part in the traditional rituals, ceremonies and compensation through payment of the stipulated form by the council of elders.⁵⁹³ There are considerations for the wider community setting where both the victim and the perpetrator live after the conflict.⁵⁹⁴ It can be seen that these components noted by Magara are found in the analysis of the traditional African systems above.

⁵⁸⁵ Tshuma 2019:16; Muchemwa et al 2013:130; Downs 2016:40.

⁵⁸⁶ Muchemwa et al. 2013:150; Downs 2016:40.

⁵⁸⁷ Downs 2016:40.

⁵⁸⁸ Spitz 2006:128.

⁵⁸⁹ Spitz 2006:128.

⁵⁹⁰ Downs 2016:40.

⁵⁹¹ More specific examples on how precolonial system could potentially addressing sexual violence under Ubuntu law are addressed in Chapter 5.

⁵⁹² Magara 2014:80.

⁵⁹³ Magara 2014:80.

⁵⁹⁴ Magara 2014:80.

A number of concerns have been raised in relation to traditional justice mechanism processes. Bastick notes that women are often absent in these mechanisms and where they are involved their decision-making powers are non-existent or severely curtailed.⁵⁹⁵ The councils that make these decisions are male dominated leaving less room for women's participation thereby reinforcing gender inequalities.⁵⁹⁶ The systems are tailored with little regard to the unique needs of female survivors. The stigma associated with rape discourages female survivors from reporting in these male dominated settings.⁵⁹⁷ African cultural orientation is such that women are usually uncomfortable sharing their experiences in an environment of other women.⁵⁹⁸ These concerns raised point to some of the challenges of traditional justice mechanisms but this can be rectified by introducing mechanisms within that community which are less discriminatory and involve women more in decision making.

In order to effect the proposed changes, the communities which practice these mechanisms ought to be actively engaged so that the proposed changes or modifications can be understood and better embraced. This is an important aspect in the considerations for an alternative integrating jurisprudence in addressing conflict related sexual violence. In expanding on how the system could potentially operate, compensation in the African traditional societies embodies restorative and retributive aspects of justice that are important for survivors of sexual violence.⁵⁹⁹ Although no amount of compensation can repair the harm lived by the survivors, compensation is required from the perpetrators to the victims in these societies.⁶⁰⁰ Ubuntu philosophy on justice regards it as a form of punishment signifying acknowledgment of the harm done to the victim and punishment to the perpetrator often desired by the survivors.⁶⁰¹ Precolonial Africa traditionally views shame and compensation as vital ingredients for any satisfactory form of punishment.⁶⁰²

⁵⁹⁵ Bastick et al 2007:165. Kihika 2010:54.

⁵⁹⁶ Bastick et al 2007:165. Kihika 2010:54.

⁵⁹⁷ Bastick et al 2007:165. Kihika 2010:54.

⁵⁹⁸ Kihika 2010:54.

⁵⁹⁹ Magara 2014:76.

⁶⁰⁰ Magara 2014:76.

⁶⁰¹ Hovil and Joana 2005:12-13.

⁶⁰² Hovil and Joana 2005:12-13.

Formal justices systems as noted by Zinstaag fail to address such issues that arise from conflict such as the co-existence with perpetrators, feelings of vengeance and hatred.⁶⁰³ On these aspects traditional justice systems aim to bring together the perpetrators and victims and address these issues. Despite the challenges highlighted, traditional justice mechanisms offer viable justice options for victims of violence.⁶⁰⁴ They possess components that provide to sexual violence survivors a sense of recognition in the idea of perpetrators owning up to the crime.⁶⁰⁵ The disputants are given an opportunity to be heard giving them voice and control over the treatment of their harm. Decisions made after deliberations which are binding on both parties are not meant to foster hostility but foster unity.⁶⁰⁶

Compensation to be paid by the offender to the victim and clan and asking for forgiveness followed by the eating and drinking together is a symbol of forgiveness and unity. These concepts namely wrongdoing, repentance and compensation play a significant role in empowering sexual violence victims. It is vitally important that the traditional Ubuntu justice do not exclusively focus on punishing the wrongdoer. It is therefore restorative and retributive justice understood by the local people and easily accessible and promotes peacefully coexistence in the larger community. This example from Magara is the potential scenario that Ubuntu law offers in the addressing sexual violence from internal conflict.

In cultures where communalism is highly valued such as Zimbabwe, social support is critical for victims' and survivors' sense of identity empowerment.⁶⁰⁷ In the adopted approaches to redressing sexual violations in Zimbabwe that have arisen from conflict, approaches to psychosocial healing that privilege an Ubuntu epistemology will highly prize the presence of social support.⁶⁰⁸ Time and again, social support has been proven a major factor in traumatic recovery and well-being.⁶⁰⁹ The value of Ubuntu law epistemology in conflict resolution is its inherent nature to promote dialogue in the form

⁶⁰³ Zinstaag 2013:190.

⁶⁰⁴ Magara 2014: 81-83.

⁶⁰⁵ Magara 2014: 81-83.

⁶⁰⁶ Magara 2014: 81-83.

⁶⁰⁷ Downs 2016:40-41.

⁶⁰⁸ Yamashita 2012:433.

⁶⁰⁹ Yamashita 2012:433.

of community based social support. Research conducted by Honwana on the rehabilitation of former child soldiers in Angola and Mozambique established that the individualist Western talk therapies are not nearly as effective as a community-based reconciliation effort with families.⁶¹⁰ Based on this research, Honwana proposes the adoption of traditional models and resources for healing and reconciliation that capitalise on social support beyond the individual trauma narrative focus of Western approaches and therapies.⁶¹¹ Bangura noted that such approaches were used with child soldiers in Sierra Leone, forging community reconciliation through traditional rituals of forgiveness and togetherness, acceptance, sharing and eating together.⁶¹² It would be appropriate to propose that traditional African resources of social support would be powerful and necessary tools for the healing and reconciliation of sexual violence survivors in Zimbabwe and Africa as a whole.

In an attempt not to romanticise social ties and community, since community are not always a positive reality, especially when conflict arises and sexual violence is used as a tool to target women. I explore the challenges it poses on women and how Ubuntu can help address the anomaly. The hierarchical systems of power and privilege, communal structure and norms can often be means of oppression.⁶¹³ Those who are most vulnerable to becoming victims of sexual violence such as women and children are not in positions of considerable power, to begin with.⁶¹⁴ The patriarchal social forces in many societies, including Zimbabwe, cause women to be devalued and ignored.⁶¹⁵ The reinforcement of such communal norms may inhibit access to justice and trauma healing and often adds to the shame and psychosocial stress that sexual violence survivors experience.⁶¹⁶ Hence, communal negative influences are common themes for sexual violence survivors in many cultures, as communities often marginalise shame and even shun women who have experienced sexual violence.⁶¹⁷ In Zimbabwe, the

⁶¹⁰ Honwana 2006:150; Murphy 2015:283.

⁶¹¹ Honwana 2006:152, 162; Murphy 2015:283.

⁶¹² Bangura 2011:256.

⁶¹³ Murphy 2015:284–285.

⁶¹⁴ Downs 2016:41.

⁶¹⁵ Mutandwa 2012; AIDS-Free World 2009

⁶¹⁶ Downs 2016:42.

⁶¹⁷ Kelly *et al.* 2011:26–27.

social norms obligate men to abandon or divorce their wife when they become victims of sexual violence compounding the trauma of such experiences for women.⁶¹⁸

Restoring Ubuntu law on healing and reconciliation translates into the holding of communities and individual healing in balance by attempting to reshape harmful social values.⁶¹⁹ In the context of Zimbabwe, divisive conflict and collective trauma have shattered communities, which lessen the power of positive social support and traditional Ubuntu. As stated in Chapter 1, sexual violence in Zimbabwe has been used as a tool to deliberately erode pre-existing networks of social support and therefore an Afro-centric model for healing and reconciliation must include initiatives to rebuild shattered social networks.⁶²⁰

The central feature of Ubuntu, African epistemology has at its core a deep sense of the interconnectedness of all people, processes and relationships.⁶²¹ In conflict situations, sexual violence is a tool that fundamentally disrupts normal patterns of community relations and interpersonal harmony.⁶²² Ubuntu has been destroyed in many communities. The continued political conflict in Zimbabwe and subsequent targeting of women through sexual violence is testimony to this fact. Sexual violence is intentionally used to deliver not only individual psychological and physical damage, but also social devastation and division. As Leatherman stated, the message of sexual violence is “I am because you are not, a twisted reversal of Ubuntu.”⁶²³ In societies where Ubuntu is of the highest value, sexual violence marks an escalation of horrific proportions, used to make a deliberate statement against the values of communalism and compassion.⁶²⁴ The use of rape and sexual violence in the conflict in Zimbabwe is part of a systematic campaign of terror,⁶²⁵ violating the traditional societal taboos in ever more horrific forms:

⁶¹⁸ Mutandwa 2012; AIDS-Free World 2009; Hodzi 2012:4-6; Kelly *et al.* 2011:26–27.

⁶¹⁹ Downs 2016:42.

⁶²⁰ Downs 2016:42. Makumbe notes that traditional leadership in Zimbabwe have been co-opted by the ruling party ZANU PF into partisan politics, thereby eroding confidence in the roles and decision they take in rural communities when political violence erupts. Makumbe 2002.

⁶²¹ Menkiti 1984:179–180.

⁶²² Downs 2016:48

⁶²³ Leatherman 2011:155.

⁶²⁴ Downs 2016:48–49.

⁶²⁵ AIDS-Free World 2009.

gang rape, mutilation, sexual slavery, pregnant women and the elderly.⁶²⁶ The persistence of the conflict due to the absence of concrete justice measures for resolving the conflict makes perpetrators employ ever-greater spectacles of horrific sexual violence to maintain shock and power over communities.⁶²⁷ Although women are usually more vulnerable, both genders are victims of sexual violence in conflict situations, since it can serve a function of emasculation and humiliation when males are targeted.⁶²⁸ In a society like Zimbabwe, that respects its young and reveres its old,⁶²⁹ rape and sexual violence victims include young and elderly women, evidencing the breakdown of cohesive norms.⁶³⁰ The systematic use of sexual violence in political conflict in Zimbabwe has resulted in women divorced from their husbands and shunned by their communities, effectively severing them from the social system that forms their selfhood.⁶³¹ Besides the individual physical and psychological trauma of rape and sexual violence, many women in Zimbabwe experience extensive damage from the social rejection that accompanies rape, destroying traditional community networks of Ubuntu.⁶³² The use of sexual violence by the incumbent ZANU PF government to achieve its political ends is an antithesis to its pre-colonial African foundational values and philosophy enshrined in Ubuntu.

2.9.1 Reconciliation as a value for sexual violence

The prolonged nature of the political conflict in Zimbabwe, the continued resort of targeting women's bodies and the absence of concrete measures in addressing conflict-related sexual violence necessitate engagement with the concept of reconciliation. According to Ubuntu law, the failure in addressing the disequilibrium brought political conflict that targets women sexually is a justice gap in African legal thought. The resort to sexual violence as a tool in conflict is an attack on the humanity and dignity of female victims; it is disruptive to normal community relation patterns, and interpersonal

⁶²⁶ Research and Advocacy Unit 2011a.

⁶²⁷ Leatherman 2011:156; Roe 1992.

⁶²⁸ Downs 2016:49.

⁶²⁹ African children are encouraged to "define self... by gaining 'significance from and through their relationships with others", gaining intelligence mainly through interaction with peers and elders. Nsamenang, 2011:247.

⁶³⁰ AIDS-Free World 2009; Zimbabwe Humans Rights NGO Forum 2019.

⁶³¹ AIDS-Free World 2009.

⁶³² Downs 2016:49; AIDS-Free World 2009.

harmony. Reconciliation is a concept that is related to Ubuntu's principle of reconciliation but it adds a different thrust to peacemaking and harmony by emphasising the equal dignity of all persons needing to be reconciled.⁶³³ The disruptive nature of conflict-related violence on the dignity of female victims and their extended families and communities entails a new dimension in the path of reconciling such atrocities. Reconciliation as a concept becomes paramount in achieving this goal from a different dimension of reconciling because it is grounded on several important values. As a concept, it is delicately bound to the African ethical dimension of community. It accords recognition to reconciling parties and the status of both parties belonging to a family. This is an important consideration for sexual violence as its effects often are a direct attack on this recognition of family belonging. Conflict is divisive and attacks the interpersonal harmony of the victims. The emphasis of reconciliation by according equal dignity to all persons who need to be reconciled makes it an appropriate value for sexual violence resolution.

The justice ledger book of Zimbabwe is not balanced due to the justice gap that has been longstanding for conflict-related sexual violence. Both victim and perpetrator ought to come to the justice table and both recognise that they are members of one family where disequilibrium is glaring. Reconciliation endorses the equal dignity of all and is a virtue that sexual violence victims need restoring. Its virtues further capture the necessity for victim and perpetrator with an urgency of restoring fellowship and community broken through sexual violence brought about by the internal conflict. The long-standing lack of Ubuntu justice for female victims of conflict-related sexual violence in Zimbabwe's unresolved political conflict makes a case for the adoption of this concept in the debate of post-conflict justice. The virtue that undergirds reconciliation, such as the necessity for the restoration of fellowship by viewing the conflicting parties under the filial lens of sons and daughters of a family, reflects Ubuntu's principles of law and justice in the resolution of conflict. The breakdown of families and communities brought about by resorting to sexual violence in conflict requires an absolute dimension in the reconfiguration of an Ubuntu model of conflict resolution.⁶³⁴ As reasoned by Obinna, the

⁶³³ Ramose 2012:35.

⁶³⁴ Ramose 2012:35.

virtue of reconfiliation endorses the equal dignity of all human beings and is sensitive to the gendered notions of conflict. As a concept, reconfiliation is relevant for incorporation in redressing sexual violence because of its connection to the African ethical dimension of community.⁶³⁵ The seeds of division that political violence has sowed through targeting women's bodily integrity require all to reclaim the sisterhood and brotherhood of being born in a family. This is achievable through concrete measures, which are not only verbal empty assertions.⁶³⁶ Addressing the polarity that is characterised by the nation of Zimbabwe on political matters as Ramose states "demands continual active participation and engagement to promote the well-being of everyone in the family including oneself."⁶³⁷ Adopting reconfiliation reasoning in addressing sexual violations perpetrated against women in conflict demands the removal of obstacles such as the oppressive political culture and environment in Zimbabwe, the disregard for the humanity of women, and the vindictive and individualistic nature of the socio-political economy of Zimbabwe. It further entails an active and continuous filial political will to address the justice deficit on politically motivated sexual violence.

The granting of fellowship and reclaiming of one's right to be part of the family addresses part of the divisive politics that shape the political landscape in Zimbabwe. Cognisant that this political landscape places women in vulnerable positions that subject them to violations in situations of conflict. Hence, addressing the obstacles in the political landscape in Zimbabwe will promote the well-being of all including oneself. This is the African community's definition of justice. Such a filial engagement with the political conflict in Zimbabwe is indispensable in the quest for the resolution of the conflict and the construction of harmonious human relations disturbed by sexual violence.⁶³⁸ The adoption of such a perspective in conflict resolution will be evidence of how Ubuntu law is lived and acted upon based on the empathetic nature that Ubuntu's epistemology advances in balancing the disequilibrium brought about by conflict.

⁶³⁵ Bujo 1998:29–32.

⁶³⁶ Obinna 2003:2.

⁶³⁷ Ramose 2012:35.

⁶³⁸ Ramose 2012:35.

From the above investigation on the centrality of Ubuntu, the core of African epistemology is a deep sense of community interconnectedness, processes and relationships. The contemplation of a truly Ubuntu-infused approach to sexual violence in Zimbabwe prioritises the systematic and structural nature of the collective trauma.⁶³⁹ This matter of justice must be examined from all perspectives that focus on macro, meso, micro, economic, political, social, individual, communal, ecological and psychological related to conflict-related sexual violence.⁶⁴⁰ A systematic approach is necessary for Zimbabwe considering especially the complexity of its contemporary conflicts.⁶⁴¹ This is in contrast to the Western justice approaches, which are individualistic and lacking in the awareness of systemic contexts. An Ubuntu law-infused systematic approach also acknowledges that culture and social systems are not static but dynamic, constantly changing and requiring flexible innovative justice, healing and reconciliation strategies.⁶⁴² Specifically, in the context of conflict that is prolonged, it is crucial to adopt approaches that take into consideration the ecological embedded nature of individual psychological response in the community's social structure and political economy.⁶⁴³ Communal atrocities require communal understandings and solutions, though it is a complex venture, it is imperative for effective Ubuntu-driven healing and reconciliation, which is part of Ubuntu justice.

2.10 Conclusion

The analysis of Western and pre-colonial African legal philosophies on law and justice is on the fundamental differences that exist between these two systems. The main difference between the two systems' philosophies is based on the respective cultures. The Western world is premised on an individualistic culture in comparison to the collective identity of African cultures. The concept of law in Western modern legal thought is premised on the notion of individualism while African legal thought is based on collectivism.⁶⁴⁴ The traditional Western culture has to a certain degree "a singular

⁶³⁹ Downs 2016:46.

⁶⁴⁰ Nwoye 2015:99.

⁶⁴¹ Nwoye 2015; Downs 2016:46.

⁶⁴² Downs 2016:46.

⁶⁴³ Murphy 2015:302.

⁶⁴⁴ Menkiti 1984:179–190.

concern for oneself and the small group of people close to oneself.”⁶⁴⁵ In the Western individualist culture, emphasis is placed on “independence, achievement, freedom, high levels of competition and pleasure.”⁶⁴⁶ Collectivist culture such as that of Africa emphasises interrelationship, accord, family security, social stratification cooperation and low levels of competitiveness.⁶⁴⁷ The maintenance of equilibrium is the whole objective of African *Abantu* law and the penalties of this law are directed not against specific infringements but to the restoration of this imbalance.⁶⁴⁸ Law in Western legal thought imposes the obligation to define law as “the recognition and effective protection of the rights and rights of the individual.”⁶⁴⁹ The concept of justice in Western legal thought is established on the principles of equality, fairness and access.⁶⁵⁰ The administration of Western justice is not imbued with elements of morality and the outcome of litigation is not dependent on the moral rectitude of the parties, but the logic of technical rule of law and procedures.⁶⁵¹

These differences have a significant bearing on conflict resolution measures of sexual violence against women, which is the main research problem of the study. In the quest to advocate the adoption of traditional justice mechanisms and values in the resolution of conflict-related sexual violence, engaging in the concept of Ubuntu law is a rich way to capture the ethos of African epistemology. This epistemology in conflict resolution is relational, holistic and multi-modal.⁶⁵² The differences in the philosophical outlooks of the Western and African philosophies on the nature of *being* and relationships influence how conflict resolution is approached and administered. These non-communal societies tackle conflict methodically and require undeviating, deterministic clarifications of existing conflicts.⁶⁵³ Senghor elaborates that “equilibrium and the congruence of African culture, of black social order, is grounded both on the community and on the person, and in which, because it was founded on discourse and mutuality; the group had

⁶⁴⁵ Senghor 1994:30.

⁶⁴⁶ Schoeman 2013:297.

⁶⁴⁷ Schoeman 2013:297.

⁶⁴⁸ Driberg 1934:231.

⁶⁴⁹ Ramose 1999:90.

⁶⁵⁰ Olaniran 2016:319.

⁶⁵¹ Olaniran 2016:319.

⁶⁵² Downs 2016:36.

⁶⁵³ Walker 2004:530.

primacy over the individual without overwhelming him, but permitting him to flourish as a person.”⁶⁵⁴ The efficacy of the African justice system stems from the fact that all stakeholders have equal access and input in the process of resolving conflict.⁶⁵⁵ All opinions are acknowledged and valued in the process and decisions are reached through agreement.⁶⁵⁶ The philosophical values found in communal societies such as Africa, respond better to the African issues arising out of conflict situations using sexual violence against women. Ubuntu’s epistemological communalistic approach to conflict resolution is relational and systematic and is better suited to respond to the complex African conflict and it resonates better with their worldview. The non-communal nature of the current legal systems in Africa today is failing to respond adequately to conflict-related sexual violations. Embarking on the differences in African and legal thought on conflict resolution assists in building towards adopting an alternative jurisprudence in the attempt of redressing conflict-related sexual violations against women in Zimbabwe.

Engaging the differences between the African and Western systems of law and justice is to dispel the myth that justice is only attained under Western philosophical thought on conflict resolution. The administration of law and justice in the modern state as seen from the Western lens is based on the misconceptions and negative connotations of colonialism that are attributed to pre-colonial African philosophies on conflict resolution as inadequate. This worldview is an exaggerated distortion that perpetuates Western knowledge in all spheres of life including conflict resolution. The precedent set by Rwanda in adopting a pre-colonial legal mechanism for resolving conflict known as *Gacaca* to address conflict-related sexual violence attests to this possibility. The assumption is that *Gacaca* has inherent Ubuntu principles that have been applied in resolving sexual violations from the 1994 internal conflict. The philosophical difference between African and Western legal systems on law and justice is one of the primary reasons that a Western legal system dominated African indigenous legal systems in conflict resolution. The stark difference in their philosophical worldview on conflict resolution is one of the foundations that generated Western epistemology in the modern

⁶⁵⁴ Senghor 1994:31.

⁶⁵⁵ Oko Elechi *et al.* 2010:73.

⁶⁵⁶ Oko Elechi *et al.* 2010:73.

legal systems present in Africa, thereby marginalising African indigenous knowledge. This resulted in the domination and subsequent eradication of pre-colonial African legal systems in conflict resolution in matters such as sexual violence, a topic that is investigated further in Chapter 3 of this study. An understanding of Ubuntu law assists in making a case for its adoption as a model for addressing conflict-related sexual violence based on its philosophical worldview of conflict resolution. In conflict situations, sexual violence is a tool that fundamentally disrupts normal patterns of community relations and interpersonal harmony.⁶⁵⁷ The use of rape and sexual violence in the conflict in Zimbabwe is part of a systematic campaign of terror,⁶⁵⁸ violating traditional societal taboos. Beyond the individual, physical and psychological trauma of rape and sexual violence, conflict-related sexual violence inflicts extensive damage regarding societal rejection and destroying the traditional community networks of Ubuntu.⁶⁵⁹

Ubuntu as a philosophy sees violence in all its forms as an antithesis of its philosophy. The detachment of communities in Zimbabwe from their pre-colonial values of humanness and harmony, the perpetuation of social equilibrium is evident in the targeting of women, which Ubuntu philosophy rejects. To address the rampant targeting of women in Zimbabwe's political conflict periods, resorting to the values of Ubuntu law would be ideal. Ubuntu law's approach to conflict resolution, if applied in addressing sexual violations, will employ relational dimensions, and appeals to the communal nature of African societies. Addressing these violations using Ubuntu law's philosophy from a relational interconnected angle has the potential of addressing the attack on the dignity of the survivors and the broken familial and community relationships resulting from sexual violence. A higher dimension of the concept of reconciliation is required that looks at mending relationships using a filial lens that reconfiliation offers. The divisive dimension that conflict-related sexual violence introduces in societies requires Ubuntu law and justice to incorporate the notion of reclaiming sonship and daughtership to the larger family. To create a strategy for addressing conflict-related sexual violence in Zimbabwe, the time is now for the adoption of an African-led perspective to take priority.

⁶⁵⁷ Downs 2016:48.

⁶⁵⁸ AIDS-Free World 2009.

⁶⁵⁹ Downs 2016:49. See also AIDS-Free World 2009.

In Chapter 3 I explore the nature and operation of pre-colonial African legal systems' responses in dealing with conflict-related sexual violence arising in its communities.

CHAPTER 3

Pre-colonial responses to sexual violence

3.1 Introduction

Chapter 2 investigates the differences that exist between the Western and pre-colonial legal systems' conception of law and justice. The focus of the chapter is on how pre-colonial African philosophy regarded particular customs and practices, which functioned as laws that governed their communities. I reflect on pre-colonial Africa's founding philosophical principle of law commonly known as Ubuntu, which lays the foundation for the Bantu people's conception of law and justice in conflict resolution. Africa's founding philosophy of law provides the grounding for the conceptual framework how the law is perceived in African thought in contrast to that of the West. The traditional Western law's conceptual framework operates from a culture of individualism that protects the rights liberties and freedom of individuals.¹ The individual in Western thought is located as the basic unit of society and society is understood to be formed by a collection of individuals whose worth is assured by the law in the form of individual legal rights.² The starting point of legal reasoning in traditional Western law is that elements of justice, rationality, generality, impartiality and certainty are regarded as distinct precise claims of justice that form an integrated system of values.³

Chapter 3 aims to provide an analysis of how pre-colonial African legal systems resolved sexual violence resulting from conflict within their communities. I analyse the pre-colonial African social structures and legal systems that operated before colonialism to understand how sexual violence was handled and investigate the impact of colonialism on Africa and its pre-colonial legal systems as well as how sexual violence arising from conflict was resolved. I raise the question whether colonialism played a significant role in transforming the African structures and legal systems in conflict administration. It is the argument of the study that wars of colonial conquest and the

¹ Schoeman 2013:297; Senghor 1994:30.

² Veitch *et al.* 2018:15.

³ Hahlo and Kahn 1973:31–35.

internal political conflicts in Zimbabwe's post-independence fuelled the overarching problem of violence against women in Zimbabwe. The marginalisation of indigenous law and customary law is a direct consequence of colonialism and the extent to which post-independent Zimbabwe chose to continue to rely on Western law is attributed to coloniality, which is the legacy of Western powers post-colony. I argue these factors have played a role in the approaches to dealing with sexual violence against women arising from internal conflict.

3.2 Pre-colonial African legal systems

In this section, the aim is to explore the pre-colonial modes of conflict resolution practised in African societies and that of Zimbabwe that addressed sexual violence crimes resulting from internal conflict. While Chapter 2 focuses on contrasting pre-colonial Africa's conception of law and justice from western legal systems, this chapter investigates the function of pre-colonial legal systems in resolving conflict focusing on conflict-related sexual violence. The aim is to determine how pre-colonial African legal systems handled internal conflict violations such as sexual violence. African scholars have demonstrated that pre-colonial African nations had functional systems of administering justice in their communities. To that effect, Onyango states that "literature, legal history, sociology, anthropology and missionary writings of the olden days have attested that traditional African societies were well structured and they had a functioning legal system even before encountering the outside powers."⁴

The onslaught of colonialism in Africa and the rest of the indigenous communities on other continents such as Asia and the Americas transformed these societies to conform their indigenous political, legal and social settings to that of the Europeans.⁵ Since the nineteenth century, the history and subsequent story of the legal relationship between colonising nations mainly from the European continent and that of the African legal system intrigued the societies it came into contact.⁶ The colonial administration's intent was to enforce law and order and to regulate the lives and habits of the people that they

⁴ Onyango 2013:30.

⁵ Ndlovu-Gatsheni 2015:485–486

⁶ Ocran 2006:465–466.

conquered.⁷ The motivation for this British colonial administrative thought was influenced by the belief that Anglo-Saxon law concepts and traditions would bring order to African communities that had little or no law.⁸ This was a challenge for the British, both as a practical matter and as a matter of legal creed and philosophy. They faced a legal system quite diverse from their legal customs.⁹ In addition to vastly different legal systems, the colonial masters had to deal with legal systems that were infused with religion intended for irreligious application that was unlike other forms of sacred law such as canon law, which was mostly relevant to the transcendent aspects of life.¹⁰ Furthermore, they encountered resentment from strong indigenous cultures that were unprepared to embrace the assumptions of the Western cultural mind.¹¹ The result was the acceptance and creation of a legal pluralistic system with the colonial legal systems dominating while maintaining indigenous laws up to a certain point.¹²

The result in colonised Africa was the bifurcation of legal structures.¹³ The nature of this state was a response to the native question, which was the problem of stabilising Western alien rule on African territory.¹⁴ As Mamdani stated, African colonial states like Zimbabwe had distinctive structures bifurcated between the “civil” and “customary”.¹⁵ The bifurcated state resembled two forms of power under a single dominant authority with the communal lands part of the state and the metropolitan areas.¹⁶ In the “civil sphere, courts administered urban mainly white citizens through European laws, while in the customary sphere traditional leaders administered rural black subjects through customary law.”¹⁷ This new structure of colonial Zimbabwe was fundamentally different from the pre-colonial legal structure where rulers, chiefs and family structures played a role in conflict resolution.

⁷ Tamale 2020:27–32.

⁸ Elias 1956:29.

⁹ Ocran 2006:465.

¹⁰ Ocran 2006:465.

¹¹ Ocran 2006:466.

¹² Ocran 2006:466.

¹³ Mamdani 1996:5.

¹⁴ Mamdani 1996:5.

¹⁵ Mamdani 1996:18.

¹⁶ Mamdani 1996:18.

¹⁷ Mamdani 1996:17.

This study argues that the analysis of the socio-economic, political and cultural structures of pre-colonial African systems brings understanding to the overall function of the legal systems in resolving conflict.¹⁸ The functioning of pre-colonial African legal systems was situated within the specific African groupings' overall social structures.¹⁹ A suitable analysis of the penal interventions in these communities demands a focus on the practices in the judicial system within the context of the entire societal situation of Africa with focus on Zimbabwe, which is the jurisdiction of this study. The penal mechanisms ought not to be evaluated from other socio-political strategies because practices function within given economies of discourses of truth, which must be acknowledged to comprehend the operation of these practices.²⁰ The identification of the underlying discourses of truth requires that these practices be situated within the overall context in which they operate. The analysis of pre-colonial African conflict resolution practices together with that of Zimbabwe is undertaken in the context of the overall social mechanisms.²¹

3.2.1 Pre-colonial Africa's social, economic, political and justice structures

The background of pre-colonial African socio-economic structures is analysed to ascertain whether it influenced how pre-colonial African philosophy was constructed. To gain an appreciation of the pre-colonial African legal systems, it is important to delve into how the social structure of pre-colonial legal systems operated in their communities. African philosophy of law and justice was influenced by the nature of the economic and social systems of pre-colonial societies. The investigation into the functioning of the administrative, political and legal structures of pre-colonial Africa is therefore vital in understanding their philosophical worldview in conflict resolution.

3.2.2 Pre-colonial legal system socio-economic context

The social context wherein law developed in pre-colonial Africa is important to be elaborated upon to gain a full understanding of the social background on how the laws

¹⁸ Kinyanjui 2009:4.

¹⁹ Diala and Kangwa 2017:194–196; Ndolu 1985:92.

²⁰ Kinyanjui 2009:4.

²¹ Kinyanjui 2009:4.

come to be. The rules that were developed in pre-colonial African societies were based on a subsistence agricultural economy characterised by a self-supporting combined family organisation.²² The core of the African traditional structure was the family unit and the focus of social concern.²³ The interests of the individual were immersed in the common welfare.²⁴ The system stressed obligations and responsibilities as opposed to rights. The family organisation was self-supporting and contained within this system, the site of each member of the family was centred on an impartial division of industry.²⁵ A sense of belonging prevailed from which developed an intricate system of mutual duties and obligations among the family unit founded on the African concept of *Munhu munhu nekuda kwevame* (*Ubuntu umuntu ngumuntu ngabantu*) translated to mean a “person is a person because of other people.”²⁶ This is the African philosophy that guided Africans’ day-to-day lives.²⁷

Women’s position in general in traditional society was founded on an equitable division of labour.²⁸ Planting, weeding and harvesting was the primary responsibility of women while men were in charge of heavier errands such as clearing the land and farming.²⁹ The head of the family who will always be male had the obligation to provide “food, shelter, clothing and basic healthcare for his dependents, and upon his death, someone had to take over this responsibility.”³⁰ It must be acknowledged that predominantly males carried the responsibility. The head of the household being male reflected a patriarchal notion of family in indigenous society. Ndulo states that, “the obligation to care for family members in pre-colonial Africa was a vital and fundamental value in the African social system.”³¹ African traditions and customary law aided the necessities of the communities from which they established and collectively the traditional practices and customary rules safeguarded that all members of the community had access to

²² Ndulo 1985:92.

²³ Ndulo 1985:92.

²⁴ Ndulo 1985:92.

²⁵ *Magaya vs Magaya* 1999(1) ZLR S 108 E-G.

²⁶ Tutu *et al.* 2010:15. See Chapter 2 analysis on differences of Western and African legal conceptualisation of law and justice.

²⁷ *Mokgoro J in S v Makwanyane and Another* 1995 (3) SA 391 (CC).

²⁸ Diala and Kangwa 2019:193–195; Ndulo 1985:99.

²⁹ Ndulo 1985:99.

³⁰ Muvangua *et al.* and Cornell 2012:240.

³¹ Ndulo 1985:99.

food, clothing and shelter.”³² The scenario elaborated above is the social context within which rules governing pre-colonial African communities were formulated and functioned. Due to the interconnectedness of the family unit and the broader community agreements, rulings such as banishment handed down to violators of the moral codes of that society were detrimental to the future survival and livelihood of such individuals and families.³³ History and archaeology reveal that African civilisation existed, stretching from Egypt,³⁴ to Angola from Timbuktu to the southernmost tip of the African continent. The civilisations consisted of a complex of cultures that exhibited formal and thematic uniformity to be observed in their literature and mythologies.³⁵ As M’Bow correctly observes, “there was a refusal to see Africans as the creators of original cultures which flowered and survived over the centuries in patterns of their own making.”³⁶ Many Afrocentric scholars have countered such Eurocentric arrogance and racist distortions by revealing Africa’s rich prehistory.³⁷

Africa is the birthplace of humankind and that is a significant contribution Africa offers to the world.³⁸ The political and economic domination of Africa is estimated to have been from 2000 BC.³⁹ The needs of humankind and the development of the environment occurred in Africa and these spread through various parts of the earth by migration and dispersions.⁴⁰ Archaeology and studies of ancient Africa have assisted in revealing that Africa had highly flourishing organised kingdoms that dated back to the fourth century, with some ruled by women.⁴¹ The distortions used by colonialists to dim Africa’s pre-colonial history include the use of the European Middle Ages as “the yardstick and reference point for African modes of production, social relations and political institutions.”⁴² The great work done by UNESCO in conjunction with African historian philosophers has restored in writing important parts of Africa’s historiography.⁴³ Mokhtar

³² Ndulo 1985:99.

³³ Omale 2006:46–48.

³⁴ Abu Bakr 1981:3–4.

³⁵ Chivaura 2007:229.

³⁶ M’Bow 1981:xvii.

³⁷ M’Bow 1981:xvii.

³⁸ Diop 1981:27–28.

³⁹ Mokhtar and Vercoutter 1981:3–4.

⁴⁰ Mokhtar and Vercoutter 1981:22–23.

⁴¹ Kizerbo 1981:47–48.

⁴² Tamale 2020:25.

⁴³ Tamale 2020:25.

delves to explain that “the Nile Valley stretching from Bahr el Ghazal in the south to the Mediterranean in the north held a special place in African history.”⁴⁴ Its geographical position made it a central point for many travellers’ movements between inland Africa and the Middle East.⁴⁵

3.2.3 Pre-colonial justice administration

Diop in his book on pre-colonial black Africa provides a glimpse of how justice was conducted in pre-colonial African societies.⁴⁶ It is accordingly stated by Diop that the traditional pre-colonial African society’s judicial organisation and religion were inseparable.⁴⁷ There were two types of justice prevalent among various African kingdoms, namely royal justice and *cadi* justice.⁴⁸ *Cadi* justice was justice administered by Muslim judges appointed by the kings; it handled common law misdemeanour disputes between citizens or between citizens and foreigners.⁴⁹ In Mali and Ghana, these were the sort of cases under the jurisdiction of the *cadi*.⁵⁰ Kings or chiefs sporadically issued laws, but the custom was unquestionably the central source of law.⁵¹

The chief himself was bound by dictates of custom and indeed was the archive of custom.⁵² Thus, in Western deliberations of sources of law, the focus on this epoch in Africa would not be on law-making or legal constructions, but rather on custom, viewed as practice of long duration.⁵³ Continued practice brought about custom, and part of custom ultimately developed customary law.⁵⁴ The pre-colonial African justice systems hinged on the unavoidable social ties that made the person(s) a part of the community, hence ordering personal conduct.⁵⁵ The justice system together with social practices governed individual conduct thus individuals behaved in accord with the societal

⁴⁴ Mokhtar 1981:4.

⁴⁵ Mokhtar 1981:4.

⁴⁶ Diop 1987:124.

⁴⁷ Diop 1987:124.

⁴⁸ Diop 1987:124.

⁴⁹ Diop 1987:124.

⁵⁰ Diop 1987:124.

⁵¹ Ocran 2006:467.

⁵² Ocran 2006:467.

⁵³ Ocran 2006:467.

⁵⁴ Ocran 2006:467.

⁵⁵ Kinyanjui 2009:4.

standards to secure the privileges that accrued from belonging to the community.⁵⁶ The essence of life was a multifaceted web of societal collaborations and one existed as part of the community rather than as an individual.⁵⁷ The restorative aspect of justice was therefore fundamental as the preservation of relations fashioned the foundation of the community.⁵⁸ The ultimate aim of justice in the African context, for the victim, was usually payment of compensation to the person(s) wronged.⁵⁹ Combined with instructions for victim's compensation the principle accentuated the significance of restorative justice in the community. The victim received justice through compensation. The practice of compensation sought to restore the victim as much as possible.⁶⁰ Whereas the possibility of reinstating the victim to the original state is unfeasible, what is apparent is that the legal systems of pre-colonial Africa strove to bring some form of justice to the victim.⁶¹

Kinyanjui elaborates that "compensation as an acknowledgment of the wrongdoing done to the victim is restorative in and of itself; a sense of belonging was affirmed for the victim whose welfare was taken into consideration."⁶² In the same breath, the offender was permitted to make good his wrong by recompensing the victim, allowing the offender to be reintegrated into the community.⁶³ Restoration of community relations was of utmost significance to the offenders bearing in mind that they were part of a community that idealised community ties.⁶⁴ There was recognition in African societies of the psychological interplay between the offender and the victim; hence, they were predisposed to blame-sharing in conflict resolution.⁶⁵ In the conflict resolution practices guided by African jurisprudence, the framework acknowledged that no party was totally at fault or completely blameless.⁶⁶ In a typical setting when a strained relationship was identified for a resolution, the immediate cause of the dispute was not the only matter

⁵⁶ Kinyanjui 2009:4.

⁵⁷ Kinyanjui 2009:4.

⁵⁸ Kinyanjui 2009:4.

⁵⁹ Kinyanjui 2009:14.

⁶⁰ Kinyanjui 2009:14.

⁶¹ Kinyanjui 2009:15.

⁶² Kinyanjui 2009:15.

⁶³ Kinyanjui 2009:15.

⁶⁴ Kinyanjui 2009:15.

⁶⁵ Adegoke 2010:4.

⁶⁶ Adegoke 2010:5.

for consideration by the adjudicators.⁶⁷ The main task was reconciliation and everything possible was undertaken to avoid the severance of the social relationships.⁶⁸ The indigenous mode of administering justice in traditional Africa was geared towards promoting civil and social welfare, while upholding the principles of the law.⁶⁹ I concede that the recognition in African approaches that ‘no party was totally at fault or blameless in conflict’ has significant negative implications on women and sexual violence redress. The psychological and psychosocial implications on victims of sexual violence in this regard outweigh greater good of restoring community relations. It is an aspect that is revisited when considering the possibility of legal integration in Chapter 5.

Compensatory punishment was ritually administered to those that offended the social order.⁷⁰ Justice was achieved through the tribunals and such tribunals were built for the sole purpose of achieving justice for all under the kingdom’s jurisdiction. It is stated “that as a tradition of keeping close to the people and upholding justice among the people, the chief and his commanders often assembled and rode their horses through the lanes of the community and around it, anyone who has suffered injustice or misfortune confronted him, and stayed there until the wrong was remedied.”⁷¹ Public cries announced the cadis or the kings when such decisions affected the population at large. The king had jurisdiction over crimes such as high treason.⁷² Omale adds that in several African societies traditional legal systems assumed an adjudicatory role for violent or serious crimes such as murder, rape and witchcraft.⁷³ The enforcement of justice law and order in pre-colonial societies lay within the network of relationships. Ibgokwe articulates that though forced coercion was an option of last resort, in the event of serious or violent crimes, victims’ families would accept a penalty of compensation or banishment of wrongdoers from the community at times with their family members.⁷⁴ Social pressures played an authoritative role in realising compliance.⁷⁵ The high degree

⁶⁷ Adegoke 2010:5.

⁶⁸ Adegoke 2010:5.

⁶⁹ Adegoke 2010:5.

⁷⁰ Diop 1987:124.

⁷¹ Dalgleish 2005:62.

⁷² Diop 1987:126.

⁷³ Omale 2006:46.

⁷⁴ Ibgokwe 1998:469.

⁷⁵ Omale 2006:46.

of community participation in resolving a dispute in the African traditional legal systems meant that defying a final ruling or settlement was tantamount to defying the entire community and could attract social banishment.⁷⁶ Significant symbolism was attached to ostracism in traditional African societies; it involved the removal by other members of society of both social contact and economic collaboration.⁷⁷ Oputa equates the scenario as representing “not only death but also a risk to the individual’s means of support, especially where food depended upon collaborative efforts and hunting and safety depended upon social efforts.”⁷⁸ Such separation from one’s group in traditional African communities and other indigenous societies has been likened to a living death.⁷⁹ To an outsider who is not acquainted or knowledgeable in African philosophy law and justice this form of social control would be unscientific.⁸⁰

It would be important to provide the background on how pre-colonial African societies were constituted and operated to fully comprehend the reasons behind the equation of ostracism to death. That being the case it is not surprising that the fundamental aim of pre-colonial traditional African society’s conflict resolution was to reach a consensus. Further to the above, reaching a consensus, abiding by the agreement and the public’s interest in ensuring a favourable speedy outcome was further strengthened by the fear of supernatural forces.⁸¹ The belief and understanding by pre-colonial African communities on conflict, quarrels, and breaching taboos and rules that such behaviour evoked supernatural forces in unleashing sickness or material hardship on the offender’s families or members of the community as a whole.⁸² An act equated as rebellion against the legal position was regarded as offensive not only in the perception of the living but also of the mystical ancestral spirits who are understood to be the guardians of the communities.⁸³ The law of the community it can be said was conceived and believed as the possession and legacy of an infinite chain of generations.⁸⁴

⁷⁶ Omale 2006:46.

⁷⁷ Omale 2006:46.

⁷⁸ Oputa 1975:8.

⁷⁹ Oputa 1975:8.

⁸⁰ Oputa 1975:8.

⁸¹ Omale 2006:47.

⁸² Omale 2006:47.

⁸³ Omale 2006:47.

⁸⁴ Omale 2006:47.

How African conflict resolution systems operated further shows the importance that community relations through the concept of restorative justice were paramount in their systems. The belief and cultural practices were geared toward ensuring that restorative justice was achieved in all instances when matters were brought before such platforms.⁸⁵ The centrality of these beliefs and practices such as community unity were objectified to be truths that rendered restorative justice as an acceptable process fostering community unity.⁸⁶ Therefore, crime control, reconciliation and reintegration of offenders in pre-colonial African communities were achieved based on these prevailing beliefs.⁸⁷ At this interval, it is important to reflect briefly on how the pre-colonial legal systems were structured and functioned when conflict arose in their communities.

3.3 Pre-colonial Zimbabwe's legal systems' structure and operation

3.3.1 Traditional court system – Dare/Indaba

Before the colonisation of Zimbabwe, the legitimate sole governing structure among the indigenous people was entrenched in the traditional leadership.⁸⁸ Zimbabwe's traditional leadership has always been central to the governance of its communities. This power of traditional leadership was derived from the prevailing tradition and culture of the various groups in the country.⁸⁹ The structure and systems of the traditional leadership among the Ndebele, Shona, Kalanga, Tonga, Venda and other ethnic communities have certain similarities and some differences.⁹⁰ Therefore, the traditional Zimbabwean society has rich customs, which are well embedded in its culture competent of handling various categories of crimes committed in communities.⁹¹ This leadership as in most African countries presents itself in various forms and shapes.⁹² The notion of hierarchy was a central feature in this leadership, the King (*Mambo*) was at the top. A council named the Kings Council (*Dare ra Mambo*) assisted him in governance.⁹³ Members of this council

⁸⁵ Kinyanjui 2009:15.

⁸⁶ Kinyanjui 2009:15.

⁸⁷ Omale 2006:47.

⁸⁸ Chigwata 2016:76.

⁸⁹ Chigwata 2016:76.

⁹⁰ Chigwata 2016:70.

⁹¹ Mandikwaza 2019:9.

⁹² Mandikwaza 2019:9.

⁹³ Church and Civil Society Forum 2012:10.

comprised Priests (spirit mediums) and Kings, wives and close relatives.⁹⁴ The village heads were the closest to the people and thus interacted with community members more intimately. At the base of this structure is the Hut (*Imba*) led by the family head.⁹⁵ The traditional leadership drew their power and legality from an accepted body of indigenous customary law and practice.⁹⁶ They exercised several powers such as governmental, judicial, administrative and political powers and authority.⁹⁷ They provided the communities with spiritual and cultural leadership. They were regarded as the custodians of culture, customs and tradition and their fair appreciation of the local tradition and culture.⁹⁸ They undertook their judicial functions in resolving differences and conflicts in communal and resettlement areas.⁹⁹

The conflict resolution platforms of the two main groups of people in Zimbabwe namely the Shona and Ndebele was conducted through the *Dare* or *Indaba* – the local court system.¹⁰⁰ The Shona and Ndebele believe that humanity has a certain concept of morality, which is inherent to them and their nature.¹⁰¹ Morality accordingly is determined by society's philosophies and traditional chiefs are defenders of these beliefs and values. The Shona traditional chieftainship reconciles disputants using the principle of Hunhu/Ubuntu (personhood) as the guiding principle for reference.¹⁰² The traditional court system comprised three main courts. The first court referred to as *Dare repamusha* was the family unit, which was regarded as the internal and primary system of resolving disputes among the indigenous people of pre-colonial Zimbabwe.¹⁰³ The process of resolving crimes committed within the community either by community members or outsiders was achieved through the court systems discussed. Due to the relational nature that is attached to conflict resolution in the African philosophy of conflict resolution, family members, both immediate and extended, play different roles at

⁹⁴ Church and Civil Society Forum 2012:10.

⁹⁵ Church and Civil Society Forum 2012:10.

⁹⁶ Chigwata 2016:78.

⁹⁷ Chigwata 2016:78.

⁹⁸ Chigwata 2016:78.

⁹⁹ Chigwata 2016:81.

¹⁰⁰ Matavire 2012:219.

¹⁰¹ Matavire 2012:219.

¹⁰² Matavire 2012:219.

¹⁰³ Masitera 2018:115.

specific dispute resolution platforms in the family structure.¹⁰⁴ It is a family court that involves private court sessions amongst members of a single family or between two families of the extended family.¹⁰⁵ The family head or aunt chairs over the case to bring justice to disputing parties without involving members of the public.¹⁰⁶ Amongst the Shona and Ndebele people of Zimbabwe, *Tete* or *Babakazi* who is a sister to the father and the mother's brothers *Sekuru* or *Malume* and close family friends *Sahwira* or *Umgano* are some of the designated individuals instrumental in resolving family conflicts.¹⁰⁷ According to Samkange, a maternal uncle *Sekuru* or *Malume* represents one's mother.¹⁰⁸ Anyone who is referred to as *Sekuru* for instance can tell a child "No, my nephew you cannot speak to your father like that, he is your father." The role of the *Sekuru* or *VaTete's* on the other hand is to handle peculiar problems in the African families in Zimbabwe.¹⁰⁹ Grandmothers, *Ambuya* or *Gogo* or grandfathers *Sekuru* or *Ukhulu* are very respectable persons in the family and society played an important role in conflict resolution and administration of justice.¹¹⁰

The purpose of the law and the court system in these African settings is to cultivate unity and loyalty, which was a clear trait of family relationships.¹¹¹ The second type of local court referred to as *Dare Remunana* was established to deal with matters involving two or more families in conflict. This court heard matters of a small nature such as theft, feuds and consumption of crops by livestock among others.¹¹² The third court was the higher court *Dare Repamusoro* and was presided over by chiefs or sub-chiefs. In this court, the chief presides over the cases brought before him with the assistance of chosen advisors based on their knowledge, wisdom, intelligence and eloquence of speech. These advisors are men of sound philosophy and great wisdom.¹¹³ Chiefs, headmen and village heads were regarded to be the primary custodians of the legal justice mechanisms. The African court system among the pre-colonial people of

¹⁰⁴ Omale 2006:46.

¹⁰⁵ Gwaravanda 2011:148.

¹⁰⁶ Gwaravanda 2011:149.

¹⁰⁷ Gwaravanda 2011:149.

¹⁰⁸ Samkange and Samkange1980:72.

¹⁰⁹ Samkange and Samkange1980:72.

¹¹⁰ Samkange and Samkange1980:74.

¹¹¹ Gwaravanda 2011:148.

¹¹² Gwaravanda 2011:149.

¹¹³ Gwavaranda 2011:149.

Zimbabwe was the foundation of law and ethics among the indigenous groups.¹¹⁴ It aimed to inculcate social unity among the disputing community members.¹¹⁵ The court system encouraged the litigant to appreciate that misconduct was part of human nature. This was to facilitate the forgiveness of the accused and the promotion of social harmony.¹¹⁶ The rulings were based on custom, law and practices and they were binding to both the victims and the offenders, thus validating the mechanisms as live concomitants of grassroots justice.¹¹⁷ Samkange provides some practical insight into how the practical view of law and sanctions functioned in a traditional African setting in the Zimbabwean context.¹¹⁸ He elaborates on the distinction between the Western court system and the African court system in understanding the relational nature of conflict resolution in African societies.¹¹⁹ He states that in a Western court of law the magistrate or judge first satisfies himself on what the law is on a particular matter at hand. Then they ask whether the evidence at hand is sufficiently presented in court to show that parties to the dispute infringed the law.¹²⁰

In an African court, similar circumstances are required to determine whether the law *Murawu*, *Mutemo* or *Umuteto* on a particular custom has been violated. This is not determined by one person's close study and interpretation of the law or custom in question but by a consensus of those present.¹²¹ In the passing of judgment, however, "the African court will take into contemplation a component that a Western court would consider quiet extraneous and immaterial, which is whether the ruling or verdict reconciles the parties to the dispute."¹²² Samkange emphasises that the African court must consider this because the disputants still have to live together in one community when they leave the court.¹²³ This is a very important consideration in an African court, which is absent in the Western court system.¹²⁴ In African societies like Zimbabwe,

¹¹⁴ Benyera 2014:336.

¹¹⁵ Gwavaranda 2011:149.

¹¹⁶ Gwavaranda 2011:149.

¹¹⁷ Benyera 2014:336.

¹¹⁸ Samkange and Samkange 1980:44.

¹¹⁹ Samkange and Samkange 1980:44.

¹²⁰ Samkange and Samkange 1980:44.

¹²¹ Samkange and Samkange 1980:44.

¹²² Samkange and Samkange 1980:44.

¹²³ Samkange and Samkange 1980:45.

¹²⁴ Samkange and Samkange 1980:45.

corporal punishment was present even before the white man set foot on African soil. The use of sticks to discipline was a sign to disapprove strongly and endeavour to correct the behaviour of those under one's tutelage. It was not administered to citizens under one's jurisdiction, it was a concept introduced to court status by the coming in of the colonial governments.¹²⁵ They elevated the use of a sjambok as an apparatus and dignified whipping as a judicial practice among the Shona and Ndebele people of Zimbabwe¹²⁶. Corporal punishment was rarely ever administered by the African courts and a whip was generally used on animals, not man.¹²⁷ A feature that was present in the pre-colonial African legal system was the avoidance of corporal punishment in public by the one accused of ill behaviour.¹²⁸ In a traditional local court in Zimbabwe, one could simply hide behind another person such as *Ambuya*, *Sekuru* or a recognised elder respectable to the chastiser.¹²⁹ This is referred to in the Shona culture as *Kupotera*, if they were not respectable to the chastiser they are referred to as a *gwenzi rapotera tsuro*, meaning they were regarded as the bush which the hare had hidden and liable to be thrashed as a hunter's stick always hits the hare as well as the bush in which it is hiding.¹³⁰

The advent of white settlers after 1890 changed the structures and function of this pre-colonial court system by converting it into a modern state institution to advance their own interests and control the black population.¹³¹ The colonial legal system imposed on Zimbabwe did away with the concept of *Kupotera* in situations of corporal punishment. The benefit of protection was available through the presence and appeal to *Ambuya* or *Gogo* to intervene in the infliction of corporal punishment.¹³² It was considered disrespectful to continue to flog a person after someone like *Ambuya* or *Gogo* intervened. *Ambuya* or *Gogo* assuaged any feeling of being unwanted or rejected that victims of flogging might begin to nurse, by taking them by the hand.¹³³ The respectable

¹²⁵ Samkange and Samkange 1980:93.

¹²⁶ Samkange and Samkange 1980:93.

¹²⁷ Samkange and Samkange 1980:93.

¹²⁸ Samkange and Samkange 1980:93.

¹²⁹ Samkange 1971:96.

¹³⁰ Samkange 1971:96.

¹³¹ Chigwata 2016:71.

¹³² Samkange 1971:97.

¹³³ Samkange 1971:97.

person would take the offender leading them to the hut where they would remain for a few days.¹³⁴ In African societies, victims of discipline in general practices received sympathy, understanding and friendship from someone exactly at the time they needed it. This highlights the importance of maintaining relations even in discipline, a paramount principle that is inherent in most African societies.¹³⁵ The operation of Western legal systems in most colonised African states has none of these pre-colonial court system's redeeming features.¹³⁶

3.4 Colonialism and its effects on Zimbabwe's pre-colonial African legal structures

Pre-colonial Zimbabwe, like any other African society from time immemorial, had organised societies that had well-defined rules and principles that served to maintain order and harmony consistently and systematically.¹³⁷ As Olawale observed, "reading from the pedigree of legal practice, sociology and anthropology, Africans lived in consistent and systematic structured societies where order and harmony existed."¹³⁸ Pre-colonial African law and philosophy existed to regulate social conduct and social ills and served as method of operation in the best interests of the societies before European domination was brought about by colonialism.¹³⁹ The mechanisms in settling disputes according to African customs placed certain levels of prohibitions on the offender.¹⁴⁰ It is unfounded for one to assert that colonial regimes introduced laws to Africans.¹⁴¹ Pre-colonial Zimbabwe's historical encounter with colonial Europeans began in the nineteenth century. The pre-colonial African communities of Zimbabwe fell under British colonial rule under the governance of the British South African Company

¹³⁴ Samkange 1971:97.

¹³⁵ Samkange 1971:97.

¹³⁶ He used the *sjambok* or whip made specific for the purpose from tough hippopotamus hide or male organ of an ox or bull. "For early pioneers like Cecil John Rhodes right down to the lowest among them the white men seemed to enjoy slapping flogging Africans for various reasons as well as imagery. Plomer 1933:129. In October 1890, an after supper at Maclousti Rhodes found on leaving early in the morning his cape cart was not ready, he went into a terrible rage saying that all natives were alike and ought to be severely flogged. He left behind orders for the offending driver to be arrested and kept without food". Samkange 1971:97.

¹³⁷ Onyango 2013:29.

¹³⁸ Onyango 2013:30.

¹³⁹ Makali 2003:102.

¹⁴⁰ Odinga 1976:61.

¹⁴¹ Odinga 1976:61.

settlement regime.¹⁴² As previously stated, pre-colonial Zimbabwe like the rest of Africa had legal systems that functioned in the resolution of disputes within their relevant groups. The Charter of Justice, dating back to 1828 and 1832 introduced the “British formal law and court system through legislative enactments, education, language, commercial policies and most notably through the judiciary.”¹⁴³ This changed the legal system of pre-colonial Zimbabwe.¹⁴⁴ The changes to the pre-colonial African legal system of Zimbabwe were augmented when the British High Commissioner’s proclamation on 10 June 1891 declared the law applicable in the territory of Southern Rhodesia as Roman-Dutch and English common law.¹⁴⁵ These Western law systems since the proclamation became an indispensable part of the Zimbabwean legal system.¹⁴⁶ Further changes occurred in 1923 to the legal landscape of Southern Rhodesia that entrenched colonial laws and systems in Zimbabwe as a British colony.¹⁴⁷

These significant enactments had permanent effects on how pre-colonial African legal law and systems would operate in matters of conflict. In that regard, Southern Rhodesia was annexed as a Crown colony by an Order in Council in 1923, which instituted a constitution and provided for an elected legislature, a cabinet of government and the High Court responsible for administering the law.¹⁴⁸ Madhuku explains that, “the creation of the Federation of Rhodesia and Nyasaland (present-day Malawi) in 1953 and its dissolution in 1963 did not change the position of common law, rather the English common law tenure increased.”¹⁴⁹ The *Southern Rhodesia Constitutional Order of 1965* modified the *1961 Constitution* but left the greater part of the Western law intact and the judiciary remained untouched and common law continued as the applicable law.¹⁵⁰ This is how the colonial encounter with African legal systems became a feature

¹⁴² Dube 2014:8–9.

¹⁴³ Dube 2014:9.

¹⁴⁴ Section 19 of the British High Commissioner’s Proclamation was “the first to formally introduce European law into the territory of Zimbabwe, wherein, it expressed that “the law for the time being in force in the Colony of the Cape of Good Hope” was to be applied.” Dube 2014:9.

¹⁴⁵ Madhuku 2010:19–20.

¹⁴⁶ Madhuku 2010:19–20.

¹⁴⁷ Madhuku 2010:19–20.

¹⁴⁸ Dube 2014:8.

¹⁴⁹ Madhuku 2010:20.

¹⁵⁰ Madhuku 2010:20–21.

with permanent existence in the British colony named Zimbabwe. Notwithstanding several changes of governments from the Federation until present, Roman-Dutch and English common law succeeded to find its way and endure in all the political dynamics of the country.¹⁵¹ The colonial displacement of pre-colonial African laws is best understood through the concept known as legal implantation. According to Diala, legal implantation is a process that occurs “when the laws and judicial systems of a foreign state are forced on another state through conquest.”¹⁵² In the case of Africa, conquest was brought about by colonialism.¹⁵³ While the concept of imposed legal implantation is an invention of conquest, it is oblivious of differences between the socio-political environments of the transplanting on recipient states.¹⁵⁴ The colonial legal implantation of its legal structures and law had significant permanent consequences on pre-colonial African legal systems and processes. The process first marginalised the free resolve of African peoples, who were on the receiving end of European laws and legal systems.¹⁵⁵ Second, the derogatory ways European laws displaced African legal orders resembling what can be termed as “malicious legal transplants.”¹⁵⁶

According to Onyango, African legal systems were significantly transformed by the colonial encounter with the indigenous people of Africa.¹⁵⁷ He opines that the advent of colonisation and post-colonisation processes in independent African states eagerly adopted Western legal systems and legal concept in a manner that was starkly at variance with their pre-colonial African legal systems.¹⁵⁸ The process of transformation elaborated by Onyango and the legal transplant expounded by Diala were not isolated events, the processes in Africa were comprehensive, self-replicating phenomena. The transformation that the legal implant had on pre-colonial African legal systems did not end in this sphere; it was so radical that it permeated into changing the socio-economic

¹⁵¹ These are the key successive political landmarks in Zimbabwe’s political history, Unilateral Declaration of Independence, Independent Nationalist State, Unity Government and the Government of National Unity, Dube 2014:1.

¹⁵² Diala and Kangwa 2019:190.

¹⁵³ Diala and Kangwa 2019:190.

¹⁵⁴ Diala and Kangwa 2019:190.

¹⁵⁵ Diala and Kangwa 2019:190.

¹⁵⁶ Diala and Kangwa 2019:190.

¹⁵⁷ Onyango 2013:30.

¹⁵⁸ Onyango 2013:30.

structures of pre-colonial Africa.¹⁵⁹ The changes irrevocably affected “the educational philosophy, religion, work, food and dress of Africans.”¹⁶⁰ In summary, it created patterns of power, philosophy and conduct that persist into what has been aptly described as the coloniality of power.¹⁶¹ The application of Roman-Dutch law and English common law in dispute resolution in Africa brought through the colonial Western administration is the direct result of the colonial encounter. It is the direct evidence of the process described by Diala as the colonial legal implantation of the application of one nation’s laws in another nation-state. In the analysis in Chapter 2 on the differences in Western and pre-colonial African laws, it was revealed that the nature and operation of these Western imposed systems of law were at variance with the pre-colonial African legal system *modus operandi*. This transformation and colonial legal implantation of its laws on pre-colonial African legal systems had profound effects on how conflict-related sexual violence would be redressed in colonial and post-colonial Zimbabwe. While pre-colonial African customary law expressed itself more in its moral dimension and subjective notion, the existing Western imposed state laws emphasise the normative aspects of the law.¹⁶² The stark variance in these two legal systems’ philosophy and operation in conflict resolution had a significant impact on resolving violations perpetrated against women. To understand how pre-colonial Africa meted out punishment in conflict resolution on rape and sexual violence I analyse the conceptual framework of crime and punishment in such societies below.

3.5 Conflict resolution and punishment in pre-colonial African legal systems on sexual violence

Pre-colonial African practices of punishment were imposed in different contexts and forms and the family as the primary institution of conflict resolution administered punishment within the family.¹⁶³ Among the Shona, Ndebele and Xhosa groupings found in Zimbabwe, South Africa and East African societies like Kenya, “the essence of life in the family was organised through acknowledged hierarchical relationships

¹⁵⁹ Diala and Kangwa 2019:191.

¹⁶⁰ Diala and Kangwa 2019:191.

¹⁶¹ Diala and Kangwa 2019:191.

¹⁶² Onyango 2013:30.

¹⁶³ Thornberry 2011:418.

conveyed in the idea of respect.”¹⁶⁴ In traditional Zimbabwe and other African cultures like the Xhosa in South Africa, it was demanded of children to respect their parents, wives to respect their husbands and the in-laws and junior members of the household to senior members.¹⁶⁵ The concept of respect was “validated through approved avoidance behaviours as well as conformity, labour for the household and the preservation of family standing through fitting social conduct.”¹⁶⁶ The inability to meet these societal obligations was regarded suitable grounds for discipline mainly through verbal admonitions and beatings.¹⁶⁷ However, disobedience was punished severely as it was regarded as the epitome of disrespect. This was the case regardless of whether it was an adult to the orders of the chief or a child to a parent.¹⁶⁸ It was observed by early colonialists that children were punished little; their guardians punished them if they told untruth to their parents or if a boy let young cows nurse or leave the cattle to stray into the tilled fields.¹⁶⁹

Information on the frequent use of corporal punishment within the family during the pre-colonial era is limited because European onlookers found nothing to imitate in the use of corporal punishment in disciplining children.¹⁷⁰ The pre-colonial legal systems of African people in Zimbabwe governed sexual violence crimes such as rape, seduction and adultery, which were all regarded as sexual offences.¹⁷¹ Rape was considered as a more serious form of seduction, adultery or unlawful sexual intercourse.¹⁷² In traditional law, a female or girl child will not report a rape directly to the traditional authorities.¹⁷³ As in all matters, her guardian is responsible for her overall well-being, and therefore responsible for reporting.¹⁷⁴ The victim of rape customarily reports “either to her mother or to her aunt, who will then report to the girl’s father or guardian.”¹⁷⁵ Rape from a Zimbabwean traditional law perspective was a crime that not only involved the woman

¹⁶⁴ Thornberry 2011:418.

¹⁶⁵ Thornberry 2011:418.

¹⁶⁶ Thornberry 2011:418.

¹⁶⁷ Thornberry 2011:418.

¹⁶⁸ Thornberry 2011:418.

¹⁶⁹ Thornberry 2011:418.

¹⁷⁰ Thornberry 2011:419.

¹⁷¹ Armstrong 1990:8.

¹⁷² Armstrong 1990:8.

¹⁷³ Armstrong 1990:22.

¹⁷⁴ Armstrong 1990:22.

¹⁷⁵ Armstrong 1990:22.

and the offender.¹⁷⁶ In all cases among the customs of the various local groups, “a case was not for an individual but the whole clan with the same totem.”¹⁷⁷ Both parties to the wrongdoing had relations to consider.¹⁷⁸ The financial liability of the penalty in conjunction with the shame and humiliation of the victim would be borne and shared by the offender and their kin.¹⁷⁹ In accordance with traditional attitudes in general, the crime of rape was perceived to be a private matter that brought about social dishonour to the whole family.¹⁸⁰ In cases where non-consensual sex occurred within the family, it was possibly punished through corporal punishment, which was an exception to the general rule of resorting to corporal punishment.¹⁸¹ Such processes within the family underlay the broader pre-colonial system of chastisement or discipline.¹⁸² In southern Africa pre-colonial African communities such as the Xhosa, Shona and Tswana remedied wrongs committed between members of different families including non-consensual sex by compensating with cattle.¹⁸³

The paying of stock by the wrongdoer in resolving relational differences in pre-colonial African societies served a number of purposes. The act was retributive to the responsible individual and as compensation, it related to the reputational, psychological and economic losses suffered by the wronged individual, family and greater community.¹⁸⁴ The payment of cattle was marked as a public acknowledgement of the wrong done.¹⁸⁵ In some instances, the cattle had to be slaughtered to restore the spiritual and social order.¹⁸⁶ Southern African civilisations resolved conflict “through compensation payments on various categories of disputes that European colonists would classify as criminal, such as theft, assault, and crimes of a sexual nature.”¹⁸⁷ The various meanings attached to the transfer of cattle made this gesture a representative approach of punishment in the pre-colonial African societies in the Eastern Cape in

¹⁷⁶ Armstrong 1990:23.

¹⁷⁷ Armstrong 1990:23.

¹⁷⁸ Armstrong 1990:23.

¹⁷⁹ Armstrong 1990:23.

¹⁸⁰ Armstrong 1990:23.

¹⁸¹ Thornberry 2011:419.

¹⁸² Thornberry 2011:419.

¹⁸³ Thornberry 2011:419.

¹⁸⁴ Thornberry 2011:419.

¹⁸⁵ Thornberry 2011:419.

¹⁸⁶ Thornberry 2011:419.

¹⁸⁷ Thornberry 2011:419.

South Africa, the Ndebele in the southern part of Zimbabwe and the Gusii people of Kenya.¹⁸⁸ The general understanding among most east and southern African pre-colonial indigenous groups was that there was no distinction between rape and consensual sex outside of marriage. The Xhosa people however considered and placed rape under the categories of *ukudlwengula* and *ukuzuma*.¹⁸⁹ These acts were consistently placed under the rape category. All acts of a sexual nature committed in the community were punished by the payment of compensation.¹⁹⁰ When a girl or woman was unmarried, rape and seduction compensation was paid to the father, in the case of married women the compensation was paid to the husband.¹⁹¹ Damages were awarded as compensation for unlawful sexual intercourse. According to Mutandwa “within the indigenous justice system of the Zimbabwean peoples, an individual is regarded as part of a group and justice was therefore geared towards the well-being of the mutual group.”¹⁹² The wrongdoer’s family “shares in the obligation to repair the broken relationship; at the same time, the victim’s family have a claim on her rights hence compensation is normally granted to the family as a whole.”¹⁹³

This practice however is in accord with other customary law values, which esteem the family as a unit when compensation is required for rights contravened and when liability accrues for the actions of individual family members.¹⁹⁴ In the determination of the number of damages to be paid for sexual offences, it appears that damages were awarded for all sexual offences; higher damages were awarded when she did not give consent.¹⁹⁵ Goldin and Gelfand assert the view that “higher damages were apportioned where there was a lack of consent and state that under customary law the male who rapes a woman is liable for damages on a higher scale than in a case of seduction or adultery.”¹⁹⁶ The act of having sexual intercourse devoid of the woman’s approval is

¹⁸⁸ Thornberry 2011:419.

¹⁸⁹ *Ukudlwengula* denotes a violent sexual assault against a waking woman or sleeping woman, and *Ukuzuma* the stealthy assault of a sleeping woman. Thornberry 2011:419.

¹⁹⁰ Armstrong 1990:16.

¹⁹¹ Mutandwa 2012:32.

¹⁹² Mutandwa 2012:32.

¹⁹³ Mutandwa 2012:32.

¹⁹⁴ Armstrong 1990:16.

¹⁹⁵ Armstrong 1990:16.

¹⁹⁶ Goldin and Gelfand 1975:169.

thus an element that validates the award of compensation.¹⁹⁷ This proves that pre-colonial African legal systems viewed rape as a serious crime.¹⁹⁸ The Gusii people in Kenya in the same manner as other southern African countries did not publicly condone sexual associations amid unmarried individuals.¹⁹⁹ Their culture however did not seem to resent in any way the loosing of virginity as young men and women had forbidden sexual associations with each other.²⁰⁰ The absence of virginity at marriage was insignificant considering that most girls engaged in extramarital sexual activities during the practice called *Ogochabera*.²⁰¹ The absence of sexual purity “demanded no higher bride price than did the absence of virginity or even a pregnant girl or unwed mother.”²⁰² Though there are differences between African cultures, most southern African cultures placed a price and heavy emphasis on the purity and virginity of females such as was the case among the Xhosa, Shona and Ndebele.²⁰³

Acts of a sexual nature among the various Bantu groupings in southern and East Africa were perceived as harm against the individual woman and the family lineage to which she belonged.²⁰⁴ For assaults that were sexual and non-consensual, compensation was paid from the family of the guilty party to that of the victim, rather than between individuals.²⁰⁵ The practice was that the head of each family represented individual family members to the external world.²⁰⁶ There were economic interest claims by household heads in the sexuality of their female dependants in both consensual and non-consensual sex.²⁰⁷ To determine the extent of the impact of colonial legal implantation on pre-colonial African legal systems' responses to sexual violence, the section below analyses some research studies undertaken in three African countries on rape and sexual violence in the early stages of the colonial administration entrenchment to ascertain the extent of the changes to Africa.

¹⁹⁷ Goldin and Gelfand 1975:169.

¹⁹⁸ It is evident here that while precolonial African viewed rape as a serious crime a look into the manner in which remedies were administered points to the notion that such violations were not regarded as very serious.

¹⁹⁹ Shadle 2008:35.

²⁰⁰ Shadle 2008:35.

²⁰¹ Shadle 2008:34.

²⁰² Shadle 2008:34.

²⁰³ Benson and Chadya 2005:609.

²⁰⁴ Benson and Chadya 2005:609.

²⁰⁵ Benson and Chadya 2005:599.

²⁰⁶ Benson and Chadya 2005:599.

²⁰⁷ Thornberry 2011:419.

3.6 The influence of colonialism on pre-colonial African legal systems in redressing sexual violence

This analysis explores several studies on rape and sexual violence conducted in the early African courts in Kenya, Zimbabwe and South Africa established by colonial administrators specifically for Africans. The purpose of providing analysis of the three countries is to address the limitation of the study where it has been acknowledged that there is limited scholarship written by African scholars on the issue of pre-colonial African societies' handling of conflict-related sexual violence. The research conducted on African courts' handling of rape and sexual crimes is significant. It provides the historical context of how colonialism introduced major changes to pre-colonial African legal forms and how it shaped the post-African system in addressing conflict-related sexual violence.

From the above, it is clear that in pre-colonial Africa the traditional leadership in all its various forms was the requisite authority responsible for handling matters in dispute within their communities. The traditional pre-colonial African political authority found its fullest expression in chiefs, traditional rulers, family heads and headsmen.²⁰⁸ The administration of justice in African indigenous communities' local, social, political actors and traditional community-based judicial and control structures were used in the management and resolution of conflict within and between communities.²⁰⁹ It is undisputed that the colonial encounter between European and African countries imposed significant changes in how such societies would operate. The nineteenth century has been earmarked as the period in which colonialism in Africa began under the auspices of Western European nations namely the British, Portuguese and Dutch in East and southern Africa.²¹⁰ This period introduced significant changes to the pre-colonial African landscape in its social, political and legal spheres including its systems. The assumption is that the advent of European colonial rule in pre-colonial Africa changed the traditional structures and systems of conflict resolution.²¹¹

²⁰⁸ Nyarko 2017:12.

²⁰⁹ Nyarko 2017:12.

²¹⁰ Thornberry 2011:415.

²¹¹ Thornberry 2011:415.

The ideology of the colonial encounter with the rest of the world was the entrenchment of its power, to control and dominate these targeted nations. The challenge that the colonialists faced in these requisite African colonies was the task of governing different African linguistic people coupled with different ideas about conflict resolution.²¹² In the three identified countries, namely Kenya, South Africa and Zimbabwe, there are common trends prevalent in the colonial encounter with pre-colonial African systems of dispute resolution. As discussed above, rape and other matters of sexual nature arising in the African communities were heard through the family units, clan leaders and chiefs, which were the requisite operational structures established in pre-colonial Africa in resolving such matters. Compensation through the payment of cattle was the form of restitution paid to victims of sexual violence. These practices are the common trends identifiable in these three African countries when it relates to redressing sexual violence in their communities.

Bearing in mind that the colonial intent in its encounters with pre-colonial African legal systems was to establish and entrench its legal systems. To further this colonial agenda the usurping of traditional pre-colonial African dispute resolution systems was achieved by setting up Native Courts.²¹³ With the coming of the British colonial administration and that of other European countries, in a bid to establish their legal authority in their newfound colonies, established the so-called Native Courts commissioned to hear indigenous African people's matters.²¹⁴ This is one of the initial meddles of the colonial encounter in its interaction with pre-colonial African legal systems. In Kenya for example, Ritongo Courts were established as African Courts in 1937 by the British colonial administration among the Gusii people. They originated from the pre-colonial Council of Elders and were gazetted in 1913 for their establishment in colonial Kenya.²¹⁵ The Ritongo Courts' jurisdiction extended to matters strictly related to intra-African conflicts such as land disputes, bridewealth, minor assaults and rape until 1926. The British meddling with the traditional African legal system structures in Kenya set up these Native Courts and staffed them with local men who they appointed sometimes in

²¹² Thornberry 2011:415.

²¹³ Shadle 2008:35.

²¹⁴ Shadle 2008:35.

²¹⁵ Shadle 2008:35.

consultation with Gusiis.²¹⁶ In the Eastern Cape in South Africa, the British administration's colonial legal system was set up in 1850.²¹⁷ Before that, a pre-colonial African legal system operated under the guardianship and custody of chiefs and their councils.²¹⁸ Matters related to rape and sexual violence were heard under these pre-colonial African legal platforms. With the coming of the British administration between 1848 and 1893, the colonial administration extended its jurisdiction.²¹⁹ In Southern Rhodesia (presently Zimbabwe), radical changes occurred to the traditional leadership dispute resolution pre-colonial structures from 1890 to the 1930s with the introduction of a British colonial takeover. Many of the Shona and Ndebele legal institutions had survived colonial disruption from about 1890 to 1898.

The possibility to recognise these African legal institutions by the British colonial administration was accepted in the early stages of the colonial establishment.²²⁰ The pre-colonial institutions of chiefs and Chiefs' Courts persisted; the Shona and Ndebele groups continued to hold judicial courts, settling disputes throughout the colonial period. With time, however, the attitude of the colonial state towards African courts changed.²²¹ The change in attitude by the colonial administration was motivated in 1898 by the revolts of local people against colonial rule that had taken place in 1896–1897.²²² Therefore, the withdrawal of the initial recognition of these pre-colonial structures was in response to the Chimurenga revolt and the apparent political authority with which Africans had yielded.²²³ The colonial administrators were unwilling for all authority to accrue to Africans in an unrestricted way, which motivated the reversal of the initial colonial decision to recognise African legal systems.²²⁴

²¹⁶ Shadle 2008:35.

²¹⁷ Thornberry 2011:415–416.

²¹⁸ Thornberry 2011:415–416.

²¹⁹ Thornberry 2011:416.

²²⁰ Smith 1994:77–78.

²²¹ Smith 1994:77–78.

²²² Smith 1994:86.

²²³ Smith 1994:86.

²²⁴ The *Proclamation No. 55 of 1910 Native Regulations* gave official “recognition to the long-standing practice of Native Commissioners settling disputes. In the two previous years, the Central Native Commissioner of Mashonaland reported that 5 468 and 4 744 civil cases respectively had been heard by the Native Commissioners in the nineteen districts under his supervision. The publication of these figures appears to have been a challenge to the administration in the Native Department's campaign for greater recognition of its work, and the expansion of its jurisdiction.” Smith 1994:86.

As the colonial administration became entrenched in the three African countries, their next strategy was the transfer of crimes such as rape and sexual violence from pre-colonial legal structures for hearing in the newly established Native Courts. In Kenya, rape was elevated by the British colonial administration as a serious crime in 1926. Thousands of cases each year were brought before the Ritongo Courts as they were granted state authority to hear intra-African disputes.²²⁵ Despite the colonial usurping of power and restructuring of the pre-colonial structure of dispute resolution the Gusii community continued to take their matters to the local elders called *Ebanyamaiga* and *Etureti*, which were semi-official dispute resolution bodies.²²⁶ In South Africa in the Eastern Cape region, the expansion of the colony brought about the idea to replace pre-colonial practices of punishment of reparation with a new retributive system. The understanding of the colonial state by the twentieth century was that punishment of rape demanded corporal punishment and a custodial sentence.²²⁷ Although there were a variety of pre-colonial Chiefs' Courts and colonial criminal courts introduced by the British colonial administrators in the respective African societies. Pre-colonial Chiefs' Courts were the most visible public institutions of punishment.²²⁸

In 1909 in Southern Rhodesia, the colonial government introduced several strategies that significantly affected how rape and sexual violence would be redressed in the colony. Work had begun through the Native Commissioners who advocated the continuation of a system that allowed chiefs and headmen in the official administration of justice as it had been in pre-colonial times.²²⁹ The position that chiefs and headman held in justice administration was regarded as important work because it placed them under the ambit of the colonial state.²³⁰ Superintendents of the natives recommended that Native Commissioners encouraged Africans "to refer petty civil disputes to their chiefs in the first instance."²³¹ The officials of the Native African Department considered the exercise of judicial authority as a means of attaining wider political authority.²³² With

²²⁵ Shadle 2008:32.

²²⁶ Shadle 2008:32.

²²⁷ Thornberry 2011:416.

²²⁸ Thornberry 2011:416.

²²⁹ Smith 1994:84.

²³⁰ Smith 1994:85.

²³¹ Smith 1994:85.

²³² Smith 1994:85.

the progression of time, the colonial administrators and Native Commissioners were of the view that chiefs and headmen were failing to control their kraals by undertaking their jobs contrary to their expectations.²³³ The colonialist perception that the chiefs and headmen were failing to undertake their duties in their communities was due to the lack of effective control by the state.²³⁴ This unease and disdain by the Native Commissioners towards the chiefs and headmen continued and the powers to adjudicate on disputes arising in their kraals resulted in the enactment of the *Native African Act*. The Act provided the structure for the administration of local Africans under the so-called “responsible government” realised by the settlers in 1923.²³⁵ The Act fashioned the official hierarchy of the traditional offices although it did not cede any judicial powers to chiefs and headmen.²³⁶ They were granted powers equated to constables. In 1937, the colonial administrator’s unease with allowing the judicial authority to remain within the local legal systems led to the enactment of African Courts through the *Native Law and Courts Act*.²³⁷ This enabled African Courts to operate and African locals made use of these courts; rape matters were heard in these courts and were initially adjudicated upon by African elders.

Though there was meddling by the colonial states in the majority of the cases, they were dealt with according to the pre-colonial African understanding of handling conflict.²³⁸ Drawing from the transcripts and studies of the African Courts in Kenya, South Africa and Zimbabwe, the handling of sexual crimes and a few important practices are established. These practices dispel the myths that surrounded pre-colonial African legal systems’ handling of sexual violence. What is evident from the complaints of rape made in these colonial courts is that the Xhosa, Shona, Ndebele, Gusii and Kamba indigenous groups of Africa identified non-consensual sex as wrong. This recognition of rape as wrong was regardless that the victim was a widow or a divorced woman, their virginity and marriageable value were not in question.²³⁹ There was

²³³ Smith 1994:85.

²³⁴ Smith 1994:85.

²³⁵ Smith 1994:88.

²³⁶ Smith 1994:88.

²³⁷ Smith 1994:79.

²³⁸ Shadle 2008:32

²³⁹ Thornberry 2011:419.

recognition in these pre-colonial African legal systems that rape and sexual crimes were wrongs that required significant action to remedy the wrong. The analysis of the matters brought before Ritongo Courts in Kenya attests to the fact that the elders treated sexual violence crimes in their communities as matters of serious consideration. How the Ritongo elders adjudicated upon the matters and imposed heavy fines on cases of rape and elopement is evidence that rape matters brought before them were regarded as crimes of a serious nature.²⁴⁰ The new position granted to African elders by adjudicating in the colonial courts as employees of the colonial administration did not affect how they redressed rape matters. This new status did not interfere with the application of their inherent pre-colonial principle of law and custom in the adjudication processes. Shadle substantiates this by stating that “post-colonial courts in Gusii land decided rape cases in much the same way that their pre-colonial era predecessors had done.”²⁴¹ The 1960s was the watershed that brought about fundamental changes in how sexual crimes in the African communities would be handled in the African colonies. The intention of the British colonial policy was to decree a wholesale reform of pre-colonial practices of punishment; a new reality where the new colonial institutions co-existed with the old.²⁴²

In Zimbabwe, according to a study conducted by Benson and Chadya on rape and sexual violence in the African Courts, established between 1946 and 1956, “Europeans appropriated the power to judge and determine punishment for all criminal offences including rape.”²⁴³ The initial phases of colonial establishment in Zimbabwe had seen the colonial administrator’s acceptance of the continued function of traditional chiefs’ leadership authority in conflict resolution. The 1960s political and social transformations in Southern Rhodesia of colonial rule and the African resistance and adaptation to the changes played an important role. This ignited a move by the colonial state to recognise the unofficial courts that were run by the local elders and their councils.²⁴⁴ The scenario of events in Kenya during the 1960s took place slightly differently from Zimbabwe, in the

²⁴⁰ Shadle’s research on pre-colonial African court records reveals that, “between 1955 and 1963, at least thirty men were found guilty of rape in Ritongo Gesima and Kuja. The fines for the twenty men averaged shs 230 in Gesima and shs 150 in Kuja. Fines in elopement cases during the same years were averaging shs 72 in Gesima and shs 121 in Kuja.” Shadle 1999:39.

²⁴¹ Shadle 2008:32, 40.

²⁴² Thornberry 2011:416.

²⁴³ Benson and Chadya *et al* 2005:588.

²⁴⁴ Benson and Chadya *et al* 2005:588.

recognition and elevation of legal systems administered by chiefs. However, the events that unfolded with redressing sexual violence crimes were similar.²⁴⁵ The Ritongo Courts run by the local elders in Gusiiland, were “phased out and replaced by magistrates trained according to British legal traditions.”²⁴⁶ There was slow gravitation toward rape and sexual violence being adjudicated upon using the colonial understanding of dealing with sexual violence offences.²⁴⁷ However, in Southern Rhodesia, the scenario developed in such a manner that the Southern Rhodesian government through the Robinson Commission recommended the recognition of the unofficial courts. The enquiry had established that unofficial courts continued to outnumber those that had been established by the *Natives Act*.²⁴⁸ The Native Affairs Department was giving increasing support to the Chiefs' Courts.²⁴⁹ The nationalist movement against colonial rule was gaining strength hence the Rhodesian regime hardened its position to African aspirations.²⁵⁰

The convergence of these factors brought more pressure on the chieftaincy than at any other point in the colonial era. The chiefs were trying to establish relevance for themselves at the same time that the government sought their undying loyalty and the supporters of the guerrilla movement were pursuing to involve chiefs in the undertaking to gain independence.²⁵¹ The late 1950s and 1960s, therefore, witnessed an integration that included a substantial strengthening of chiefs at the local level by the state and the building of a national voice for the chiefs. Further to that, chiefs supported the state and a coalition of chiefs and the state of Rhodesia contrary to growing nationalist expectations.²⁵² The enactment of the African Law and Tribal Courts Act in 1969 conferred criminal jurisdiction on a restricted number of courts administered by the chiefs.²⁵³ Since the time of conquest, the colonial administration had struggled to control dispute settlements among the local Africans in Rhodesia. The weakness of the state in

²⁴⁵ Benson and Chadya 2005:598–599.

²⁴⁶ Shadle 2008:33–36.

²⁴⁷ Benson and Chadya 2005:598–599.

²⁴⁸ Smith 1994:79.

²⁴⁹ Smith 1994:79.

²⁵⁰ Smith 1994:79.

²⁵¹ Smith 1994:354.

²⁵² Smith 1994:351.

²⁵³ Smith 1994:78.

that regard meant that there was a failure to suppress the exercise of judicial power by so-called unauthorised persons.²⁵⁴ The colonial administration had capacity challenges in dealing with all African disputes. The result of the colonial encounter with the African Courts in the handling of rape and sexual violence was a slow and steady gravitation towards these crimes being adjudicated upon using the colonial understanding of handling sexual violence offences.²⁵⁵ These courts laid the foundation into which Western concept of law gradually were introduced in the adjudication of matters related to conflict and sexual violence against women. The African or Native Courts established by colonial administrators in the initial phases of the colonial conquest had jurisdiction to hear matters related to sexual violence.²⁵⁶ As colonial rule was entrenched in the colony, the courts' criminal jurisdiction over such matters was transferred to the Western legal systems. The colonial usurpation of pre-colonial African legal systems, modes of punishment and remedying such violations progressively were guided under the auspices of magistrates' courts, which had been established by the colonial administrators in various African countries.²⁵⁷ The setting up of a Western court system structure with the progression of time is further evidence of the influence of colonial encounters in how crimes perpetrated against women's bodies would fall under the auspices of Western judicial systems and law.

3.7 Evaluation of the analysis of three case studies on rape and sexual violence

The predominant common white assumption among the colonial administration in the early years of the colonial takeover was that the pre-colonial African legal systems' approach to dealing with rape and sexual violence was lenient.²⁵⁸ Africans, according to colonial administrators, did not consider rape a serious crime.²⁵⁹ This is seen by their actions in Kenya, for example, in 1926 the legislative commission elevated rape to a capital crime (regardless of the race of the victim or offender).

²⁵⁴ Smith 1994:79.

²⁵⁵ Benson and Chadya 2005:598–599.

²⁵⁶ Shadle 2008:32.

²⁵⁷ Smith 1994:79.

²⁵⁸ Shadle 2008:33.

²⁵⁹ Shadle 2008:33.

The sentiments expressed by Governor Grigg in 1926 on the death penalty noted that “the prevailing native beliefs did not regard the offence of rape as a matter of grave importance in that regard the death penalty could not possibly be imposed on African women.”²⁶⁰ The judiciary in the same vein attached little significance on rape among Africans. The deputy public prosecutor’s statement in 1956 reveals European colonists’ perceptions on African views regarding the crime of rape. He stated that “Mr Justice Connell’s proposition is that in many cases related to rape the wrongdoing is not a matter that is accorded serious consideration particularly those between fellow Africans.”²⁶¹ Without a doubt, one dignitary contended that in comparison to Europeans thought indigenous African communities “attach values that are different on this specific crime...in many of the cases it is viewed as little more than an infringement on the code of behaviour.”²⁶²

This perception was amongst others the fundamental reason why newly established colonial legal systems operating in these countries took precedence in hearing rape and sexual violence offences matters among other crimes that the colonial administration considered very serious offences.²⁶³ The effects of the colonial usurping of pre-colonial African traditional authority in conflict resolution on the minds of the colonised Africans cannot be ignored. This effect influenced Africans in propagating the colonial agenda of entrenching Western legal systems and practices on pre-colonial African practices.²⁶⁴ The changing social and political structures in these colonies brought about by the colonial capitalist system affected the perception of the growing African middle-class Africans.²⁶⁵ The indoctrination of the colonial way of life resulted in the growing middle class of Africans leaning towards accepting the colonial settlers’ legal systems,

²⁶⁰ Telegram, Governor of Kenya to Secretary of State for the Colonies, June 5, 1926, National Archive (UK): CO533/612. Shadle 2008:33.

²⁶¹ 1926, National Archive (UK): CO 533/612. 7. Acting Deputy Public Prosecutor to Registrar, Supreme Court, March 2, 1956, KNA: Jud 4/114. Arthur Phillips, author of an exhaustive 1943 study of Kenya’s African Courts, and later Judicial Advisor, was convinced that Supreme Court rulings in rape cases only breed uncertainty among Africans. “In African mans’ eyes, he wrote, when the Supreme Court heard a rape case the result is apt to be either an unjustified acquittal.” Phillips 1945:266; Shadle 2008:33.

²⁶² Due to the so-called technicalities respected in English courts or an excessively heavy sentence in English Phillips 1945:266. Provincial African Courts Officer Nyanza to African Courts Officer, Nov. 14, 1957, KNA: MAA 2/119. Some administrators, however, took issue with this view. See Ag. DC Kyambu to AG. PC Central, Sep. 9, 1919, KNA: Jud 1/1104. Shadle 2008:33.

²⁶³ Shadle 2008:33.

²⁶⁴ Smith 1994:79–80.

²⁶⁵ Shadle 2008:32.

practices and ideology. This dovetailed with the colonial governments' strategies to dominate and fundamentally change the pre-colonial African legal systems' operational ethos and ideology. This directly affected how sexual violence would be adjudicated upon in African communities.²⁶⁶ As the British colonial administrators entrenched their rule in the African colonies, their legal systems became entrenched and fundamentally replaced those belonging to the local African people. The recruitment by colonial governments of local Africans to serve in their newly established legal systems as officers in the magistrates courts substantiates this fact. The enactment of government policies and directives from Ministries of Justice requesting courts to show no leniency to men convicted of sexual violence matters including rape is testimony to the colonial disruption of the pre-colonial African systems dispute resolutions platforms.²⁶⁷ As explained, the pre-colonial African values in conflict resolution were grounded on fostering a spirit of reconciliation and maintaining harmony.

This value system was replaced by the colonial government's call in 1960 to have serious punishments handed down by magistrates for crimes of rape and sexual assault.²⁶⁸ The expansion of colonisation in Africa sought to supplant pre-colonial systems of punishment, namely in the form of compensation with new penal system.²⁶⁹ In earlier matters, African litigants except the new colonial magisterial officers approved compensation by payment of stock from the wrongdoer to the victim's family as the acceptable penalty.²⁷⁰ By the turn of the twentieth century the crime of rape was understood at the very least to the colonial justice system to demand corporal punishment and a custodial sentence.²⁷¹ The colonial legal system brought about by the colonial government introduced corporal punishment in the form of strokes or lashes, imprisonment and fines were handed down to those convicted of sexual violence crimes contrary to that of pre-colonial African times.²⁷² Therefore, the pre-colonial African systems for legal administration resembled chiefs and their councils, were being shaped

²⁶⁶ Shadle 2008:32.

²⁶⁷ For example in Kenya, a directive in 1968 was given to courts on how to handle sexual crimes such as rape. Shadle 2008:33.

²⁶⁸ Shadle 2008:41.

²⁶⁹ Thornberry 2011:416.

²⁷⁰ Thornberry 2011:416.

²⁷¹ Thornberry 2011:416.

²⁷² Shadle 1999:39–41.

by many influences both direct and indirect brought about by the colonial presence.²⁷³ In Southern Rhodesia, for instance, the Dare system was affected “by the increased overarching management of offences by the police and the colonial courts and by the new possibility of complainants to take civil cases to the Native Commissioners rather than the chiefs.”²⁷⁴ With the passage of time, the overt interpositions on behalf of the colonial administration resulted in these establishments being manipulated to evoke and construct African consent to European overrule.²⁷⁵ In articulating on Zimbabwe’s pre-colonial legal institutions such as the chieftaincy on how they were affected by the colonial encounter, Ncube relays “that during the colonial era chiefs had at length been transformed into agents of colonial rule and naturally became mere functionaries of the despotic state.”²⁷⁶ As a result, during the independence struggle, they were derided and sometimes became targets of the freedom fighters in the struggle for independence.²⁷⁷

This resulted in many of them being categorised as “traitors and appeared on the death lists of the guerrillas.”²⁷⁸ As a result, in the rural areas, Chiefs’ Courts and the District Commissioners had been “rendered non-functional and discredited” and it was inconceivable that a new nationalist administration could retain their judicial functions.²⁷⁹ The colonial interference in the structure and function of the pre-colonial African legal system led to the handling of sexual violence crimes in the sole custody of the Western-established British legal system.²⁸⁰ The elevation of rape and other sexual assault matters as crimes of serious category by the colonial administrators resulted in the inferiorisation of the chief’s councils and the requisite structures of conflict resolution that would adjudicate rape and sexual assault. The status quo in Zimbabwe’s legal system where prosecution is the default approach in handling rape is an imposed colonial preferential imposition.²⁸¹ Accordingly the colonial judicial system regards rape as an unlawful offence committed against the government rather than against an

²⁷³ Smith 1994:80.

²⁷⁴ Smith 1994:80.

²⁷⁵ Smith 1994:80.

²⁷⁶ Ncube 1991:64.

²⁷⁷ Ncube 1991:64.

²⁷⁸ Ncube 1991:64.

²⁷⁹ Ncube 1991:64.

²⁸⁰ Benson and Chadya 2005:608.

²⁸¹ Benson and Chadya 2005:608.

individual, family and community as in pre-colonial African practice.²⁸² Whereas resolution of disputes within the African societies in communal settlements is specific, centring on communal discipline and accountability, the colonial courts tried the sexual offender devoid of considerations on the harm suffered by the victim and the family.²⁸³ The harm done to the victim cascades with the family through the responsibility that fathers have in taking care of the harm imposed on their family members.²⁸⁴ These were the value systems that governed dispute resolution in pre-colonial African societies in their quest to maintain law and order to foster harmony in their communities when conflict erupted. The result of colonial interference in pre-colonial practices of handling rape was that such matters had to be tried in a colonial criminal court. This imposition leads to depriving African traditional leadership of its inherent power to settle disputes in the African way.²⁸⁵

3.8 The implication of colonial interference on pre-colonial legal systems and sexual violence

The shifting of the jurisdiction from pre-colonial African legal systems hearing matters on rape and sexual violence orchestrated by the relevant colonial administrators is a reflection of the colonial state's failure and refusal to appreciate African law and its customs of handling conflict within their societies. It is symbolic of the dominant nature of Western philosophy and systems that began during the colonial encounter with its relics visible in post-colonial African nations. Despite the changes that the colonial legal system imposed on pre-colonial African legal systems there is still popularity in the use of these systems amongst the indigenous African people who are custodians of this heritage. Due to the conflicting of models between existing African methods of doing justice and that of the colonial powers, pre-colonial African legal forums have been regarded as hindrances to progress owing to colonial ideology.²⁸⁶ Omale states that “such criticism is bound up in the traditional modern contradiction in which traditional is often associated with backwardness and modern equated with progressive

²⁸² Benson and Chadya 2005:599.

²⁸³ Benson and Chadya 2005:599.

²⁸⁴ Benson and Chadya 2005:599, 609.

²⁸⁵ Benson and Chadya 2005:599.

²⁸⁶ Omale 2006:43.

initiatives.”²⁸⁷ The development of Western thought only occurs within a modern framework.²⁸⁸ This equation is problematic in that “it is based on very fixed and naive views of tradition because it ignores those traditions are often designed and hence very contemporary in content.”²⁸⁹ Furthermore, it was the expectation of critics of African traditions that as Africa modernised the pre-colonial African traditional legal system model would eventually die out.²⁹⁰ It remains the case, contrary to the above criticism that traditional African modes of dispute resolution in Africa have remained alive and as widespread as ever among its African people and even receiving international attention in the form of restorative justice in the Western world.²⁹¹

The implication of these changes to the pre-colonial legal systems has a bearing on the status of women in Africa in accessing such platforms for redress. The status of women in these pre-colonial African legal platforms has been a focus of criticism. The process is often perceived as “illogical, patriarchal or partial,” with resolutions often based along ethnic, sexual category or other political lines.²⁹² It is alleged that those especially disadvantaged in these pre-colonial African legal processes are women who often remain in situations of powerlessness in this highly masculine society.²⁹³ For instance, a female victim of sexual violence may find her perpetrator making amends to her father or husband without much consideration being given to her.²⁹⁴ Some considerations on how domestic violence and sexual violence are handled in the Western legal system juxtaposed against the African system might provide further understanding of African legal systems’ platforms in relation to the criticism alleged above.

In many jurisdictions in Western societies, police discretion is prohibited when matters of domestic violence including sexual violence are reported.²⁹⁵ The perpetrators must be arrested and that is the prevailing policy. There is virtually no possibility of diverting many serious offences from the formal court system, and sexual violence and domestic

²⁸⁷ Omale 2006:43.

²⁸⁸ Omale 2006:43.

²⁸⁹ Keulder 1998:294.

²⁹⁰ Omale 2006:43.

²⁹¹ Omale 2006:44.

²⁹² Omale 2006:50.

²⁹³ Omale 2006:50.

²⁹⁴ Perrot 2004:1.

²⁹⁵ Omale 2006:51.

violence are categorised as serious.²⁹⁶ In Africa, through legislation, domestic violence and sexual assault are now handled by the state.²⁹⁷ The reporting by a woman to the police regarding these violations may typically result in the police advising her to settle the matter privately.²⁹⁸ Accordingly, Perrot suggests that “were domestic assaults and sexual violence grappled with at the village level, this would signify an improved appreciation of the severity of the conduct, though many Western systems would not perceive it as lessening in magnitude.”²⁹⁹ It is argued that the African practice of dealing with violence against women does not underscore the rights of women as most feminist criminologists might think. It is premised on the African philosophy that no dispute is beyond the realm of resolution and the principle that one cannot take a friend to court and remain friends.³⁰⁰ Omale substantiates the assertion by Perrot and avers that the African philosophy on conflict resolutions is premised on the principle that no situation or wrongdoing is beyond solving, reconciling and no wrongdoer who has disturbed the balance is beyond the ambits of rehabilitation and integration into the family and the greater society.³⁰¹

This again, emphasises the importance of pre-colonial African legal systems as a value system and the African philosophy’s quest for the restoration of broken relationships to promote harmonious living in the family and community at large.³⁰² An important notion that has a bearing on women's status and their ability to acquire African justice is the perception that the traditional legal system silenced women’s voices. Masitera, in that regard, states that pre-colonial African legal systems allowed that all contributions and views of community members present in the meetings were not taken for granted.³⁰³ This would mean that women could contribute to the proceedings.³⁰⁴ Drawing from the practices of pre-colonial African dispute meetings, it was the obligation of kings and their advisors and chiefs to accept all views regardless of gender, by putting them

²⁹⁶ Omale 2006:51.

²⁹⁷ Perrot 2004:2.

²⁹⁸ Perrot 2004:2.

²⁹⁹ Perrot 2004:2.

³⁰⁰ Perrot 2004:2.

³⁰¹ Omale 2006:51.

³⁰² Omale 2006:51.

³⁰³ Masitera 2018:115.

³⁰⁴ Masitera 2018:115.

through critical analysis by all present at the proceedings.³⁰⁵ This aspect in pre-colonial African philosophy in administering justice is evidence that equal participation, recognition and consideration of people's ideas were given due regard.³⁰⁶ The understanding of the cultural and customary dimensions of pre-colonial African legal systems in handling sexual violence is the compass that guides how such cases were handled. The vast differences in the conceptual framework and worldview of pre-colonial African legal philosophy to the colonial legal systems are not a valid justification for its abrogation in conflict resolution. It rather calls for a systematic unearthing of its value system objectively to identify the positive contributions that it can contribute to dispute resolution platforms in conflict-related sexual violence matters.

3.9 Colonialism and violence against women

Violence against women has become a problem in post-colonial Africa through the targeting of their bodies in situations of political conflict. As the focus of the research problem of the study is on avenues of redress for violations against women, it is imperative to analyse how violence became a central feature of African conflicts. The research assumption and African scholars attribute the present conflict in Africa as having its roots in the colonial era. This section explores the role of colonialism in violence and conflict and how this impacts women.

The different aspects of colonial violence have only gradually become foundational for any study of violence.³⁰⁷ This is due to the historical centrality of these colonial processes in shaping contemporary patterns of violence across the world.³⁰⁸ Brute violence alongside representational violence has been articulated as having played a significant role within the context of colonialism.³⁰⁹ The Casement and Putumayo Atrocities Report in 1910–1914 on the colonial enterprises in Africa and South America characterises the nature of colonial interventions in general. The report notes that

³⁰⁵ Masitera 2018:115.

³⁰⁶ Masitera 2018:115.

³⁰⁷ Lokaneeta 2016:1014.

³⁰⁸ Lokaneeta 2016:1014.

³⁰⁹ Lokaneeta 2016:1014.

flogging, scalping, lashing and deliberate starvation of the colonised people occurred.³¹⁰ Franz Fanon elaborates on colonial violence's impact on French colonialism in Algeria and other colonised peoples as leaving deep bodily and psychological scars and thus locates within the violence the origins of revolutionary violence.³¹¹ Guha describes British colonial rule as centred on coercion in the concept of dominance without hegemony.³¹² There were attempts by the colonial states toward dominance with hegemony using persuasion.³¹³ This became apparent in their policy of improvement through education and reforms, but coercion became the primary method of colonial rule in India as well as the rest of the colonised lands.³¹⁴ For the colonial state to have order, they required the use of coercive state apparatus such as the army, penal systems and the police. Guha, in explaining the nature of coercion in colonial states that the issue of coercion combined with the *danda* (stick) became an expression of violence on the part of the colonial master against the subordinated colonised.³¹⁵

In trying to explore the subject of conflict in post-colonial Africa, Mazrui states that “there are ironies, paradoxes and outright contradictions.”³¹⁶ Mazrui elaborates that more people have died because of conflict between black and black than conflict between black and white.³¹⁷ This is explained as a “paradox of racial deficit.”³¹⁸ It is a fact that anti-colonial wars did cost the loss of many lives but post-colonial wars have been ruthless.³¹⁹ The seed of contemporary African conflicts today lies “in the sociological chaos that colonialism created in Africa in the destruction of the old methods of conflict resolution without creating effective substitutes in their place.”³²⁰ Mazrui continues to state that the second paradox of African conflicts today is a result of the colonial imposed borders. “While most conflicts in Africa are partly caused by colonial created

³¹⁰ Roger Casement (1864–1916). A diplomat and Irish independence fighter. The Casement Report was a 1904 document, detailing abuses in the Congo Free State, which was under the private ownership of King Leopold II in Belgium.

³¹¹ Fanon 1961: Fanon 1969:94.

³¹² Guha 1997:24.

³¹³ Guha 1997:24.

³¹⁴ Guha 1997:24.

³¹⁵ Guha 1997:24; Lokaneeta 2016:1015.

³¹⁶ Mazrui 2004:480.

³¹⁷ Mazrui 2004:480.

³¹⁸ Mazrui 2004:480.

³¹⁹ Mazrui 2004:480.

³²⁰ Mazrui 2004:480.

boundaries, those conflicts are not themselves about boundaries.”³²¹ The boundaries have been attributed as catalysts in the conflicts because they were the direct creation of colonial powers to enclose groups with no tradition of common power or common structures of settling disputes. The African governments have added fuel to fire by defending the colonial borders instead of questioning them.³²² There is therefore agreement among African scholars on the instrumental role that colonialism wielded in creating a culture and system of violence in its colonies with resounding effects on current conflicts in Africa presently.

In the colonising agenda, several strategies were employed in creating the colonial states through many layers. Tamale describes the imposition of colonial ideology on the African continent as the “Eurocentric Westphalian world order and was ill suited to the diverse political truths and interests of the continent.”³²³ The massive theft of Africa’s land and resources was a historically important process fundamental to the colonial agenda. The key apparatus used to justify the controlled takeover and the domination that shaped how human races are known today is the concept of race.³²⁴ The ideology justifying the domination defines those populations under their control as different and inferior and is usually expressed in an idiom of race.³²⁵

The first and most thoroughly documented strategies of colonialism were the racialisation and the attendant inferiorisation of Africans and other colonised nations. Racialisation has been referred to as an ongoing process of “marking, categorising and reproducing human differences through the unfair distribution of life chances within detailed geographic space-time continuums.”³²⁶ Gilmore, in describing the colonial ideology of racism describes it as the “death-dealing supplanting of change into pyramids that structured associations within and between the world’s autonomous zones.”³²⁷ In Africa and the Americas for example, the colonial nations were built centrally in racial definitions and management. The colonised states in the colonial

³²¹ Mazrui 2004:480.

³²² Mazrui 2004:480.

³²³ Tamale 2020:4.

³²⁴ Tamale 2020:4.

³²⁵ Gartrell 1984:4.

³²⁶ Isoke 2016:741.

³²⁷ Gilmore 2002:16.

entrenchment, its reproduction and expressions rested upon the imposition of otherness on certain subjects in an ongoing manner to account for, know and control differences.³²⁸ In other words, the racial state can be referred to as a racist state. This means that it is a state that arranges and coordinates racial hierarchy in economic, political, social and cultural domains. It fashions, modifies and reifies the terms of racial expression as well as racist exclusion and subjugation.³²⁹ Isoke comments on the effects of race and racialisation in colonised states. Isoke states that “within the European societies and geographies that have withstood generations of colonial invasion, enslavement and diverse modes of radical apartheid, dissimilarities are replicated through the preservation of fairly rigid social economic and political orders based on skin colour and hereditary culture.”³³⁰ It is reproduced in the invention and enforcement of legal fiction that reify human difference.³³¹

Morrison comments that race was designed to construct artificial boundaries and maintain them against all reason and evidence to the contrary.³³² These boundaries are deadly as they determine who qualifies for personhood and who is rendered subhuman. It stripped off the rights of those compartmentalised in this category culminating in a failure to live freely and to belong within their sovereign political territories.³³³ Tamale notes that colonialism vastly changed the pre-colonial African societies that exist presently.³³⁴ She attributes the African people existing today as an invention of Anglo-Americans' political economic manoeuvre designed to rationalise privilege and domination.³³⁵ The common observable traits of European colonial encounters are seen in the events in history such as the Atlantic slave trade and preferential treatment by the ruling class towards the enslaved Europeans.³³⁶ This included granting civil and social privileges to these classes and denying such to African slaves. It can be said that racial differentiation was a fictitious concept of race and the basis of pseudo-science to justify

³²⁸ Gilmore 2002:16.

³²⁹ Isoke 2016:754.

³³⁰ Isoke 2016:741.

³³¹ Isoke 2016:741.

³³² Morrison 1998:xvi.

³³³ Morrison 1998:xvi.

³³⁴ Tamale 2020:4.

³³⁵ Tamale 2020:4.

³³⁶ Tamale 2020:4.

the double standard treatment.³³⁷ The ideology of the coloniser, on who was considered superior naturally, inherently and biologically was rightfully justified, to rule those they regarded as naturally inferior such as Africans, Asians and other indigenous groups.³³⁸ Race was the basis, therefore, for replacing the relations of superiority and inferiority actuated by domination, thereby reconvening humanity and human relations fictionally along biological lines.³³⁹ Race and the historic processes of racialisation have been linked in the role of perpetuating violence epistemic, physical and structural in the un/gendering of subjects within and across diverse spatial and temporal domains.³⁴⁰

Isoke adds that racialisation contributed to the impossibility and impairment of life to social death and the negation of freedom and humanness.³⁴¹ Myers, in describing race and sexism, states that “the complexity and pervasiveness of racism and sexism go to the very core of the conceptual system and consequent worldview that is characteristic of Western thought and Euro-American culture.”³⁴² Muntu echoes this observation of European culture and relays it to be characterised by separateness, alienation, hostility, competition, cultural and economic aggression characteristics found in the colonial administration.³⁴³ Lambon proposes that the general problems of violence and conflict that colonised nations face cannot be resolved in the absence of understanding European Western culture in its encounter with African and indigenous nations through the colonial conquest.³⁴⁴

To understand the problem of sexual violence in conflicts and its intensity during present times, African and South American authors acknowledge the role that colonialism had in perpetuating a culture of violence in colonised lands.³⁴⁵ In that regard Oyewumi and Lugones have argued that “sexual objectification complemented, pervaded and coloured the colonial project of racialising the so-called people of

³³⁷ Mbembe 2017:20–22.

³³⁸ Lugones 2007:190.

³³⁹ Lugones 2007:190.

³⁴⁰ Isoke 2016:741.

³⁴¹ Isoke 2016:741.

³⁴² Myers 1988:10.

³⁴³ Jahn 1990:23.

³⁴⁴ Lambon 1992:VIII–X.

³⁴⁵ Lugones 2007, 2010; Oyewumi 1997; Tamale 2020; Quijano 2000; Mendoza 2016; Rose 2014.

colonised nations.”³⁴⁶ African scholars empathetically state “that race and racism in the Western colonisation process were integral in the structured process of inferiorising the conquered, which paved the way for violent overthrow, slavery and subjugation as central elements of European global expansion.”³⁴⁷ The production of race was achieved by the application of violence.³⁴⁸ The scholars further contend that “the colonisation process in indigenous lands created spaces through its philosophy and the commission of sexual violence in indigenous communities by undermining their customary values and protective practices against sexual violence.”³⁴⁹

Violence against women in colonised lands was entrenched through the colonial construction of viewing “indigenous women as dirty and impure.”³⁵⁰ This construct resulted in the sexual harassment and rape of Indigenous women by white men.³⁵¹ As race became the first layer in the colony, Rose states that this construct naturally gravitated towards the idea of salvaging and civilising these supposedly inferior groups while mercilessly exploiting their lands, labour and sexuality.³⁵² While it cannot be evaluated how these cultures would have acclimatised in the absence of colonialism, what is evident is that “the advent of colonialism brought about new diseases, alcoholism, violence in its many forms, increased conflict, killings, suicide and family and sexual violence.”³⁵³

Emecheta substantiates this observation from a southeastern Nigerian context, which can be inferred from most African countries that share the same history of colonialism.³⁵⁴ She elaborates on it using a situation in which a Nigerian Igbo woman reminds her husband who was contemplating joining the British colonial army.³⁵⁵ The African woman stated that “it is a curse among her people for a woman to sleep with soldiers, who kill, rape and disgrace women and children, all in the name of the white

³⁴⁶ Oyewumi 1997:121–124; Lugones 2010:743,748; Gqola 2015:50, 52.

³⁴⁷ Mbembe 2017:20–21.

³⁴⁸ Mbembe 2017:17–19.

³⁴⁹ Lugones 2007, 2010; Oyewumi 1997; Tamale 2020; Quijano 2008; Mendoza 2016; Rose 2014.

³⁵⁰ Rose 2014:95.

³⁵¹ Rose 2014:95.

³⁵² Rose 2014:95.

³⁵³ Rose 2014:95.

³⁵⁴ Emecheta 1979:88.

³⁵⁵ Emecheta 1979:88.

man's money.”³⁵⁶ The statement implies that pre-colonial southeastern Nigeria was free of the attendant violence associated with military might introduced during the colonial era. Josiah comments that “this does not however infer that there were no traces of rape and violence during the pre-colonial era in the region, nor does it mean that all the military personnel were rapists.”³⁵⁷ It rather reveals “the height of violence associated with the arms of the colonial state such as the military during the colonial period.”³⁵⁸

The second process of the colonial agenda was the inferiorisation of females. Oyewumi in her analysis of colonialism and its effects on social relations among Africans in colonised lands states that the British colonial administration advanced the superiority of settlers over natives.³⁵⁹ At the same time in one seamlessly interwoven bureaucratic system, the superiority of men over women was established.³⁶⁰ To understand the status of women under colonialism it is important to note that sexism and patriarchy were the founding principles of the colonial system.³⁶¹ Oyewumi states “the processes were entwined and were both entrenched in the colonial classified arrangement.”³⁶² African women were relegated to occupy the lowest position of this colonial hierarchy.”³⁶³

Sexism and patriarchy can be traced back to the slave trade era as the pillars of the capitalist structure. Hooks illustrates this concept of biologisation, which led to the inferiorisation of women.³⁶⁴ The slave trade period placed women at the bottom of the social hierarchy in comparison to black men.³⁶⁵ Women suffered from triple oppression, from white men, white women and black men on the social scale.³⁶⁶ Though the women were at the bottom of the social scale, Fanon stated that black men were dehumanised and inferiorised by white men who removed their status as men, which had significant

³⁵⁶ Emecheta 1979:88.

³⁵⁷ Josiah 2019:88.

³⁵⁸ Josiah 2019:88.

³⁵⁹ Oyewumi 1997:121.

³⁶⁰ Oyèwùmí 1997:121.

³⁶¹ Oyèwùmí 1997:152.

³⁶² Oyewumi 1997:153.

³⁶³ Oyewumi 1997:153.

³⁶⁴ Hooks 1981:30.

³⁶⁵ Hooks 1981:30.

³⁶⁶ Hooks 1981:30.

meaning to their women.³⁶⁷ The constant humiliation of black men in the presence of black women was a stamp of authority to show that black women were the possessions of white men.³⁶⁸ Rose affirms that “colonialism led to the assertion of the biological inferiorisation of women and in some societies the devastation of social relations that led to the relegation of women.”³⁶⁹ Oyewumi concurs with Hooks’ view by stating that colonial processes of imposing hierarchy in the colonial social structures transformed pre-colonial African societies.³⁷⁰ This led to the aligning of pre-colonial African societies with the “Western patriarchal standpoint in which women were systematically designated to be naturally, historically and biologically inferior.”³⁷¹ As a result, women’s sexuality was constructed as the epitome of the wretched.³⁷²

In essence, colonial Victorian sexual morality was imposed onto African societies and used as a benchmark on the degree of their inhumanity and this was deeply foreign to the social orders of the indigenous people in existence at the time.³⁷³ Gqola echoes this thought and relays that “Western patterns were violently enforced in ways that were extremely and holistically unsettling and that turned any deviation from the Western norm into a source of personified racialised, sexualised dishonour for the colonised.”³⁷⁴ In Mbembe’s analysis of this shame, he states “the core of all construction of the native as lesser being closer to the animal than the human.”³⁷⁵ Whatever the actual historical facts may have been in diverse pre-colonies, scholars have noted that central to the colonising and so-called humanising colonial mission was the imposition of the European gender system.³⁷⁶ This imposition had deep seated effects on the relations between colonised women and men and the forces unleashed against indigenous women were amply dangerous to be considered genocidal.³⁷⁷ Oyewumi on the colonial situation cautions that “the race-related and gender oppressions endured by African

³⁶⁷ Fanon 1961:1.

³⁶⁸ Fanon 1961:1.

³⁶⁹ Rose 2014:95.

³⁷⁰ Oyewumi 1997:123.

³⁷¹ Oyewumi 1997:123.

³⁷² Oyewumi 1997:123.

³⁷³ Gqola 2015:40; Oyewumi 1997:123.

³⁷⁴ Gqola 2015:40.

³⁷⁵ Mbembe 2001:1–2.

³⁷⁶ Mendoza 2016:118.

³⁷⁷ Mendoza 2016:118.

women ought not to be seen in terms of additions; they should not be viewed from a lens as though they were piled one on top of the other.”³⁷⁸ Lugones articulates this further and relays that the creation of race was simultaneously a recreation of gender and both are integral to these injustices.³⁷⁹ The structures that supported colonial ideology perpetuated the construction of “the white bourgeois man as a human being par excellence and white women as the human inversion of men.”³⁸⁰ The so-called “civilising” colonial mission relegated indigenous people as nearer to animals thereby dehumanising males and females as not equivalent to being regarded as men and women. The Caucasian women were subservient to Caucasian men but remained empowered than African men and women who were envisaged as debased beings.³⁸¹

Oyěwùmí adds further to Lugones' analysis and writes that “the creation of woman as a category was one of the very first accomplishments of the colonial state.”³⁸² The females in pre-colonial Yoruba society, as in other pre-colonial African societies, had multiple identities such as farmer, hunter, mother, cook and warrior, rolled all into one.³⁸³ This means that “these multiple identities were not gendered and linked to their female anatomy.”³⁸⁴ However, under colonial rule women were downgraded and normalised into identifiable legal, social and biological classifications well-defined by their make-up and relegation to men in all conditions.³⁸⁵ African females were categorised and reduced in a way that fixed them in a particular and visibly delineated prearranged and adopted identity.³⁸⁶

The second phase of the colonial strategy is what can be regarded as the ongoing interpretation of most African societies through a Western conceptual framework, which assumes the existence of women and their social inferiority.³⁸⁷ Western and many African feminist scholars follow this approach. The male-based system introduced by

³⁷⁸ Oyewumi 1997:123.

³⁷⁹ Lugones 2010:744.

³⁸⁰ Lugones 2010:744.

³⁸¹ Lugones 2010:744.

³⁸² Oyěwùmí 1997:124.

³⁸³ Oyěwùmí 1997:14.

³⁸⁴ Oyěwùmí 1997:124.

³⁸⁵ Oyewumi 1997:124.

³⁸⁶ Oyewumi 1997:124.

³⁸⁷ Oyewumi 1997:124.

colonialism in the realm of religion, political, social and education systems was translated to mean that women were consequently precluded from roles and positions they had formerly engaged like governors and merchants.³⁸⁸ It subjugated and derogated women within the categories of colonised or native. This was achieved through the combination of “sexualised and racialised essentialist marking of their bodies.”³⁸⁹ The creation of colonialism’s most dishonoured group namely indigenous women was in a self contradictory manner pivotal to the colonial sexual racial restructuring of all spheres of the African indigenous life.³⁹⁰

The exclusion of females from the newly created colonial public sphere is one key approach in which the construction and subsequent subjection of women were affected.³⁹¹ The formulation of the gendered public sphere she refers to is an attribute and emblem of the colonial process.³⁹² The analysis that Oyemuwi provides on pre-colonial African societies’ structure and operation in relation to the category of women has faced criticism from other African scholars. Feminist scholars Oyowe and Yurkivska have been critical towards the African communitarian concept; they assert that pre-colonial African legal systems of delivering justice are discriminatory and oppressive to women.³⁹³ One of the proposed arguments is that most African philosophers and thus most African communitarians have the male species in mind when they discuss human beings.³⁹⁴ It is further argued that defenders of these concepts of personhood ignore the role that gender plays in this concept of personhood.³⁹⁵ Furthermore, matters related to gender-based violence are consistently and systematically flouted in African philosophy and it is the result of the imaginary gender impartiality. It is further proposed that the

³⁸⁸ Oyěwùmí 1997:128–130.

³⁸⁹ Oyěwùmí 1997:123.

³⁹⁰ Oyewumi 1997:123.

³⁹¹ Oyewumi 1997:123.

³⁹² Oyewumi 1997:154.

³⁹³ Oyowe and Yurkivska 2014; Dube 2000:20; Imbo 1998:68.

³⁹⁴ According to Imbo, the “traditional African value systems so dear to ethnophilosophers undermine the systems in African societies that oppress and exclude women”, Imbo 1998:68; Oluwele contends that “when it relates to philosophy proper, it is evident that the important scholars in the discipline have almost, in an obscure way, avoided feminist issues” Oluwele 1998:96 and Dube asserts that the matter in question which is gender is obvious by its absence whereby women are either subsumed by the “we” of the Africans or absent, Dube 2000:20; Oyowe and Yurkivska 2014:85.

³⁹⁵ Oyowe and Yurkivska 2014:85.

connectedness and sense of community of the collectivist idea of individuality is itself a gendered notion.³⁹⁶

There is a general acceptance by proponents of the above-mentioned criticisms, that Ubuntu ethics understand the person to be essentially relational and normative.³⁹⁷ Furthermore, it is their proposed argument that Ubuntu is always presented in non-gendered manner in that it is to uphold all community adherents equally irrespective of their gender in a web of reciprocal ethical duties connected with the tenets of Ubuntu.³⁹⁸ This non-gendered structure they believe is “an outcome of the African communitarian philosophers detachment from those persons positioned and constructed in a fundamentally historical cultural varied gender stipulated collective realm.”³⁹⁹ This argument recognises a philosophical viewpoint that the value system of a society has a bearing that shapes the outcome of the individuals, but a negation in the same vein of the acknowledgement of the significant role gender renders in the formation of the individual person.⁴⁰⁰

This argument it is proposed is intrinsically conflicting. The argument here is that regardless that all indigenous communal societies were patriarchal and oppressive to women, why should this diminish the equitable values of Ubuntu? The failure of persons in indigenous African communities to uphold or not uphold specific ethical obligations of Ubuntu should not equate Ubuntu as absent of these injunctions or obligations.⁴⁰¹ The understanding of the self in African philosophy as essentially interactive and regulative means that relations with others establish the self. It does not state that these associations are inescapably egalitarian but proposes that they should aspire towards the attainment of these values through recognition of exclusivity and distinction.⁴⁰² Murungi concurs with the above argument and asserts that “it is a misconception to portray pre-colonial African settings as societies in which entitlements or individual

³⁹⁶ Oyowe and Yurkivska 2014:85.

³⁹⁷ Oyowe and Yurkivska 2014:86.

³⁹⁸ Oyowe and Yurkivska 2014:86.

³⁹⁹ Oyowe and Yurkivska 2014:87.

⁴⁰⁰ Oelofsen 2018:49.

⁴⁰¹ Oelofsen 2018:49

⁴⁰² Oelofsen 2018:50.

independence was repressed.”⁴⁰³ By making such an assertion, Murungi says, “it is not a denial of incidents of tyranny in these traditional African societies.”⁴⁰⁴ Rather in every social setting instance of oppression and maltreatment will be present.”⁴⁰⁵ The proposed solution to combating suppressing and ill-treating behaviour should not propagate situations where human society is condensed to a mere collection of persons.⁴⁰⁶ Collectiveness in that manner has the likelihood to fashion individuals who are predisposed to alienation from their human nature.⁴⁰⁷ In place of construing the requirements of commonality as mitigations of the individual’s autonomy, they must be seen as devices for safeguarding the humanity of the person.⁴⁰⁸ Masolo, like Murungi, asserts that communitarianism is beneficial and places burdens on the individual.⁴⁰⁹ Proper consideration of this reveals that they are not as oppressive of the individual as is often believed. There is a tendency to abuse when they are misunderstood in the same manner as the liberties of the individual under liberalism.⁴¹⁰

There is an agreed position by female African philosophers that women and feminist issues have not been adequately presented or explored in most African literature; this in no way means that one cannot revert to the principles of Ubuntu and its subsequent African legal systems in conflict resolution because of these criticisms. Moreover, one cannot categorically assert that these pre-colonial African legal systems do not possess valuable principles that can guide the re-conceptualisation of pre-colonial traditional legal systems in resolving conflict-related sexual violence crimes against women. We can perhaps reveal that whereas it might be the case that womenfolk are not automatically overtly assumed as equal peers in African communities in how their individuality is moulded. Ubuntu principles of law and justice if applied consistently, it will be clear that in Ubuntu philosophy of law women ought to be treated equally in their difference to men.⁴¹¹ It is the bias and agenda of male dominance that prescribes that

⁴⁰³ Murungi 2004:523.

⁴⁰⁴ Murungi 2004:523.

⁴⁰⁵ Murungi 2004:523.

⁴⁰⁶ Murungi 2004:523.

⁴⁰⁷ Murungi 2004:523.

⁴⁰⁸ Murungi 2004:523.

⁴⁰⁹ Masolo 2004:495; Murungi 2004:523.

⁴¹⁰ Masolo 2004:495.

⁴¹¹ Oelofsen 2018:50.

personhood or persons are not inclusive of women in its definition. The Ubuntu law and justice philosophies' fundamental foundations exemplify relations and the value of humanity, and if applied accordingly, it will be evident that no platform is created for the use of violence and all forms of ill-treatment of the other being.⁴¹² The shortcomings found in practice are a mere reflection of the selfish nature of human beings and the misconstruction of the concepts, which results in the unjust treatment of women through abuse. The proposition that human beings are essentially gendered is not to say that there is or ought not to be a social structure between the genders. Gender is "an expression of the idea of otherness and so the difference is a feature of the very human nature of bodily persons."⁴¹³ Even if the accusation towards pre-colonial traditional African societies is that they were oppressive to women, it is not enough to say that gender differences must connote gender inequality.⁴¹⁴ At this juncture, it is important to ask whether equality necessarily means women taking up roles that are masculine or accorded to men. Should equality be seen as doing what men do? As Nzegwu, an African scholar asks, does equality begin with individual autonomy and sameness?⁴¹⁵

Like Oyewumi, Lugones' work has faced significant criticism. Lugones' approach to coloniality is motivated by Oyewumi's work, which captures and proposes that in some indigenous African communities the issue of gender is absent moreso in Yoruba society prior to colonisation. The European settler introduced the binary concept of gender identities.⁴¹⁶ Julieta Paredes, Rita Laura Segato and Silvia Rivera Cusicanqui are scholars that argue in different ways that Lugones' work under-estimates the significance that gender welds in patriarchal traditional societies prior to European imperialism.⁴¹⁷ Mendoza articulates that regardless of their critic of Lugones propositions, "there is consent among scholars that gender classification instituted by Europeans deeply affected associations between men and women in the new colonial

⁴¹² Oelofsen 2018:50.

⁴¹³ Mama 2005:105; Oyowe and Yurkivska 2014:87.

⁴¹⁴ Nzegwu 1994:85.

⁴¹⁵ Nzegwu accordingly states that equality as a concept in a dual-sex system such as in Africa, issues of sexual differences is factored into an understanding of human worth. It is therefore imperative to gain understanding of what counts as equality in such societies where men and women are conceived as social complements and gender identity is defined by social role and responsibilities. Nzegwu 1994:85.

⁴¹⁶ Lugones 2007; Oyewumi 1997:30, 32–33.

⁴¹⁷ Paredes 2008; Segato 2001; Cusicanqui 2004.

setting.”⁴¹⁸ Mendoza argues that “the robustness of Lugones’ analysis is exactly similar to the way that she positions gender with regard to coloniality as destroying rationality.”⁴¹⁹ It is acknowledged that Oyewumi’s analysis of pre-colonial African societies is not representative of the entire African continent due to the different historical and cultural contexts that are varied. However, there is a general acceptance by scholars from South America and Asian societies who have corroborated Oyewumi’s and Lugones’ work by accepting and acknowledging that the gender system operational today is a colonial imposition.⁴²⁰ Segato, in her analysis of Oyewumi’s work, recognises within the Yoruba society that the indigenous sexual category is not easily understood to the one operating presently.⁴²¹ She calls attention to the continuation of differences in gender although they are less oppressive than those prescribed by European colonisation. She somewhat joins Oyewumi in pointing out that colonisation reinforced Yoruba patriarchy.⁴²²

An Asian scholar Wieringa asserts that “many pre-colonial Asian communities were identified by gender diversity that is not structured on dual separation at all.”⁴²³ The static essentialist hierarchical dichotomy of gender as it is known today is a construct of Western colonial modernity and has found its commonplace.⁴²⁴ This affirms Oyewumi’s assertion that pre-colonial indigenous society had gender systems that were constructed differently from Western Europe. It can be deduced that the dehumanisation and inferiorisation of African women brought about by the colonial agenda played a catalyst role in the justification of the use of violence and sexual violations that women experienced and experience presently. Scholars have referred to colonialism as a conquest or conflict towards the colonised fuelled by the notion that such societies were not equals.⁴²⁵ The result of such a worldview was seen in the act of colonial conquests that resulted in the ill-treatment, oppression, use of force and bodily

⁴¹⁸ Mendoza 2016:118.

⁴¹⁹ Mendoza 2016:118.

⁴²⁰ In the scholarly work by Lugones 1998, Allen 1992, Silverblatt 1990 and De Ayala corroborated with Oyewumi in acknowledging that colonial agendas distortion of the gender system of indigenous and colonised nations.

⁴²¹ Segato 2001; Bertolt 2018:

⁴²² Segato 2001; Bertolt 2018:13.

⁴²³ Wieringa 2010:153.

⁴²⁴ Wieringa 2010:153.

⁴²⁵ Hooks1981; Fanon 1961.

violations of the inferior other. The underlying theme of the colonial quest, which views another human being as inferior or unequal in status can be seen in current Africa's current conflicts. In conflicts where sexual violence is a prevalent violation, the same colonial concept can be seen to be directly playing itself out in the post-colony. The nation or identified group subjected to these violations is in most instances seen as unequal, of no value and thus not entitled to the dignity, protection and status of the dominant entitled group. This relegation of the identified group as inferior in status thus warrants their subjection to the violation in the eyes of the one denying equal status to the other.

3.10 Conclusion

This chapter explores pre-colonial African legal systems, philosophies, beliefs and practices that governed conflict resolution on rape and sexual violence. The chapter investigates the effects of colonialism on pre-colonial Africa's philosophy and practices in administering sexual violations arising from internal conflict. The motivation for the analysis responds to the research problem of the lack of responses on sexual violence against women because of the internal conflict in Zimbabwe. Based on the investigation above, the changes that colonialism introduced extended to the modelling of African systems along European thinking, manner and skill. The social norms in relation to whom and what was regarded as important and of the greatest value were thereby significantly altered and tailored after European thinking.⁴²⁶

The pre-colonial African administration of justice was placed under the auspices of the Chief's Court. The pre-colonial regime was discernable by the important role of family networks in mediating between actors involved in the conflict and some instances with the greater community.⁴²⁷ The form of punishment in pre-colonial Africa for rape and sexual violence was compensation to the family and community.⁴²⁸ Compensation payments, reckoned in cattle were the standard punishment for wrongdoings in pre-colonial Zimbabwean, Kenyan and South African indigenous groupings. The reliance on

⁴²⁶ Tamale 2020:6.

⁴²⁷ Thornberry 2011:416.

⁴²⁸ Thornberry 2011:415–416.

compensation in pre-colonial Africa symbolised the harnessing of kinship obligations to the maintenance of public order.⁴²⁹ Punishment for crimes committed in pre-colonial Africa emphasised restoration and a philosophy linked to Ubuntu that emphasises reparation over retaliation.⁴³⁰ The advent of colonial authority to pre-colonial Africa through British legal thought, considered damages fitting for civil cases, the imposition of fines appropriate for lesser offences, and grave offences requiring incarceration, corporal punishment or death.⁴³¹

The categorisation into major and minor crimes and the distinction between civil and criminal crimes was a colonial imposition as such categorisation of crimes was unknown in pre-colonial African legal systems.⁴³² The British colonial administration altered the pre-colonial legal thought where punishment for rape and sexual violence is borne by the individual family and community to a situation where punishment would be borne by the individual, for crimes that were regarded as serious.⁴³³ The colonial interference in the structural function of the pre-colonial African legal system led to the handling of sexual violence crimes in the sole custody of the Western-established British legal system. The colonial officials pursued to institute a model of governing justice that honoured the direct relationship between the individual and state through a blanket restructuring of pre-colonial African practices of punishment.⁴³⁴ The new colonial laws and systems concerning rape and sexual violence conflicted with African sensitivities of women's sensuality and individuality.⁴³⁵

Rape under colonial justice administration was a crime committed against the state rather than an individual, as in civil cases.⁴³⁶ Consequently matters related to sexual violence had to be tried in colonial criminal courts, a scenario that infringed Africans ability to resolve disputes the pre-colonial African way.⁴³⁷ In matters related to rape, it infringed the African criteria of womanhood, consent as well as determine persons

⁴²⁹ Benson and Chadya 2005:599–602.

⁴³⁰ Tutu 1999.

⁴³¹ Thornberry 2011:415–416.

⁴³² Kenyatta 1975:225.

⁴³³ Thornberry 2011:415.

⁴³⁴ Thornberry 2011:415–416.

⁴³⁵ Benson and Chadya 2005:599.

⁴³⁶ Thornberry 2011:415.

⁴³⁷ Benson and Chadya 2005:599.

injured by the offence.⁴³⁸ Whereas conflict resolution in indigenous African settings in communal lands focused on communal discipline and accountability, the colonial courts tried the rape offender without giving due regard to the harm suffered by the offended and her kinsman.⁴³⁹ The legal system under colonial governance presumptions about personal identity undermined pre-colonial African approaches considerations when it relates to sexual violence offences, such as the age of the victim, stage of life and social ties, thus failing to achieve justice that met with African approval.⁴⁴⁰ The difference in the distinction of crimes and their categorisation posed challenges among Africans. To convince Africans to use the colonial legal system, colonial government needed to satisfy anticipations of reparations. The compromise that emerged placed reparations to civil disputes, where customary law was recognised, and petty criminal matters.⁴⁴¹ There was an insistence by British administrators that individuals would be held responsible for crimes that they relegated as “serious crimes”, which included rape and sexual violence.⁴⁴²

On matters that were regarded as “violent, allegations of forcible, non-consensual sex continued to be adjudicated with the customary (civil) court system, where they are labelled seduction or adultery.”⁴⁴³ The colonial encounter in effect imposed new forms of punishment on the pre-existing landscape of punishment, which affected the administration of rape and sexual violence.⁴⁴⁴ The difference between pre-colonial Africans and colonial administrators in their practices of punishment, administration of non-consensual sex and the appropriate punishment influenced the co-existence of the two legal systems and their negotiated relationship with each other.⁴⁴⁵ The expansion of colonial practices of punishment in Africa was moulded by the drive to accommodate African beliefs of compensation as the standard for wrongs including rape.⁴⁴⁶ This is the scenario even though many Africans were frustrated in their efforts to utilise colonial

⁴³⁸ Benson and Chadya 2005:599.

⁴³⁹ Benson and Chadya 2005:599.

⁴⁴⁰ Benson and Chadya 2005:599.

⁴⁴¹ Benson and Chadya 2005:599.

⁴⁴² Thornberry 2011:415; Merry 2002:3.

⁴⁴³ Thornberry 2011:415; Merry 2002:3.

⁴⁴⁴ Spear 2003:3–4; Shadle 2006.

⁴⁴⁵ Benton 2002:3; Thornberry 2011:418.

⁴⁴⁶ Thornberry 2011:418.

legal structures to be awarded damages in the form of reparations.⁴⁴⁷ The changes that colonialism effected on the legal structure of pre-colonial Africa transcended and altered the social relations between communities, leading to the emergence of the “double complex of dependence and inferiority.”⁴⁴⁸ This inferiority has significant implications on women and how they would be perceived in society and their subjection to violence.⁴⁴⁹ The continued perpetuation of the colonial system in post-colonial Africa and its roots can be traced to the European imperial project inspired by patriarchy.⁴⁵⁰ This European cultural view is now part and parcel of African patriarchy. The consequences are a binarisation of gender individualities around the masculine and feminine, a reduction of the role of women in the private sphere.⁴⁵¹ These factors post colony has contributed to the targeting of women in situations of the present conflict.

The allowance by post-colonial governments for the continued existence of colonial systems and knowledge of post-colonialism has contributed to the continued systems that subject women to violence. These factors can be equated to a breeding ground conducive to the potential of perpetuating the objectification and targeting of women along gender lines. Even if we cannot, extend Oyewumi’s analysis to all African societies, it remains that colonisation and the continued existence of systems of colonialism in independent Africa influenced gender characteristics on the continent. These dynamics of inequalities continue today through the continued existence of colonial systems post colony, which are characterised by the domination of patriarchy and the disparity between men and women.⁴⁵²

To understand the problem of sexual violence in conflicts and its intensity during and post colonialism of the pandemic, it is important to understand the role that colonialism play towards conflict and its intersection with gender dimensions. Furthermore, African and South American authors have persistently maintained that colonisation and the existent systems post colony have contributed to the perpetuation of sexual violence in

⁴⁴⁷ Benson and Chadya 2005:600–601.

⁴⁴⁸ Tamale 2020:6.

⁴⁴⁹ Tamale 2020:6; Hooks 1981:30; Oyewumi 1997, 2002; Lugones 2010.

⁴⁵⁰ Bertolt 2018:4–5.

⁴⁵¹ Bhambra 2014:118–119.

⁴⁵² Amadiume 1997:74; Oyewumi 1997:123; Tamale 2020:6; Lugones 2007; Mendoza 2016.

indigenous communities through the undermining of their traditional values and protective practices against sexual violence.⁴⁵³ The recognition of this link between rape, sexual violence and the marginalisation of African knowledge systems on conflict resolution and current conflicts in Africa will be instrumental in finding lucrative avenues for addressing the targeting of women's bodies in political conflicts. Chapter 4 explores Zimbabwe's current adopted approaches to conflict-related sexual violations against women in post-colonial political conflict.

⁴⁵³ Rose 2014:95.

CHAPTER 4

Post-independent responses to sexual violence

4.1 Introduction

The main research problem of the study focuses on sexual violence against women in Zimbabwe's political conflict and the lack of responses in addressing such crimes by the government of Zimbabwe. My argument is that the historical context of colonialism and the nineteenth-century historical developments in Europe together with the current government's actions in enacting laws enshrined in the *Constitution* and subsequent legislation on violence against women have significantly shaped responses in redressing political motivated sexual violence against women in Zimbabwe. To develop the argument the investigation is guided by providing the history of Zimbabwe's post-independence political conflict and the targeting of women's bodies sexually, the historical context of the colonial encounter and the impact of globalisation on Zimbabwe's African customary legal systems of conflict resolution. Chapter 2 explores the differences between the Western and African understanding of the law. I expound on the pre-colonial African conception of law to provide a basic understanding of pre-colonial African knowledge systems for resolving conflict. My expansion aims to reveal specifically how pre-colonial African societies addressed conflict-related sexual violence, which is the focus of the study. I investigate pre-colonial African principles of law in conflict resolution to determine the differences between these two legal systems' conception of law on conflict resolution.

Chapter 3 investigates the influence of colonialism on Zimbabwe by focusing on the pre-colonial legal systems of conflict resolution. I highlight the impact of colonialism on the pre-colonial legal system of Zimbabwe and Africa as a whole that culminated in the legal implantation of Western Europe's law systems. This chapter investigates the current approaches followed to redress sexual violence crimes committed against women in Zimbabwe's ongoing political conflict. I further explore the present operating system and evaluate the dominant system of law in Zimbabwe's legal structures, as this

has a significant bearing on how conflict-related sexual violence against women is addressed. I analyse the present government of Zimbabwe's influence on the legal system post-colonial rule to ascertain how the present operating legal system is faring in relation to sexual violence resulting from the ongoing political conflict. I address Zimbabwe's current legal system, which is based on constitutionalism and raise the question of the enduring influence of colonial legacy in current approaches including the constitutional and national peace building institutions. I proceed to explore the political conflict in Zimbabwe and how sexual violence perpetrated against women has been endemic since independence. This is followed by analysing the legislative framework that has been developed by the government of Zimbabwe in their response to conflict-related sexual violence.

4.2 Political environment of post-colonial Zimbabwe

At the dawn of independence in Zimbabwe, the country pledged through the *Constitution* that the nation would be grounded on principles enshrined in the new legal document. Zimbabwe, like any other African state after independence, was confronted with the special task to build modern uniform structures of statehood, which have been bedevilled by problems that resulted from colonialism.¹ The revolutionary encounters that ensued from Africa's experience with colonialism gave birth to nation-states made up of previously separate ethnic groupings.² At the end of the colonial era, various leaders commonly found among the chieftaincy in the African groupings lost most of their real political and judicial powers to the political leaders of the new nation-states.³ The interaction of colonial Western legal systems with pre-colonial African legal systems changed the normative framework of pre-colonial Africa and its systems of conflict resolution.⁴ The new reality of African states like Zimbabwe based on these historical developments was the severe alteration of the normative behaviours in the social fields of African nations by the colonial encounter.⁵ The situation after independence in post-colonial Zimbabwe resembled socio-economic systems and structures rooted in the

¹ Chabal 1986:13.

² Atiemo 2006:360.

³ Atiemo 2006:360.

⁴ Diala and Kangwa 2019:191.

⁵ Diala and Kangwa 2019:191.

legal, economic, religious and educational legacies of colonial rule.⁶ The existence of state laws is the most visible and powerful legacy of colonialism. State laws were propped and promoted by systematic patterns of power and philosophy.⁷ The historical influences and the interaction of legal orders reveal that the state of Zimbabwe presently is a thorough embodiment of coloniality thriving on the neo-liberalist foundations of its political economy.⁸ According to Quijano, coloniality refers to the philosophy and culture that undergirds the structure of the modern world political economy.⁹ The current legal structure and system of Zimbabwe is an evolution from European laws, most of which are grounded in the finest imperial tradition.¹⁰ The current legal system is a traditional creation with historical breaches.¹¹ The imposed colonial laws parading as state laws occupy formal space with the African customary norms making this arena a place for discourse, coercion and modification.¹² This integration of cultures, technologies and economies on legal pluralism has had profound negative effects on African customary laws.¹³

In Zimbabwe, Roman-Dutch law and English common law form the normative core of the legal system. This claim is projected through its neo-liberal *Constitution* that provides the founding compass of its legal system.¹⁴ A critical examination of the foundations of the prevailing law reveals that Roman-Dutch law and English common law are European culture, law and value system in nature, imposed by the British at varying historical epochs.¹⁵ The end of the colonial enterprise in Zimbabwe in 1980 was accompanied by instituting in the former colonies, constitutions moulded after metropolitan parliamentary systems.¹⁶ Africa's founding constitutions far-reaching with "protections for opposition parties, individual rights, independent courts, and some measures of regional or local autonomy, were crafted as pacts between the retreating

⁶ Diala and Kangwa 2019:191.

⁷ Diala and Kangwa 2019:191.

⁸ Diala and Kangwa 2019:191.

⁹ Quijano and Wallerstein 1992:549.

¹⁰ Diala 2019b:4.

¹¹ Diala 2019b:4.

¹² Diala 2019b:4.

¹³ Diala 2019b:4.

¹⁴ Diala 2019b:4.

¹⁵ Diala 2019b:4.

¹⁶ Diala 2019b:4.

colonial power and pro-independence leaders supposedly laying the foundation for post-colonial constitutionalism.”¹⁷ While this laid the foundational structure for legal systems, it became clear with time to African leaders that the nature of the constitutions was ill-suited for the advancement of their instrumental needs.¹⁸ This reasoning led to the replacement of the independence constitutions across Africa, thereby depicting the initial perception by African leaders that these constitutions were set up to further their imperial masters’ interest in their newly established statehood.¹⁹ In 2013, the late President Robert Mugabe signed into law a new *Constitution* replacing the 1979 *Lancaster House Constitution* that paved way for independent Zimbabwe. The development of these imposed laws guided the intellectual mindset of Africans that regarded Western Europe as the pinnacle of human civilisation and the accepted cultural standard for the rest of the world.²⁰

This universalist context resonates with African scholarly critique on the history of international law. African scholarship has acknowledged that the history of international law together with its structure of international governance is in many respects an end-product of the history of Europe’s imperial expansions.²¹ African scholars have cautioned the dominant position that international human rights law holds the world over. One such scholar, Mutua, states that human rights law is not neutral but is a reflection of the preference for the Western liberal mode of state.²²

Banda asserts that human rights law is criticised as being Eurocentric and construes gender and African states as savages.²³ African women are viewed as victims needing rescuing from barbaric acts under the guise of protection of rights.²⁴ European imperialism properly historicised is in varying degrees responsible for the vast majority of wars fought across the globe in the past five centuries.²⁵ Though some of these wars fought were due to territorial disputes, the majority were a direct result of aggressive

¹⁷ Prempeh 2007:473.

¹⁸ Prempeh 2007:473.

¹⁹ Prempeh 2007:473.

²⁰ Amin 2009:177–178.

²¹ Diala 2019b:5.

²² Mutua 2002:205.

²³ Banda 2005:44.

²⁴ Banda 2005:44.

²⁵ Diala 2019b:5.

commercial activities along with contradictions in the legal principles, which justified these activities. Law attended commerce and the commercial laws of European nations laid the basis for our modern-day international law.²⁶ The brief history of the current structure of Zimbabwe's legal system explains the neo-liberal framing of Zimbabwe's *Constitution* and the explicit subjection of African customary laws to universalist human rights standards. The Universalist human rights standard found in Zimbabwe's Constitution forms the basis of some of the approaches adopted in the avenues of redress for conflict-related sexual violence in Zimbabwe. I proceed below to analyse the political culture of Zimbabwe's post-independent constitutional system of governance.

4.2.1 Post-independent Zimbabwe's political culture

The ideal of democracy in the global political world was a subject in the contemporary world of politics that had become the most credible and valued principle of social organisation.²⁷ According to Matlosa, a close relationship exists between democratic governance and political culture in Africa and particular Zimbabwe.²⁸ He believes that in the democratic debate, the focus has tended to lean towards the election and electoral systems and by default leaving out culture in the discourse.²⁹ Chikerema and Chakunda corroborate this view reiterating that in the democracy discourse more emphasis has been placed on neo-colonialism, elections and electoral systems ignoring the importance of political culture in democratic consolidation.³⁰

Matlosa argues that "the culture of political violence and instability in southern Africa is justifiable in terms of the structural character of the region's political economy and not so much by the level of institutionalisation of governance itself."³¹ The social cohesion of any culture rotates predominantly around the prevalent philosophy of the nation.³² Culture becomes therefore the critical determinant of the past, individuality and purpose

²⁶ Diala 2019b:5.

²⁷ Chikerema and Chakunda 2014:85.

²⁸ Matlosa 2003:85.

²⁹ Matlosa 2003:85.

³⁰ Chikerema and Chakunda 2014:55.

³¹ Matlosa 2003:85.

³² Matlosa 2003:86.

of any given society.³³ Political culture in that regard is the substance and basis of any political system that promotes or undermines governance in any society.³⁴ Gaidzanwa conceives “political culture as a concept that denotes a broad array of norms, values, beliefs, attitudes and traditions that shape systems, institutions and processes of governance.”³⁵ The most powerful influence that configures a political structure is political culture, in that it creates customs and dogmas on human conduct and these norms shape social conduct.³⁶ In scenarios where structures of governance are isolated and inaccessible the end result is that citizens become estranged from them, or if the structures of authority are dictatorial, overbearing and intolerant of dissent it creates hostilities between citizens and their states.³⁷ This type of governance system generates dissent, protests and opposition, which often results in their destabilisation as well as the structures and societies concerned.³⁸

On the other hand a political tradition is an alleged formal point of view that is prevalent among certain groupings which is scrutinised, contextualised and archival.³⁹ Political traditions are not uniform, each culture and system possesses a unique archival framework that is subject to analysis and subsequently used in its grouping.⁴⁰ Consequently encapsulated within the political culture are political ideals and ethics of a polity, thereby forming the psychological and instinctive dimensions of politics.⁴¹ It is developed through phased, varied processes that entrench several activities and sub-processes for the institutionalisation of that culture.⁴² British colonisation shaped Zimbabwe’s political culture from 1893 imposing their preferred mode of governance upon the colonised people inhabiting the territory they named Southern Rhodesia and later Rhodesia.⁴³ The indigenous people pre-colonisation had varied political cultures that depended on the groups; the Ndebele operated under a monarchical system and the

³³ Matlosa 2003:86

³⁴ Chikerema and Chakunda 2014:56.

³⁵ Gaidzanwa 2020:25.

³⁶ Matlosa 2003:98.

³⁷ Gaidzanwa 2020:25.

³⁸ Gaidzanwa 2020:25.

³⁹ Chikerema and Chakunda 2014:57.

⁴⁰ Chikerema and Chakunda 2014:57.

⁴¹ Chikerema and Chakunda 2014:57.

⁴² Chikerema and Chakunda 2014: 57–58.

⁴³ Gaidzanwa 2020:26.

Shona had a less centralised system of chiefs, headmen and headwomen as political authorities.⁴⁴ The Ndebele chiefs were council representatives, the *Imbizo*, which implemented joint authority over issues affecting clans and families and counselled the king.⁴⁵ The overthrow by the colonialists of the Shona and Ndebele indigenous groups spelt the establishment of a new political society and new political culture, subordinating the Shona and Ndebele as subjects of the colonial order.⁴⁶ Zimbabwe's political culture under ZANU PF rule after independence was structured in the shadow of, and reaction to Rhodesia's racial, cultural and political exclusive culture, resembled by "exploitative and separatist ethnic cultural, economic and political institutions and arrangements."⁴⁷ Continuities between Rhodesia and Zimbabwe's politics exist because an overbearing and intolerant state was retained.⁴⁸

As in the colonial state, the Rhodesian Front was the dominant party in post-colonial Zimbabwe, while ZANU PF is the dominant political party presently.⁴⁹ It considers itself the legitimate representative of the majority due to its war credentials against colonial rule.⁵⁰ This is despite the racial, class system, gender and other fragmentations that continued to exist within the populace.⁵¹ At independence, no far-reaching modifications took place in the political culture save for the Africanisation of the administration, and the exodus of whites who feared the black peril of independence shortly after 1980.⁵² An interesting dimension presents itself in the study of the development of political culture in the case of Zimbabwe's post-independence. Zimbabwean scholars, notably Makumbe, Kurebwa, Tarugarira and Mandaza have classified Zimbabwe as a country with a "punitive culture of intolerance" to its founding principle of democracy enshrined in the *Constitution*.⁵³ Former Vice-President of Zimbabwe Joshua Nkomo in his book *The story of my life*, accuses ZANU PF as the root cause of political intolerance and

⁴⁴ Ndlovu-Gatsheni 2009.

⁴⁵ Gaidzanwa 2020:26.

⁴⁶ Gaidzanwa 2020:27.

⁴⁷ Gaidzanwa 2020:33.

⁴⁸ Gaidzanwa 2020:33.

⁴⁹ Ndlovu-Gatsheni 2009.

⁵⁰ Gaidzanwa 2020:33.

⁵¹ Gaidzanwa 2020:33.

⁵² Gaidzanwa 2020:33.

⁵³ Makumbe 2002; Kurebwa 2000; Tarugarira 2010; Chikerema and Chakunda 2014:58; See also Tarugarira 2010.

impunity in Zimbabwean politics.⁵⁴ He further accuses “ZANU PF and former President Mugabe of their abhorrent attitude to divergent political views that led to the party assassinating its political rivals both during and after the liberation struggle.”⁵⁵ Gumede shares a similar view and notes, “many freedom and political movements that heroically opposed autocratic rule of colonialism often behave in a similar manner.”⁵⁶ In the post-colonial political conflicts of Zimbabwe, women have been subjected to rape and sexual violence. A noticeable pattern of violent contests in the state structures has been used in Zimbabwe over the years, particularly over political power.⁵⁷ Rupiya states that Zimbabwe, since independence has been governed through military-style operations.⁵⁸ The military style leadership of post-independent Zimbabwe is the resort to violence by the government of Zimbabwe in dealing with dissenting views on matters of policy.⁵⁹ The ruling party, to defend its prejudiced political interests, has used the Zimbabwe Defence Forces and the Zimbabwe Republic Police for years.⁶⁰

In the 2008 political violence, the primary targets of sexual violence carried out by “youth gangs, war veterans, state security agents and supporters of the ZANU PF” were perceived as Movement for Democratic Change – Tsvangirai (MDC-T) supporters.⁶¹ Accordingly 83 per cent of crimes were committed by ZANU PF youth, while state agents Zimbabwe Republic Police and Zimbabwe National Army and members of the Central Intelligence Organisation committed eighteen per cent.⁶² Consequently, countless human rights violations have been perpetrated in Zimbabwe’s political contestations.⁶³ Zengenene and Susanti aver that this trend in the political space in Zimbabwe is illustrated by Althusser’s repressive state apparatus theory.⁶⁴ Althusser uses the term *apparatus* to illustrate how Western legal political circumstances replicated as an ideology in the service of capitalist exploitation.⁶⁵ This theory applies to

⁵⁴ Nkomo 2001:4.

⁵⁵ Nkomo 2001:4–5. See also Mandaza 2000.

⁵⁶ Makumbe 2002:19–20.

⁵⁷ Rupiya 2005:118.

⁵⁸ Rupiya 2005:118.

⁵⁹ Nyere 2016:102.

⁶⁰ Hodzi 2012:3.

⁶¹ Reeler 2009:31.

⁶² AIDS-Free World 2009:10, 17.

⁶³ AIDS-Free World 2009:10, 17.

⁶⁴ Zengenene and Susanti 2019:85; Althusser 2014:71.

⁶⁵ Zengenene and Susanti 2019:85. Althusser 2014:70, 71, 75–76.

Zimbabwe's political context in that devices of the apparatus such as the army, police and the law itself are used by the government of Zimbabwe to subdue its people in general and women in particular.⁶⁶ As Althusser puts it, "there are political units that are made up of of the nation state and most of its divisions."⁶⁷ These, among others, retain power by compulsion primarily and philosophy at a secondary level."⁶⁸ This description given by Althusser has been the standard practice in which Zimbabwe's political arena has operated since 2000. It has also been present in the political conflict periods in 2002, 2008 and 2019.⁶⁹ Women in Zimbabwe become prey to the armed forces of Zimbabwe namely the Zimbabwe Defence Force. ZRP and the ruling party's political structures who abuse and torture women without any action taken against such acts by the requisite authorities.⁷⁰ Additionally, the government of Zimbabwe used the government administration, the judiciary and prisons as repressive state apparatus.⁷¹

The police force is politicised and partisan to the government of Zimbabwe.⁷² This impartiality demonstrates itself in repressive, politicised policing.⁷³ When judges or magistrates hand down decisions contrary to the government in political cases, the police pay no attention to court orders.⁷⁴ In the prosecution of all offenders, police undermine prosecutors and as a matter of policy in political cases, they arrest opposition activists.⁷⁵ ZANU PF supporters and their associates who commit crimes in the context of political matters go free.⁷⁶ Judiciary appointments and judgments are based on political affiliation to the ruling party; judgments on political matters are often in line with the cause of the government to punish, harass and incarcerate opposition activists.⁷⁷

⁶⁶ Zengenene and Susanti 2019:85; Althussers 1969:14–15.

⁶⁷ Althusser 2014:74–75.

⁶⁸ Althusser 2014:16.

⁶⁹ Manyonganise 2017:116; Zengenene and Susanti 2019:85; Chikerema and Chakunda 2014.

⁷⁰ Zengenene and Susanti 2019:85.

⁷¹ Zengenene and Susanti 2019:85.

⁷² Human Rights Watch 2008:24.

⁷³ Makumbe 2002:93.

⁷⁴ Human Rights Watch 2008:24.

⁷⁵ Makumbe 2002:90; Human Rights Watch 2008:25, 31.

⁷⁶ Makumbe 2002:90; Human Rights Watch 2008:25, 31.

⁷⁷ Human Rights Watch 2008:13–21.

The police, who as a matter of policy in matters of politics only arrest MDC opposition activists, have undermined prosecutors who have sought to prosecute all offenders.⁷⁸ Post-independent Zimbabwe is professed to be egalitarian, but the findings point out that Zimbabwe's political landscape is defined by "a culture where perpetrators of political crimes are exempt from prosecution and effective governance is compromised."⁷⁹ Since political culture is deeply entrenched in the process of political socialisation, the Zimbabwean political system has been tainted by propaganda and politics of partisanship.⁸⁰ The dominant ruling party ZANU PF has monopolised the agents of political socialisation, the family structure, learning institutions, religious entities, mass media, political parties, civil society and the state.⁸¹

4.2.2 Observations on the current political environment of post-independent Zimbabwe

The observations on the status quo of Zimbabwe's political culture are that violence is a cancer that has cascaded down to the common man reaching alarming levels.⁸² The political culture is marked by impunity, brutality, militating negatively on the stability of the country's political environment and general governance.⁸³ One of the primary reasons for this status quo is attributed to the fact that the nationalist government (ZANU and ZAPU) that led Zimbabwe to independence is still the government in power. The mode of governance as a nationalist movement during the war of liberation was not structured according to the democratic principles that they founded the new Zimbabwe on.⁸⁴ Masunungure attests to the view that ZANU PF and ZAPU were not structured democratically, and he states, "authoritarian militarism was the chief and common feature of the liberation struggle ... the movement paid scant attention to issues of freedoms ... and both advocated an implacable internal unity."⁸⁵ "The liberation struggle was fraught with these intense conspiracies, factionalism, divide rule, violence purges

⁷⁸ Human Rights Watch 2008:21–22.24.

⁷⁹ Chikerema and Chakunda 2014:55.

⁸⁰ Chikerema and Chakunda 2014:56.

⁸¹ Chikerema and Chakunda 2014:56–57.

⁸² Chikerema and Chakunda 2014:59.

⁸³ Chikerema and Chakunda 2014:59.

⁸⁴ Chikerema and Chakunda 2014:59.

⁸⁵ Bratton and Masunungure 2011:7.

and assassinations, intimidation and torture and enemies being summarily dealt with.”⁸⁶ This pre-independence political culture in the guerrilla movement was nurtured and translated into a culture that continued in the new Zimbabwe’s political landscape.⁸⁷ To understand why political violence and instability have manifested themselves in present-day Zimbabwe’s political system, the mindset of the power struggle needs elaboration. Ake and Lumumba-Kasongo’s opinion is that “Zimbabwe’s politics is centred principally on state power, hence the fierce contestations over state power and they regard it as an end in itself.”⁸⁸ The seizure of state power is perceived as an end in itself rather than a means to an end.⁸⁹ Political power is seen as surety or license for economic power through accumulation aimed not at viable national progress but self-aggrandisement by the ruling elite.⁹⁰ It can be stated that the combination of political and economic power is meant to ensure the domination and self-reproduction of the political elite and dominant party ZANU PF in politics both within and outside the state sphere.⁹¹

Since independence, the political system in Zimbabwe is centralised through the adoption by ZANU PF of a *de facto* one-party rule and authoritarian political culture.⁹² Ake discerns that “although political autonomy ushered in prolific changes to the state administration, the central elements of the state have replicated much of the character of the colonial state era.”⁹³ It persisted to be tyrannical in scope establishing a welfarist economy presenting itself as an instrument of violence at the same time having a narrow base relying on submission to coercion rather than authority.”⁹⁴ The political nature of ZANU PF towards election periods in Zimbabwe is to win elections at any cost.⁹⁵ During periods of elections throughout Zimbabwe’s history violence erupts and contestations of state power play out.⁹⁶ It is commendable that elections have been held regularly since independence, the quality of elections however has become periods of

⁸⁶ Bratton and Masunungure 2011:7.

⁸⁷ Bratton and Masunungure 2011:7.

⁸⁸ Ake 2000:14; Lumumba-Kasongo 2002:95–96.

⁸⁹ Ake 2000:14.

⁹⁰ Ake 2000:14.

⁹¹ Chikerema and Chakunda 2014:61.

⁹² Chikerema and Chakunda 2014:61.

⁹³ Ake 1996:2.

⁹⁴ Ake 1996:3.

⁹⁵ Chikerema and Chakunda 2014:63.

⁹⁶ Chikerema and Chakunda 2014:63.

critical questioning.⁹⁷ The quality of elections is best defined by the environment that has been characterised by “institutionalised intimidation, fear, violence, rigging, selective application of the law and the inability to accept and concede defeat of the polls.”⁹⁸ The current political impasse in Zimbabwe that began in 2000 is characterised by violent political tension and polarisation.⁹⁹ It is linked with the fierce contestation for state power between the Citizens Coalition for Change¹⁰⁰, MDC formations and ZANU PF.¹⁰¹ This contestation is driven by the privileges that accompany state control for the political elite.¹⁰² The state of decay in the political social and economy in Zimbabwe is linked to the amassing of wealth by the political elites leading to the violent resource-based conflicts.¹⁰³

The political leaders have become specialised in inflicting acts of violence by employing mechanisms of intimidation to extract the resources of the people of Zimbabwe.¹⁰⁴ The contestation over the bounties in Zimbabwe that emanate with the control over state power is fierce and violent; it not only fails to deliver development outcomes, but it also maims, terrorises citizens and kills.¹⁰⁵ This scenario above is the dominant characteristic of the political environment and culture of Zimbabwe since independence.¹⁰⁶ To expound on the issue of whether the political conflict in Zimbabwe

⁹⁷ Chikerema and Chakunda 2014:63.

⁹⁸ Chikerema and Chakunda 2014:63.

⁹⁹ Chikerema and Chakunda 2014:63.

¹⁰⁰ The Citizens Coalition of Zimbabwe is a Zimbabwean political party led by politician Advocate Nelson Chamisa. It was established on 22 January 2022 after a breaking away from the MDC alliance due to political squabbles over party name and fighting within the Movement for Democratic Change led by the late Morgan Tsvangirai, established in 1999. https://en.m.wikipedia.org/wiki/Citizens_Coalition_For_Change. (Accessed 7 July 2022).

¹⁰¹ Chikerema and Chakunda 2014:62.)

¹⁰² Sachikonye 2011b:70.

¹⁰³ Sachikonye 2011b:70.

¹⁰⁴ Sachikonye 2011b:70. According to Sachikonye, “the state elites in the ZNA, police and intelligence were drawn into diamond mining through their exposure to mining in the DRC, where they collaborated with both the Kabila regime and the rebels in looting diamonds. The discovery of diamonds in Marange, east of Zimbabwe in 2006 and ZANU PF effectively encouraged a diamond rush by declaring the field open for anyone to mine. The ZNA, police and Intelligence were well versed in diamonds from the DRC in 1996–1997.”

A Human Rights Watch report in 2009 states that, “in the Marange area in eastern Zimbabwe, the military and security forces mounted Operation Hakudzokwi (Operation No Return), to violently drive out alluvial diamond panners from the Marange diamond fields. In 2016, the Alternative Information and Development Centre described the gruesome mass murders, beatings and maiming that had occurred, and stated that hundreds of panners had been beaten and gunned down by the security forces, both police and military.” The Human Rights Watch report suggested that “the state allowed the military to rotate army brigades in Marange to ensure that they could all benefit from the diamond trade, thus earning their loyalty as well as that of senior ZANU PF personnel.” Gaidzanwa 2020:46–47; Human Rights Watch 2009:3–4, 12, 29–31.

¹⁰⁵ Sachikonye 2011b:70.

¹⁰⁶ Chikerema and Chakunda 2014:62.

places women in situations of vulnerability where they are targeted, I investigate the effects of this political culture of post-independent Zimbabwe on women in periods of conflict below.

4.3 Sexual violence in Zimbabwe – women and political violence

I explore above the nature of the political climate and culture that has engulfed post-independent Zimbabwe. The ruling elite have since 1980, centred the political environment upon control of state power.¹⁰⁷ To maintain control violence, thuggery, impunity, and intolerance to opposing views have been characteristic of elections as the exercise of holding regular elections determines who controls and retains state power.¹⁰⁸ Politically motivated violence is employed targeting citizens indiscriminately that pose a threat to the ruling party ZANU PFs power and control of the resources of the nation. Considering that post-independent Zimbabwe's political conflict has resulted in the violence and targeting of those perceived by the state as enemies;¹⁰⁹ I explore below how this political culture of violence in Zimbabwe has affected women. I further explore the nature of the violations that women in Zimbabwe are subjected to during conflict periods. The important aspect that this work draws from is the exposition of how the political governments ignore what women endure during the political conflict because they are complicit in the violence.

4.3.1 Sexual violence and women in Zimbabwe's political conflict

In Zimbabwe's post-independent political context, examples abound in this historical epoch where the sexual targeting of women's bodies has been a strategy employed in the political realm.¹¹⁰ The prevalence of sexual violence in Zimbabwe is not a new phenomenon in its political history. While sexual violence is prevalent in the current political conflict that began in 2000, there are reports of political motivated sexual violence occurring during the liberation war of the 1970s.¹¹¹ The *Gukurahundi*

¹⁰⁷ Chikerema and Chakunda 2014:59.

¹⁰⁸ Chikerema and Chakunda 2014:59.

¹⁰⁹ Makumbe 2002:90.

¹¹⁰ Hodzi 2012:2–3; Bardall *et al.* 2018:3.

¹¹¹ Research and Advocacy Unit 2011b:3.

massacres in the early 1980s, the election periods since 2000 with unprecedented political violence and the January 2019 shutdown are such examples.¹¹² There is an acknowledgement by government officials, namely Chung and Muchinguri, that rape during the liberation war, was used to weaken and punish women during the war and other political conflicts limiting the participation of women in the political realm as either candidates or voters.¹¹³ The current Defence Minister, Oppah Muchinguri¹¹⁴ and former Minister of Education Fay Chung are some of the most senior government officials that have openly attested to the prevalence of politically motivated rape as far back as the liberation war.¹¹⁵

Several organisations, locally and international have carried out research on politically motivated violence against women since 2000. According to several civil society sources, rape has been used as a political weapon in Zimbabwe.¹¹⁶ The prevalence of violence in Zimbabwe is rife during election times. In 2010, the Research and Advocacy Unit reported that “politically motivated violence, including rape, has primarily occurred during elections.”¹¹⁷ The report findings by the Research and Advocacy Unit were supported by a human rights bulletin titled *Gender based violence in Zimbabwe*, which alludes that women experience violence in the form of rape sexual abuse and concubinage during elections in Zimbabwe.¹¹⁸ The report outlined incidences of politically motivated violence in Zimbabwe from 2001–2008.¹¹⁹ The Zimbabwe Human Rights NGO Forum has been providing comprehensive data on human rights violations through their politically motivated reports from 2001–2008 and continues to do so presently.¹²⁰ In 2006, the Zimbabwe Human Rights NGO Forum published a report on

¹¹² Report from Zimbabwe Human rights Ngo Forum states that “from 14 January to 5 February 2019, cases of extra judicial killings, rape assault, arbitrary arrests, destruction of property and other human rights violations were reported across the country.” Zimbabwe Human Rights NGO Report: On the dark days of darkness in Zimbabwe. An updated report on the Human Rights Violations Committed between 14 January 2019 to 5 February 2019. Hodzi 2012:1; Zimbabwe Human Rights NGO Forum 2019c:6–8.

¹¹³ Chung and Kaarsholm 2006:200. Chung and Kaarsholm 2006:125–126; Zimbabwe Human Rights NGO Forum 2019c:8.

¹¹⁴ <https://www.pazimbabwe.com/politics-24991-video-oppah-muchinguri-reveals-raped.html>

¹¹⁵ Chung and Kaarsholm 2006:105. <https://www.theindependent.co.zw/2016/08/26/sexual-abuse-untold-story-liberation-war/>

¹¹⁶ Research and Advocacy Unit 2011b:3; Institute for Democratic Alternatives in South Africa, the International Center for Transitional Justice and the Research and Advocacy Unit 2010:6.

¹¹⁷ Research and Advocacy Unit 2011a:3, 9.

¹¹⁸ Research and Advocacy Unit and Zimbabwe Association of Doctors for Human Rights, No hiding place 2010:13.

¹¹⁹ Research and Advocacy Unit and Zimbabwe Association of Doctors for Human Rights, No hiding place 2010:13.

¹²⁰ Reeler 2009:11; Zimbabwe Human Rights NGO Forum 2019d.

gender-based violence and opposition politics in Zimbabwe. The report confirmed the systematic targeting of women and the prevalence of sexual violence during conflict in Zimbabwe.¹²¹ In 2009, AIDS-Free World released a report titled *Electing to Rape: Sexual Terror in Mugabe's Zimbabwe*. The findings of the report exposed that since 2000, women in Zimbabwe have suffered sexual violence during conflict situations.¹²²

The literature on political violence in Zimbabwe before 2000 has been acknowledged to be lacking a gendered perspective.¹²³ According to Manyonganise, this finding in the reporting of political violence in Zimbabwe dates back to the pre-colonial era. This underscores an important perspective of Zimbabwe's societal lack of commitment to issues that relate to and affect women.¹²⁴ In the political sphere, matters related to violations against women related to the political conflict, have received an eerie silence and this has cascaded into the community sphere.¹²⁵ Every time another wave of violence emerges, it is met by unsympathetic silence from the regime and political leaders, as they are the ones that carry out such dreadful acts.¹²⁶ This often has a significant implication on the adopted approaches in addressing conflict-related sexual violence. In most instances, this silence in the political sphere translates into silence in the legal sphere in redressing conflict-related sexual violence, a classic scenario in Zimbabwe's political conflict. This lack of accountability in holding perpetrators of political violence is evidence of the eerie silence by the state of Zimbabwe and its subsequent legal apparatus that ought to hold all accountable for crimes including those of a sexual nature.¹²⁷

However, there have been progressive shifts in the mindset of the government of Zimbabwe on the use of sexual violence in the political realm since 2012. The then-Minister of Justice stated publicly that survivors of political rape should present themselves to the ministry and have their cases heard. He promised to prosecute, but nothing to date has been done, as women did not trust the system enough to report

¹²¹ Zimbabwe Human Rights NGO Forum 2006c:9–11.

¹²² AIDS-Free World 2009:10–11.

¹²³ Research and Advocacy Unit 2011b:3–4.

¹²⁴ Manyonganise 2017:114.

¹²⁵ Zengenene and Susanti 2019:87.

¹²⁶ Zengenene and Susanti 2019:87.

¹²⁷ Zengenene and Susanti 2019:87. Amnesty International 1993:8.

their cases after his assurance.¹²⁸ In 2018, Zimbabwean government officials acknowledged the use of sexual violence in politics.¹²⁹ The challenge that this acknowledgement faces is that there has been very little action against it by the government of Zimbabwe. In 2019, women reported being violated by state agents during a national stay-away.¹³⁰ The research and interventions of NGOs and civil society organisations have advocated the plight of women and the violations they endure during Zimbabwe's political conflict both before and after independence; more so from 2000 until recently.¹³¹

In the current political conflict, the same findings were substantiated as reasons that subjected women in Zimbabwe to sexual violence during the political conflict periods. AIDS-Free World findings reported "countless women during the 2008 elections were coerced to witness their husbands, children, and parents murdered or tortured before they were raped."¹³² The sexual violence targeted at women, was intended "to terrorise, shame and penalise them, and by extension their families, for their political association."¹³³ The defining moment in the political scene of Zimbabwe was in 2008. The political crisis that began in 2000 progressively deteriorated reaching unprecedented levels of political violence in 2008.¹³⁴ Not only did the country record the highest inflation in the history of the world, but experienced a total collapse of the economy.¹³⁵ Faced with the general mass disgruntlement, socio-political resistance and intense prospects of losing the 2008 harmonised elections ZANU PF resorted to sexual violence to re-establish its political dominance.¹³⁶ Sexual violence and rape were most reported in the 2008 election period; though in the previous elections held from 2000

¹²⁸ Zimbabwe Human Rights NGO Forum 2019a:20.

¹²⁹ Commissioner General Matanga was speaking at the Women's Coalition of Zimbabwe launch of a project on violence against women in elections VAWIE in partnership with Zimbabwe Peace Project, Zimbabwe Women Lawyers Association with support from International Federation of Electoral Systems and the Canadian Embassy. This launch was in July 2018. Kwenda 2013.

¹³⁰ Ndlovu-Gatsheni and Ruhanya 2020:393–394.

¹³¹ Zimbabwe Human Rights NGO Forum 2019b:8, 23.

¹³² AIDS-Free World 2009:12.

¹³³ AIDS-Free World 2009:13.

¹³⁴ Nyere 2016:100.

¹³⁵ Nyere 2016:100–101.

¹³⁶ In the general election held in March 2008 and again June 2008 disputed runoff presidential elections; violence was unleashed by the ZANU PF led government upon its citizens in an attempt to frustrate voters that the ZANU PF led government believed were favouring the main opposing party. There was also a violent state-sponsored operation that was codenamed '*operation mavhoterapapi*?' simply translated to mean 'who did you vote for.' Hodzi 2012:2; Nyere 2016:100; Ndlovu-Gatsheni 2013:168.

state led violence had been rife and serious.¹³⁷ In 2008, sexual violence was mostly perpetrated by state-sponsored agents such as youth militia and war veterans¹³⁸ but in recent reports on violence in 2018 and 2019, the military is increasingly mentioned.¹³⁹ The 2008 state orchestrated violence and brutality received international attention as rape and sexual violations against women were showing a systematic pattern at record levels countrywide.¹⁴⁰ The prevalence of politically motivated sexual violence in post independent Zimbabwe is ascribed to opposing ideologies of several people within the political parties over the years.¹⁴¹ These differences are attributed to the formation of political parties before independent Zimbabwe, namely ZANU and ZAPU and their military wings ZANLA and ZIPRA.¹⁴² They were the agents of the views and ambitions of the nation of Zimbabwe.¹⁴³ The ideological differences and animosity that existed between the Zimbabwean nationalists during the liberation war continued in independent Zimbabwe.¹⁴⁴

This is evidenced by the political conflict in the early years of Zimbabwe's independence where scores of women were subjected to heinous forms of sexual violence during this *Gukurahundi* conflict.¹⁴⁵ In recent times, the current political impasse between ZANU PF and the opposition parties MDC and Citizens Coalition for Change attests to the continuation of intolerance of ideological differences.¹⁴⁶ It is further manifested in the sexual targeting of women in Zimbabwe during election periods and situations of protests by citizens as in the January 2019 shutdown.¹⁴⁷ Reports during this period are indicative of the fact that state agents and the ZNA sexually abused women during the 2019 national shutdown.¹⁴⁸ The targeting of women as victims of state approved violence stems from the economic and political chaos in the form of overt support for

¹³⁷ Nyere 2016:101.

¹³⁸ Hodzi 2012:3.

¹³⁹ Zimbabwe Human Rights NGO Forum 2019b:20–23.

¹⁴⁰ Nyere 2016:100–101.

¹⁴¹ Nyere 2016:99.

¹⁴² Nyere 2016:99.

¹⁴³ Nyere 2016:99.

¹⁴⁴ Nyere 2016:99.

¹⁴⁵ CCJPZ 1997:14.

¹⁴⁶ CCJPZ 1997:14.

¹⁴⁷ CCJPZ 1997:14; Nyere 2016:99.

¹⁴⁸ A military operation followed conducted under the guise of an internet shutdown in which many reports of sexual violence, beatings, torture and plunder were carried out against innocent civilians. Ndlovu-Gatsheni and Ruhanya 2020:393.

ZANU PF that permeates all facets of life.¹⁴⁹ The effect of this political structure of post-independent Zimbabwe is illustrated by the continuous political culture where women have been the victims of politically motivated sexual violence for years.¹⁵⁰ To such a great extent that women have lost their lives in these political periods of violence.¹⁵¹ Politically motivated sexual violations against women, harassment, torture and displacements have become characteristics of the Zimbabwean political landscape.¹⁵² The persistent occurrence of political violence in Zimbabwe should however not come as a surprise. Sachikonye posits that violence has been a decisive instrument in the attainment of independence; it, therefore, remains the “cancer that corrodes the country’s political culture.”¹⁵³

Many Zimbabweans hoped that the removal of Mugabe by the ‘2017 coup’ would change the political culture. The removal of Mugabe however did not usher in a new dispensation as originally stated by Mnangagwa. The political culture of intolerance, violence and impunity stated above in the 2019 violence incidences substantiates this fact.¹⁵⁴ Ndlovu-Gatsheni’s analysis of the transition from Mugabe to Mnangagwa states “throughout Mnangagwa’s rule, the government has continued to selectively target critics, labour, human rights and political activists with intimidation, rape, harassment, abduction, arrests, detention, torture and killings. In many instances, it has relied on pseudo-elements in the security sector or party youth wings to carry out these heinous crimes.”¹⁵⁵ Impunity remains a grave issue in dealing with politically motivated violence and those that are gendered in nature, which women experience during political conflict situations in Zimbabwe¹⁵⁶. Violence is and always has been the very essence of politics in Zimbabwe.¹⁵⁷ In this way, it has led to the aggravation of violence against women in Zimbabwe. In relation to the perpetuation of violence, Benyera and Nyere argue that in

¹⁴⁹ Zengenene and Susanti 2019:89.

¹⁵⁰ Zengenene and Susanti 2019:85.

¹⁵¹ Zengenene and Susanti 2019:85.

¹⁵² Zengenene and Susanti 2019:84.

¹⁵³ Sachikonye 2011b:71–73.

¹⁵⁴ Ndlovu-Gatsheni and Ruhanya 2020:394.

¹⁵⁵ Ndlovu-Gatsheni and Ruhanya 2020:394.

¹⁵⁶ Zengenene and Susanti 2019:84.

¹⁵⁷ Zengenene and Susanti 2019:84.

the analysis of violence in Zimbabwe, violence must not be seen as episodic but rather as a continuum.¹⁵⁸

4.4 Current approaches to politically motivated violence against women in post-independent Zimbabwe

I unravel above the history and culture of the political conflict in Zimbabwe to ascertain whether there is a prevalence of sexual violence perpetrated against women during conflict situations since independence. The investigation highlights that women in Zimbabwe since it attained independence, have been targeted sexually during political conflicts, primarily during election periods.¹⁵⁹ Sexual violence against women during the political conflict in Zimbabwe has been used as a strategy to instil fear to dissuade women from supporting and participating in opposition politics.¹⁶⁰ State-sponsored agents, ZANU PF supporters, youth militias and the military have perpetrated the violations that women endure during political events such as elections.¹⁶¹

This section aims to explore the current approaches adopted by Zimbabwe's legal system in responding to politically motivated sexual violations against women. This investigation is important as the study evaluates whether crimes of a sexual nature committed against women in Zimbabwe during the conflict have been accorded the necessary redress. To evaluate the efficacy of the responses it is necessary to look into the legal system of Zimbabwe and enacted policies relating to justice and accountability for sexual violence that affected women from political conflict. My argument is that the *Constitution* and the subsequent legislative framework and policies on sexual violence developed under the auspices of the Mugabe regime in post-independent Zimbabwe, are lacking in appropriating viable responses to politically motivated sexual violence against women in Zimbabwe. In developing the argument, I explore the enacted laws, policies, political agreements and national institutions of peacebuilding that have been adopted in dealing with sexual violence in times of conflict in Zimbabwe. I begin with an overview of Zimbabwe's sexual offence legal framework.

¹⁵⁸ Benyera and Nyere 2015:6522.

¹⁵⁹ AIDS-Free World 2009:1; Research and Advocacy Unit 2011a:13.

¹⁶⁰ Sachikonye 2011b:81–84.

¹⁶¹ Hodzi 2012:3

4.4.1 Overview of Zimbabwe's sexual offences legal framework – The Constitution

Having assumed a constitution mediated between the colonial and guerrilla forces at the onset of independence (the *Lancaster House Constitution* in 1979),¹⁶² its successor, the 2013 *Constitution* was authored at the start of possibly the fiercest elections in post independent Zimbabwe.¹⁶³ The constitutional concessions agreed at Lancaster House in 1979 were the outcome of home-based, regional and diplomatic pressures that set into motion the post colonial state's political system.¹⁶⁴ Raftopolous notes that "the coming into power by ZANU PF as is the case of other post-colonial parties, rendering the constitution to concentrate power in the Presidency and reconstruct power relations between the state and opposition parties in the states' favour."¹⁶⁵

The diverse voices of opposition politics in post-colonial Zimbabwe established their existence through the dialogue on constitutionalism.¹⁶⁶ This prompted the emergence of a National Constitutional Assembly (NCA) in the 1990s that symbolised the unification of criticism of the state under the ZANU PF around matters of national building, political and economic adjustment shaped by voices such as churches, emerging human rights organisations and the labour movement.¹⁶⁷ Between 1990 and the 2000s, the constitutional movement gained momentum and the contestation from 2009–2013 between political parties to the 2008 Global Political Agreement (GPA) was the struggle for constitutional reform.¹⁶⁸ Preceding the drafting of the 2013 *Constitution*, there was a constitutional reform process in 1999 that failed to pass during the 2000 referendum.¹⁶⁹

¹⁶² Magaisa 2011:51.

¹⁶³ Preceding the drafting of the 2013 *Constitution*, there was a constitutional reform process 1999 that failed to pass during the 2000 referendum. Coltart 2014:31.

¹⁶⁴ Raftopolous 2013:972.

¹⁶⁵ Raftopolous 2013:972.

¹⁶⁶ Raftopolous 2013:972.

¹⁶⁷ Raftopolous 2013:972–973.

¹⁶⁸ The 2008 election violence prompted the SADC and its appointed mediator, Thabo Mbeki to escalate efforts to find a solution. This led to the signing of the Global Political Agreement (GPA) by the two MDC formations and ZANU PF on 15 September 2008 that formed the Government of National Unity (GNU). Raftopolous and Mlambo 2009:9; Raftopolous 2013:973.

¹⁶⁹ In February 2000 a referendum was held whether to accept the government's proposed changes to the *Constitution*, following the unprecedented defeat which was met with surprise and alarm by the ruling ZANU PF. The government of Zimbabwe was unaware of the extent to which Zimbabwean had grown dissatisfied with its many years of misrule and persistent human rights violations. In response to this defeat, the political climate changed significantly. International Crisis Group 2001 report states that, "ZANU PF blamed the urban voters overwhelming

The NCA, civic society organisations and other stakeholders conducted a national campaign for the rejection of the 2000 draft *Constitution*.¹⁷⁰ The unprecedented violence since independence of the 2008 elections precipitated the need to draft a new constitution. The major impediment with the signing of the GPA in 2008 between the main political parties was constitutional reform.¹⁷¹ The NCA and women's groups identified several challenges in the former *Constitution* that necessitated the drafting of a new constitution for Zimbabwe with stipulated rights for women. The previous constitution contained a declaration of rights that was not as extensive as the current 2013 Constitution declaration of rights, it did not recognise the rights pertaining to freedom from all forms of violence.¹⁷²

The *Bill of Rights* in the *former Constitution* was limited in that it failed to exhaust women's needs and lacked conceptual clarity on women's rights.¹⁷³ Dziva opinions that, "the provisions of the *Lancaster House Constitution* were retrogressive regarding best practices in gender equality, allowing discrimination in areas where personal law was applicable."¹⁷⁴ The former *Constitution* was weak in prejudicing women's enjoyment of rights in critical areas that related to socio-economic and political development, absence of violence, access to land, education and health.¹⁷⁵ By enacting a new constitution in 2013, Zimbabwe incorporated the human rights-based approach and liberal women's rights.¹⁷⁶ Women's rights advocates and leaders celebrated Zimbabwe's 2013 *Constitution* because it outlines equality and non-discrimination between all in society, and stipulates various declarations related to women's legal and political rights.¹⁷⁷ It

support for the MDC and white minority for the constitutional referendum defeat." International Crisis Group 2001:3–4.; Amnesty International 2003:2.

¹⁷⁰ The NCA and civil society "developed into a voice for the nation in opposition to the proposed changes by the government of Zimbabwe in the draft *Constitution*. The No vote campaign to the draft *Constitution* became the voice of no confidence to the political culture under the auspices of ZANU PF." Holmgren and Selerud 2005:18.

¹⁷¹ Coltart 2014:3.

¹⁷² Coltart 2014:31.

¹⁷³ Dziva 2018:21.

¹⁷⁴ Dziva 2018:21.

¹⁷⁵ Dziva 2018:21.

¹⁷⁶ Dziva 2018:22.

¹⁷⁷ Zimbabwe's Ministry of Youth Development, Gender and Employment Creation 2004; Zimbabwe has also has passed the following policies and legislation to protect women's rights: The National Gender Policy (2004), to mainstream gender in all sectors and promote equal advancement of women and men; The *Domestic Violence Act* (2006); The Gender Implementation Strategy 2007–2010; The First Schedule of the Public Service Regulations (2000), prohibiting sexual harassment; Amendments to the *Labour Act* (Act 7 in 2002 and Act 17 in 2005) prohibiting the demand of sexual favours in return for recruitment for employment, promotion or any other related activities.;

emphasises legal, policy and institutional reforms to strengthen equality between women and men in society and freedom from violence.¹⁷⁸ The signing into law by former President Mugabe ushered into law for the first time in its national history the supreme law of the land that enshrined a right to freedom from all forms of violence from both public and private actors.¹⁷⁹ The signing of the *Constitution* into law by Mugabe at independence and in 2013 was a pledge and acceptance that the new Zimbabwe would be governed under the principles of constitutionalism and constitutionality. Constitutionalism as a concept pertains to a system of governance based on a constitution, where in a government demonstrates adherence to the principles of the constitution.¹⁸⁰ Constitutionality on the other hand is the state conforming to the dictates of the founding constitution.¹⁸¹ By enacting a constitution, it means that all laws of that state derive their validity from the constitution.¹⁸² The notion of constitutionality is perceived to be a system of checks and balances for the law or governmental actions to operate according to the dictates of the law.¹⁸³ Thus, the emphasis on constitutionality is on formal validity.¹⁸⁴

As a principle, constitutionalism restrains errant governments that are prone to abuse power by regarding law as limitless or simply disregarding imposed limits under the pretext of pursuing a common or greater good.¹⁸⁵ It ensures that governmental powers are curtailed beyond principle, and in practice.¹⁸⁶ It is important to note at this point that the human rights-centred approach reflected in the Declaration of Rights echoes and reflects the fundamental constitutional and human rights themes that symbolise Zimbabwe's political and legal history since colonial times.¹⁸⁷ The concerns that necessitated the inclusion of this approach are the inequities and oppression created by

Committee on the Elimination of Discrimination against women 2012:2. 1 February–2 March 2012. Bardall *et al.* 2018:3.

¹⁷⁸ Dziva 2018:22.

¹⁷⁹ Coltart 2014:31.

¹⁸⁰ Mzikamanda 2011:4.

¹⁸¹ Mzikamanda 2011:3.

¹⁸² Mzikamanda 2011:3.

¹⁸³ Mzikamanda 2011:3.

¹⁸⁴ Mzikamanda 2011:3.

¹⁸⁵ Mzikamanda 2011:4.

¹⁸⁶ Mzikamanda 2011:4.

¹⁸⁷ Tsabora n.d.

a patriarchal society and the need for their redress.¹⁸⁸ There was a further concern to embrace international human rights standards from international human rights instruments and the need to create an open, equal, just and democratic society.¹⁸⁹ These human rights objectives embraced in the *Constitution of Zimbabwe* are a direct outcome of various dynamics that configure Zimbabwean socio-political and cultural history.¹⁹⁰ Such dynamics include colonial racial and economic oppression, sexism, inequalities prompted by patriarchy and political repression in general.¹⁹¹ One of the central goals of Zimbabwe's constitutionalism is repairing the breach between former injustices and present realities in the lives of women in a liberated modern Zimbabwe.¹⁹² To attain this it entails a shift in the mindset, attitudes and behaviours in addition to the treatment of women in all spheres whether public or private.¹⁹³ This further entails fostering transformation in the laws that oppress and dominate women subjecting them to vulnerabilities that perpetuate inequalities.¹⁹⁴

In a constitutional state like Zimbabwe, constitutionalism is critical in placing laws that can generate opportunities for both men and women built on standards and principles of basic rights, self-worth and egalitarianism.¹⁹⁵ By pledging to be bound by the dictates of constitutionalism, the state of Zimbabwe was enabling women to have a voice and access to justice and ensuring the adoption of appropriate measures to redress violations against women that arise within the state.¹⁹⁶ By enacting a new constitution in 2013, Zimbabwe incorporated the human rights-based approach and liberal women's rights¹⁹⁷ which emphasise legal, policy and institutional reforms to strengthen equality between women and men in society.¹⁹⁸ In addition, Zimbabwe's constitutional reform implemented international and national human rights standards obliging signatory states to foster a culture that promotes gender parity and equal opportunity.¹⁹⁹ In

¹⁸⁸ Tsabora n.d.

¹⁸⁹ Tsabora n.d.

¹⁹⁰ Tsabora n.d.

¹⁹¹ Tsabora n.d.

¹⁹² Machakania *et al.* 2016.

¹⁹³ Machakania *et al.* 2016.

¹⁹⁴ Machakania *et al.* 2016.

¹⁹⁵ Machakania *et al.* 2016.

¹⁹⁶ Machakania *et al.* 2016.

¹⁹⁷ Dziva 2018:4.

¹⁹⁸ Dziva 2018:22.

¹⁹⁹ Dziva 2018:4.

acknowledging that women in Zimbabwe are often victims of social and economic injustice, the state of Zimbabwe regarded it as imperative to develop legal frameworks and policies to ensure the protection of women. Constitutional provisions that have been promulgated in various subsidiary legislation are explored below.

4.4.2 Constitutional provisions on the rights of women in Zimbabwe

The *2013 Constitution* was drafted and enacted to respond to the gaps that were present in the previous *1979 Constitution*. The current *Constitution* explicitly gives expression to Zimbabwe's pledge towards the involvement and empowerment of women through its founding ideals and principles of human rights, liberties and gender equality among others. The specific provisions that give expression to Zimbabwe's commitment based on the *Constitution* to promote, protect and enforce the rights of women in Zimbabwe are analysed. Matters of gender are found in Section 17. It states that the government and all relevant institutions are to promote the full participation of women in all spheres based on the principle of equality with men.²⁰⁰ The prohibition against discrimination on the grounds of sex, gender and marital status is contained in Section 23.²⁰¹

This section recognises the protection of women from domestic violence, access to resources, and elimination of gender-based discrimination in policy law and practice. It stipulates the equal representation of women in all institutions and agencies of government considering that these institutions are male-dominated.²⁰² Zimbabwe is patriarchal in nature and this disproportionality places women at a disadvantage in the political, economic and social spheres. Section 80 stipulates the provision for equal opportunities in political, social and economic activities that speak to the rights of women.²⁰³ This section grants women the same rights as men regarding custody and guardianship of children. It negates the protection of women from customs, traditions and cultural practices that violate the rights of women.²⁰⁴ There is the acknowledgement

²⁰⁰ Section 17 of the *Constitution of Zimbabwe*.

²⁰¹ Section 23 of the *Constitution of Zimbabwe*.

²⁰² Section 23 of the *Constitution of Zimbabwe*.

²⁰³ Section 80 of the *Constitution of Zimbabwe*.

²⁰⁴ Section 80 of the *Constitution of Zimbabwe*.

that women are often subjected to harmful traditional practices that include the early, child or forced marriages.²⁰⁵ The enactment of the *Domestic Violence Act* was promoted in recognition of the constitutional provision on the absence of violence for all citizens and the susceptibility of women to violence in the private sphere.²⁰⁶ The Act addresses violence in the domestic sphere and makes provision for the protection and relief of victims. The definition of domestic violence under the Act is broad and incorporates violations emanating from cultural and customary ceremonies that discriminate or degrade women.²⁰⁷ These include “forced virginity testing, female genital mutilation, pledging of women and girls for purposes of appeasing spirits, abduction, child marriages, forced marriages, forced wife inheritance and other such practices.”²⁰⁸ The definition of domestic violence should include violence in the homes that are caused by differing political opinion and affiliations between partners.

Considering that political violence in the communities in Zimbabwe is based on opposing views, I believe that such opposing views in the domestic milieu have the probable effect of perpetuating violence against women. The addition of this ground of violence in the Act would show the commitment of the state to protect women from one of the major root causes of violence in Zimbabwe, bearing in mind the political history of targeting women. Section 85 supports the enforcement of fundamental rights and freedoms whereby the courts and the requisite institutions are responsible for granting appropriate relief and compensation where women’s violations have been infringed.²⁰⁹

It entrenches the constitutional right of women to justice and accountability to the state for violations perpetrated against women. The Gender Commission is mandated to ensure gender equality, investigate violations and take appropriate action.²¹⁰ Section 246 of the *Constitution* mandates the Gender Commission to conduct research into issues related to gender and social justice and provide the necessary recommendations

²⁰⁵ Section 78 of the *Constitution* is on marriage rights. It provides that every person who has attained the age of 18 years has a right to found a family and that no person can be compelled to enter into a marriage against their will. Women have often been forced into marriage and this section prohibits that.

²⁰⁶ The *Domestic Violence Act* [Chapter 5:16] (Act 14/2006).

²⁰⁷ The *Domestic Violence Act of 2006*, Section 3 and 4.

²⁰⁸ The *Domestic Violence Act of 2006*, Section 3.

²⁰⁹ Section 85 of the *Constitution of Zimbabwe*.

²¹⁰ Section 245 of the *Constitution of Zimbabwe*.

for changes in the law that ought to take place and practices that lead to discrimination based on gender.²¹¹ The relevant institutions recognised by the *Constitution of Zimbabwe*, such as the Ministry of Women Affairs, Gender and Community Development and the Gender Commission, have worked with local organisations and development agencies in advancing women's rights. In addition to the legislative framework in the recognition of women's rights, national policies, protocols and strategies have been developed that seek to prevent and protect survivors of gender-based violence. In 2019, the Judicial Services Commission launched a revised National Protocol on Multi-Sectoral Management on Sexual Abuse and Violence. The protocol stipulates how different stakeholders, including the police, deal with sexual abuse and gender-based violence.²¹² The developed referral pathway gives guidance for those handling sexual abuse and the minimum care package required by survivors of sexual violence.²¹³

The marginalisation of people with disabilities and their exclusion from the majority of interventions that seek to eliminate and prevent sexual abuse necessitated the modification of the 2012 protocol.²¹⁴ Furthermore, the new trends and sophisticated cybercrime that are threats, especially to women and children were factors that necessitated the revision to the 2012 National Protocol.²¹⁵ To safeguard the protection of women from violence and the ability to access facilities within the criminal justice system, a National Programme on Gender-Based Violence and Prevention and the Victim Friendly Court System were put in place.²¹⁶ The Victim Friendly System in Zimbabwe is one such measure designed to ensure the safety and active involvement of survivors in the criminal justice system.²¹⁷ The government and women and children's rights activists initiated the system in the early 1990s. Their advocacy resulted in a multi-sectoral approach to offering welfare and judicial services to survivors of sexual

²¹¹ Section 246 of the *Constitution of Zimbabwe*.

²¹² Advocacy Accelerator 2020:21.

²¹³ Advocacy Accelerator 2020:21.

²¹⁴ Lupande 2019.

²¹⁵ Lupande 2019.

²¹⁶ International Commission of Jurists 2020:6.

²¹⁷ Judicial Services Commission 2012:16. Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe. 2012 Led by the Judicial Service Commission.

violence and abuse.²¹⁸ In the domestic sphere the government of Zimbabwe, relevant Ministries and partner organisations have developed approaches in an attempt to address violence against women. These efforts have been significant to elevate the status of women and alleviate some of the socio-economic challenges they face in the domestic realm. Despite efforts made to empower women in Zimbabwe, there are still gaps in addressing sexual violence against women.

4.4.3 Constitutional provisions and legislation on sexual violence

The *Constitution of Zimbabwe*,²¹⁹ the *Criminal Law Codification and Reform Act (The Criminal Code)*²²⁰ and the *Domestic Violence Act*²²¹ are part of the legal framework responsible for the regulation of sexual violence in Zimbabwe. The *Constitution of Zimbabwe* guarantees the rights to, freedom from discrimination and equality (Section 56), freedom from torture, cruel, inhumane and degrading treatment or punishment (Section 53), human dignity and personal security. Section 52(a) of the *Constitution* states the right to bodily and psychological integrity, which includes the right to freedom from all forms of violence from public or private spheres.²²² These provisions in the *Constitution* form the foundation for the protection of violations that are sexual in nature. Hence, the *Constitution* is the principal domestic law protecting sexual autonomy.

It is the belief of the current legal system in Zimbabwe, that the encapsulation of rights in the supreme law of the country guarantees the right and protection of women from all forms of violation. It further goes to the international obligation of due diligence in the human rights framework particularly for violence against women.²²³ It is a concept grounded on assessing whether the state has taken adequate measures to fulfil its duties to protect women. The adoption of the *Constitution* of Zimbabwe acknowledges this fact by enshrining rights in the recognition of freedom from violence and subjecting

²¹⁸ Judicial Services Commission 2012:16. Protocol on the Multi-Sectoral Management of Sexual Abuse and Violence in Zimbabwe. 2012 Led by the Judicial Service Commission.

²¹⁹ The *Constitution of Zimbabwe Amendment (No.20) Act 2013*.

²²⁰ The *Criminal Law (Codification and Reform) Act* [Chapter 9:23] Section 65(1).

²²¹ The *Domestic Violence Act* [Chapter 5:16] (Act 14/2006). Section 65(1) 24 16].

²²² Section 52(a) of the *Constitution of Zimbabwe*.

²²³ Benninger-Budel 2008:13.

the state to respect, promote and protect these declared rights.²²⁴ In response to the constitutional obligation of due diligence the legislature enacted laws that govern sexual violence. In the current governmental structure, the legislature has an important role to play in fulfilling these duties, as “the primary arm of government tasked with law reform by passing new legislation and making amendments to existing laws.”²²⁵ In the criminalisation of rape and sexual violence in the fight to end violence against women, the *Criminal Law and (Codification and Reform) Act 2004* regulates this protection. Section 65(1) of the Criminal Code defines rape as a crime “where a male person has vaginal or anal intercourse with a female person without her consent.”²²⁶ Section 61(1) (b) of the Criminal Code provides the definitions of unlawful sexual conduct as “any act the commission of which constitutes the crime of rape, aggravated indecent assault, indecent assault, sexual intercourse or performing an indecent act with a young person or sodomy”.²²⁷ The definition of rape is comprehensive but not without challenges. Several concerns arise with respect to the definition of rape in Section 65(1) of the Criminal Code. It defines rape in a traditional conservative manner, as an offence committed merely by men and exclusively towards women.²²⁸ This definition is narrow in scope in failing to identify intrusive sexual deeds such as oral rape and the use of objects to commit rape, both of which are encompassed in the classification of rape.²²⁹

The definition of rape when read with the definitions of sexual intercourse and anal sexual intercourse in Section 61 of the Criminal Code, restricts the types of penetration to vaginal or anal penetration of women by men.²³⁰ Therefore, the definition dismisses other categories of forced penetration, such as oral penetration, or vaginal and anal penetration by objects other than a penis.²³¹ These categories of forced penetration fall

²²⁴ Coltart 2014:33.

²²⁵ *Constitution of Zimbabwe*, Section 117.

²²⁶ It is framed as follows:

“If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse ... the female person has not consented to it ... and ... he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it ... he shall be guilty of rape and liable to imprisonment for life or any shorter period.”²²⁶

²²⁷ The *Criminal Law and (Codification and Reform) Act 2004*; Section 61(1).

²²⁸ International Commission of Jurists 2020:7.

²²⁹ International Commission of Jurists 2020:7.

²³⁰ The *Criminal Law and (Codification and Reform) Act 2004*; Section 61.

²³¹ The *Criminal Law and (Codification and Reform) Act 2004*; Section 65.

under another crime category, namely aggravated indecent assault.²³² Although aggravated indecent assault is penalised like rape, it has proposed that the exclusion of these category of offences from the classification of rape is problematic. It is incapable of appreciating that the ordeal endured by the victim is equally severe in all incidents of penetration and implicitly labels such acts of penetration a lesser crime.²³³ The oversight to exclude these acts from the definition of rape and the relegation to the lesser crime of aggravated indecent assault distorts the offence, outlining it as an offence against decency.²³⁴ On the other hand, it is unable to draw the appropriate societal censure that sexual violence in all its forms warrants.²³⁵ There is a gendered description given to the definition of rape in Section 65(1) and it poses a challenge in the promotion and protection of women against politically motivated violence. The types of acts omitted in the definition of rape are some of the characteristic violations women face in situations of conflict in Zimbabwe. The proscribing in the definition that a man is a perpetrator and a woman a victim embodies the traditional male-on-female paradigm.²³⁶

This paradigm fails to describe rape as a coercive, intrusive sexual act that is perpetrated against anybody, regardless of sex or gender, for instance, against men and boys and other at-risk individuals.”²³⁷ The use of “gender-inclusive language in laws proscribing sexual violence, including criminal law provisions concerning rape, allows for widening the scope, and thus protection, to all victims or survivors of rape.”²³⁸ Further to that, patriarchal roots in the considerations of the gendered definition of rape can be traced in the current legislation related to sexual violence against women.²³⁹ The commission of rape under common law was traditionally regarded as a property crime against men.²⁴⁰ The idea behind this common law conception of rape was that only woman are rapeable and this propagates the patriarchal conception of rape as

²³² The *Criminal Law and (Codification and Reform) Act 2004*; Section 65.

²³³ Research and Advocacy Unit 2011a or b?:4.

²³⁴ International Commission of Jurists 2020:10.

²³⁵ International Commission of Jurists 2020:10.

²³⁶ International Commission of Jurists 2020:8.

²³⁷ International Commission of Jurists 2020:8.

²³⁸ International Commission of Jurists 2020:8.

²³⁹ Coltart 2014:34.

²⁴⁰ Shalhoub-Kevorkian 1999:5; Coltart 2014:34.

associated with womanhood.²⁴¹ Section 56(1) of the *Constitution* stipulates equality before the law and the subsequent protection and benefit of the law for all in Zimbabwe.²⁴² The alignment of Section 65 of the Criminal Code, in the adoption of gender-specific and gender-neutral language, has the potential of according the protection of women from unequal disparities that arise from the patriarchal nature of Zimbabwean society.²⁴³ Caution should however be applied in adopting and aligning current laws on sexual violence in gender-neutral forms in the fight against violence against women. The exclusive use of gender inclusive language could result inadvertently in the outright refusal that rape is a gendered crime, which serves power-political goals such as gender and sexual domination.²⁴⁴ In this framework, gender-neutral definitions alone may obscure the fact that women are overwhelmingly the victims of sexual violence perpetrated by men in conflict settings.²⁴⁵ Gender inclusive laws and policies ought to be scrutinised to ensure that they cease from fostering and perpetuating prevailing disparities.²⁴⁶ A balanced approach should be adopted to prevent the unintended negative consequences such programmes, policies and legislation will have on gender-based violence.²⁴⁷ This can be achieved by including gender inclusiveness and gender accepted provisions in the regulation, to echo the necessities and truths of female victims and protect male victims and other vulnerable groups.²⁴⁸

4.4.4 The role of the judiciary

The arm of the state that oversees the punishment of violators of the right to freedom from violence, through verdicts handed down to those convicted of violent sexual offences, under criminal law is situated in the judiciary.²⁴⁹ The judiciary is mandated with the role of reforming laws by developing the common law in line with the

²⁴¹ Shalhoub-Kevorkian 1999:5; Coltart 2014:34.

²⁴² *Constitution of Zimbabwe 2013*. Section 56(1).

²⁴³ International Commission of Jurists 2020:9.

²⁴⁴ International Commission of Jurists 2020:9.

²⁴⁵ International Commission of Jurists 2020:9.

²⁴⁶ United Nations Committee on the Elimination of Discrimination Against Women 2010.

²⁴⁷ International Commission of Jurists 2020:9.

²⁴⁸ International Commission of Jurists 2020:9.

²⁴⁹ Section 46(2).

*Constitution*²⁵⁰ and striking down any unconstitutional legislation.²⁵¹ The concern is that the current Zimbabwean laws simply address random acts of sexual violence in the general sense without regard to centrally organised widespread and systematic acts.²⁵² The current law of Zimbabwe does not reflect the scale and monumentality of sexual violence committed as part of a widespread and systematic attack against civilians.²⁵³ In addition, the laws related to sexual violence and accountability fail to integrate the principles of command responsibility, which would enable the prosecution of organisers and sponsors of organised sexual violence in conflict.²⁵⁴ This is compounded by the fact that the aggressor, which is the state of Zimbabwe, is reluctant to amend these laws to remedy the gaps in the law provisions. The exclusion in the legislation in defining sexual violation using a broad approach is a failure of the system in recognising the potential existence and violations that are committed against women in Zimbabwe during its political conflict. The vulnerability of women victims of politically motivated sexual violence in Zimbabwe in attaining justice for their crimes is further extended in how the government and its relevant structures of justice handle political motivated sexual violence crimes.

While it is arguable that the definition of rape and sexual violence in Zimbabwean law could be improved, the question remains whether it is unconstitutional.²⁵⁵ The judiciary ought to be guided and influenced by the approach laid down by the Zimbabwean Supreme Court in *Smyth v Ushewokunze*.²⁵⁶ The court stated that “[t]he endeavour of the Court should always be to expand the reach of a fundamental right than to attenuate its meaning or content.” This approach has been given added weight in light of Section 46(1)(a) of the new *Constitution of Zimbabwe*, which binds the courts to give “full effect to the rights and freedoms enshrined in [the Declaration of Rights].”²⁵⁷

²⁵⁰ Section 46(2).

²⁵¹ Section 175(6)(a).

²⁵² Hodzi 2012:2.

²⁵³ AIDS-Free World 2009:34.

²⁵⁴ Hodzi 2012:2.

²⁵⁵ Coltart 2014:34.

²⁵⁶ *Smyth v Ushewokunze* 1998 (3) SA 1125 (ZS).

²⁵⁷ *Constitution of Zimbabwe*, section 46(1)(a) (emphasis added).

Furthermore, in *Zimbabwe Township Developers v Lou's Shoes*,²⁵⁸ the Supreme Court stressed that when considering whether a statute is unconstitutional, “[o]ne doesn’t interpret the *Constitution* in a restricted manner in order to accommodate the challenged legislation.” The Court stated, “[t]he Constitution must be properly interpreted, after which the challenged legislation must be examined to discover whether it be interpreted to fit into the framework of the Constitution.” In light of the above, and in relation to the right to freedom from all forms of violence, it is suggested that “Zimbabwean courts now have the opportunity to declare or expand on the criminal law’s distinction between different forms of coerced sexual penetration, given the appropriate case.”²⁵⁹ The Supreme Court has provided some guidance in the manner in which disparities in law and legislation in their failure to articulate the rights enshrined in some provisions of the constitution. A failure to rectify this gap perpetuates the failures of the system legislatively and the judiciary in recognising other violations of a sexual nature that are prevalent in conflict settings. This ultimately has a bearing on the ability of female victims and survivors to get the necessary redress and obtain justice for political crimes of rape and sexual violence they have been subjected to in political conflict settings in Zimbabwe.

The striking down of provisions of the law that fail to express the constitutional provisions that entrench freedoms from all forms of violence is to a large extent part of the fight to end violence against women in conflict settings in Zimbabwe. However, I argue other factors within the government institutions ought to be addressed for a holistic approach to end violence against women during political conflict situations. There are deep-rooted cultural biases that need to be addressed before there is any change in redressing conflict-related sexual violence crimes in Zimbabwe. These cultural practices and biases are present in the political culture of the nation and the private sphere. The current approaches that post-colonial Zimbabwe has adopted in dealing with sexual violence reflect a deep-seated issue within Zimbabwe’s society. As carriers and guardians of the people’s culture and prospective generations, the manner in which women were targeted is centrally connected to their gender and sexual

²⁵⁸ *Zimbabwe Township Developers v Lou's Shoes* 1984 (2) SA 778 (ZS).

²⁵⁹ Coltart 2014:34.

identity.²⁶⁰ All of the chauvinist violence against women emanates from the patriarchal nature that is engrained in Zimbabwean society.²⁶¹ The judiciary in Zimbabwe has adopted the patriarchal nature and approach of governance of Zimbabwe in matters that relate to politically motivated violence. The alignment of the judiciary of Zimbabwe by being partisan to the ruling ZANU PF government's actions and directives on political matters related to the conflict in the country attests to this fact. Notwithstanding the efforts to mainstream gender in Zimbabwe, women's rights are still disparaged as all institutions of government as they remain patriarchal and dominated by the ruling party, proliferating all spheres in Zimbabwe.²⁶² The structures of government reflect the patriarchal nature and attitude that views violations of a sexual nature against women in politics as justifiable in advancing the cause of retaining power. As a highly conservative society that upholds deeply societal norms on woman's reputation and sexual purity, sexual violence is an effective tool in instilling fear and dread to deter Zimbabweans from political participation aligned with opposition politics.²⁶³

The stigmatisation attached to sexual violence in general plays into the purpose and intentions of the government of Zimbabwe more so when it relates to politically motivated violence. This stigma induces silence to the very violations against women that the government of Zimbabwe refuses to acknowledge to escape accountability. This silence emanating from the stigma society attaches to sexual violence crimes inadvertently plays into the government of Zimbabwe's intention to deter women from reporting. This thereby becomes a form of denial of justice for the victims. A failure to address these factors means sexual violations against women during conflict in Zimbabwe will be a perpetual problem. Below I analyse whether enacted legislation and laws related to political agreements, amnesties and clemency orders have affected redress and justice for conflict-related sexual violence against women in Zimbabwe.

²⁶⁰ Hodzi 2012:3.

²⁶¹ Zengenene and Susanti 2019:88.

²⁶² Zengenene and Susanti 2019:88.

²⁶³ Hodzi 2012:2; Zimbabwe Human Rights NGO Forum 2019b:7–8.

4.4.5 Political agreements, amnesties and clemency orders

The political history of Zimbabwe has shown that political violence and human rights violations have been widely reported in pre- and post-independence.²⁶⁴ In the post-independence era particularly after 2000, it has become widespread and systematic.²⁶⁵ Evidence from human rights reports shows that in the resolution of political differences the state of Zimbabwe post-independence has always used force through its security agents.²⁶⁶ One of the paramount factors that have shaped the government of Zimbabwe's stance in addressing politically motivated sexual violence against women lies at the heart of the history of the use of amnesties and clemency orders.²⁶⁷ These amnesties and clemency orders are invoked through political agreements entered into after each violent political conflict period.²⁶⁸ The entrenched nature of the problem of political violence and impunity in Zimbabwe lies in comprehending the origins and application of presidential pardon or amnesty powers.²⁶⁹ Impunity dates back to the colonial era,²⁷⁰ when crimes perpetrated in the name of the government by state agents were not addressed.²⁷¹ The antagonistic forces (Rhodesian security forces and guerrillas) during the liberation war were both responsible to the atrocities and violations committed.²⁷²

Magaisa in relation to the above states that “senior members of the Rhodesian security establishment were retained in the security apparatus of the new Zimbabwean State. The 1979 and 1980 *Amnesty (General Pardon) Ordinance 12 of 1980* was part of the Lancaster House Agreement, which included an amnesty for what were regarded broadly as acts of war.”²⁷³ At independence, essentially political considerations dictated “that not only would past human rights violators not be brought to justice, but they would

²⁶⁴ Hodzi 2012:1.

²⁶⁵ Hodzi 2012:1.

²⁶⁶ Zimbabwe Human Rights NGO Forum 2019a:10.

²⁶⁷ Zimbabwe Human Rights NGO Forum 2019a:10–11.

²⁶⁸ Zimbabwe Human Rights NGO Forum 2019a:10.

²⁶⁹ Declaration of the Johannesburg Symposium, August 2003, in Civil Society and Justice in Zimbabwe Summary of Proceedings of a Symposium held in Johannesburg 11–13 August 2003.

²⁷⁰ Declaration of the Johannesburg Symposium, August 2003, in Civil Society and Justice in Zimbabwe Summary of Proceedings of a Symposium held in Johannesburg 11–13 August 2003.

²⁷¹ Zimbabwe Human Rights NGO Forum 2006b:7.

²⁷² Amnesty International 1993:3.

²⁷³ Magaisa 2016.

be retained in their positions in the security apparatus, with no investigation or calling to account for the deeds of the past.”²⁷⁴ The precedent set by the 1979–1980 amnesty for any future government was that they could violate human rights and before departure, they could grant amnesty.²⁷⁵ The amnesty agreed upon at Lancaster House was certainly a concession driven by politics of pragmatism; the issue of justice was forfeited on the “altar of stability.”²⁷⁶

According to Amnesty International analysis acknowledged that amnesty for Rhodesian human right violators is not the sole reason for continuation of human rights abuses in independent Zimbabwe.²⁷⁷ However, it did provide the environment and the means for continuing human rights violations post-independence.”²⁷⁸ Nevertheless, at all stages of political transitions since independence, the state forced amnesia reconciliation and *forgive and forget* rhetoric is employed in dealing with politically motivated violations including sexual violence against women.²⁷⁹ Magaisa echoes the same sentiments and has described these amnesties as forced amnesia upon the people of Zimbabwe.²⁸⁰ Consequently, between 1980 and 2008 no formal transitional justice processes were instituted to address the polarising effects of the conflict within this mentioned period. State actors resorted to issuing several blanket amnesties to perpetrators since 1980 who were allegedly ZANU PF supporters and sympathisers.

Madhuku states that the courts dealt with the land and electoral conflicts in a political manner.²⁸¹ In 2000, former President Mugabe issued *Clemency Order No 1 of 2000*, a general amnesty for all politically motivated crimes.²⁸² Similarly, in 2008 Mugabe issued *Clemency Order No.1 of 2008*.²⁸³ Masunda *et al.*, relating to the amnesty order state that the orders covered the period pre- and post-March 29 election up to the June 2008

²⁷⁴ Amnesty International 1993:3.

²⁷⁵ Amnesty International 1999:3.

²⁷⁶ Amnesty International 1993:5.

²⁷⁷ Amnesty International 1993:9.

²⁷⁸ Hodzi 2012:1.

²⁷⁹ Hodzi 2012:1.

²⁸⁰ Magaisa 2016.

²⁸¹ Madhuku 2004:137, 144–145; Legal Resources Foundation 2002:7.

²⁸² Ncube 2005:43-44, 45.

²⁸³ Under General Notice 85A/2008.

runoff election.²⁸⁴ The period covered by the amnesty orders is the time that the opposition party MDC claims to have lost more than 300 of its supporters and scores of women were subjected to sexual violence.²⁸⁵ The Legal Resources Foundation noted that these series of amnesties exacerbated the breakdown of law and order in the country.²⁸⁶ The violent run-up to the June election in 2008, affected Mugabe's legitimacy in winning the elections under such violent circumstances.²⁸⁷ Raftopolous and Mlambo state that countries such as Tanzania, Botswana, the African National Congress alliance partners, and the Western countries raised the legitimacy questions.²⁸⁸ This crisis prompted the SADC and its appointed mediator, Thabo Mbeki to escalate efforts to find a solution.²⁸⁹ This led to the signing of the GPA by the two MDC formations and ZANU PF on 15 September 2008.²⁹⁰ The GPA itself and the amnesties granted to the 2008 perpetrators of violence resemble the enforcement of precedence that was established in Zimbabwe. Justice for victims and survivors of politically motivated sexual violence continues to be sacrificed on the altar of stability peace and reconciliation.

The government of Zimbabwe, post-Mugabe removal, has assumed a similar practice of invoking amnesties and clemency orders for politically motivated crimes and has continued in present-day Zimbabwe. The current president in December 2017, told Zimbabweans "to let bygones be bygones," paving the way for continued widespread impunity for abuses by the military and state security agents.²⁹¹ This protection that state-sponsored agents are granted through such amnesties is a challenge, which must be addressed if citizens are to be treated equally before the law and Zimbabwe commits to protect its citizens and adhere to human rights principles. The ZRP in accordance with the *Police Act* ²⁹² is supposed to act in a non-partisan manner²⁹³ but they have blatantly supported the ruling party, particularly in human rights and political cases,

²⁸⁴ Masunda *et al.* 2019:96.

²⁸⁵ Masunda *et al.* 2019:96.

²⁸⁶ Legal Resources Foundation 2002:7.

²⁸⁷ Masunda *et al.* 2019:96.

²⁸⁸ Raftopolous and Mlambo 2009:9.

²⁸⁹ Raftopolous and Mlambo 2009:9.

²⁹⁰ Masunda *et al.* 2019:96.

²⁹¹ Human Rights Watch 2019.

²⁹² The *Zimbabwe Republic Police Act* [Chapter 11:10] sets out the specific duties of the Police Act. Human Rights Watch 2008:24.

²⁹³ Schedule to *Police Act*, Article 48. Makumbe 2002:93.

resulting in impunity for cases brought against the ruling party members and supporters.²⁹⁴

4.4.6 Approaches adopted by civil society organisations and non-government organisations on politically motivated violence in Zimbabwe

International human rights organisations, local NGOs and civil society organisations have recorded and exposed on an ongoing basis the plight of women in Zimbabwe and the violations they face from politically motivated violence.²⁹⁵ To date, the courts in Zimbabwe have heard a few cases related to sexual violence resulting from political violence in Zimbabwe. They are isolated cases but not enough to say that such matters are given serious consideration by the government of Zimbabwe. This is due to the government's stance to resist and frustrate any efforts to redress political matters by meddling in the investigation and ultimate hearing of the matters in the courts of Zimbabwe.²⁹⁶ There have been admissions by the government of Zimbabwe of their involvement in the political conflict dating back to *Gukurahundi* up to the 2008 election violence. The challenge with the admission is that while the government of Zimbabwe accepts that they were violent during these conflicts they want to portray their minimal involvement in the violence.²⁹⁷

Commissions established with a mandate to investigate violations committed during periods of conflict have never been published.²⁹⁸ The 2018 Motlanthe Commission report was published, but the recommendations have yet to be implemented. There has never been an official acknowledgement and apology of this fact from the government of Zimbabwe post-independence.²⁹⁹ Coincidentally, there have been unofficial transitional justice processes by civic societies in Zimbabwe. Since 1998 for example, the Zimbabwe Human Rights NGO Forum has worked with victims of organised

²⁹⁴ Zimbabwe Human Rights NGO Forum 2006b:7.

²⁹⁵ Zimbabwe Human Rights NGO Forum 2006b:7.

²⁹⁶ Human Rights Watch 2008:19-23, 12-14.

²⁹⁷ Zimbabwe Human Rights NGO Forum 2006b:7.

²⁹⁸ The government instituted two commissions of inquiry; the 1981 Dumbutshena Commission and the 1938 Chihambakwe Commission, but the findings by the commissions were not made public. The only record that chronicles the *Gukurahundi* episode is the CCJP/LRF report of 1997, which is unofficial. Masunda *et al.* 2019:94.

²⁹⁹ CCJPZ and Legal Resources Foundation 1997:43.

violence and torture to try and find ways of redressing these violations.³⁰⁰ Civil society organisations working on different themes related to political violence, held a symposium making recommendations for the inclusion of survivors in transitional justice processes in Zimbabwe in 2003.³⁰¹ In 2008³⁰² and 2012, further meetings by civic societies were held laying down minimum demands on transitional and conducting surveys and research on behalf of victims of organised violence and torture resulting from the political conflict.³⁰³ These unofficial transitional justice processes have shaped discussions on transitional justice policies placing them at the centre stage of communities and largely influenced policy formulations.³⁰⁴ The difficulty that unofficial transitional justice processes encounter sometimes is their failure to make a meaningful impact as they can only be applied in a complementary capacity.³⁰⁵ Since 2000, the perpetual cycles of political violence have spurred into a lack of trust and confidence in the current government and legal system and structures by victims of sexual violence in their handling especially of politically motivated crimes.³⁰⁶

Among other violations committed during the political conflict in Zimbabwe, victims report frustration by the institutions with the requisite authority under the law of the country to investigate and prosecute all matters criminalised under the law in Zimbabwe.³⁰⁷ These factors listed above are reflective of the failures of the current legal system of the government of Zimbabwe in addressing politically motivated sexual violence against women. There are further significant strategies and advocacy efforts that have been made by NGOs such as Zimbabwe Lawyers for Human Rights and

³⁰⁰ Zimbabwe Human Rights NGO Forum 2006b:1–2.

³⁰¹ Experts from the region together with over 70 civil society organisations from Zimbabwe gathered at a symposium in Johannesburg South Africa. From 11 to 13 August 2003 a symposium was held in Johannesburg on Civil Society and Justice in Zimbabwe. At the end of the symposium, several recommendations were made which mainly emphasised the need for accountability for past violations and prevention of future violations. Zimbabwe Human Rights NGO Forum 2003. Zimbabwe Human Rights NGO Forum 2013:xiv–xvi.

³⁰² A Transitional Justice Options Workshop for Zimbabwe Workshop was held in Harare. Experts from the region together with over 70 civil society organisations from Zimbabwe gathered at a symposium in Johannesburg South Africa. Zimbabwe Human Rights NGO Forum 2013: xiv–xvi.

³⁰³ An international Conference on Transitional Justice in Zimbabwe took place in October 2012 was organised to bring together various stakeholders to deliberate on the way forward for transitional justice in Zimbabwe. Experts from the region together with over 70 civil society organisations from Zimbabwe gathered at a symposium in Johannesburg South Africa. Zimbabwe Human Rights NGO Forum 2013: xiv–xvi.

³⁰⁴ Masunda *et al.* 2019:94.

³⁰⁵ Masunda *et al.* 2019:94.

³⁰⁶ Zimbabwe Human Rights NGO Forum 2019b:18.

³⁰⁷ AIDS-Free World 2009:10–17. Institute for Young Women Development 2021:16.

Zimbabwe Human Rights NGO Forum. These organisations have brought criminal and civil suites before courts in Zimbabwe related to political violence, but none has been related to conflict-related sexual violations against women.³⁰⁸ However, justice and accountability considerations for serious human rights violations and those of a political nature have fallen on deaf ears.

The post-colonial state of Zimbabwe has repeatedly demonstrated in its actions an unwillingness to address the accountability of politically motivated sexual violence against women.³⁰⁹ This perpetual stance by the government of Zimbabwe is because the government has been in the past and remains presently the primary perpetrator of political violence in Zimbabwe.³¹⁰ The system ignored or denied allegations of abuse of a political nature.³¹¹ The limited number of criminal cases that appeared before the courts stands as a testimony of the culture of impunity for politically motivated violence matters by the government of Zimbabwe. In the *State v Dube*,³¹² the accused persons abducted and assaulted a member of the opposition, resulting in the victim's death during period leading to the 2000 elections.³¹³ They were arraigned and found guilty of culpable homicide.³¹⁴ The accused persons approached the Bulawayo High Court challenging the conviction by invoking the amnesty pleading that they had committed a politically motivated crime, which was covered by the Clemency Order.³¹⁵ Under the Clemency Order, culpable homicide was covered, the court set aside the conviction and the perpetrators were released.³¹⁶

The accused did not deny that they had committed the murder, but as they were perpetrators of political violence, they walked scot-free. They found refuge in the presidential amnesty.³¹⁷ A local NGO, Zimbabwe Human Rights NGO Forum took the

³⁰⁸ Zimbabwe Human Rights NGO Forum 2006b:7, 18, 20.

³⁰⁹ Zimbabwe Human Rights NGO Forum 2006b:7.

³¹⁰ Zimbabwe Human Rights NGO Forum 2006b:7.

³¹¹ Zimbabwe Human Rights NGO Forum 2006b:7.

³¹² *State v Dube* March 2006. Bulawayo High Court.

³¹³ *State v Dube* March 2006. Bulawayo High Court.

³¹⁴ *State v Dube* March 2006. Bulawayo High Court.

³¹⁵ *State v Dube* March 2006. Bulawayo High Court.

³¹⁶ Magaisa 2016.

³¹⁷ Magaisa 2016.

same case to the African Commission on Human and People's Rights.³¹⁸ They lodged a complaint against the state of Zimbabwe challenging the legality of the *Clemency Order No.1 of 2000*.³¹⁹ The Commission found that the Clemency Order violated the provision contained in the African Charter on Human and People's Rights.³²⁰ It further found that "the state of Zimbabwe had not only encouraged impunity by excusing perpetrators of politically motivated violence, but it had also foreclosed any options or recourse that victims might want to take against their perpetrators."³²¹ These cases demonstrate the infamous effects of amnesties, which is one of the approaches that the government of Zimbabwe adopted in dealing with politically motivated crimes. It is worth noting that issuing amnesties after an election period has almost become a tradition. *Clemency Order No. 1 of 1995* was also issued after the general elections in that year.³²² The continued use of amnesties after each episode of political unrest and gross violations committed against citizens sacrifices the promotion of peace and justice.³²³ Victims and survivors are expected to forgive and forget and move on.³²⁴

The Zimbabwean government's casual nature and attitude in addressing human rights violations including sexual violence go back to the beginning of Zimbabwe's establishment as a nation after colonial rule.³²⁵ With the ZRP and the Attorney General constant refusal to probe and hold accountable those responsible for politically motivated cases of sexual violence, victims are left without recourse while the perpetrators are cushioned by clemency orders and amnesties.³²⁶ These have become the adopted approaches in dealing with politically motivated sexual violence in Zimbabwe amongst all other violations committed. What transpired in 1980 has been replicated in the post-independent period. A culture of violence and impunity has

³¹⁸ *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Decision Comm.245/2002 (ACmHPR May 15, 2006) Communication No.245/2002.

³¹⁹ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Decision, Comm. 245/2002 (ACmHPR May 15, 2006). Communication No.245/2002

³²⁰ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Decision, Comm. 245/2002 (ACmHPR, May. 15, 2006) paragraph 215. Communication No. 245/2002.

³²¹ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Decision, Comm. 245/2002 (ACmHPR, May. 15, 2006). Communication No.245/2002. Paragraph 215.

³²² Magaisa 2016.

³²³ Magaisa 2016.

³²⁴ Amnesty International 1993:8.

³²⁵ Magaisa 2016.

³²⁶ Hodzi 2012:4.

impacted the ability of women to access justice for sexual violations during political conflicts. The use of political agreements, amnesties and clemency orders has had a profound effect on the justice options available for female victims and survivors of conflict-related sexual violations in Zimbabwe.

4.5 National peacebuilding mechanism in Zimbabwe on political conflict

The justification for Zimbabwe to adopt a peacebuilding mechanism is premised on its history filled with various conflict periods, which are characterised by violence.³²⁷ The violations committed during these conflict periods include the targeting of women through sexual violence.³²⁸ This trend can be traced from the early 1980s post-independence conflict to date. Since 1980, the government and other external players initiated several peacebuilding efforts to restore peace in Zimbabwe.³²⁹ The challenge that the initiatives have faced is their failure to adequately deal with the root causes of the conflict and violence.³³⁰

The initiatives have failed to address the justice element in the resolution of violence and conflict that make women vulnerable to sexual violence. Hence, there is throughout post-independent Zimbabwe the continued escalation of internal conflict and hostilities to date.³³¹ These challenges have affected female victims and survivors of sexual violence as they have experienced obstacles in their efforts to seek justice for the violations they have been subjected to during Zimbabwe's political conflicts. The unprecedented levels of violence in 2008 and the general state of affairs with politically motivated violence compelled the operationalisation of a national institution with the mandate to promote peacemaking and peacebuilding. The coming into effect of the National Peace and Reconciliation Commission (NPRC) cannot be understood outside the signing of the Global Political Agreement of 2008 (GPA) that birthed Organ for National Healing, Reconciliation and Integration (ONHRI). Through ONHRI and the

³²⁷ Mazambani and Tapfumaneyi 2020:280.

³²⁸ CCJPZ 1997:13.

³²⁹ Mazambani and Tapfumaneyi 2020:280.

³³⁰ Mazambani and Tapfumaneyi 2020:280.

³³¹ Murambadore and Wielenga 2015:52.

Constitution provisions for independent commissions on post-conflict justice, the *NPRC Act* were set and signed into law.³³² Below, I first explore ONHRI and thereafter explore the NPRC and the *NPRC Act* subsequently. The investigation into these institutions is important as their establishment into the legal framework of Zimbabwe was necessitated by the political conflict of 2008 in addition to the absence of any substantial approaches in addressing by the government of Zimbabwe on politically motivated violence.

4.5.1 Organ for National Healing, Reconciliation and Integration

The Article of Promotion of Equality, National Cohesion and Unity paved the way for ONHRI to deal with politically motivated violence including sexual violence in Zimbabwe. Specifically, Article 7.1(c) of the GPA calls for “the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre- and post-independence political conflicts.”³³³ In that regard, ONHRI was set up as a government institution whose rationale was the desire to entrench peace following decades of polarised violence.³³⁴ The mandate of the ONHRI in other words was to advise the state of Zimbabwe on how to address past injustices and human rights abuses including politically motivated violence against women in Zimbabwe.³³⁵

The relevance to ONHRI in the approaches that Zimbabwe implemented to deal with political violence was based on an acknowledgement of the national hurt in the country’s historical past that needs healing.³³⁶ ONHRI was meant to facilitate the normalisation of Zimbabwe’s political life through development inclinations. ONHRI’s work provided a unique opportunity to address issues of violence. Stakeholders in government such as the Joint Operation Monitoring and Implementation Commission³³⁷

³³² It was signed into law by President Mnangagwa on 5 January 2018. *National Peace and Reconciliation Act No. 11/2017* [Chapter 10:23].

³³³ Mutisi 2015:2.

³³⁴ Masunda *et al.* 2019:96.

³³⁵ Hodzi 2012:1.

³³⁶ Masunda *et al.* 2019:105.

³³⁷ Masunda *et al.* 2019:106.

and civil society organisations³³⁸ attested to the relevance and position that ONHRI held in addressing the phases of turmoil and political unrest.³³⁹

The ordinary Zimbabweans were dissatisfied with ONHRI and the ambiguous terms of its operation, what it symbolised, more so as it was an institution intended to serve the interests of the masses.³⁴⁰ The composition of ONHRI was not well received by grassroots communities as the senior members of the institution were members of political parties who orchestrated the violence on their citizenry.³⁴¹ The broader civic society regarded the ONHRI as a body that had been captured to further the political interests and power retaining strategies of the elite leaders.³⁴² Zhangazha notes that “the broader principle of having a body like ONHRI to deal with reconciliation issues was relevant, however, with time, it has become cosmetic and more about political leaders in the inclusive government socialising at various conferences organised by the same body.”³⁴³ Considering the reasons for the establishment of ONHRI, the popular expectation for attaining national healing and reconciliation was not met by the ONHRI. It failed to incorporate a combination of restorative and retributive mechanisms in addressing politically motivated violence since it was independent transitional justice machinery.³⁴⁴ The lack of a clear mandate and obscure provisions of Article VII that established the ONHRI frustrated its work making it more difficult.³⁴⁵ There was confusion on whether the role of ONHRI was to implement or advise and this ambiguity interfered with its efficacy.³⁴⁶

The ONHRI's structural limitations namely scanty policy framework, coercing socioeconomic and political context and narrow legal directive, resulted in *impromptu* activities that lacked public input.³⁴⁷ This explains why the ONHRI was not relevantly

³³⁸ Zimbabwe Human Rights Commission (ZHRC), and civil service societies like the Zimbabwe Human Rights Forum (ZHRF), the Zimbabwe Human Rights Association (ZimRights) and Heal Zimbabwe. Masunda *et al.* 2019:105–106.

³³⁹ Masunda *et al.* 2019:105.

³⁴⁰ Masunda *et al.* 2019:108.

³⁴¹ Masunda *et al.* 2019:106.

³⁴² Masunda *et al.* 2019:106.

³⁴³ Interview 16 July with T. Zhangazha. Masunda *et al.* 2019:106.

³⁴⁴ Masunda *et al.* 2019:108.

³⁴⁵ Masunda *et al.* 2019:108.

³⁴⁶ Masunda *et al.* 2019:108.

³⁴⁷ Masunda *et al.* 2019:108.

addressing the people's needs and expectations.³⁴⁸ Consequently, the implementation of the GPA and subsequent transitional justice mechanisms disregarded gender dimensions of political violence.³⁴⁹ Since the inception of ONHRI, there has been a systematic failure in its programming and responses to politically motivated violence against mainstream gender.³⁵⁰ The ONHRI insisted on focusing on other violations from the political conflict in Zimbabwe than sexual violence.³⁵¹ There was therefore a miscarriage of justice for violations against women and a failure to examine the connection between gender inequalities and how these undergird incidences of violence in Zimbabwe.³⁵² This stance that the ONHRI embarked on neglects the dynamics of gender and sexual violence in addition to its role in perpetuation poverty, social rejection, health and accessing justice for victims.³⁵³ Consequently politically motivated sexual violence against women is marginalised in Zimbabwe's transitional justice processes.³⁵⁴

The major failings of the Government of National Unity between 2008 and 2013 were the same path of forced amnesia, which resembles the 1980s.³⁵⁵ The established ONHRI was another "justice for peace trade-off," that left all affected by the political violence betrayed and helpless.³⁵⁶ It meant that once again victims and survivors of politically motivated sexual violence were never consulted about their experiences leaving them in a justice lurch. As such, the ONHRI has been dismissed as a "largely symbolic entity without a gender-oriented statutory mandate."³⁵⁷ Since its establishment, it remained hinged on reconciliation and national healing without establishing accountability.³⁵⁸ These approaches by the government of Zimbabwe ultimately impinge

³⁴⁸ Masunda *et al.* 2019:108.

³⁴⁹ Hodzi 2012:5.

³⁵⁰ Hodzi 2012:4.

³⁵¹ Hodzi 2012:4.

³⁵² Hodzi 2012:5.

³⁵³ Hodzi 2012:4.

³⁵⁴ Hodzi 2012:4.

³⁵⁵ The Lancaster House Agreement is the founding document of the new state of Zimbabwe from colonial Rhodesia. At the signing of the agreement, two critical things happened "general amnesties were granted to Rhodesian security forces and guerrillas for atrocities and human rights violations during the war of liberation. Senior members of the Rhodesian security establishment were retained in the security apparatus of the new Zimbabwean State. Both had profound effects on the new state." Magaisa 2016. BSR: Presidential Amnesty and Impunity in Zimbabwe.

³⁵⁶ The Government of National Unity established ONHRI, which included three ministers from each of the GPA parties. Magaisa 2016.

³⁵⁷ Hodzi 2012:4.

³⁵⁸ Hodzi 2012:4.

on the ability of women who have been subjected to sexual violence due to the political conflict to redress for their violations.³⁵⁹ Regional and international bodies have been, to a certain extent, complicit in the approaches Zimbabwe has adopted in dealing with politically motivated related crimes.³⁶⁰

Arguably, the SADC in coming to rescue Zimbabwe from the political impasse of the 2008 electoral violence, were less concerned with justice for victims and survivors but promoted the stability of Zimbabwe.³⁶¹ Thabo Mbeki, as the mediator of the GPA, was of the view that the immediate concern was the protection of the Zimbabwean state against Western interference.³⁶² Mbeki repeatedly “thwart all attempts by international community to criticise the Mugabe government.”³⁶³ Mbeki’s approach towards Zimbabwe was characterised “by the policy of *quiet diplomacy*, which was a refusal to recognise and address the human rights abuses by the Mugabe government.”³⁶⁴ He tended to refrain from criticism of the ZANU PF government and this policy was evident in his speeches and statements as a political leader.³⁶⁵ Matyszak, commenting on South Africa’s position on Zimbabwe at that time states “Mbeki acted to block all criticism and proposed action against Mugabe in international fora.”³⁶⁶ He deflected pressure for action on the Zimbabwean issue by claiming that negotiations between the principals were underway and that this mitigated the need for alternative actions by outside actors.”³⁶⁷

Mbeki’s strategy towards Zimbabwe and the stance of the ruling African National Congress is illustrative of these points. It became apparent that the mediation through the SADC under the auspices of former President Mbeki, and issues related to constitutionalism that founded the state of Zimbabwe, and less important the element of

³⁵⁹ Magaisa 2016.

³⁶⁰ Magaisa 2016.

³⁶¹ Magaisa 2016.

³⁶² Following the 2002 election, “Mbeki blocked a condemnatory resolution on Zimbabwe at the annual meeting of the United Nations High Commission on Human Rights (UNHCHR). After this, he and his administration repeatedly introduced motions of “no action” on the Zimbabwean situation at the UNHCHR and other UN bodies over the following years as a means to squash any formal debate on the issue.” Matyszak 2010:2, 7.

³⁶³ Matyszak 2010:7.

³⁶⁴ Beardworth 2012:111.

³⁶⁵ Beardworth 2012:111.

³⁶⁶ Matyszak 2010:2.

³⁶⁷ Matyszak 2010:2.

justice for the egregious violence was not a priority.³⁶⁸ The criticism of the Lancaster House Agreement was that Lord Carrington was concerned with protecting white minority interests at in 1979, then in 2008, former President Mbeki seems to have been more concerned in protecting Mugabe and ZANU PF, who he believed had been unleashed with unfair attacks by the Western powers.³⁶⁹ Once again, female victims of sexual violence from the political conflict were sidelined and sacrificed for the sake of power, peace and stability.

4.5.2 National Peace and Reconciliation Commission

The *Constitution of Zimbabwe*, in recognising the mandate of ONHRI, makes provision to establish the NPRC through Chapter 12.³⁷⁰ The *Constitution* thus provides for the establishment of the NPRC, and spells out the Commission's mandate and functions.³⁷¹ The NPRC becomes a peace-building structure in the *Constitution* to respond to the political violence that Zimbabwe has experienced since the 2000 political crisis. The key functions of the NPRC broadly include ensuring post-conflict justice, healing and reconciliation by encouraging truth-telling about the past and making provision for justice.³⁷² It is tasked with the development and implementation of programmes that promote national unity and cohesion in Zimbabwe by ensuring persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support.³⁷³ As a commission, it is mandated to develop mechanisms for early detection of potential areas of conflict and disputes and take appropriate preventive measures.³⁷⁴ It is further mandated to conciliate and mediate disputes among communities, organisations, groups and individuals.³⁷⁵ The NPRC becomes the adopted mechanism for redressing politically motivated violations including sexual violence in advancing post-conflict justice in Zimbabwe presently.

³⁶⁸ ONHRI was replaced by the establishment of the NPRC. Magaisa 2016.

³⁶⁹ Magaisa 2016. Matyszak 2010:2.

³⁷⁰ *Constitution of Zimbabwe*.

³⁷¹ Chapter 12, Part 6, Sections 251–253 of *Constitution of Zimbabwe*.

³⁷² Section 252 (a) and (c) of the *Constitution of Zimbabwe*.

³⁷³ Section 252 (b) and (e) of *Constitution of Zimbabwe*.

³⁷⁴ Section 252 (g) of the *Constitution of Zimbabwe*.

³⁷⁵ Section 252 (i) of the *Constitution of Zimbabwe*.

4.5.3 National Peace and Reconciliation Commission Act of 2018

To operationalise the NPRC in Zimbabwe's long path to national reconciliation, the *NPRC Act* became law on 5 January 2018. These are part of the national effort stipulated in the *Constitution* that should be addressing conflict-related sexual violence against women in Zimbabwe. These are part of the process that must be adopted in consolidating justice, peace and reconciliation for victims of sexual violence, among other human rights violations committed during conflict periods in Zimbabwe. The NPRC came into effect in 2013 and up until 2018, no formal gender policy had been developed to deal with the violations that were specific to women during the political conflicts in Zimbabwe. In the final recognition of the significant role of women and the gender dynamics in conflict settings, the Parliament of Zimbabwe explicitly included provisions on gender in the law that operationalises the NPRC. It is a "constitutional body mandated to ensure post-conflict justice and truth-telling as a basis for dealing with the past."³⁷⁶ In carrying out its mandate, it is required by law to "ensure its programming is gender-responsive."³⁷⁷

Section 9 of the *NPRC Act* outlines the key provisions dealing with gender, mandating the Commission "to ensure that women, girls and other vulnerable groups" are included in the country's country's reconciliation and peace-building efforts."³⁷⁸ The Commission is mandated to establish a special unit to develop rules and guidelines on incorporating gender in its work.³⁷⁹ It is to develop strategies to encourage the participation of women in the work of the Commission, by ensuring gender equity in all the structures of the Commission and addressing the gender implications of their activities.³⁸⁰ It is to develop protocols and tools that are gender sensitive and capture data on gender concerns of women and girls.³⁸¹

The law also mandates the NPRC "to investigate the use of sexual crimes as a weapon during and after conflicts and to provide survivors of gender-based violence with an

³⁷⁶ Section 9 of the *National Peace and Reconciliation Act No 11/2017*.

³⁷⁷ Section 9 of the *National Peace and Reconciliation Act No 11/2017*.

³⁷⁸ *National Peace and Reconciliation Act No. 11/2017* [Chapter 10:23].

³⁷⁹ Section 9 of *National Peace and Reconciliation Act No 11 of 2017*.

³⁸⁰ Section 9 of *National Peace and Reconciliation Act No 11 of 2017*.

³⁸¹ Section 9(j) of *National Peace and Reconciliation Act No 11 of 2017*.

opportunity, in private or public, to relate their accounts of the violations or harm they have suffered and to effectively respond to their needs.”³⁸² The law further prescribes that “any form of response should be guided by a thorough assessment of the needs of survivors of gender-based violations and marginalisation and make recommendations that may include urgent appropriate measures and policies to redress such violations and marginalisation and to restore human and civil dignity.”³⁸³ To kick-start this process, the NPRC established a Victim Support, Diversity Management and Gender Committee to advise on how best to elaborate strategies and methodologies for responding to the gender provisions of the law.³⁸⁴ A window of opportunity through the management committee is now open and it remains to be seen how its effectiveness will fare on post-conflict just measures for sexual violence.

4.6 Evaluation of the National Peace and Reconciliation Commission legal framework

The NPRC mandate in the *Constitution* is to conciliate and mediate disputes among the specified listed groups in conflict.³⁸⁵ The list of groups does not specifically mention political parties as target groups for conciliation and mediation. The failure of the *Constitution of Zimbabwe* to include political conflict in provisions that relate to the absence of violence, discrimination and equality is problematic. Considering that the crisis in Zimbabwe since pre- and post-2000 has been precipitated by political impasses between the ruling party and opposition political parties, it has been prudent for the *Constitution* to specifically state and include politically motivated violence in all provisions related to discrimination, equality and non-violence.

Political violence is one of the root causes of conflict in Zimbabwe that has perpetuated discrimination, inequality and violence towards women. It has resulted in targeting women in Zimbabwe sexually due to their political affiliation and participation. The *Constitution* should explicitly mention and include political parties as target groups since

³⁸² Section 9(i) of *National Peace and Reconciliation Act No 11 of 2017*.

³⁸³ Section 9 (k) of *National Peace and Reconciliation Act No 11 of 2017*.

³⁸⁴ Tshuma 2018:2.

³⁸⁵ Section 252 (i) of the *Constitution of Zimbabwe Amendment No. 20 of 2013*. Mentions political parties as potential institutions for dialogue to prevent conflict. There is no mention of its conciliatory and mediatory role when political conflict impasses arise.

they have been the culprits that perpetuate violence and conflict that has led to the sexual violation of women in Zimbabwe. The *Constitution* ought to acknowledge explicitly and include in its provisions the role that politically motivated violence has played in Zimbabwe's conflicts. There is a tendency in the national narrative of the current political crisis to amplify the colonial government's role in the political conflicts that led to the liberation war. Yet, when it relates to the narrative of the post-independent Zimbabwe political conflict, more so post-2000, there is censored and calculated silence and a total disregard for the role that the ruling party ZANU PF plays in the current political crisis. This silence and attitude that the government of Zimbabwe posits are resembled in the legislation framework beginning with the *Constitution*, which outrightly neglects to include political violence in the legislative framework. This neglect cascades down shrouding violations such as sexual violence resulting from the political conflict where women are targeted. Post 2000, significant efforts have been made in recognising the gendered nature of political violence through the NPRC and its founding legislation, however, a lack of political will has stifled efforts to address sexual violence.

The delay of five years in enacting the *NPRC Act* and a National Gender Policy on conflict resolution attest to this anomaly. In 2018 and 2019, the NPRC rolled out provincial outreach programmes to enhance stakeholders' awareness of the NPRCs functions and provide a platform for stakeholders to work with the NPRC for peace, healing and reconciliation in the country.³⁸⁶ It is only in 2019 that consultative meetings with female victims of *Gukurahundi* in Matabeleland that NPRC pledged to create women-specific spaces to address their conflict experiences and healing needs.³⁸⁷ It is through these consultations that the Commission stated "In all our conflict episodes, women have been the most affected, so through the victim support, gender and diversity committee we will have women only spaces where women are going to engage."³⁸⁸ Musanhu, a commissioner of the NPRC reiterated "even as we talk about *Gukurahundi*, women were disproportionally affected and the manner in which they were affected cannot be said in public, so we are going to create spaces where these

³⁸⁶ Mutisi 2015:1–2.

³⁸⁷ Mandikwaza 2019:4.

³⁸⁸ Mandikwaza 2019:4.

women are going to participate.”³⁸⁹ The NPRCs pledge to women demonstrates its commitment to delivering on its promises of post-conflict justice. The main criticism against government institutions when it relates to justice and accountability for conflict-related sexual violence against women in Zimbabwe has been its marginalisation of these key issues in the broader national narrative on conflict resolution. This new stance by the NPRC is a significant new step in the acknowledgement and recognition of the plight that female victims of violence face during periods of conflict in Zimbabwe. The fact that the NPRC promised and seems to have taken some action, registers landmarks that the NPRC has scored since the promulgation of its enabling act on 25 January 2018. More importantly, the safe spaces engagements definitely “shape the NPRCs healing and reconciliation agenda, especially in terms of developing gender-sensitive victims’ support systems and response structures.”³⁹⁰ However, there should be gender targeted responses to the violations that women suffered and gender sensitive justice for female victims of sexual violence developed by the NPRC.³⁹¹ These responses ought to combat all forms of violations and marginalisation against women and guarantee the non-recurrence of political violence that targets women.³⁹²

The NPRC must create opportunities for access to justice as they meet women in their different safe spaces, as this is the main area of neglect since post-independent Zimbabwe. The integration of gender issues in the NPRC national agenda for healing and reconciliation is a positive initiative for female victims of conflict-related violence. It is however doubtful if the current NPRC platforms will be able to develop broader mechanisms to ensure that re-traumatisation do not occur.³⁹³ In the women’s safe spaces, the NPRC must come to the recognition that the possibility of the existence of female perpetrators and the dilemma it creates.³⁹⁴ In any conflict situation, there are female perpetrators and collaborators to the gross human rights violations.³⁹⁵ They act as “merchants of death, intelligence carriers and active tempo raisers.”³⁹⁶ They may not

³⁸⁹ Kupe 2019.

³⁹⁰ Mandikwaza 2019:4.

³⁹¹ Mandikwaza 2019:5.

³⁹² Mandikwaza 2019:5.

³⁹³ Mandikwaza 2019:5.

³⁹⁴ Mandikwaza 2019:5.

³⁹⁵ Mandikwaza 2019:5

³⁹⁶ Ahmed Ali 2007:71.

only be victims but contributed to the conflict as military force members and indirectly supporting militias and organising logistics and supplies.³⁹⁷ They may be active as bearers of the war culture engaging in ritual ceremonies that validate the conflict and blesses those engaged in the fighting.³⁹⁸ This category of women complicates the dynamics of the women's safe spaces in that, they may want to participate in the safe spaces but they are known or perceived for their active involvement as accomplices in the violent conflict.³⁹⁹ The NPRC ought to be mindful of the multiple subjectivities that women carry in the context of conflict. They may be victims, survivors, activists and perpetrators to as well as other violations other than sexual violence that they may have been subjected to.⁴⁰⁰ The women's safe space initiative is good in principle, the challenge it exhibits is that it is created for women and not with women.⁴⁰¹

Rather, the NPRC ought to create safe spaces together with victims of conflict-related sexual violence and other violations. The involvement of women in developing and sustaining such structures in the target community provides some guarantees of lasting beyond the lifespan of the Commission.⁴⁰² The commitment by the NPRC to create these safe spaces for women to elaborate on their conflict experiences, is hoped will be implemented broadly for all victims and survivors of political periods, regardless of their political affiliation covering all conflict periods post-independence. The hope is that sexual violations that women have endured during the conflict in Zimbabwe will be addressed with true intent by the government of Zimbabwe by providing meaningful avenues of justice and rendering perpetrators accountable.

4.6.1 Challenges of the National Peace and Reconciliation Commission

Having identified some milestones that the NPRC has initiated on gender-related conflict issues in Zimbabwe, a few recent studies indicate a bleak future. The concerns raised relate to the ability of the NPRC to provide meaningful programming for the violations women endured during the political conflict in the country. Several challenges

³⁹⁷ Ahmed Ali 2007:71.

³⁹⁸ Ahmed Ali 2007:71.

³⁹⁹ Mandikwaza 2019:5.

⁴⁰⁰ Ahmed Ali 2007:71; Mandikwaza 2019:5.

⁴⁰¹ Mandikwaza 2019:5.

⁴⁰² Mandikwaza 2019:5.

are reported as hindrances in the effective performance of the NPRC mandate stipulated in its founding act. A recent study by the Institute of Young Women Development found that formal peacebuilding and conflict resolutions initiatives in Zimbabwe continue to ignore and marginalise gender and women's involvement in formal missions and talks remains low.⁴⁰³ A total of 80.4 per cent of the research participants indicated that they did not know of the existence of the NPRC.⁴⁰⁴ As analysed above, on paper the NPRC has provided reports on having conducted national consultative work with female victims of political violence.⁴⁰⁵ The report by the Institute of Young Women Development reveals that the NPRC had only conducted four meetings in one province in Zimbabwe.⁴⁰⁶ The report states that the NPRC had only received twenty complaints from the Mashonaland Central Province since its inception in 2013.⁴⁰⁷

This reflects negatively on the approaches that the government of Zimbabwe and its institutions are adopting in dealing with matters related to politically motivated sexual violence. It can be concluded therefore that these institutions, that are tasked with supporting and ensuring post conflict justice, healing and reconciliation as stipulated in the *Constitution of Zimbabwe*, the intended users are unfamiliar with them.⁴⁰⁸ This is notwithstanding the alleged impartiality and alleged capture of these institutions by the executive, impairing their independence.⁴⁰⁹ A very senior member of the NPRC secretariat admitted the lack of independence by the commission by stating “our independence is qualified”.⁴¹⁰ This allegation against the government of Zimbabwe in relation to the NPRC is further demonstrated in the usurping of the powers of the NPRCs constitutional mandate to facilitate national dialogue among political parties.⁴¹¹ The executive hijacked the commission's mandate to dialogue with political parties and instead launched the Political Actors Dialogue with the largest opposition party not

⁴⁰³ Mutongwiza 2021.

⁴⁰⁴ Mutongwiza 2021.

⁴⁰⁵ Mandikwaza 2019:4.

⁴⁰⁶ Institute for Young Women Development 2021:16–18.

⁴⁰⁷ Institute for Young Women Development 2021:16.

⁴⁰⁸ Institute for Young Women Development 2021:16.

⁴⁰⁹ Mutongwiza 2021.

⁴¹⁰ Institute for Young Women Development 2021:16.

⁴¹¹ Section 252 (i) of the *Constitution of Zimbabwe*.

represented.⁴¹² It was facilitated by the “Office of the President and Cabinet, the NPRC and the Gender Commission chairpersons were invited as co-conveners with no influence or decision-making power in terms of setting the agenda, outputs and outcomes.”⁴¹³ The capture of the NPRC by the executive is further demonstrated in its exclusion from the Commission of Inquiry set up by President Mnangagwa and chaired by Kgalema Motlanthe to investigate the 2018 election violence.⁴¹⁴ At the inception of the commission, it was hoped that the NPRC would be the rightful organ to conduct investigations since issues of political and electoral conflict and violence are within its constitutional mandate.⁴¹⁵ The government of Zimbabwe sidelined the NPRC on the basis that it lacks institutional independence and the capacity to delve into the root causes of the conflicts and handle highly technical conflict matters.⁴¹⁶ Such brazen actions by the government of Zimbabwe depict the lack of independence of the NPRC on the national issue of justice for politically motivated violence including sexual violence against women.

There is a continued practice by the Zimbabwean government of failing to exercise goodwill on matters related to political violence, ultimately affecting matters of redress that pertain to conflict-related sexual violence against women in Zimbabwe. The lack of goodwill and good governance by the government of Zimbabwe is demonstrated further in the action that was taken to remedy the tenure challenges that the NPRC was facing. The NPRC has a limited tenure of operation and since its inception; it has faced protracted delays to begin functioning. This is a direct result of the lack of political will by the government of Zimbabwe to enact the NPRCs operational legal policy.⁴¹⁷ This delay

⁴¹² Mazambani and Tapfumaneyi 2020:286.

⁴¹³ Mazambani and Tapfumaneyi 2020:286.

⁴¹⁴ According to report based on the violence on 1 August 2018, reports indicated that “six unarmed civilians lost their lives and several others were wounded by government soldiers who opened fire on people protesting alleged misconduct by the Zimbabwe Electoral Commission (ZEC). The protesters accused ZEC of delays in announcing election results and vote rigging. Even before the July 31 general election, the ZEC, a body responsible for ensuring that elections are transparent, free and fair, was consistently challenged in court by civic groups for failing to address the abnormalities in the voter registration roll. These protests and anomalies were overlooked by the ZEC and no effort was made to resolve these contentious issues.” Murambadoro 2019.

⁴¹⁵ Mazambani and Tapfumaneyi 2020:287.

⁴¹⁶ Mazambani and Tapfumaneyi 2020:287.

⁴¹⁷ Even though members of the commission were appointed by the President as far back as 2016, there was no secretariat to implement the commission’s strategy and resolutions, thus further paralysing the work of the NPRC. The NPRC, which was supposed to come into force in 2013, was only operationalised through an Act of Parliament in January 2018, with its mandate scheduled to end in 2023. President Mnangagwa under the new dispensation in 2018 promulgated the *NPRC Act*. Mazambani and Tapfumaneyi 2020:282.

in the NPRC commencing its functions has a “bearing on the fulfilment of the long list of functions outlined in Section 252 of the *Constitution* and expanded in the enabling Act.”⁴¹⁸ Hence, it becomes virtually impossible for the commission to deliver on its mandate effectively given the further limited operational period.⁴¹⁹ A former opposition member of the National Assembly lodged a court application to the High Court seeking an order to allow reinstatement of the five years that the NPRC lost before full operationalisation.⁴²⁰ The court granted this order,⁴²¹ but the State appealed against the ruling.⁴²² This court challenge by the government is a major disappointment, which exhibits actions that are contrary to the dictates of good governance.⁴²³ It is illustrative of the government of Zimbabwe's lack of goodwill on issues related to justice and accountability on political violence. Commenting on the government of Zimbabwe's challenge to the court order, Mazambani and Tapfumaneyi's opinion that, “the government is culpable by prejudicing citizens through delayed operationalisation of the commission and thereafter refusing to make amends by reinstating the lost period of the NPRCs tenure.”⁴²⁴ With the appeal still pending in the courts of law, the fate of the NPRCs lifespan therefore remains in limbo.”⁴²⁵ The uncertainty that the appeal brings on the NPRCs tenure inadvertently overshadows the inroad that the NPRC has made regarding its recognition and incorporation of gender and conflict in its programming and policy. This uncertainty is further extended to female victims of sexual violence as they face further hurdles in their fight for justice and accountability for the violations they have endured.

4.7 Conclusion

The State of Zimbabwe at independence signed an agreement that placed the new state under the auspices of a constitution. The constitution became the supreme law of

⁴¹⁸ Mazambani and Tapfumaneyi 2020:282.

⁴¹⁹ Mazambani and Tapfumaneyi 2020:282.

⁴²⁰ *Concilia Chinanzvavana v Ministry of Justice, Legal and Parliamentary Affairs and Others* HMA 13/19 Case No HC 455/18.

⁴²¹ *Concilia Chinanzvavana v Ministry of Justice, Legal and Parliamentary Affairs and Others* HMA 13/19 Case No HC 455/18. Para 54–56.

⁴²² Mazambani and Tapfumaneyi 2020:282.

⁴²³ Mazambani and Tapfumaneyi 2020:282.

⁴²⁴ Mazambani and Tapfumaneyi 2020:283.

⁴²⁵ Mazambani and Tapfumaneyi 2020:283.

the land that includes the provisions of law that will govern the state, institutions and citizens based on the broader governing principle of constitutionalism. There exists a constitutional and legislative framework in the investigation of the current approaches the post-independent Zimbabwe has adopted in addressing conflict-related sexual violence against women. This legislative framework is influenced and flows from the principles of constitutionalism that seek to promote and protect citizens from all forms of violence.⁴²⁶ It upholds the rights of women towards political participation, equality and access to justice for violations committed.⁴²⁷ At the heart of the fight against violence against women, the legal framework in Zimbabwe that regulates sexual violence includes the *Constitution of Zimbabwe*,⁴²⁸ the *Criminal Law Codification and Reform Act* (the Criminal Code)⁴²⁹ and the *Domestic Violence Act*.⁴³⁰

In the realm of political conflict, national peace-building mechanisms are set up in response to the 2000 political crisis and the unprecedented level of politically motivated violence in 2008. This necessitated the operationalisation of the preceding ONHRI and the NPRC and its founding Act with the mandate to embark on post-conflict justice and peacebuilding.⁴³¹ As a government institution, it is one of the adopted approaches of post-independent Zimbabwe to address violence against women in the conflict that Zimbabwe has grappled with. That is because political conflict during election periods in Zimbabwe is a major root cause of sexual violence against women.

The gender dimensions of conflict in Zimbabwe are now recognised in its founding legislation, the *NPRC Act*, which provides the functional legal authority of the commission. Therefore, the NPRC is the relevant institution to address violations that women have faced in Zimbabwe's conflict seasons. It is the relevant institution by law and policy to undertake and facilitate issues of justice and accountability for conflict-related sexual violence for women in Zimbabwe. The path to achieving its mandate to foster post-conflict healing, justice and reconciliation has been fraught with challenges

⁴²⁶ Section 56 of the *Constitution of Zimbabwe*.

⁴²⁷ Section 53 of the *Constitution of Zimbabwe*.

⁴²⁸ *The Constitution of Zimbabwe Amendment (No.20) Act 2013*.

⁴²⁹ *The Criminal Law (Codification and Reform) Act* [Chapter 9:23] Section 65(1).

⁴³⁰ *The Domestic Violence Act* [Chapter 5:16] (Act 14/2006). Section 65(1) 24 16].

⁴³¹ It was signed into law by President Mnangagwa on 5 January 2018. *National Peace and Reconciliation Act No. 11/2017* [Chapter 10:23].

for politically motivated violence that relate to women in conflict settings. The NPRC represents an “original concept born out of a compromise between various political parties and demonstrates the first attempt post-1980 to engage the past honestly and truthfully.”⁴³² This raises much optimism and as such, the NPRC has a central and significant role to play to the peace process.⁴³³ At the same time, however, “the NPRC is the manifestation of a profoundly faulty approach that must be addressed.”⁴³⁴ Since its inception in 2013, the NPRC has failed to prevent the rise of political tension in the country and to foster an environment for peaceful dialogue.⁴³⁵ Violations committed in the 2018 and 2019 political conflicts where women were subjected to sexual violence by the military and state agents, under its watchful eye, have gone unpunished, unacknowledged and without redress. The political culture of amnesties and pardon and militarisation of the state of Zimbabwe precipitates violence.⁴³⁶ Reconciliation and justice processes remain futile as long as the endless loop of impunity exists.⁴³⁷ The meddling of political leaders in the management processes of the NPRC hinders impartial carriage of its obligation.⁴³⁸

The failure of the NPRC and other independent commissions in carrying forward their official mandates is attributed to the continual political interference from the power that be.⁴³⁹ This thereby renders them ineffective mechanisms in addressing post-conflict justice, peace and reconciliation for female victims and survivors of sexual violence, among other victims. As observed by Murambadoro, “politicisation has compromised the effectiveness of the NPRC and political figures have been using the NPRC as a political strategy to gather support from the electorate and be seen as compliant to international standards of justice and respect for human rights.”⁴⁴⁰ A deteriorating economic crisis and political instability continue to pose a serious threat to peace and justice in Zimbabwe.⁴⁴¹ The paradigm of conflict refuses to fade in Zimbabwe according

⁴³² Tsuma 2018:25.

⁴³³ Tsuma 2018:25.

⁴³⁴ Tsuma 2018:25.

⁴³⁵ Mazambani and Tapfumaneyi 2020:296.

⁴³⁶ Mazambani and Tapfumaneyi 2020:296.

⁴³⁷ Ndlovu-Gatsheni and Benyera 2015:33.

⁴³⁸ Murambadoro 2019.

⁴³⁹ Murambadoro 2019.

⁴⁴⁰ Mazambani and Tapfumaneyi 2020:297.

⁴⁴¹ Mazambani and Tapfumaneyi 2020:297.

to Ndlovu-Gatsheni and Benyera because “there is minimal political will to establish the truth and guarantee justice as the meaningful pathways of reconciling Zimbabwe.”⁴⁴² For the government’s adopted approaches in dealing with politically motivated violence against women in Zimbabwe to yield the desired results, there must be a stop to the endless denial and victim-blaming by the perpetrators of sexual violence.⁴⁴³ Victim-blaming is targeting women sexually because they are opposition affiliated and denial is in the failure to acknowledge that such violations occurred.⁴⁴⁴ The government of Zimbabwe’s approaches to the marginalisation and lack of prosecutions for conflict-related sexual violence express denial since independence to date. This stance by the government of Zimbabwe and by extension the NPRC signifies a serious flaw of the conflict resolution methods and approaches in engaging with the violent past in a holistic manner.⁴⁴⁵

To address sexual violence against women during conflict periods in Zimbabwe effectively, the Zimbabwean government ought to show goodwill and good governance by implementing all policies on paper into tangible actions that see justice attained for past violations of women. As a constitutional state founded upon the principle of constitutionalism and constitutionality the government of Zimbabwe ought to abide by its founding principles of an absence of violence for women and all other citizens within its borders during election periods. In the broader national narrative of post-conflict resolution in Zimbabwe, the NPRC national programming and consultative work must address all epochs of violence in Zimbabwe and unearth the root causes of the political violence. These periods are recognised and have been acknowledged over the years as volatile times that subject women to violence because of their gender. The NPRC is making some strides in the recognition of the violence that women have undergone during conflict. However, without addressing the abovementioned challenges the commission will fail to accomplish its mandate of post-conflict justice, peace and reconciliation for sexual violence against women in Zimbabwe.

⁴⁴² Ndlovu-Gatsheni and Benyera 2015:33.

⁴⁴³ Tshuma 2018:21, 25; Mazambani and Tapfumaneyi 2020:284.

⁴⁴⁴ Tshuma 2018:21, 25.

⁴⁴⁵ Tshuma 2018:25; Mazambani and Tapfumaneyi 2020:284.

CHAPTER 5

Possibilities for integration

5.1 Introduction

This chapter aims to respond to the research problem of the study, namely the failures of female victims and survivors of politically motivated violence in obtaining redress for sexual violations committed by the government of Zimbabwe during conflict situations, and by asking if the approaches in the legislative framework on post-conflict justice for sexual violations against women can be integrated with pre-colonial African knowledge systems on resolving conflict. It is determined in Chapter 4 that Zimbabwe as a new state after a violent conflict for liberation from colonialism, adopted constitutionalism that dictates principles to govern the newfound state territory.¹ The constitution as the supreme law of the land, enacted criminal laws and various institutions are the regulatory legislation that foresees issues of justice and accountability for post-conflict related sexual violence.²

In response to the political conflict of 2008, the political agreement to end the violence and foster post-conflict justice healing and reconciliation, the government of Zimbabwe adopted national peacebuilding mechanisms.³ The approach that the government of Zimbabwe adopted post-independence to address conflict-related political violence has been amnesties, clemency orders and pardons, thereby deterring justice for female victims of conflict-related sexual violence violations.⁴ The national peace building institutions have not been successful in addressing post justice healing and reconciliation. Sexual violence against women during all epochs of post-independent Zimbabwe has been used as a political tool to instil fear and intimidate women from participating in the political sphere.⁵ It is further determined that the political culture and

¹ Diala 2019b:4.

² *The Constitution of Zimbabwe Amendment (No.20) Act 2013; The Criminal Law (Codification and Reform) Act [Chapter 9:23] Section 65(1) and The National Peace and Reconciliation Commission Act.*

³ Mazambani and Tapfumaneyi 2020:280.

⁴ Matyszak 2010, Zimbabwe Human Rights NGO Forum 2019a:10–11.

⁵ Hodzi 2012:2–3; Manyonganise 2017:113.

environment cultivated by the government of Zimbabwe against its perceived political opponents has been one characterised by violence, harassment, torture, rape and impunity for such violations.⁶ There is the ongoing marginalisation and silent approach adopted by the government of Zimbabwe and its requisite institutions toward the justice narrative on violations that target women.⁷ As a result, justice and accountability for female victims and survivors of sexual violence from the conflict have been elusive. The most recent institution constituted after the 2008 conflict in response to the political violence that persistently mars Zimbabwe's political climate, is the NPRC.⁸ It is mandated to address the injustices of Zimbabwe's conflict periods, which include violations that women in Zimbabwe have endured during these violent periods. As acknowledged in Chapter 4, it is in the last few years since the NPRC's inception in 2013 that the gender dimensions of the conflict have been included in the national peacebuilding structures of post-conflict justice, healing and reconciliation.⁹ Through the *NPRC Act's* provisions for the enactment, the inclusion of gender in the work of the commission and redressing of conflict-related crimes during Zimbabwe's political conflict have been stipulated.¹⁰

The post-independent approaches adopted by the government of Zimbabwe in addressing sexual violations against women during political instability are fraught with challenges that translate as the denial of justice for such violations.¹¹ The political culture of Zimbabwe on justice and accountability for political violence have been marred with a lack of political will to proceed in a constructive path that brings national dialogue on violations perpetrated against women in Zimbabwe.¹² One of the main contributions of the government of Zimbabwe's stance on political violence is the complicit nature that the state apparatus is playing in the perpetuation of violations against women in conflict periods, which have predominantly been during election times.¹³ This has inadvertently affected negatively the ability of women to seek justice

⁶ Chikerema and Chakunda 2014:59.

⁷ Zengenene and Susanti 2019.

⁸ Murambadore and Wielenga 2015:52.

⁹ Hodzi 2012:3–4; Manyonganise 2017:113.

¹⁰ *National Peace and Reconciliation Act No. 11/2017* [Chapter 10:23]

¹¹ Murambadore and Wielenga 2015:52.

¹² Dziva 2018:4; Zimbabwe Human Rights NGO Forum 2006b:7.

¹³ Zimbabwe Human Rights NGO Forum 2006b:7.

for violations they have endured during the political conflict in Zimbabwe since independence. Having provided the summary of the findings of the analysis on current approaches to the status of sexual violations against women during conflict in Zimbabwe, I now elaborate on the aim and purpose of Chapter 5. The overall aim of the chapter is to ascertain whether the pre-colonial African knowledge system and law on conflict resolution can bridge the gaps in the systematic failures of the current approaches implemented by the government of Zimbabwe in addressing conflict-related sexual violence. I argue that the preeminence placed on constitutionalism in the current state of Zimbabwe and the derogation of the pre-colonial African legal system and Ubuntu philosophy of law in the resolution of the conflict has contributed to the failures of the current approaches on this matter.

The history and construction of the constitutional principles enshrined as the founding law of Zimbabwe are devoid of any African value system. Their roots originated on Western principles and a colonial culture that is at variance with the African values and principles on conflict resolution. The current legal structure in Zimbabwe resembles a pluralistic legal system where constitutionalism and African customary law co-exist as institutions that play a role in resolving conflict. The challenge in the co-existence of the two systems pose in conflict resolution for sexual violence is the dominant nature that the Western law system wields over African customary law systems. African customary law on conflict resolution is not regarded as a source of rights enshrined in the post independent Zimbabwe constitutional state.¹⁴ I argue that the African philosophical worldview should be employed to challenge the constitution's adherence to individualism that emphasises the needs of individuals over the needs of the whole group. This is contrary to Ubuntu law that emphasises and prioritises communalism over individualism. The emphasis on individualism mean that mainstream jurisprudential approaches to the resolution of conflict often miss the interconnected networks, the

¹⁴ Sections 280- 287 of Constitution are provisions that give recognition to the institution of traditional leaders. Culture is given recognition in Section 16. However Section 2 of the Constitution specifically places the Constitution as the supreme law of the land and all customs inconsistent with its dictates are invalid. This is the dominant nature that the Western jurisprudence welds on Zimbabwe customary law. it is my contention that this is the perpetuation of coloniality in post colonial Zimbabwe. The principles of Ubuntu are absent in practice and theory in addressing conflict related violence. The emphasis on individualism over the African customary law philosophy of communitarism is problematic and ought to be address in addressing sexual violations against women arising from political internal conflict.

interdependency of systems over time and the importance of context.¹⁵ This interdependency is crucial for addressing African psychosocial life.¹⁶ The argument in the study is trajected towards aligning of current approaches on sexual violations from internal conflict to an Ubuntu-based approach to conflict resolution. This it is argued could offer better suited responses to women who are victims of sexual violence in political internal conflict. Further to that, in Zimbabwe's adopted approaches on conflict-related sexual violations against women, its operating legal system and structures are reliant to a large degree on Western principles of conflict resolution. This has culminated into the replacement of Zimbabwe's pre-colonial African legal principle and systems in conflict resolution on sexual violations against women with the domination of a global Western principle and systems. In these approaches adopted by the Zimbabwe's government post-independence, there exists the Western colonial culture of failing to purposefully deal with political conflict violations that target women and thereby neglecting their redress.

The adoption of national building structures such as the NPRC to address violations that arise in Zimbabwe's continued political crisis attests to the fact that the current legal system is not the sole institution or structure with the ability to resolve and offer post-conflict justice healing and reconciliation. Its institutionalisation is an admission by the authorities of the shortcomings of the Western legal system in providing the justice needs of women amongst other victims and survivors of political violence. This prompts the argument for reconsideration by the government of Zimbabwe for the adoption of pre-colonial principles of conflict resolution on sexual violence perpetrated against women during conflict. Consequently, the global shift in international law and national legal structures in recognising and adopting in practice restorative justice in conflict resolution favours the argument. Restorative justice forms the basis and core of pre-colonial African law in conflict resolution. I argue that a complementary approach can be adopted in addressing sexual violations arising from conflict situations in Zimbabwe to remedy the shortcomings of the Western legal system approaches. This approach includes the adoption of pre-colonial African law and justice philosophy and must be

¹⁵ Sexton, 2012:63. Downs 2016:27.

¹⁶ Downs 2016:27.

accorded the position of an equal partner in conflict resolution. In developing the argument for Chapter 5, I first analyse the challenges that liberal constitutionalism poses to indigenous African knowledge systems on conflict resolution in Zimbabwe and its impact in the quest for justice for sexual violations women face in conflict. Thereafter, I analyse the adoption of the complementary approach in the integration of the two legal systems in current existence in Zimbabwe in the resolution of political conflict. Literature that supports the existence of a legal pluralistic system where African knowledge systems are posited as equal and valuable in conflict resolutions, guides the analysis. This is substantiated by African scholarly writings that posit the call for integrating African knowledge systems and law in conflict resolution, as the broader research problem focuses on the possibility of the adoption of African traditional justice mechanisms in redressing sexual violations against women during conflict in Zimbabwe. I analyse the contributions pre-colonial African knowledge system poses towards their inclusion in resolving sexual violence. Lastly, I make recommendations on how an integrated approach in dealing with conflict-related sexual violence could provide the platform for women to get the necessary post-conflict justice, healing and reconciliation for violations committed against them during the political conflict.

5.2 Liberal constitutionalism and its challenges to African indigenous knowledge systems

The purpose of engaging in the criticism of Zimbabwe's constitutional state is to provide an argument that the persistent marginalisation and inaction towards addressing sexual violence against women in conflict unsettles post-independence constitutionalism, political culture and jurisprudence. The central problem of the study is premised on the fact that Zimbabwe's post-colonial constitutional state has rendered empty towards the historical justice in its failure to actualise justice and accountability for sexual violence women have endured over the years due to political violence. The global influence of Western forms of conflict resolution, corruption, lack of political will, a violent and intolerant culture to alternative views to the ZANU PF government, and partiality of its

institutions towards ZANU PF account to a large extent towards these challenges.¹⁷ The history of colonialism in Zimbabwe was marked by brutal violence, land dispossession and exploitation of black bodies by subjecting women to sexual violence and introducing enduring forms of legal and political governance of indigenous populations.¹⁸ Through colonialism, there were rearranged socio-economic inequalities and extreme poverty as well as psychological alienation and imposed symbolic degradation of African personality.¹⁹ In the legal realm, pre-colonial African legal knowledge and systems on conflict resolution were usurped resulting in the annihilation of African cultures and onto-epistemics.²⁰ It was the hope of all that with the introduction of a liberal constitution in Zimbabwe at independence the colonial inequities, violence and injustice, and freedoms denied would be remedied and realised under the new constitutional dispensation. It is evident from the analysis in preceding Chapter 4 that these approaches adopted by the present government of Zimbabwe under the constitutional framework are failing to translate into tangible dreams for the ordinary citizen.

Many critical theorists such as Crenshaw and Torres argue that “formerly post-conflict societies that have undergone liberal legal reform, such as Zimbabwe can remain oppressive for as long as they are defined by unredressed asymmetries of power and continue to display features of stratification, exploitation, violence, marginalisation, powerlessness and cultural dominance.”²¹ As the present study’s focus is on the failures of the current legal system in addressing conflict-related sexual violence against women in Zimbabwe, justice healing and reconciliation for women is still a far reality for women in Zimbabwe. The current approaches adopted by the government of Zimbabwe presently to address political violence and the sexual targeting of women are drawn from a transitional justice framework which is guided by regional and international law. There exist constitutional provisions and subsequent legislation that regulates sexual violence and stipulations for the state and all agencies of government to adopt measures in preventing violence.²² Despite these provisions and injunctions, there are

¹⁷ Ndlovu-Gatshen and Ruhanya 2020; Hodzi 2012:6.

¹⁸ Modiri 2017:7.

¹⁹ Modiri 2017:7.

²⁰ Modiri 2017:7.

²¹ Modiri 2017:28 See for example Crenshaw 1988, Young 1990, Cudd 2006 and Maldonado-Torres 2007.

²² *Constitution of Zimbabwe*, Section 25.

rampant incidences of sexual violence perpetrated against women during political conflict in the country. The current approaches adopted as they stand in addressing politically motivated sexual violence against women are a result of the neglected dimension, entrenched with impunity and riddled with distorted truth-finding outcomes.²³ They are canvassed with ZANU PF narratives of blaming victims and denial of the existence of such violations and the stance of undermining the legitimacy of its transitional justice initiatives probed by the NPRC.²⁴ The constitutional state of Zimbabwe can be criticised for its failure to realise the urgent need to actualise justice and conciliate politically motivated sexual violations against women. Mzikamanda argues and attributes these failures of southern African constitutions like that of Zimbabwe as too closely resembling “Western notions and values of democracy and good governance, with little or nothing of African cultural values and the idea of African democracy.”²⁵ The adoption process of these constitutions resembles “copying and pasting” with a pure conformist fashion to meet the demands of Western governments.²⁶ A critical gaze into the *Constitution of Zimbabwe* reveals the observation that it is not only a formal law text; it is riddled with “hegemonic public grammar, political imaginary and a form of historical and social consciousness.”²⁷

Embedded within it is a particular cultural and ideological value and as such works to consolidate and preserve particular arrangements and relations of power and knowledge.²⁸ The current laws in Zimbabwe’s legal system have no voice that speaks to African law and the Ubuntu philosophical thought. I refer here to pre-colonial African conflict methods since the study focuses on addressing sexual violence using traditional justice mechanisms in conflict resolution. It is bereft of African worldviews and philosophical conceptual thought that relates to Zimbabwe’s pre-colonial conflict methods. This absence of African philosophy thought and worldview in the current conflict resolution approaches to sexual violence perpetuates coloniality in knowledge and culture. The current adopted approaches are embedded with the cultural relations

²³ Hodzi 2012:6.

²⁴ Hodzi 2012:6.

²⁵ Mzikamanda 2011:3.

²⁶ Mzikamanda 2011:3.

²⁷ Modiri 2017:10.

²⁸ Modiri 2017:10.

of power and knowledge that draws us to state that the *Constitution* has perpetuated the continuation of coloniality power relations, values systems and subjectivities.²⁹ The main question to be assessed at this point is what interest and powers the *Constitution* secure and leave untouched in post-independent Zimbabwe? In other words, what truths and demands does the present *Constitution* silence lessen or remove? I revert to Ndulo's assessment of the cultural problems of constitutionalism in Zimbabwe to answer the question posed above. The root causes of cultural problems of constitutionalism in Zimbabwe according to Ndulo "stem from the colonial experience overlaid with the post-colonial imposition of a one or dominant-party system."³⁰ He states further that, "the legacy of colonialism is often referred to as an explanation for Africa's failures in governance and in the case of Zimbabwe, it is often branded as neocolonialist."³¹ Undoubtedly, the colonial governments were not conducive to creating a culture of the rule of law, despite hasty and belated attempts to create a framework for a constitutional government in the last years of colonial rule.³²

For most of its history, "the colonial government in Zimbabwe was by nature dictatorial and its legacy provided allurements for similar conduct by the consecutive rulers in the state of Zimbabwe."³³ However, the state of Zimbabwe through its constitutional state has been complicit in silencing and minimising justice and accountability narratives for women subjected to its brutality during the conflict. This is similar in manner in which the Western-inspired constitution erases silences and perpetuates coloniality. The current *Constitution of Zimbabwe* has served the ends of the government of Zimbabwe in abrogating its agendas on politically motivated violence and addressing such violations. The nation of Zimbabwe is characterised by executive dominance and continues to slide towards the "big man" rule.³⁴ There are deliberate efforts under the auspices of the *Constitution* and all other legislative frameworks on non-violence to discredit and alienate post-conflict justice healing and reconciliation for violations that pertain to

²⁹ Modiri 2017:10–11.

³⁰ Ndulo 2011:195.

³¹ Ndulo 2011:195.

³² Ndulo 2011:195.

³³ Ndulo 2011:195–196.

³⁴ Mzikamanda 2011:5.

women in its political conflicts.³⁵ Mzimakanda observes that, “the ruling elite, though committed to the principles of the constitution, disregard the provisions of the constitution at their convenience in the pursuit of selfish goals in the name of the poor and illiterate majority.”³⁶ That being said, constitutionalism in the hearts of the general populace is a “pie in the sky” with enshrined principles that have failed to translate into tangible results of redress for political crimes. The consideration here is that what anchors at the core of politically motivated violence in Zimbabwe is the disregard of the dictates of the Constitution by the requisite government of Zimbabwe and relevant institutions of post conflict justice and healing. In the same vein the erasure and silencing of African knowledge systems in the current *Consitution* I argue has contributed in fuelling politically motivated violence in Zimbabwe specifically on women victims of sexual violence. The lack of Ubuntu epistemology in the Constitution’s recognised approaches on post conflict justice silences and erases African customary orientation responses in resolving conflict.

This curtails the possibilities of offering women victims of sexual violence arising from conflict responses that align with their African communal orientation. There is a general belief and acceptance in the legal and political culture that enacting new constitutions after conflict facilitates a substantive and symbolic break from the past.³⁷ The culture of legality in the realm of a constitutional state like Zimbabwe becomes central in producing a particular political culture and conceptions of what it entails on the notion of nationhood, subjectivities and the particular vision of the greater civil society.³⁸ Douglas argues against this narrative asserting “that the centring of constitutions as a pivotal instrument for the production and reconstruction of the political community after conflict always comes at the expense of alternative imaginations of the political community.”³⁹ The messy reality of subjectivities is denied and has the probability of glossing over the persistent issue of inequality.⁴⁰ Douglas in this regard states that, “post-conflict constitutions signal particular kinds of shifts in culture and articulate aspirations for

³⁵ Mzikamanda 2011:5.

³⁶ Mzikamanda 2011:5.

³⁷ Modiri 2017:13.

³⁸ Modiri 2017:13.

³⁹ Douglas 2016:140–141.

⁴⁰ Douglas 2016:142.

renewal.”⁴¹ According to Modiri “this often contains a false teleological conceit that casts the social, political and legal order as being on a progressive move from a dark and conflictual past to a democratic future.”⁴² Christodoulidis opinions the overly relying on and investing in constitutions as problematic, because constitutionalism is unable to provide reflexive politics and is unable in placing weight to appreciate the depth of the terror and conflict.⁴³ Using this analogy in the context of post-independence Zimbabwe’s political conflict, constitutionalism has failed to place weight on the unstable conceptions of the political community, women and the legal traditional legal system.⁴⁴ Hence defining the social and political life of a polity mainly through constitutions symbolises a closure of politics rather than an opening.⁴⁵ It is argued here that such a perception fails to appreciate that binding a political community together through sovereign devices places blinkers on the constitution and its proponents to its failures and exclusions.⁴⁶

Modiri’s analysis on this matter is “there is a potential danger that a constitution can postulate in post-conflict settings, it purports to ground a transformed polity and define its values and ideals hoping to hold together the already fragile civic bond of the nation.”⁴⁷ Hence, “the constitution and the discourses and subjects it produces must repress the difficult issue of the contested foundations and unrealised promises of the new order.”⁴⁸ In most instances, the constitution monopolises the sphere of public and political engagement unless actively countered by different politics that are more radical.⁴⁹ Based on these propositions it can be inferred that this is the central position that the *Constitution of Zimbabwe* holds in framing the political legal culture and social discourse in resolving conflicts.⁵⁰ It is having the effect of narrowing the space for political contention and eradicating from a serious logical view the living memory of female victims of sexual violence and the failures of the legal system in redress as

⁴¹ Douglas 2016:141.

⁴² Modiri 2017:14.

⁴³ Christodoulidis 2003 401–403.

⁴⁴ Christodoulidis 2003:401–403; Modiri 2017:14.

⁴⁵ Douglas 2017:116.

⁴⁶ Douglas 2017:116.

⁴⁷ Modiri 2017:16.

⁴⁸ Modiri 2017:16.

⁴⁹ Modiri 2017:16.

⁵⁰ Modiri 2017:16.

artefacts of the present government.⁵¹ Brown advances the notion that “the moralistic dimension of placing a constitution on a pedestal inheres in its deification of the constitution and its inevitable casting of any criticism of the constitution is in some way sacrilegious.”⁵² It hinders the political and social economy from criticising it and advancing the notion that all polity cannot live and think outside of it, at a distance from or even against it.⁵³ Vimalassery states that “the moralism constitutional worship disseminates structures the field of sense, knowledge, perception and imagination in such a way as to make substantive decolonisation appear unreasonable and unrealistic.”⁵⁴ The prevailing underlying theme after these reflections as stated by Maldonado is that, “the development and conceptualisation of knowledge on modern constitutionalism are framed through the experiences, institutions and epistemologies of the Global North.”⁵⁵

The operating position of this system is hierarchal with the Global South relegated to a lower, underdeveloped and purely mimetic tier.⁵⁶ This is the position that the African indigenous knowledge system on conflict resolution lands itself in the grand scheme of global knowledge production. This attachment to hegemonic Western legal traditions and philosophical thinking reproduce universal patterns of legal knowledge that propel the marginalisation of African jurisprudential methods in producing knowledge on Zimbabwean constitutionalism.⁵⁷ The assumption that relying on law, the rights discourse and elitist assumptions on transitional justice as the primary machinery for political restoration and social makeover pose several challenges. As articulated by Modiri this scenario “serves only to deny the urgent need for historical justice and reparation, insulate beneficiaries and perpetrators of atrocities from historical and present moral responsibility” and assimilate the violated majority into the “conqueror’s Zimbabwe.”⁵⁸ Narrowing it down to the state level, local pre-colonial African indigenous conflict resolution practices of Zimbabwe are in a similar position in relation to the

⁵¹ Modiri 2017:16.

⁵² Brown 2001:20.

⁵³ Brown 2001:20.

⁵⁴ Vimalassery *et al.* 2016:19. Modiri 2017:16.

⁵⁵ Maldonado 2013:1–2; Modiri 2017:21.

⁵⁶ Maldonado 2013:1–2; Modiri 2017:21.

⁵⁷ Maldonado 2013.

⁵⁸ Modiri 2017:25–26.

current operational legal system. This is particularly challenging as the research is premised on the development of an unconventional legal philosophy that can work against the more traditional realist or black letter legal thinking and liberal legalism.⁵⁹ I embark next on what ought to be done to African philosophy in addressing this anomaly that constitutionalism poses to African indigenous knowledge systems on conflict resolution. The argument is that the failures that the present system exhibits in the redress of conflict-related sexual violence require a change of mindset in the conflict resolution framework of Zimbabwe. The change of mind can be stimulated by embarking on decoloniality theories and the Africanisation of philosophy in all aspects of African life. African philosophy can play an instrumental role in decolonising the African mind and conflict resolution systems in addressing conflict-related sexual violence. The basis of the argument is premised on the proposition that African philosophy has the capability to help develop concepts rooted in Africa, as this is the philosophy's main project if it is adopted from a narrative of understanding African philosophy as a philosophy-in-place.⁶⁰

5.3 Liberative conceptual ideas in the quest for reconfiguration

One of the persistent problems in Zimbabwe's political landscape is violent conflict during political contestations, which seems to have no solution. Responses to intervene in the political crisis have been the resort to foreign interventions instead of seeking solutions by engaging available resources within the culture of the people. This aggravates the situation, as traditional capital as readily available resources and knowledge remains untapped. One of these resources is the African concept of Ubuntu law and justice. As stated above, the current approaches adopted in redressing sexual violations resulting from conflict are riddled with coloniality. In reconstructing a different conflict justice perspective in addressing the continued coloniality in the legal system and post-conflict resolution approaches in Zimbabwe's decolonisation is an essential process. I explore whether African philosophy as a system of African indigenous knowledge can provide a useful philosophical framework in the reconstruction of conflict

⁵⁹ Modiri 2017:11.

⁶⁰ Oelofsen 2015:130.

resolution approaches that will enable communities in Zimbabwe to participate in their own conflict resolution methods. In embarking on the decolonial path, I argue the conceptual framework of decoloniality and African Renaissance are essential conceptual frameworks that assist in decolonising conflict resolution approaches to sexual violations in Zimbabwe. I argue rescuing the marginalisation of African knowledge in conflict resolution and imaging a post-conflict resolution system that is pluralistic requires a decolonised and Africanised mindset both politically and institutionally. I engage below in the concepts of decoloniality and African Renaissance to develop the argument.

5.3.1 Decoloniality as a concept for reconfiguration of legal pluralism coloniality

The hegemonic knowledge that placed European knowledge at the centre of African life resulted in a political movement known as decoloniality. In the 1960s when most African states gained independence the movement centred on the empowerment of African people and the criticism of knowledge created by Western imperialism.⁶¹ Ndlovu–Gatsheni explains that “decoloniality as a concept is not only a time-honoured political and epistemological movement aimed at the liberation of formerly colonised peoples from global coloniality but also a way of thinking, knowing and doing.”⁶² He further articulates that “it is part of the relegated, but obstinate movements that emerged from struggles against the slave trade, imperialism, colonialism, apartheid, neo-colonialism and underdevelopment as constitutive negative elements of Euro-North American-centric modernity.”⁶³ Decoloniality is according to Maldonado-Torres “a critical way of thinking by the colonised subject that must challenge the present world system and open space for what is widely viewed as traditional, indigenous knowledge of the non-Western world to also contribute to the imagination of the future of the world in which we all live in.”⁶⁴

⁶¹ Geduld 2020:381.

⁶² Ndlovu-Gatsheni 2015:485.

⁶³ Ndlovu-Gatsheni 2015:485.

⁶⁴ Maldonado-Torres 2007:117; Ndlovu 2014:91.

The ostracisation of African principles in conflict resolution has resulted in the general Westernisation of conflict theory and practice in Africa, and conflict resolution research has not escaped this process.⁶⁵ The legal study is invariably a study about social order, the making of laws and their implementation means that legal study must automatically be influenced by societal moralities, which entail beliefs and practices dominant in the society.⁶⁶ In Zimbabwe, like most parts of Africa, the law and legal education in conflict resolution do not reflect societal morality. There is a disparity between the law and lived realities of society in many parts of the post-colonial states of the world.⁶⁷ Ndlovu-Gatsheni reiterates that “as an epistemological movement, decoloniality has always been overshadowed by hegemonic Euro-North American-centric intellectual thought and social theories.”⁶⁸

Higgs avers the same stating that “dominant research epistemologies have developed methods of initiating and assessing research in Africa where researchers fail to acknowledge the cultural preferences and practices of African people.”⁶⁹ In decolonising conflict resolution approaches it asks for critical inclusion of epistemologies, ways of knowing, practices and lived experiences that have been excluded.⁷⁰ It requires thinking critically about the relationship between state law in relation to African indigenous knowledge holders, the victim or survivor and the greater community.⁷¹ Furthermore, decolonisation in the context of this thesis is a move from a hegemonic or Eurocentric concept of law connected to legal cultures historically rooted in colonialism in Zimbabwe and the approaches adopted post-colony by Zimbabwe, toward a more inclusive legal culture.⁷² As a concept, decolonisation is not limited to inclusion, as it seeks to overthrow those ideas and perspectives that devalue “the other” in conflict resolution.⁷³ Decolonising conflict resolution approaches to the sexual violation against women in Zimbabwe, entails a radical departure from the perspectives of received laws exported

⁶⁵ Higgs 2012:1.

⁶⁶ Karibi-Whyte 2020:2.

⁶⁷ Karibi-Whyte 2020:2.

⁶⁸ Ndlovu-Gatsheni 2015:485.

⁶⁹ Higgs 2012:1.

⁷⁰ Karibi-Whyte 2020:4.

⁷¹ Karibi-Whyte 2020:4; Adebisi 2018.

⁷² Himonga and Diallo 2017.

⁷³ Himonga and Diallo 2017.

to Zimbabwe, which have no link with the local African communities' philosophy on the subject.⁷⁴ As a political movement, decoloniality has consistently been subjected to scrutiny of global imperial designs and colonial models of power. However today, as stated by Ndlovu-Gatsheni, "decoloniality is re-emerging at a time when the former reigning Euro-North American-centric modernity and its dominant theories of knowledge are experiencing a knowledge break."⁷⁵ The concept of decolonisation is premised on the quest to change and free colonised countries from the shackles of colonialism by obtaining political independence from their formal colonisers.⁷⁶ Decolonisation however is not merely about political independence, it entails independence in its structure of governance and other institutions and its economic organisation as they are still influenced by the former colony's manner of thinking.⁷⁷ In other words, despite "the absence of a physical colonial presence in Zimbabwe, Eurocentric knowledge systems, cultural traditions and habits remained."⁷⁸ This is partly because "former colonial subjects were promoted to reason and are often still determined by the former colonial powers in post-colonial countries, as a result of the economic and cultural power the former colonisers wield," and Zimbabwe is no exception.⁷⁹

There is an urgent need in recognising that in the quest to decolonise, flag independence does not spell the end of the impact of the colonial project. A failure to appreciate this places the decolonial project in danger of missing the depth of the colonial project on the country, its citizens and operating structures.⁸⁰ Oelofsen advances the notion that, "to overcome the legacy of colonialism, it is necessary to also decolonise the intellectual landscape of the country in question, and, ultimately, decolonise the mind of the formerly colonised."⁸¹ The intellectual landscape for purposes of this study entails legal systems presently operating in Zimbabwe as they are still governed by the legal systems of their former colonial Western states. It includes the intellectual landscape of approaches adopted post-independence in

⁷⁴ Karibi-Whyte 2020:4.

⁷⁵ Ndlovu-Gatsheni 2015:485.

⁷⁶ Oelofsen 2015:130.

⁷⁷ Oelofsen 2015:130.

⁷⁸ Oelofsen 2015:131.

⁷⁹ Oelofsen 2015:131.

⁸⁰ Oelofsen 2015:131.

⁸¹ Oelofsen 2015:131.

redressing sexual violence arising from the conflict in Zimbabwe. Engaging in the concept of decoloniality, I argue that it is of fundamental importance as the development of concepts with their roots in Africa has a more probable positive result of working towards the decolonisation of the mindset of Zimbabwe and its legal intellectual landscape on conflict resolution.⁸² I engage with decoloniality from the angle of decolonising the mindset as this is the required initial step in the realisation of the problem in embarking on the reconfiguration journey of tackling the challenge and developing a conceptual framework that facilitates the creation of the intended future. Thus, decolonisation of the mind is an important project for post-colonial Zimbabwe in the realisation of justice for politically motivated sexual violence against women. The inferior status that its pre-colonial legal systems on resolving conflict hold in its adopted approaches necessitates the process of decolonisation. This process has to begin by changing its psyche as Zimbabwe's history of colonialism and the continued existence of coloniality of the legal system post-independence.

The effects of colonialism on the African mind according to Fanon resulted in a psycho-existential complex.⁸³ Fanon states that the black man must be liberated from the arsenal of complexes that germinated in the colonial situation.⁸⁴ Fanon believed that a black person had to overcome the psychological effects of colonialism.⁸⁵ Biko, the founder of the Black Consciousness Movement, in echoing Fanon's intellectual thought claims "colonialism left blacks in South Africa with an inferiority complex as the situation that can be applied to colonised African states including Zimbabwe."⁸⁶ In dealing with the possible social and psychological repercussions, he argues that it is imperative not to ignore the deep repercussions of these classifications of former colonised African states as a whole.⁸⁷ Pyke, in writing about the psychology of the colonised states, states that "the values of the coloniser or oppressor that judge the colonised to be inferior and backward are internalised by the colonised and thus suffer a loss of self-esteem and

⁸² Oelofsen 2015:131.

⁸³ Fanon 2008:xvi.

⁸⁴ Fanon 2008:14.

⁸⁵ Fanon 2008:14.

⁸⁶ Biko 2012.

⁸⁷ Biko 2012.

start to hate themselves and what they represent in the worldview of the oppressor.”⁸⁸ De Sousa Santos describes what has taken place to law and what ought to be done to remedy the scenario. He states that the colonisation of law has brought about the colonisation of the sociology of dispute resolution and before the decolonisation of the law is attempted full decolonisation of the sociology of law in conflict resolution must be accomplished.⁸⁹ The assertions by Fanon, Biko and Pyke are highly significant for Zimbabwe today in the quest for an African identity in conflict resolution adopted approaches. Undertaking the decolonisation of the sociology of law as Ndlovu-Gatsheni states will achieve the epistemic break in Western-European knowledge domination and the problems modernity has created and Western theories that have become exhausted if not obstacles in understanding contemporary human issues.⁹⁰ Decoloniality to the Zimbabwean mindset, I propose, is a necessary process that ought to be undertaken to overcome coloniality in the current approaches to addressing conflict-related sexual violence crimes.

One of the fundamental starting points is through the decolonisation of post-conflict resolution adopted approaches, the legal system and the political culture of the country. The superiority and inferiority complex that colonialism initiated in the subjugation of African indigenous knowledge is present in the Zimbabwe situation. Another way, in which this can be understood, is that “the colonial and post-independence political culture has affected how people learnt to think about themselves and others and that this way of thinking is not necessarily eliminated through political change alone.”⁹¹ To address the unpleasant political culture that is plaguing Zimbabwean political society, I propose the adoption of the central features of African philosophy and law and justice as forming the core of the adopted approaches to post-conflict justice.

⁸⁸ Pyke 2010:551.

⁸⁹ De Sousa Santos 1987:280.

⁹⁰ Ndlovu-Gatsheni 2015:485.

⁹¹ Oelofsen 2015:132.

5.3.2 Africanisation, African Renaissance and African indigenous knowledge in conflict resolution

In Section 5.3.1, I explore the notion of decolonisation in tackling the colonality in Zimbabwe's adopted approaches to conflict resolution for politically motivated sexual violations against women. I state that engaging in the concept of decoloniality is of fundamental importance as the development of concepts with their roots in Africa has a more probable positive result of working towards the decolonisation of the mindset of Zimbabwe and its legal intellectual landscape on conflict resolution. Below I explore decolonisation using the Africanisation and African Renaissance conceptual perspective in the reconstruction of a legal pluralist environment towards one rooted in African philosophy. The question for consideration is whether the African decolonisation conceptual framework can motivate Zimbabwe towards the inclusion of African philosophy in its modern liberal legal system.

The African Renaissance call has been present in the period marking nearly four decades of African post-independence.⁹² Decolonisation as a process during this era placed Africa on a path to reconfigure its post independence identity within its indigenous African context.⁹³ Ngugi Wa Thiong'o claims "that independence was about people's struggle to claim their own space and their right to name the world for themselves rather than be named through the colour-tinted glass of the Europeans."⁹⁴ In the era of post-colony reconstruction, the structures and systems of colonialism that perpetuated its existence in independent colonised states must be undone (decoloniality) to address the inequalities, subjectivities and epistemology in knowledge systems.⁹⁵ In recent days, with the call for the recognition of indigenous African knowledge systems, the concept of the African Renaissance has taken on much greater significance.⁹⁶ African Renaissance in conflict resolution goes out, a call that insists law, philosophy and the legal system reflects the values in which it is situated.

⁹² Diop 1996; Maloka 2000; Muiu and Martin 2002; Lumumba-Kasongo 2002.

⁹³ Diop 1996; Maloka 2000; Muiu and Martin 2002; Lumumba-Kasongo 2002.

⁹⁴ Ngugi Wa Thiong'o 1993:17.

⁹⁵ Seepe 2001a; 2001b.

⁹⁶ Seepe 2001a; 2001b.

Focusing on the application of the African philosophy concept of justice in conflict resolution underpins that notion that Africa has significant knowledge that is of benefit to the intellectual justice forum with the hope of transforming the inferiority complex African minds possess.⁹⁷ Oelofsen emphasises the importance of focusing on understanding African philosophy as a post-colonial philosophy in place.⁹⁸ This approach she adds, “is to start from the individuals’ particular place, not geographically but also contextually as Africa denotes more than a geographical location to recognise that this could affect one’s ideas and so to focus on what the individual’s specific context can offer for understanding, creating and investigating concepts.”⁹⁹ The creation of projects from such a place gives Africa the task to work toward decolonising the conflict resolution academic scene so that the mind personifies philosophy as therapy in the post colonial African context.¹⁰⁰

Drawing lessons from African cultural values could, in itself, negate the lack of pride and symbolic order through instilling self-importance in adopting the African Renaissance in conflict resolution.¹⁰¹ Higgs states that drawing from these lessons entails “that all critical and transformative legal fraternity and those relevant stakeholders in post-conflict justice embrace indigenous African worldviews and root their national paradigms in indigenous Africa socio-cultural and epistemological frameworks.”¹⁰² This implies that all responsible fraternities in conflict resolution and intellectual landscape on post-conflict justice be indigenous grounded and orientated.¹⁰³ A failure to undertake such a mindset in the reconfiguration of post-conflict justice will mean that the adopted approaches to conflict resolution become alien, oppressive and irrelevant as is seen in the case of the legacy of colonialism and neo-colonialism legal systems and education in Zimbabwe and Africa.¹⁰⁴ In relation to this, Elias argues that “the current legal theory and system has yet to take full account of the African interpretations of the juridical

⁹⁷ Oelofsen 2015:140.

⁹⁸ Oelofsen 2015:140.

⁹⁹ Oelofsen 2015:140.

¹⁰⁰ Oelofsen 2015:140.

¹⁰¹ Oelofsen 2015:140.

¹⁰² Higgs 2012:3.

¹⁰³ Higgs 2012:3.

¹⁰⁴ Higgs 2012:3.

problems with which law must grapple in each society.¹⁰⁵ An intellectual exploration into African legal concepts should broaden our prospects, if not deepen our knowledge of the function and purpose of law in the modern-day world.”¹⁰⁶ The African Renaissance theory, when applied in conflict resolution, for that reason seeks to demonstrate how the African knowledge system can be employed as a radial resource for social justice transformation of the African continent and more specific Zimbabwe.¹⁰⁷ It further demonstrates how these indigenous African knowledge systems can be politically and economically redemptive.¹⁰⁸ The call for an African renaissance in conflict resolution by virtue of assuming homegrown culture does not imply a disengagement from political radicalism and mobilisation.¹⁰⁹ As stated by Biko, “radicalism is in opposition with the realistic and gradualist views and approaches to social and past injustice that are sensitive to the fear and anxiety of the group.”¹¹⁰

The traditional radical positions urge defiance to tyrannical power and mobilise and theorise for sustainable meaningful change.¹¹¹ Hence radical position” is not geared towards a set of millenarian and popularist political passions or naïve idealism.”¹¹² Nevertheless, it is concerned with “moral refusal to aid an unjust social system and an analytical hypothesis of the unyieldingness of oppressive power; it concedes nothing without a demand.”¹¹³ Modiri elaborates on radicalism as “signifying not only its traditional definition of grasping problems at the root level but also a desire to breach the boundaries that demarcate what is realistic and possible and what is not.”¹¹⁴ This is based on the appreciation that the differentiations themselves are fabrications of the overriding symbolic order.¹¹⁵ In short, what is required therefore in the African Renaissance call is that the Western Eurocentric culture on Africans on post-conflict justice approaches needs to be vehemently detained by all critically cognisant African

¹⁰⁵ Elias 1962.

¹⁰⁶ Elias 1962.

¹⁰⁷ Higgs 2012:3.

¹⁰⁸ Higgs 2012:3.

¹⁰⁹ Higgs 2012:3.

¹¹⁰ Biko 2012: 63; Modiri 2017:40.

¹¹¹ Biko 2012: 63; Modiri 2017:40.

¹¹² Modiri 2017:40.

¹¹³ Biko 2012:63, 100.

¹¹⁴ Modiri 2017:40.

¹¹⁵ Modiri 2017:40.

scholars, institutions and governing states for the enactment of an African identity in post-conflict resolution theory and practice.¹¹⁶ The notion of redeeming the African indigenous knowledge system in conflict resolution from its current predicament in the modern world system and locally in Zimbabwe is not only premised on its portrayal as a fantasy but also because its philosophy, principles and “concepts are hijacked and distorted by those who are at the apex of this hierarchically ordered legal system.”¹¹⁷ For instance, the African legal principle, Ubuntu is hijacked by those at the top of the modern legal system maintaining the status quo of coloniality. The maintenance of the status quo of coloniality is perpetuated by privileging the rhetoric of “forgiveness and forget the past” by the dominant subject while neglecting that of justice, compensation and restoration by the oppressor.¹¹⁸

In post-independent Zimbabwe, in the context of redressing politically motivated violence this is a challenging situation. At independence, the colonial violations and those committed during the war of liberation from colonialism the rhetoric of *forgive and forget* was extended.¹¹⁹ This rhetoric continued under Mugabe’s rule and still continues after his overthrow under Mnangagwa’s regime. In the political conflicts that ensued since his overthrow of Mugabe, politically motivated violations including sexual violence victims have been sidelined. As it stands, the ZANU PF who is the oppressor and violator of women and the rest of the citizens of Zimbabwe, has not initiated any concrete justice measures in remedying and compensating female victims and survivors of conflict-related sexual violence. As the pre-colonial African principle of law postulates, justice cannot be realised in the absence of truth.¹²⁰ Truth precedes justice, and the absence of truth amounts to injustice in the African concept framework of justice.¹²¹ The African philosophy of justice belief is that time cannot change the truth. Therefore, a

¹¹⁶ Higgs 2012:3.

¹¹⁷ Ndlovu 2014:91–92.

¹¹⁸ Magaisa 2016; Raftopolous and Mlambo 2009:XII–XIII.

¹¹⁹ Robert Mugabe at independence in 1980 states that “the wrongs of the past must now stand forgiven and forgotten. If ever we look to the past, let us do so for the lesson the past has taught us, namely the oppression and racism are inequalities that must never find scope in our political and social system. It could never be a correct justification that just because the whites oppressed us yesterday when they had power, the blacks must oppress them today because they have power. An evil remains an evil whether practiced by white against black or black against white.” Former President Robert Mugabe’s speech after his 1980 victory.

¹²⁰ M’Baye 1974:138.

¹²¹ Ramose 2001:3

prescription is an unknown legal principle in the African concept of law and justice.¹²² Truth, as it must be considered each time it becomes known, so no stumbling block must be placed in the pursuit for the truth and its discovery.¹²³ Based on this African thought of law and justice, the judicial decision is not absolute in authority but may be questioned when the need arises.¹²⁴ According to Ramose, this reasoning forms “the basis of historical justice in the Ubuntu understanding of the law.”¹²⁵ A debt or a feud is never extinguished until the equilibrium has been restored.”¹²⁶ This distortion of the concept of Ubuntu by inference has turned a noble indigenous idea into a strategy of silencing the female victims and survivors of politically motivated sexual violence in Zimbabwe.¹²⁷ It has in the same vein reformed coloniality to continue a system of oppression beyond the demise of the juridical administrative colonial system.¹²⁸

The continued sexual targeting of women in the political realm since the crisis in 2000 and presently by Zimbabwe’s state apparatus, the ruling party ZANU PF supporters and militia is a violent exercise and capital on the subject located in the zone of non-being.¹²⁹ This continued political culture and environment of violence silencing political dissent and the absence of any action by the institutions of national building and reconciliation clearly shows a pattern of continued coloniality under the governance of a post-independent government.¹³⁰ Hence, in the analysis of Zimbabwe’s political history, culture and conflict, the truth remains that the women of Zimbabwe have been victims of sexual violence under the auspices of the current government of Zimbabwe. In the African conceptual framework of justice and applying this to the context of Zimbabwe, no amount of laws enacted, and amnesia to such violations can obliterate this truth. It, therefore, goes to say that as in pre-colonial African justice philosophy female victims of conflict-related sexual violations must be restituted and compensated for these violations. In most cultures, there is the belief that all persons are equal in their

¹²² M’Baye 1974:138.

¹²³ M’Baye 1974:138.

¹²⁴ M’Baye 1974:138.

¹²⁵ M’Baye 1974:138; Ramose 2001:3.

¹²⁶ M’Baye 1974:138; Ramose 2001:3.

¹²⁷ Ndlovu 2014:92–93.

¹²⁸ Ndlovu 2014:92–93.

¹²⁹ Ndlovu 2013:46–58.

¹³⁰ Ndlovu 2013:46–58; Ndlovu 2014:91–92.

humanity.¹³¹ The notion of justice in African thought flows this idea as giving to another what is due to them.¹³² In practice, this denotes treating all persons in a non-discriminatory manner by regarding all as equal. Thus, violations of their dignity as human beings by systematic targeting and the refusal to be recognised as equal in political participation are a double injustice. Accordingly, the Ubuntu understanding of justice as balance and harmony demands the restoration of justice through the reversal of dehumanising consequences of the political conflict of Zimbabwe and the elimination of the perpetual targeting of women during the political conflict using sexual violence.¹³³ The African concept of law aims to pursue and actualise the demands of justice.¹³⁴ The debt of justice that the government of Zimbabwe is owing to female victims of sexual violence arising from conflict has been obscured by ZANU PF discourse about the past and the unequal socio-political situation in Zimbabwe presently. Thus, the remembering and urgent need to remedy these past violations and those present is triggered by the unequal relationship that is present in the socio-political situation in Zimbabwe.¹³⁵

The African philosophy of Ubuntu could offer some guidelines on how to rectify the present relational disequilibrium that is existing in the socio-political situation in Zimbabwe. The African principle of Ubuntu views “human beings as essentially placed in a multifaceted network of associations, an emphasis that arguably extends to a temporal view of relationality that challenges the time frames associated with and imposed by Western modernity.”¹³⁶ Ubuntu on the other hand is “concerned with human existence in the world; it is a conceptual philosophy of both a condition of beings as well as becoming” according to Ramose.¹³⁷ Etieyibo states that “Ubuntu narrates the notion of humanity as well as how we are coming to know the world and ourselves as radically interdependent.”¹³⁸ He states further that, “this relational ontology echoes the general inclination of African ethics to define human-ness as the interweavement of self and

¹³¹ Ramose 2001:1.

¹³² Ramose 2001:1.

¹³³ Ramose 2001:1.

¹³⁴ Ramose 2001:1–2.

¹³⁵ Hunfeld 2022:111.

¹³⁶ Hunfeld 2022:112.

¹³⁷ Ramose 1999:55.

¹³⁸ Etieyibo 2017:143.

other.”¹³⁹ Using the concept of personhood found in Ubuntu philosophy conceptually it is understood as a process of becoming through time, one can become more or less of a person at any given stage of one’s life. This is highly dependent on how one lives in relation to others and the broader world over time.¹⁴⁰ This African relational approach of Ubuntu moral values is a relevant approach of imagining relationality.¹⁴¹ This approach offers auspicious resources that can make a valuable contribution to the decolonisation of the time and temporal imagination of Zimbabwe. I propose that the incorporation of Ubuntu justice principles in resolving past and present violations against women in Zimbabwe can decolonise the system from the historical injustice and present status of failing to redress sexual violations perpetuated against women in conflict situations post-colony. An example of this decoloniality is using the concept of being in the African principle of Ubuntu’s process of becoming a being. This process of fully becoming a being means not only nurturing a relationship of carefulness and reverence with present human beings but also with past relationship and the immediate environment.¹⁴²

In this instance Hundsfeld notes that, “by accepting intertemporal relatedness as a feature of human existence, it has the great important potential for allowing us to think differently about what matters when reflecting on issues of justice in conflict resolution.”¹⁴³ He further states that, “in contrast to the Western interpretation of the lifelessness of the past and the nothingness of the future, Ubuntu views all three interrelated realms as equally important dimensions and thereby rallies a different sense of obligation.”¹⁴⁴ Hence considerations for and nurturing relationships with the living in different periods of existence is not hostile towards considerations for those in the present-day world.¹⁴⁵ The past and present are inextricably linked meaning that the suffering and healing are also transversally witnessed.¹⁴⁶ Ramose echoes similar sentiments in stating that “Ubuntu and its foregrounding of intertemporal connectedness assists in pausing and thinking about the question of the responsibility of the living,

¹³⁹ Etieyibo 2017:143.

¹⁴⁰ Hunfeld 2022:112.

¹⁴¹ Hunfeld 2022:112.

¹⁴² Ramose 1999:63.

¹⁴³ Hunfeld 2022:113.

¹⁴⁴ Hunfeld 2022:113.

¹⁴⁵ Hunfeld 2022:113.

¹⁴⁶ Hunfeld 2022:113.

suggesting that we owe the past and future the same interest, concern and care as we fundamentally for the living.”¹⁴⁷ Hunsfeld in this regard avers that, “in diffusing the tension between the past, present and future in thinking about temporary situatedness Ubuntu offers great conceptual and hermeneutical resources for rethinking relationality with a special temporary sensibility.”¹⁴⁸ Consequently, the notion of communal self-realisation under the Afro-communitarian person is a conceptual thought that can be engaged in a reimagined future model for the decolonisation agenda in conflict resolution. The self-realisation in African philosophy under the pretext of Afro-communitarianism is premised on the notion that it is the collective self, which is the proper object of the virtue that justifies and grounds the importance of harmony.¹⁴⁹ Ultimately, self-realisation is dependant upon individuals and communities’ commitment to their imagined society which fosters an environment that allows all in it to flourish.¹⁵⁰

A vigorously sound collective self involves building healthy relationships with all in society as such this is the essence of humanisation in the Ubuntu sense.¹⁵¹ On the contrary dehumanisation involves for an Afro communitarian “being detached, isolated and excluded” from the collective self.¹⁵² Mostly importantly, to be fully human in Afro communitarian philosophy is hinged upon the consideration of others in a gracious manner.¹⁵³ For the Afro-communitarian, when referring to *dehumanisation*, “this includes erosion of one’s humane responses (dehumanisation of the self), as well as a perception of others as not being worthy of similar respect and value as myself (dehumanisation of others).”¹⁵⁴ Fostering a humanised society from an Afro-communitarian perspective needs to focus on the importance of imagination.¹⁵⁵ Metaphors, proverbs and storytelling have been central in many African countries like Zimbabwe in imagination in all spheres of life including conflict resolution.¹⁵⁶ They have been pivotal in forming the moral compass of younger members of the community as

¹⁴⁷ Ramose 1999:63.

¹⁴⁸ Hunfeld 2022:113.

¹⁴⁹ Lutz 2009:315; Oelofsen 2015:143.

¹⁵⁰ Oelofsen 2015:143.

¹⁵¹ Oelofsen 2015:144.

¹⁵² Oelofsen 2015:144.

¹⁵³ Oelofsen 2015:144.

¹⁵⁴ Oelofsen 2015:144.

¹⁵⁵ Oelofsen 2015:143.

¹⁵⁶ Mandova and Chingombe 2013:101–103.

well as the greater community.¹⁵⁷ The hearer is encouraged to envision a different context by positioning themselves in the various character's shoes.¹⁵⁸ The centrality of humanising in the Afro communitarian model is in the ability of imaginative understanding which strengthens the sense of community pertinent in forming the communitarian self.¹⁵⁹ As conflict dehumanises the other, rehumanising the other and in the same process the self is, therefore, a practice that has imagination at its core from an Afro-communitarian perspective.¹⁶⁰ Bringing humanisation to African conflict resolution methods in resolving present conflict-related violations requires engaging with the Western material on post-conflict resolution on the understanding that African knowledge systems have a valuable contribution alongside what is found in the Western canon. Decolonising conflict resolution methods has a lot to do with creating a new set of mental dispositions.¹⁶¹

Accordingly, the core of philosophy based on Janz's argument "is its ability to bring to ...life to the surface and reflect on it, creating new territory extending the range of life by creating new concepts."¹⁶² Concepts do not so much point to the past (or, not only to the past), but also to the future, as they open the possibility of new forms of expression and new self-understandings. And, they also point to the present, to the place on which we stand and the life that matters."¹⁶³ I believe this is another central and related feature of African philosophy in the reimagined future in redressing past and present violations resulting from conflict situations. Janz argues that the core of African philosophy thus "draws and creates concepts from the place of *Africa*."¹⁶⁴ As a result, I believe it can be instrumental in the decolonisation of the African mind. This possibility is made certain by providing an unconventional framework for knowledge in the adopted approaches of dealing with the problem at hand, which *de-centres* the assumed (Western) centre of knowledge and practice.¹⁶⁵ The adopted approaches need to be created by engaging

¹⁵⁷ Mandova and Chingombe 2013:101–103.

¹⁵⁸ Mandova and Chingombe 2013:108, 100.

¹⁵⁹ Oelofsen 2015:143.

¹⁶⁰ Oelofsen 2015:143.

¹⁶¹ Mbembe 2015:144 Oelofsen 2015:143–144.

¹⁶² Janz 2004:111.

¹⁶³ Janz 2004:111.

¹⁶⁴ Janz 2004:111; Oelofsen 2015:136.

¹⁶⁵ Oelofsen 2015:137.

with Zimbabwe's past and present; however, these concepts will not be "old" concepts in the sense that they are "discovered" in Zimbabwe's past. Instead, they will be concepts that have their roots in the Zimbabwean past and present.¹⁶⁶ In engaging with concepts rooted in Africa, we ought to take them as a starting point for reflection. In the argument I propose of adopting African philosophy in the re-imagined future of conflict resolution in redressing sexual violence, it is not to say Ubuntu is a static concept from Zimbabwe's pre-colonial past. It is to say engage the African philosophy of Ubuntu in conflict resolution as a dynamic concept with its roots in the past.¹⁶⁷ In the quest of reconsidering the past in mapping the future, concepts formulated for this purpose should be developed and recognised as having significance, which is "fluid and changing to take into account the present and future situations and contexts."¹⁶⁸

Having said that, Tabensky argues that "African philosophy's distinctive aim is the quest for health, which in his view he sees as intimately related to the quest for authenticity."¹⁶⁹ I propose that as a result of this aim in African philosophy, it translates into empowering Africans through articulating a philosophical position, which takes the context and cultural particularities of African places into account. This empowerment, in turn, leads to reclaiming of the intellectual space denied to Zimbabwe both in the past under colonialism and in the post-colony approaches adopted for post-conflict justice. Accordingly, Western philosophy's primary aim is rooted in the search for truth. African philosophy also aims at the truth but places this search for truth to work in its main project of restoring lost health.¹⁷⁰ Hence, projects in African philosophy aim to restore lost health.¹⁷¹ In the context of Zimbabwe, the site for our analysis, the restoration of lost health brought by the dominant oppressive political culture of the ZANU-PF government, the perpetual use of sexual violence as a conflict tool and the denial of justice for these violations can be reclaimed through exploring truths articulated within its African philosophical context.

¹⁶⁶ Oelofsen 2015:137.

¹⁶⁷ Oelofsen 2015:137.

¹⁶⁸ Oelofsen 2015:137.

¹⁶⁹ Tabensky 2008:291; Oelofsen 2015:136.

¹⁷⁰ Tabensky 2008:291.

¹⁷¹ Tabensky 2008:291.

5.4 An integrated approach to legal pluralism

The question posed at this stage in the rebuilding of modern institutions is whether an integrated approach is a viable option in the determination of the relevance of African cultural practices in post-conflict resolution. The argument centres on the emergence of a system of legal pluralism whereby the legal state system and the traditional forms of institutions of resolving conflict in Zimbabwe flourish side by side until these traditional forms and knowledge systems on conflict resolution are gradually integrated into the formal institutional system.¹⁷² The basis of the argument that a dismissive approach in claiming that traditional institutions and systems on conflict resolution are incompatible with modern institutional values is not only inaccurate but perpetuates the alienation of the role of the traditional institution in African post-conflict justice governance.¹⁷³ Zimbabwe's society is deeply traditional, with a significantly large population residing in rural areas, thus the role of traditional customs and institutions has paramount importance.¹⁷⁴ Mostly, the influence of traditional institutions is pivotal in remote communal areas where modern institutions are largely invisible and in some cases absent and dysfunctional for some communities.¹⁷⁵

In such instances people opt to engage traditional institutions and customs and their leadership in redressing conflict and other community- related matters.¹⁷⁶ In other words, the failure to officially recognise traditional leadership and its institutions by formal state fraternities is not to say the future existence of these institutions in Africa is not guaranteed.¹⁷⁷ African constitutional systems face an existing conflict between formal state laws and the African traditional knowledge laws and systems. Nevertheless, a return solely to pre-colonial legal systems is unfeasible. African customary practices, its past and tradition still apprise African people's lives in this modern era.¹⁷⁸ Although Zimbabwe, like the rest of Africa, has adopted Western liberal

¹⁷² Abede 2013:429.

¹⁷³ Abede 2013:429.

¹⁷⁴ Abede 2013:430.

¹⁷⁵ Abede 2013:430.

¹⁷⁶ Abede 2013:430.

¹⁷⁷ Abede 2013:430; Mengistaeb 2009:181–182.

¹⁷⁸ Adelman 1998:73–74, 85.

constitutional systems, traditional institutions remain entrenched.¹⁷⁹ Consequently, academia, political elites, activists and traditional leaders debate the proper position of traditional authorities in society and the significance of these institutions at length.¹⁸⁰ The matter at hand in this debate is the reconciling of traditional authorities with modern political systems at a local level. This is important as Logan states “traditional institutions exert the most influence on the daily lives of Africans where the contest with government authorities for resources and responsibilities is most intense.”¹⁸¹ Post-colonial rebuilding in Zimbabwe and Africa as a whole has been largely undertaken under the guise of “transplanting the European institutional system that has made the state in Africa a neo-colonial one.”¹⁸² The lack of an objective situation in Africa to “transplant either liberal or socialist packages of government, and the transformation of African governance,” including that of Zimbabwe, has largely been characterised by tyranny, exploitation and disorganisation as well as the inability to address poverty and conflict.¹⁸³

This observation is determined in Chapter 4 of Zimbabwe’s political culture and state formation. These failures of state formation in Zimbabwe and the rest of Africa, has ignited debates on how African governance should move forward. Most specifically, the debate has increased leaning towards the role that traditional institutions can play in an imagined African democratisation process.¹⁸⁴ Though the total exclusion of traditional institutions had been practised since the end of colonialism,¹⁸⁵ the contemporary trend in Zimbabwe and some African countries grant some room for the function of African traditional institutions in their various forms.¹⁸⁶ These, Dialla states, “stand at the intersection of colonial continuities and discontinuities in indigenous African laws.”¹⁸⁷ He articulates that, “they play a useful role for policymakers who are interested in the

¹⁷⁹ Logan 1998:1, 3.

¹⁸⁰ Logan 1998:1, 3.

¹⁸¹ Logan 1998:5.

¹⁸² Abede 2013:429.

¹⁸³ Abede 2013:430.

¹⁸⁴ Abede 2013:430.

¹⁸⁵ Mafeje 2013:10.

¹⁸⁶ Zimbabwe has the most prominent provisions on the right to indigenous culture and communal life. The role of chiefs in Zimbabwe includes “the preservation of culture, facilitation of development, and resolution of disputes amongst people in their communities in accordance with customary law.” S 282 of the Zimbabwean *Constitution of 2013*. Diala and Kangwa 2019:201–203.

¹⁸⁷ Diala and Kangwa 2019:191.

integration of state laws with customary laws.”¹⁸⁸ The normative effects of “coloniality and the historical continuities of state laws of Africa” led to the African constitutions’ incorporation of customary laws from people’s adaptations of indigenous socioeconomic changes.¹⁸⁹ Pursuant to the notion of traditional institutions’ continued relevance, the viable option in my view to improve justice governance in Zimbabwe on post-conflict justice would entail the radical recognition of traditional customs and institutions with the existing state structure. Radical recognition is a system of legal pluralism that allows traditional institutions in post-conflict resolution to discharge their responsibilities.¹⁹⁰ This would greatly improve the conflict resolution gaps in that the state laws and the current adopted approaches to post-conflict justice, peace and reconciliation.¹⁹¹

The incoherence of the two systems in their coexistence has structured different socioeconomic positions and citizenship resembling marginalisation, nepotism and patronage, which results in the application of many forms of conflict practices thereby entrenching incompatible relationships threatening long lasting peace.¹⁹² The incompatibility in the dual¹⁹³ existence of these two systems has the likelihood of fostering social instability due to increased uncertainty, and disorientation necessitating increased incentives or coercion to make people follow prescribed rules.¹⁹⁴ Hence, the inability to recognise and engage institutions with grassroots support, formal state establishments have remained ineffective to avert conflict especially in collaborating policy and resources with broad social interests, as well as bolstering cooperation in state-society relations.¹⁹⁵ The continued existence of such conditions fails to facilitate a peaceful process of post-conflict rebuilding that fosters justice, peace and reconciliation.¹⁹⁶ Mapping a way forward out of this paradox is a mammoth task.

¹⁸⁸ Diala and Kangwa 2019:191.

¹⁸⁹ Diala and Kangwa 2019:190.

¹⁹⁰ Hagg 2011:9.

¹⁹¹ Hagg 2011:9–10.

¹⁹² Hagg 2011:9; Abede 2013:434.

¹⁹³ Mengisteab comments that, “the duality that is seen in the adherence of rural populations, the overwhelming majority in most African countries, primarily to colonial state, operates on institutions of governance, which are largely imported and often transplanted outside their cultural and socioeconomic milieus.” Mengisteab 2009:179.

¹⁹⁴ Mengisteab 2009:179.

¹⁹⁵ Mengisteab 2009:179.

¹⁹⁶ Mengisteab 2009:179.

The exclusive adherence to either modernised state systems or customary institutions is a great expense to justice administration.¹⁹⁷ As modern institutions on the other hand have a wider appeal due to the impact of globalisation, Zimbabwe like the rest of the African states cannot ignore the relevance of such institutions.¹⁹⁸ Further to that, not only is it doubtful whether the existing traditional institutions are in a position to regulate complex social and economic relations efficiently, colonial heritage and post-colonial governments of Zimbabwe have seriously weakened the role of traditional institutions.¹⁹⁹ In the same vein, African societies including Zimbabwe are incapable of entirely depending on modern institutions.²⁰⁰ These institutions are characterised by inefficiency and corruption, and are visibly situated in urban centres with the majority of African populations still depending on traditional institutions in the resolution of conflict.²⁰¹

Based on this status of African indigenous law and systems a radical approach to address this anomaly entails placing African law and its knowledge systems on the same level of authority as the ideals of the current liberalism. Adopting a system in which traditional institutions are granted equal authority as liberalist values generates criticism.²⁰² Traditional institutions have been criticised as repressive and not compatible with modern liberal values. In the context of “the hereditary nature of power holders in traditional institutions and the harmful traditional practices that discriminate against women, traditional institutions are at odds with modern liberal values.”²⁰³ On the contrary, the participatory, consensual, transparent and changing nature of traditional institutions makes them not necessarily against liberalism ideals and values.²⁰⁴ In the resolution of the conflict that exists between state laws and African knowledge systems mapping the way forward is reconciling the application of traditional institutions with modern systems of post-conflict justice.²⁰⁵ In identifying the requisite equilibrium

¹⁹⁷ Abede 2013:434.

¹⁹⁸ Abede 2013:434.

¹⁹⁹ Sindima 1990:193.

²⁰⁰ Sindima 1990:193.

²⁰¹ Sindima 1990:193.

²⁰² Abede 2013:430.

²⁰³ Abede 2013:430.

²⁰⁴ Abebe 2013:430.

²⁰⁵ Abede 2013:435.

between the two systems, it is fundamentally contradictory to presume that African traditional systems are wholly unable to coexist with democratic philosophical beliefs.²⁰⁶ With regard to the notion of the universality of democratic values, it is an erroneous assumption to state that every aspect of liberal values is alien to Africa, due to their difference from the West in their form, practice and expression.²⁰⁷ On this notion, Abede states “though liberal values seem to be alien to the African culture, there are African philosophical principles such as social justice and leadership accountability that can serve as fertile ground to grow the seeds of liberal values.”²⁰⁸ The challenges of adopting constitutionalism in Zimbabwe are in the approach rather than the mere adoption of liberal values.²⁰⁹ Since Zimbabwe like many African countries endeavoured to transplant modern liberalism by disregarding pre-colonial African values systems, African constitutional liberalism in that regard remains elusive.²¹⁰ Nonetheless, as such official discouragement of cultural values and knowledge systems on conflict resolution has weakened many of the rich cultures in Zimbabwe, there remain abundant African indigenous values that if African states would attempt to cultivate and support, would be the grounding work in overhauling the values of post-conflict justice.²¹¹ Traditional law and justice values could support the redress of post-conflict justice for sexual violence because they represent and appeal to the masses.²¹²

5.4.1 The future vision through decolonisation and African Renaissance conceptual framework

In reimagining a new model of post-conflict justice that is integrating with its approach, addressing the targeting of women during conflict situations in Zimbabwe, as Fanon states, requires self-ownership. In Fanon’s articulation, “self-ownership under decolonisation is relational, always a bundle of innate rights, capabilities and claims made against others, taken back from others and to be protected against others, once

²⁰⁶ Adelman 1998:77–78.

²⁰⁷ Abede 2013:435.

²⁰⁸ Abede 2013:435. See also Nwauwa 2005; Nieman 2005.

²⁰⁹ Abede 2013:435.

²¹⁰ Abede 2013:435.

²¹¹ Abede 2013:435.

²¹² Adelman 1998:80.

again, by force if necessary.”²¹³ Self-ownership is a prerequisite important consideration in the path to a reimagined genuine system of living as fully human.²¹⁴ The process of becoming human Fanon further states, “is not an event but is attained through the progression of time, in other words, it is only attained by virtue of time.”²¹⁵ Mbembe alludes this process as requiring “reshaping, turning human beings once again into craftsmen and craftswomen who, in reshaping matters and forms, needed not to look at the pre-existing models and need not use them as paradigms.”²¹⁶ In the context of decolonisation Mbembe further states that, “the time of decolonisation has a double character. It is the time of closure as well as the time of possibility.”²¹⁷ As such, it required a politics of difference as opposed to a politics of imitation and repetition.”²¹⁸ Ngugi Wa Thiong’o in reimagining and repositioning the future for Africans uses the concept to Africanise as part of a larger search, which he calls a liberating perspective.²¹⁹ He places ‘to Africanise,’ as a “perspective that allows us to see ourselves clearly in relationship to ourselves and other-selves in the universe.”²²⁰

In reference to decolonisation, Ngugi Wa Thiong’o sees it “not as an event for all at a given time and place but as an ongoing process of seeing ourselves clearly, emerging out of a state of either blindness or dazedness.”²²¹ It entails grappling with the question of what can be done to the inherited legal system that persists in its coloniality in post-independent Zimbabwe. What directions should post-conflict justice take should it resemble African thought or European thought? In responding to the questions as Ngugi Wa Thiong’o argues, “decolonisation is about re-centring; it is about rejecting the assumption that the modern West is the central root of Africa’s consciousness and cultural heritage.” It is about defining clearly what the centre is and Africa has to be placed at the centre.²²²

²¹³ Fanon 1961:312.

²¹⁴ Fanon 1961:312.

²¹⁵ Fanon 1961:312.

²¹⁶ Mbembe 2015:12–13.

²¹⁷ Mbembe 2015:13.

²¹⁸ Mbembe 2015:13.

²¹⁹ Ngugi Wa Thiong’o 1981:87.

²²⁰ Ngugi Wa Thiong’o 1981:87.

²²¹ Ngugi Wa Thiong’o 1981:87–88.

²²² Ngugi Wa Thiong’o 1981:88; Mbembe 2015:13.

The adoption of these conceptual frameworks in decolonising and Africanising the future using an integrated approach in addressing conflict-related sexual violations against women in Zimbabwe requires a particular mindset. Mbembe identifies two sides in the decolonial project that ought to be engaged in transforming the African mind. The initial side entails a dominant criticism of the Eurocentric legal model and the fight Latin American scholars call “epistemic coloniality”.²²³ That is a particular “anthropological knowledge, which is a process of knowing about *others*, but a process that never fully acknowledges these *others* as thinking and knowledge-producing subjects.”²²⁴ The second side attempts at imagining what the alternative to this model could look like. This is where a lot remains to be done. Whatever the case, “there is a recognition of the exhaustion of the present post-conflict justice model with its origins in the universalism of the enlightenment.”²²⁵ Enrique Dussel for instance makes it clear that “knowledge can only be thought of as universal if it is by definition pluriversal.”²²⁶ It is a notion premised on “a process that not only necessarily abandons the notion of universal knowledge for humanity but also has the capability of embracing it through a horizontal strategy of openness to dialogue among different epistemic traditions.”²²⁷

In the context of the study, to decolonise the post-conflict justice model and adopted approaches to conflict-related sexual violence is therefore to reform these approaches with the specific aim of creating “less provincial and more open to critical cosmopolitan pluriversalism.”²²⁸ Using Mbembe’s articulation on this matter is that “it is a task that involves the radical re-founding of our ways of thinking as and a transcendence of our disciplinary divisions.”²²⁹ It is a process that does not necessarily “abandon the notion of universal knowledge for humanity, but embraces it via a horizontal strategy of openness to dialogue among different knowledge customs.”²³⁰

²²³ Mbembe 2015:18.

²²⁴ Mbembe 2015:18–19.

²²⁵ Mbembe 2015:18.

²²⁶ De Sousa Santos 1987; Dussel 2012.

²²⁷ De Sousa Santos 1987; Dussel 2012.

²²⁸ Mbembe 2015:19.

²²⁹ Mbembe 2015:19.

²³⁰ Mbembe 2015:19.

5.5 Lessons learnt from the African continent

There are ample examples that can serve as learning points for Zimbabwe in the development of an integrated legal approach for conflict-related justice for female victims of sexual violations. The prevalent view on African legal systems in both the human rights world and the dominant Western feminist thought is that traditional African legal systems are not able to afford adequate processes for sexual violence. Yet ample work and evidence are available where pre-colonial African legal systems have been invoked to deal with conflict-related sexual violence. In this consideration, Zimbabwe would not be the first to consider traditional justice mechanisms in dealing with serious atrocities, as a relevant example in the context of Africa. In Rwanda, the traditional justice mechanism of *Gacaca* was a major component adopted by the Rwandan government in holding perpetrators responsible for the atrocities of the Rwandan genocide.²³¹

The *Gacaca* process was used as a mechanism for delivering justice for sexual violence in the aftermath of the 1994 conflict.²³² The *Gacaca* process was able to address the many challenges resulting from the genocide that their Belgian-inherited Western legal system failed to address adequately.²³³ The challenges encountered by Rwanda after the 1994 genocide included the ability to work with overwhelming numbers of perpetrators that needed to face trial and the speed with which matters were heard and concluded.²³⁴ The success of the *Gacaca* process is seen by the insistence of the Rwandan government in relying and placing emphasis on their inherent pre-colonial conflict resolution process. As Paul Kagame stated, the conception and implementation of *Gacaca*, born out of a traditional Rwandan practice was, “an African solution to African problems”²³⁵ This was a response by a nation to unprecedented violence in

²³¹ Longman 2009:304–312.

²³² It was conceived of in the *Organic law No. 40/2000 of 26/01/2001* was further developed into *Organic Law No. 16/2004 of 19/6/2004*, establishing the organisation, competence and functioning of *Gacaca* Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity committed between 1 October 1991 and 31 December 1994.

²³³ Taylor 2003:2.

²³⁴ Taylor 2003:2.

²³⁵ Mwai 2018.

nature and scale.²³⁶ Kagame's assertion that *Gacaca* is unique to Africa is conceivable as Africa's peacebuilding processes cannot be achieved solely through external solutions and requires Africans to own the solutions.²³⁷ Sierra Leone stands as a case study where African local methods of conflict resolution were evoked in dealing with sexual violence perpetrated against women during the conflict.²³⁸ Sexual violence during the Sierra Leone conflict was rife in the ten years of civil conflict from 1991 to 2001.²³⁹ *Fambul Tok*, a local method of conflict resolution played a significant role in bringing to the fore the sexual violations that women endured during the civil conflict.²⁴⁰ Traditional justice mechanisms were "not part of the official transitional process in Sierra Leone, although they have played a central role in reconciliation, re-integration and re-unification at a local level."²⁴¹ According to Among, Sierra Leone is the first documented transitional society to modify transitional justice with restorative justice measures to deal with atrocities committed by both adults and child soldiers.²⁴²

Fambul Tok translated to mean *family talk* is an ancient cultural practice in Sierra Leone tradition "of discussing and resolving issues within the security of a family circle."²⁴³ The *family* as it is represented here "not as biological linkages but rather to an association of community members co-existing communally and depending on each other."²⁴⁴ The concept is centred on the communal impulse of 'wholeness' and to redress past injustices that 'disturb the balance of communities through conflict.'²⁴⁵ It is in this concept that the traditions and practices of reconciliation are found in Sierra Leone culture.²⁴⁶ As a Sierra Leonean initiative, it is rooted in the African concept of Ubuntu, with the same values of African communal sensibilities that emphasise the need for

²³⁶ The catch all phrase coined by the eminent political economist George Ayittey in response to the behaviour of the international community in the crisis in Somalia. Since then it has acquired a degree of autonomy in the African.

²³⁷ Speech of President Paul Kagame at the launch of *Gacaca* Jurisdictions, June 18, 2002, available in Penal Reform International report. Penal Reform International 2002; Haskell 2011:12, 137–138; Mwai 2018.

²³⁸ Taylor 2003:3-4.

²³⁹ In 1999 the Lome Peace Accord made provision for the establishment for the Sierra Leone Truth Commission. The United Nations Security Council subsequently established a Special Court to prosecute those who bore the greatest responsibility for atrocities committed during the conflict. Taylor 2003:61.

²⁴⁰ Iliff 2012:253–273; Taylor 2003:3, 25–35, 61.

²⁴¹ Alie 2008:140–143; Terry 2010:1:00:23.

²⁴² Among 2013:452.

²⁴³ Terry 2010:23.

²⁴⁴ Dolberg and Meesenburg 2012:67. See also these concepts in chapter 2 of the thesis relating to Ubuntu law.

²⁴⁵ Dolberg and Meesenburg 2012:67.

²⁴⁶ Dolberg and Meesenburg 2012:67.

communities to be whole with each member playing a role in the peaceful existence of communities at large.²⁴⁷ Through *Fambul Tok*, communities in Sierra Leone are currently using the community-based mechanism to establish accountability for crimes committed by child soldiers and these include sexual violence.²⁴⁸ In Mozambique, mention can be made of the traditional mechanism of *Magamba*,²⁴⁹ which was one of the approaches that communities used in addressing the abuses and injustices of the civil war.²⁵⁰ The processes of healing and the dispensation of restorative justice were through *Magamba* spirits and *Magamba* healers for the war-related crimes committed in some regions of Mozambique.²⁵¹ The survivors of war engaged actively in the adoption and use of community resources at their disposal to address past injustices of the war.²⁵²

In Gorongosa, the war-related *Magamba* spirits and *Gamba* healers are the only post-civil war marvel that closely relates to post conflict justice in a wide sense.²⁵³ They engage with the “grisly past discursively, bodily and by means of a performance to create post-war healing of war-related wounds. They also create public spaces where restorative justice is attained in the context of the transition from civil war to peace.”²⁵⁴ In Burundi, *Obushingatahe*²⁵⁵ (meaning the one who bolts down the law) is a traditional mechanism engaged in the resolution of the conflict-related violations.²⁵⁶ The term *Bashingantahe* (singular *Umushingantahe*) refers to “men of integrity who are responsible for settling conflicts at all levels, from the top of the hill to the courts of

²⁴⁷ Dolberg and Meesenburg 2012:67–68. See also Ramose 1999.

²⁴⁸ Among 2013:452.

²⁴⁹ Igreja explains that “the *Magamba* spirits emerged into the socio-cultural world of Gorongosa, which historically was already inhabited by a plethora of spirits and healers, in the context of the Mozambican civil war, and are particularly prominent in the Gorongosa region. They play different roles in society. The various spirits initially cause suffering, but then the suffering is transformed into a healing power. Particularly with *Magamba* spirits, the procedures followed to transform affliction into healing disclose the existence of social spaces and momentum for the enactment of restorative justice. Igreja, the *Magamba* spirits went further by establishing themselves as a local institution of healing activity alongside the existing ancestral *madzoca* healers.” Igreja 2008:68–69.

²⁵⁰ Igreja 2008:353–371.

²⁵¹ Igreja 2008:66–67.

²⁵² Igreja 2008:68

²⁵³ Igreja 2008:68

²⁵⁴ *Magamba* healers suggest that “if these spirits are to be dealt with successfully the violence of the past cannot be ignored. There is a need to engage with the past, to find out what injustices were done, to acknowledge the wrongdoing and to repair the damage.” Igreja 2008:68, 70.

²⁵⁵ The ancient institution of *Bashingantahe* in Burundi is made up of “elders, people of irreproachable morality. It presided over the judicial organisation of the country at all levels and played the role of check and balance on power, ensuring that arbitrary judgement and lack of justice were curbed.” Naniwe-Kaburahe 2008:155.

²⁵⁶ Tshimba 2015, 62–85.

kings.”²⁵⁷ By tradition, an *Umushingantahe* was appointed to help the parties to a dispute resolve their differences, through mediation, reconciliation and arbitration when conflict arose in the family, among neighbours and the greater community.²⁵⁸ In the 1993 crisis, many traditionally invested *Bashingantahe* tried to “protect persecuted individuals, save victims from criminals and organise themselves to arrest killers and looters.”²⁵⁹ Following the return of calm, in several areas “these men started to organise themselves to engage in a process of reuniting and reconciling communities which had been tearing themselves apart along ethnic lines, intending to restore dialogue and progressive reconciliation among their members.”²⁶⁰ The institution is considered as heroes by many in their communities for the role they have played in the resolution of conflict in Burundi.²⁶¹

Within the specific conditions of the conflict in Northern Uganda, the traditional justice mechanisms envisaged “include *Mato Oput* among the Acholi,²⁶² *Kayo Cuk* among the Langi,²⁶³ *Cula Kwor*²⁶⁴ among the Acholi and *Langi Tonuci Koka* among the Madi.”²⁶⁵ These are compensatory mechanisms and practices among the Acholi, Lango and Madi people in northern Uganda.²⁶⁶ These models of justice are ritualistic by nature to a number of northern indigenous people preceding European colonisation and independence in Ugandan.²⁶⁷ They are pre-colonial practices that “seek to obtain justice, reconciliation, harmony and the reintegration of offenders following disputes between and within communities.”²⁶⁸ The signed peace agreement between the Lord’s

²⁵⁷ The term *umushingantahe* refers to “A man responsible for good order, for tranquility, for truth and peace in his environment. And this is not by virtue of some conferred administrative authority, but by his very being, by the quality of his lifestyle recognized by the society and for which it confers such powers on him”. Naniwe-Kaburahe 2008:154.

²⁵⁸ Naniwe-Kaburahe 2008:156.

²⁵⁹ This finding is based on a study undertaken by the University of Burundi in collaboration with the Life and Peace Institute in ten different representative communities of the country Ntahombaye *et al.* 2003:160.

²⁶⁰ Naniwe-Kaburahe 2008:161.

²⁶¹ This finding is based on a study undertaken by the University of Burundi in collaboration with the Life and Peace Institute in ten different representative communities of the country. Ntahombaye *et al.* 2003:160.

²⁶² *Mato Oput* refers to “the traditional ritual performed by the Acholi after full accountability and reconciliation has been attained between parties formerly in conflict, after full accountability.” Uganda 2007:2–3.

²⁶³ It is the traditional accountability and reconciliation processes practiced by the Langi communities after full accountability and reconciliation has been attained between parties formerly in conflict. Uganda 2007:2–3.

²⁶⁴ It refers to “the compensation to atone for homicide as practiced in Acholi and Lango cultures and any other forms of reparation for any other purposes, after full accountability.” Uganda 2007:2–3.

²⁶⁵ Uganda 2007:2–3. Lubaale 2020:189.

²⁶⁶ Igreja 2008:68

²⁶⁷ Among 2018:442.

²⁶⁸ Among 2018:442.

Resistance Army (LRA) and the Ugandan government in 2007, commended “the use of alternative traditional justice practised in northern Ugandan communities affected by the conflict as the central framework for accountability and reconciliation.”²⁶⁹ They have mainly used these cleansing rituals to reintegrate former child soldiers that committed atrocities in the northern region of Uganda.²⁷⁰ The adoption of the *Gacaca* for Rwanda as a nation and Sierra Leone invoking *Fambul Tok* for sexual violations against women is a reflection of the potential Africa as a continent in its resort to its African conceptual framework of Africanisation and African Renaissance.²⁷¹ The inclusion of these examples employed by African countries is not to say their processes were not fraught with challenges, but they are cases in point showing and disputing inherent criticisms that traditional African legal systems are unable to address adequately crimes of a sexual nature that women face owing to conflict.²⁷²

Though the nature of conflict in both Rwanda and Sierra Leone were committed on a much greater scale than that of Zimbabwe, they are precedence for reference for Zimbabwe’s reintegration approach model to post-conflict justice in addressing sexual violations against women. The stances adopted by Rwanda, Sierra Leone, Mozambique, Burundi and Uganda in adopting their pre-colonial conflict resolution platform for conflict resolution dovetails with Fanon’s concept of self-ownership in the reconstruction phase of decolonisation. It is what Ngugi Wa Thiong’o coined in decolonisation as re-centring in adopting a post-justice conflict model that is founded on African thought. As stated by Ngugi Wa Thiong’o “in embarking on decolonisation the process is not an event for all at a given time and place but an ongoing process of seeing ourselves clearly, emerging out of the state of either blindness or dazedness.”²⁷³ The African countries’ examples of post-conflict justice based on their inherent traditional practices substantiate the notion of “African solutions to African problems”. “African solutions to African problems”, is “a phrase that has become the boast of the

²⁶⁹ Latigo 2008:101.

²⁷⁰ Among 2018:442.

²⁷¹ Mwai 2018.

²⁷² In both the Rwanda and Sierra Leone’s conflict, women and girls were subjected to heinous sexual crimes. In Sierra Leone women activists and NGOs worked with the Truth Commission and the Special Court of Sierra Leone to seek justice and reconciliation for conflict related violations including sexual violence against women. Truth and Reconciliation Commission 2004:3.

²⁷³ Ngugi Wa Thiong’o 1986:87–88.

continent as well as a way to show that Africa has both the capability and determination to solve her problems without any external interference.”²⁷⁴ It is a motto that can be employed in advocating ownership of solutions, if Africa formulates its own solutions to its own problems there will be work and incentive to see them to fruition.²⁷⁵ This phrase has presented itself with some dilemmas by African states' failures to live up to their signed obligations under international law in upholding justice. There has been an instance by African states to hide behind this phrase due to their lack of political will to apply some tenets of international justice that requires them to hold accountable those responsible for atrocities within their territories. At times, it has been invoked to shield prosecution of heads of state from extradition for international prosecution.²⁷⁶

In this context of the study as the focus is on addressing sexual violations using traditional justice mechanisms in Zimbabwe, the invocation by the relevant states of *Gacaca* and *Fambul Tok* processes in dealing with ethnic and political violence resonates with the global trends of conflict endemic in Africa. The lessons that these approaches can impart are particularly significant for the African continent and Zimbabwe as many African societies share the problems of civil war and its aftermath.²⁷⁷ Too many nations are plagued with similar challenges; therefore, these adopted traditional justice mechanisms in the countries mentioned above do not strictly provide an “African solution to an African problem”. It should be seen as a success story but also as a human response and solution to a persistent global problem.²⁷⁸

5.5.1 A new lens for integration and non-legal pluralism

Legal pluralism in Zimbabwe is constructed on a top-down approach due to how Zimbabwe as an African state compels its indigenous norms to adapt to its legal order.²⁷⁹ The African customary law, as it was established in Chapter 3, is an adaptation of norms to socio-economic changes brought about by colonialism and globalisation.

²⁷⁴ Lobakeng 2017:1–2.

²⁷⁵ Figueariam 2008.

²⁷⁶ The 2015 incident of South Africa's refusal to arrest Al Bashir since a warrant of arrest by the international criminal Court was issued for atrocities committed in South Sudan. Ngari 2017.

²⁷⁷ Molenaar 2005:157.

²⁷⁸ Molenaar 2005:157.

²⁷⁹ Diala 2019b:22.

The nature of colonial rule was resort to coercive control and the shifting of standards and norms ushered in adjustments thereby instilling disparities between pre-colonial norms and post colonial norms.²⁸⁰ The coercive influence of state law on indigenous Africans prompts behavioural adaptations by the custodians of indigenous African law.²⁸¹ These adaptations constitute customary law since customary law is in essence what people do.²⁸² African customary law contains elements of state law and pre-colonial African laws, reflecting the influence of globalisation in modern social fields. This is how customary law in Zimbabwe is constructed. As part of the legal impact of coloniality, “state laws and its judicial apparatus such as courts and judges have an instrumental role in the reconstruction of African customary law and this is justified and driven by the constitution, the supreme law of the land.”²⁸³

The constitutional status of legal pluralism is ironic since “the guarantee of cultural diversity in the constitution is supposed to put a stamp of approval on cultural diversity, thereby allowing indigenous laws to thrive.”²⁸⁴ The *Constitution’s* demand for courts to interpret indigenous law in accordance with the *Bill of Rights* mocks legal pluralism in Zimbabwe.²⁸⁵ Specifically, judges expressly subject indigenous norms to universalist values of equal human dignity and non-discrimination.²⁸⁶ This delicate co-existence of legal orders in Zimbabwe imposes a change-prone character on indigenous African laws and legal history reveals that it will ultimately eliminate these laws as a normative competitor to state law.²⁸⁷ The adaptability of African indigenous laws and legal pluralism is revealed through the coloniality of the legal system of Zimbabwe.²⁸⁸ The sustained coloniality has blurred the lines between external and indigenous norms and altered the nature of Africa’s social fields.²⁸⁹ The inferior constitutional status of customary law has negative impacts on justice delivery, especially regarding the rights

²⁸⁰ Diala and Kangwa 2019:191.

²⁸¹ Hund 1998:423; See *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (4 June 2008).

²⁸² Hund 1998:423; See *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) (4 June 2008).

²⁸³ Diala 2019b:22.

²⁸⁴ Rautenbach *et al.* 2003:18–20.

²⁸⁵ Diala 2019b: 22; Sanders 1987:406–409.

²⁸⁶ Diala 2019b:22.

²⁸⁷ Diala 2019b:22.

²⁸⁸ Sanders 1987:409.

²⁸⁹ Diala 2019b:23.

of marginalised groups such as women and girls.²⁹⁰ Principally, the value norms raised by customary law may be anachronistic, iniquitous and antithetical to those sought to be established by the state.²⁹¹ The treatment of vulnerable groups is also a matter of concern, what becomes critical is that customary law and practices serve such groups as sources of rights. The nature and content of rights under customary law however must be determined with reference to indigenous law and not common law.²⁹² The emphasis on interpreting traditional law in the indigenous context, and not through the common law lens, would be the laudable approach to integrate the two competing legal systems.²⁹³ This approach could offer reprieve to vulnerable groups such as women in the resolution of political conflict. The advantages of this approach emanate from the fact of complementing the formal justice system's weakness, while allowing for participatory justice and communal ownership and promoting indigenous values of tolerance, respect and dignity.²⁹⁴ This approach might offer valuable undertakings in that it is developing mechanisms by dealing with cultural beliefs and practices not addressed by other legal systems in society. It is a reflection of the individual's place in the social order of the community.²⁹⁵

It is probably impossible to exhaust the impact of coloniality on African indigenous laws and access to justice for marginalised groups such as women.²⁹⁶ As Zimbabwe, as in the rest of Africa, is incapable of turning the hands of their legal clocks, it may be noble at this point to embrace change in a way that achieves justice for marginalised groups.²⁹⁷ Given this scenario, the conclusion proposed in the reconstruction of the new legal order on conflict resolution methods in Zimbabwe is that its legal pluralism's future is bleak while legal integration is bright.²⁹⁸ Zimbabwe's *Constitution* based on this logic should spearhead the integration of customary law with state laws by adopting Ubuntu's foundational values of indigenous laws as constitutional principles.²⁹⁹ These easily

²⁹⁰ Diala and Kangwa 2019:204.

²⁹¹ Bahl 2016:62–63.

²⁹² Bahl 2016:82.

²⁹³ Bahl 2016:87.

²⁹⁴ Bahl 2016:62.

²⁹⁵ Bahl 2016:79.

²⁹⁶ Diala and Kangwa 2019:206.

²⁹⁷ Diala and Kangwa 2019:206.

²⁹⁸ Diala 2019 b: 22–23.

²⁹⁹ Diala and Kangwa 2019:205.

ascertainable values include African indigenous justice norms of humanness, communitarianism, restitution and reconciliation. With this vision of the future of an African-integrated approach to post-conflict resolution, the dialogue between state laws and indigenous laws must be handled sensitively and urgently to the latter's value system. These values as stated by Diala, inform how indigenous norms adapt to socio-economic conditions vastly at variance from their agrarian origins.³⁰⁰ A failure in the proper handling of the dialogue between its legal orders will result in the inability of indigenous law in occupying a respectable position in an inevitable Zimbabwean common law.³⁰¹ The implementation of legal integration founded on customary law was spearheaded and successfully undertaken in the Pacific Island nations, Papua New Guinea, Solomon Islands, Vanuatu and Western Samoa.³⁰² After attaining independence, "these states accorded customary law a higher or equivalent status to the imposed colonial law by making it their primary law."³⁰³

There are examples of countries that can work as case studies for Zimbabwe in the proposed process of integrating its legal orders founded on customary law. These countries illustrate the ability to respond to the challenge of coloniality of the legal system by adopting a legal system that places indigenous law on par in terms of authority with the prevailing Western legal systems. With regard to the approaches in resolving violations from political conflict, Uganda is an African case study that also offers insights into how an integrated approach response could look in a legal pluralistic environment such as that of Zimbabwe. Since 1986, northern Uganda has faced conflict with an armed group (the LRA) taking up arms against the Ugandan government.³⁰⁴ The protracted conflict resulted in the commission of multiple atrocities including rape and sexual violations against women.³⁰⁵ According to the International Criminal Court (ICC) situation report on Uganda in 2004, the atrocities were of such a serious nature and were characterised as crimes under international law falling under the ambits of the

³⁰⁰ Diala 2019b:23.

³⁰¹ Diala 2019b:23.

³⁰² Weisbrot 1987:45–46; Diala and Kangwa 2019:206.

³⁰³ The *Underlying Law Act 13 of 2000* of Papua New Guinea, the *Laws of Kiribati Act of 1989*, the *Laws of Tuvalu Act of 1987*, and the *Customs and Adopted Laws Act 1971* of Nauru.

³⁰⁴ Lubaale 2020:187.

³⁰⁵ Lubaale 2020:187.

ICCs jurisdiction.³⁰⁶ The state of Uganda had enacted laws and unofficial laws that were specific in dealing with the northern conflict. There were two adopted approaches, in addressing this conflict, primarily by invoking amnesties and criminal prosecution using the ICC framework.³⁰⁷ Subsequently in 2007, a “signed agreement was adopted by Uganda and the LRA leaders commonly known as the Juba Peace Agreement on Reconciliation (2007).”³⁰⁸ Traditional justice mechanisms, including *Mato Oput* were embedded in the peace agreement as acceptable practices for adoption and use for reconciliation.³⁰⁹ At this point, although recourse was to be made to traditional justice mechanisms, the agreement also enclosed that those responsible for serious crimes committed in conflict be subject to criminal prosecution.³¹⁰

With mounting pressure for peace and the expectations by LRA rebels of the possibility of amnesty from the government of Uganda, reconsiderations were undertaken by the requisite leaders to the agreement of the decision to have the Ugandan Northern situation under the sole jurisdiction of the ICC.³¹¹ This can be gleaned from the statements of Museveni who is on record as saying “what we have said in the agreement is that instead of using this formal Western type of justice we are going to use the traditional justice, a traditional blood settlement mechanism.”³¹² He added that “under traditional law someone who has committed a mistake asks for forgiveness, pays some compensation and that settles their accountability.”³¹³ The stakeholders to the agreement expressed reservations on the retributive nature of the ICC justice system, they envisaged it as having the propensity to undermine peace and reconciliation efforts as anticipated by the negotiation process.³¹⁴

³⁰⁶ International Criminal Court 2004.

³⁰⁷ These were the options available after Uganda’s referral of the situation to the ICC. Lubaale 2020:188.

³⁰⁸ Uganda 2007:3.

³⁰⁹ Uganda 2007:3.

³¹⁰ The agreement adds that “formal courts provided for under the *Constitution* shall exercise jurisdiction over individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes” It followed, implicitly, that TJMs did not rule out criminal prosecution, especially, for the high level perpetrators, such as Joseph Kony (the head of the LRA). Uganda 2007:4, 6.

³¹¹ Lubaale 2020:188.

³¹² Croft 2008; Lubaale 2020:188.

³¹³ Croft 2008; Lubaale 2020:188.

³¹⁴ The traditional, political and religious leaders among others expressed these concerns. Allen 2006:178.

Embarking on this narrative demonstrates that the Juba Peace Agreement envisaged a combination of traditional justice mechanisms and national criminal prosecutions. To some victims of this conflict, “justice cannot be spoken of without due regard to traditional justice mechanisms, such as *Mato Oput*.”³¹⁵ They contend that despite “the crucial role of the ICC and national proceedings, the values underlying traditional justice cannot be ruled out, as they remain crucial in bolstering criminal processes.”³¹⁶ Though currently the ICC proceedings and national prosecution in Uganda have ignored traditional justice mechanisms, it is evident that legal centralism is at play to the exclusion of all other plural systems and norms.³¹⁷ Despite this sidelining of traditional justice mechanisms, “the communities in northern Uganda have invoked *Mato Oput* as a means of integrating former child soldiers back into their communities.”³¹⁸

This standpoint of excluding traditional justice mechanisms in post-conflict resolution approaches has already been criticised in the analysis above. Hence, this context highlights a need to develop a pluralist account for justice that has an integrated approach, where traditional justice mechanisms play a role.³¹⁹ Among avers that “despite the challenges the process, if properly adhered to, is rigorous, therefore, comparable to modern-day restorative justice processes, in terms of the values they both uphold and advance.”³²⁰ This brazen effort by these nations’ states in adopting these approaches resolving conflict-related violations and granting customary laws authority similar to that of its state’s laws has important lessons. It is a reflection of their determination to spearhead a move towards a legal system that denounces imposed common law traditions embracing a system founded on customs, values and traditions of its people.³²¹ The ultimate goal for these states was “to bring about the development of a new culturally sensitive jurisprudence that blends customary law and institutions with modern Western law and institutions in an appropriate mix.”³²² In this context, as stated by Dialla and Kangwa, “the foundational values of indigenous laws should be

³¹⁵ Tshimba 2015:62, 85.

³¹⁶ Tshimba 2015:62, 85.

³¹⁷ Among 2013, 441–463; Lubaale 2020:190.

³¹⁸ Among 2013, 441–463; Lubaale 2020:190.

³¹⁹ Lubaale 2020:188.

³²⁰ Among 2013:441–463; Lubaale 2020:190.

³²¹ Goldring 1978:150.

³²² Aleck 1991:139; Weisbrot 1988:2.

used as constitutional principles; these principles can start their journey from constitutional preambles and work themselves into bills of rights.”³²³ After all, “all law is customary or at the very least, the primary form of law was customary” as asserted by scholars Fuller and Webber.³²⁴

5.6 Conclusion

The inspiration to adopt legal integration in the conflict for Zimbabwe’s post-conflict justice approaches are based on the conflicting coexistence of the Western and African legal system approaches to conflict resolution in Zimbabwe. The present modern structure and knowledge systems in the coexistence of these systems as stated in the above analysis shows a hierarchical organisation that places Western knowledge systems at the apex while the African knowledge systems occupy the bottom of it.³²⁵ In other words, the nature of Zimbabwe’s indigenous knowledge systems at local and international levels in conflict resolution resembles a bottom-up approach in hierarchy and authority to Western legal systems, institutions and standards.³²⁶

Since legal implant occurred in Zimbabwe at the dawn of colonialism, very few efforts have been made to develop jurisprudence that blends African customary law with modern Western law and institutions in an appropriate mix.³²⁷ Coloniality undergirds the approaches and operation of the Zimbabwean legal system on issues related to redressing conflict-related violations.³²⁸ Constitutionalism adopted at independence by the government of Zimbabwe has perpetuated the current coloniality on post-conflict justice initiatives.³²⁹ The condescending treatment of customary law by colonial authorities and the delay by Zimbabwe’s government to remedy the unequal operation of the two legal systems probably contribute to its subordinate status in African legal

³²³ Diala and Kangwa 2019:206.

³²⁴ Diala and Kangwa 2019:206. See also Fuller 1969.

³²⁵ Ndlovu 2014:86.

³²⁶ Diala 2018:730; Diala 2019b:3, 22.

³²⁷ Weisbrot 1988:30–31.

³²⁸ Diala 2019b:3.

³²⁹ In line with this discourse, several countries including, “Uganda, Guinea, Tanzania, Burkina Faso, Zambia and Zimbabwe attempted either to strip chiefs of most of their authority or to abolish chieftaincy altogether. However, these efforts have proved largely unsuccessful.” Mengisteab 2009:181.

systems.³³⁰ Customary law is still accorded and perceived as inherently antithetical to state law, especially the *Bill of Rights*.³³¹ This perception of customary to state law and constitutionalism should not be persistent considering its flexibility, adaptability to social and economic changes and its possession of foundational values that guide and inform this flexibility.³³² The constitutional states and its foundational principles from the analysis resemble a failure of the system to disrupt the historical and present dynamics of political conflict in Zimbabwe. The present existential account of victims of politically motivated sexual violence remains organised in terms of a failure to address such violations.³³³ The socio-political, economic and cultural landscape post-independence mimics political ontology under colonialism.³³⁴ The persistent epistemic power in knowledge, the history of conquest and the present globalisation and its impact on Zimbabwe's African indigenous knowledge systems prompts a need for an alternative jurisprudence. This prompts a new lens in thinking in law, politics, history and social lines of jurisprudence of liberation for Zimbabwe.³³⁵

The persistent political conflict that ultimately places women in Zimbabwe as targets of sexual violence prompts this shift in thinking on Zimbabwe's constitutional state. As Modiri suggests, proposing this new frontier of alternative jurisprudence, it is not in providing a "programmatic blueprint or list of solutions, but it entails an opening of forgotten erased archives on justice and a disruption of dominant political discourses and approaches to the present conflict."³³⁶ The intended thinking here assumes that imagination and experiences of the present legal system and knowledge of vulnerable marginalised groups such as women, who have been targeted during the political conflict in Zimbabwe who are sidelined in attaining justice and take seriously their intellectual heritage as African people, would pose very different questions and enact a different orientation towards Zimbabwean law and constitutionalism than what is presently the case.³³⁷ In developing an approach to conflict resolution that accords

³³⁰ Diala 2018:730.

³³¹ Diala 2018:730.

³³² Diala 2018:730.

³³³ Modiri 2017:45.

³³⁴ Modiri 2017:45.

³³⁵ Modiri 2017:45.

³³⁶ Modiri 2017:46.

³³⁷ Modiri 2017:46.

African indigenous knowledge systems on conflict resolution authority as that of the state laws it is argued the conceptual thoughts of decoloniality, African Renaissance and Africanism can provide conceptual new thoughts in dealing with the protracted coloniality in conflict resolution approaches in Zimbabwe. Zimbabwe can only achieve the redemptive goal of African indigenous knowledge systems in conflict resolution its rightful authority by embarking on a decolonisation path from an African Renaissance and Africanisation perspective. This process of decoloniality requires the African mind, in this case Zimbabwe, to be decolonised in the reconstruction process from the coloniality of its law, legal system and justice system.³³⁸ Mignolo, on decolonising knowledge, points out what is required through a concept referred to as delinking. Mignolo clearly states that “the delinking project entails the need to change the terms (concepts) as well as the content of the conversations on modernity or coloniality.”³³⁹ He further elaborates that, “the decolonial epistemic shift must enable the histories and thoughts of other places to be understood as before European incursions and be used as the basis for developing connected histories of encounters through those incursions.”³⁴⁰ Therefore, “epistemic delinking from the rhetoric of modernity involves rethinking the emancipating ideals of modernity from the perspective of coloniality.”³⁴¹

By embarking on this thinking proposed by Mignolo, Zimbabwe’s mindset on this present jurisprudence can be transformed. The most viable option for Zimbabwe in moving forward in resolving conflict-related sexual violations is through the recognition of diverse forms of traditional institutions to which the majority of Zimbabweans prescribe. This argument is cognisant with the modern debates and transitions that recognise that “the prerequisite to a legal pluralistic African system that gears towards a feasible conflict resolution alternative is hinged only on amassing approval of indigenous African majority.”³⁴² This fusion of traditional and modern institutions is likely to a more acceptable system that is compatible with Zimbabwe’s socio-economic realities by integrating the parallel legal spaces.³⁴³ The task ahead in the reconstruction

³³⁸ Karibi-Whyte 2020:4.

³³⁹ Mignolo 2007:469.

³⁴⁰ Mignolo 2007:469.

³⁴¹ Mignolo 2007:469.

³⁴² Abede 2013:435.

³⁴³ Abede 2013:435.

will require decoloniality not only in law and the legal system but also in the political culture of Zimbabwe. Decolonising the political dominance of ZANU PF and the repressive political culture they wield is an intricate and uneasy process and praxis that should shun their liberal post-colony narratives of its innocence to political violence and historical closure of past and present violations that target women sexually.³⁴⁴ Therefore, decolonisation in this regard entails a pre-colonial African justice philosophy of reparations to victims of sexual violence and should not be used as a metaphor for other things that need to be done to improve society.³⁴⁵ Without a fundamental rethinking and engaging in these philosophical concepts that foster self-ownership, self-realisation and rehumanising the disequilibrium from an African philosophical lens is a far cry to developing a reimagined model for conflict-related sexual violations.

In light of the unseen influences of culture governing the conflict resolution platforms of ordinary Zimbabwe's the way forward is to search for mechanisms within African knowledge systems of conflict resolution to transform African cultural legal systems and institutions rather than leave them to extinction.³⁴⁶ This can only be achieved by adopting an integrated post-conflict resolution approach so that the coexistence of the legal systems accords African knowledge philosophy and systems equal to the authority of the modern legal system in Zimbabwe. As Bahl suggests, African customary law should be a source of rights³⁴⁷ and as Diala proposes, the foundational principles of pre-colonial Africa in conflict resolution inherent in Ubuntu should be included in African constitutions, especially in the bill of rights.³⁴⁸

³⁴⁴ Tuck and Yang 2012:35; Modiri 2017:4.

³⁴⁵ Tuck and Yang 2012:1.

³⁴⁶ Abede 2013:435.

³⁴⁷ Bahl 2016:82.

³⁴⁸ Diala and Kangwa 2019:205

CHAPTER 6

Conclusion

6.1 Political history of Zimbabwe

The study labours in addressing the main research problem that centres on the lack of tangible responses that address sexual violations against women arising from the ongoing internal political conflict by the government of Zimbabwe. The research problem anchors on the political history of Zimbabwe, as sexual violence against women has been endemic in situations of internal political conflict. From the analysis of the political history of Zimbabwe, the current post-colonial leadership in Zimbabwe is guilty of despotic and authoritarian rule.¹ The present leadership has created gaps among its people resulting in the intensification of violent conflict within the nation.² The political culture of the incumbent government in Zimbabwe is characterised by political intolerance of dissenting views, and a culture of impunity for violations committed against targeted groups such as women. This political culture and the internal conflict of the last two decades have placed women in vulnerable situations where they are subjected to rape and sexual violence. This prevalent political situation and the Western legal system in post-colonial Zimbabwe have aided in the justice and accountability gap on conflict-related sexual violence against women.

6.2 Differences in Western and pre-colonial African legal concepts of law and justice

One of the main challenges that the study attempts to address is the current laws' failure to provide adequate approaches to justice for women subjected to crimes of a sexual nature from Zimbabwe's internal political conflict. This miscarriage in the current law necessitated an investigation into the differences in philosophy between Western and pre-colonial African law in conflict resolution. The investigation is guided by the research question I address in Chapter 2 of the study that analyses the differences

¹ Nabudere 2005:7.

² Nabudere 2005:7.

between Western and pre-colonial African concepts of law and justice. In this light, the study shows the strength of African traditional value systems and philosophical thinking as a foundation of African legal systems by differentiating it from Western philosophical notions of law and justice. Based on the analysis, the fundamental difference between the Western and pre-colonial African legal systems are the culture that modelled and shaped these conceptual philosophies. The concept of law in mainstream Western modern legal thought is premised on the notion of individualism whereas the pre-colonial African legal thought is based on collectivism.³ The individualist nature of dominant Western culture places emphasis on individuality, accomplishment, liberty, high levels of competition and pleasure.⁴ The collectivist nature of African culture emphasises interdependence, harmony, family, security, social hierarchy and cooperation.⁵ The objective of African law is maintaining the equilibrium and its penalties are not directed against specific infractions but geared toward the restoration of this equilibrium.⁶

In contrast to African law, mainstream Western legal thought defines law as the recognition and efficient protection of the rights and liberties of the individual.⁷ The main argument of the study centres on the idea that addressing conflict-related sexual violence in Zimbabwe should be directed by the agency of Africans characterised by an Ubuntu based systems epistemology.⁸ Ubuntu epistemology's communalistic approach to conflict resolution is relational and systematic, hence it is better suited to respond to the complexity of African conflict, resonating better with their worldview. Traditional Western epistemology, which is individualistic, forming modern legal thought is limited in its ability to address social problems in societies with a communal orientation like Zimbabwe. The modern scientific nature of conflict resolution, which is positivist, ignores African philosophical psychologies under Ubuntu law, which has specific cultural webs of meaning.⁹ The predominant mechanistic and individualistic orientation of Western

³ Menkiti 1984:179–190.

⁴ Schoeman 2013:297.

⁵ Schoeman 2013:297.

⁶ Driberg 1934:231.

⁷ Ramose 1999:90.

⁸ Downs 2016:2.

⁹ Christopher *et al.* 2014:648.

thought means that mainstream modern jurisprudential approaches to the resolution of conflict often miss the interconnected African networks and the interdependency of systems over time and in a relational context.¹⁰ Addressing rape and sexual violence using Ubuntu law philosophy from a relational interconnected angle has the potential of addressing the attack on the dignity of the survivors and the broken familial and community relationships resulting from sexual violence. To address the rampant targeting of women in Zimbabwe's political conflict periods, resorting to the values of Ubuntu law would be ideal. Ubuntu law's approach to conflict resolution if applied in addressing sexual violations will employ relational dimensions that appeal to the communal nature of African societies.

6.3 Effect of colonialism on pre-colonial African legal systems in redressing conflict-related sexual violence

The golden thread of the study centres on sexual violence committed against women in Zimbabwe due to internal conflict and the absence of approaches to redress these violations. The investigation is guided by research question 2 I address in Chapter 3 of the study that probes the pre-colonial modes of conflict resolution practised in African societies and Zimbabwe in particular, that addressed sexual violence crimes because of internal conflict, and how pre-colonial resolution methods were affected by the colonial administration and by the government of Zimbabwe post-independence. This investigation into present-day Zimbabwe as carrying the legacy of colonialism and imperialistic tradition explores its contribution to the loss of African values that shape the current approaches to addressing sexual violence. It dwells on the effects of colonialism, pointing out a factual situation of intrinsic legal plurality and philosophical thought evident in Zimbabwe's legal system, which is present on the African continent. The basis of the analysis is that colonialism shaped Zimbabwe's present legal system imposing new forms of punishment to the pre-existing African landscape of punishment thereby transforming the administration of rape and sexual violence.¹¹ African legal systems after the establishment of colonial administration were modelled along

¹⁰ Sexton 2012:63; Downs 2016:27.

¹¹ Spear 2003:3–4.

European thinking, manner and skill, placing the pre-colonial African administration of justice under the auspices of the Chief's Court. The important role that family networks play in mediating between actors involved in the conflict was altered. The colonial administration changed the pre-colonial African legal thought where punishment, rape and sexual violence were borne by the individual family and community to a scenario where punishment would be borne by the individual, for crimes that were regarded as serious.¹² Hence, the colonial interference in the structural function of the pre-colonial African legal system led to the handling of sexual violence crimes in the sole custody of the Western-established British legal system. The colonial officials pursued to institute a model of governing justice that honoured the direct relationship between the individual and state through a blanket restructuring of pre-colonial African practices of punishment.¹³ The new colonial laws and systems concerning rape and sexual violence conflicted with African sensitivities of women's sensuality and individuality.¹⁴

Rape under colonial justice administration was a crime committed against the state rather than an individual, as in civil cases. Consequently matters related to sexual violence had to be tried in colonial criminal courts, a scenario that infringed Africans ability to resolve disputes the pre-colonial African way.¹⁵ In matters related to rape, this infringed the African criteria of womanhood, consent as well as determination of persons injured by the offence.¹⁶ The newly imposed colonial laws and system in relation to rape and sexual violence conflicted with African perceptions of women's sexuality and independence.¹⁷ This transformation of the legal structure of pre-colonial Africa transcended and altered the social relations between communities, leading to the emergence of the double complex of dependence and inferiority.¹⁸ This inferiority had significant implications on how women would be perceived in society and their subsequent subjection to violence.¹⁹ The allowance by post-colonial governments for the continued existence of the colonial system and knowledge post-colonialism

¹² Thornberry 2011:415.

¹³ Thornberry 2011:415–416.

¹⁴ Benson and Chadya 2005:599.

¹⁵ Benson and Chadya 2005:599.

¹⁶ Benson and Chadya 2005:599.

¹⁷ Benson and Chadya 2005:599.

¹⁸ Tamale 2020:6.

¹⁹ Tamale 2020:6; Hooks 1981:30; Oyewumi 1997, 2002; Lugones 2010.

contributed to the continuation of systems that subject women to violence. These factors are conducive breeding grounds with the potential of perpetuating the objectification and targeting of women along gender lines.²⁰ In addressing sexual violence the historical encounter of colonialism and its effects on the African legal systems assists in understanding the link between conflict and gender.²¹ The loss of pre-colonial African heritage, culture and the African way of life caused by colonialism, and the continued failure by African governments in empowering African people to their pre-colonial heritage of Ubuntu has contributed to Africa's conflicts.²² Therefore, the recognition of the link between rape, sexual violence and the marginalisation of African knowledge systems on conflict resolution and current conflicts in Africa is instrumental in finding lucrative avenues for addressing the targeting of women's bodies in political conflicts.

6.4 Zimbabwe's post-independence – current approaches to conflict-related sexual violence

The imperative of the study investigates the possibility of adopting the pre-colonial African principle of Ubuntu in addressing conflict-related sexual violence in Zimbabwe. The analysis is directed by research question 3 I address in Chapter 4 that probes the current adopted approaches of Zimbabwe's post-colonial legal system on sexual violence crimes committed against women in Zimbabwe's ongoing political conflict. Determining the value of pre-colonial African law in the resolution of conflict entailed evaluating the present legal operating system of law in Zimbabwe's legal structure on conflict resolution. From the foregoing analysis, as a state post-independence, the *Constitution of Zimbabwe* is the supreme law of the land governing the state and the enacted legislative framework that stipulates the approaches adopted in law that address violence against women. With regard to the current responses to violations against women resulting from political conflict, national peacebuilding mechanisms, namely the NPRC and its founding Act, are mandated with the task of post-conflict justice, peacebuilding and incorporating the gender dimensions of conflict. This paves

²⁰ Tamale 2020:6; Hooks 1981:30; Oyewumi 1997, 2002; Lugones 2010.

²¹ Zegebeye and Vambe 2011:1.

²² Nabudere 2005:7.

the way for the NPRC to address conflict-related sexual violations resulting from Zimbabwe's internal conflict. The enacted legislation on post-conflict justice signifies positive milestones in the search for justice for Zimbabwean women subjected to politically motivated sexual violence. The difficulty in Zimbabwe's adopted approaches to sexual violence is that the legislative framework and the national peacebuilding institutions for post-conflict justice are modelled and influenced by the principles of constitutionalism.²³ This legal positivist approach to post-conflict justice healing and reconciliation is dominated by Western hegemony and epistemology. The current laws are devoid of African philosophy thereby lacking African philosophical thought of Ubuntu in the resolution of conflict. The approaches do not incorporate and reflect the ways of Africans thereby perpetuating coloniality in knowledge and culture. More so, African indigenous knowledge of conflict resolution is stifled by the continued existence of coloniality in the legal system operating in post-colonial Zimbabwe. The different discourses built up around the African traditional legal systems in a modern African state and the scepticism surrounding the existence of African jurisprudential thinking deter the preeminent position that African knowledge systems ought to hold in Zimbabwe's present legal system.

Further to the above, several challenges that curtail the redress of sexual violations women face from Zimbabwe's internal conflict hampered the effectiveness of the NPRC. As an adopted approach to conflict-related violations including sexual violence, the NPRC fails to quell tensions when political conflicts erupt.²⁴ The ongoing political culture of impunity, pardons and amnesties and the meddling by the executive in the operation of the NPRC has prevented any tangible action on justice for women subjected to rape and sexual violence from the internal conflict. As Ndlovu-Gatsheni and Benyera opine, the minimal political will to establish the truth and guarantee justice as meaningful pathways of reconciling Zimbabwe obscured the fading of the paradigm of conflict in Zimbabwe.²⁵ This scenario begs the call for alternative approaches to the present conflict resolution mechanisms that revert to African indigenous knowledge in conflict

²³ Section 56 of the *Constitution of Zimbabwe*.

²⁴ The 2018 and 2019 internal conflict women were once subjected to rape and sexual violence and not tangible action from the NPRC as it is the national peace building mechanism.

²⁵ Ndlovu-Gatsheni and Benyera 2015:33.

resolution to address the gaps found in the current approaches adopted in addressing rape and sexual violence.

6.5 The possibility of integration of the two legal systems

The tension in the nature and structure of the coexistence between the Western and pre-colonial African legal systems in Zimbabwe invokes questions on challenges that Ubuntu epistemology faces in this coexistence and the implications of the lack of responses for conflict-related sexual violence. The investigation is steered by research question 4 I address in Chapter 5 that probes whether there is a possibility of integrating pre-colonial modes of conflict resolution and the existing Western legal systems in providing African justice for conflict-related sexual crimes. The analysis in the study determines that the socio-political, economic and cultural landscape of Zimbabwe post-independence mimics the political ontology under colonialism²⁶ Constitutionalism adopted at independence by the government of Zimbabwe perpetuates the present coloniality on post-conflict justice initiatives.²⁷ The constitutional state of Zimbabwe and its foundational principles resemble a failure of the system to disrupt the historical and present dynamics of political conflict in Zimbabwe.

The present existential account of victims of politically motivated sexual violence remains organised in terms of a failure to address such violations adequately.²⁸ This persistent epistemic power in the knowledge of the history of conquest and the present globalisation and its impact on Zimbabwe's African indigenous knowledge systems prompts a need for an alternative jurisprudence and reimagined future of conflict resolution. The conceptual thoughts of decoloniality, African Renaissance and Africanism can provide conceptual new thoughts in dealing with the protracted coloniality in conflict resolution approaches in Zimbabwe. The continued legal pluralism where African epistemology is repressed in conflict resolution is not sustainable for the re-envisioned future of conflict-related sexual violence redress. Ubuntu epistemology is

²⁶ Modiri 2017:45.

²⁷ In line with this discourse, several countries including, "Uganda, Guinea, Tanzania, Burkina Faso, Zambia, and Zimbabwe attempted either to strip chiefs of most of their authority or to abolish chieftaincy altogether. However, these efforts have proved largely unsuccessful." Mengisteab 2009:181.

²⁸ Modiri 2017:45.

unable to thrive in a society driven by purely positivistic principles that form the mainstream thinking of the West. The triumph of Ubuntu epistemology in conflict resolution in Africa is possible if principles of African law and justice are propagated and maintained.²⁹ The persistent political conflict that ultimately places women in Zimbabwe as targets of sexual violence prompts this shift in thinking on Zimbabwe's constitutional state. The intended thinking here assumes that imagination and experiences of the present legal system and knowledge of vulnerable marginalised groups such as women, who have been targeted during the political conflict in Zimbabwe who are sidelined in attaining justice and take seriously their intellectual heritage as African people, would pose very different questions and enact a different orientation towards Zimbabwean law and constitutionalism than what is presently the case.³⁰

The task ahead in the reconstruction further requires decoloniality, not only in law and the legal system but also in the political culture of Zimbabwe. Decolonising the political dominance of ZANU PF and the repressive political culture they wield is a complex and discomforting process and praxis that should eschew their liberal post-colony narratives of its innocence to political violence and historical closure of past and present violations that target women sexually.³¹ In the endeavour to re-envision Ubuntu epistemology in Zimbabwe's constitutional state, African customary law in this integrated approach should be recognised as a source of rights and the foundational value of pre-colonial Africa in conflict resolution inherent in Ubuntu and must be included in African constitutions' bill of rights.³²

²⁹ Mapaure 2011:161.

³⁰ Modiri 2017:46.

³¹ Tuck and Yang 2012:35; Modiri 2017:48.

³² Bahl 2016; Diala and Kangwa 2019:205.

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