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Access to Justice in the Republic of Zambia

A Situation Analysis

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THE DANISH INSTITUTE FOR HUMAN RIGHTS

Access to Justice in the Republic of Zambia

A Situation Analysis carried out on

behalf of the Governance Secretariat

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Author's Preface

This study is the product of a team effort. Fergus Kerrigan is the main author and general editor of the study and is responsible for its content and for any errors. Dr. Lungowe Matakala is the main co-author, especially on issues of customary and family law and justice. Responsibility for writing the individual chapters of the report is as follows:

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4	The Zambia Police Service	Fergus Kerrigan, with input from Mr. Wilfred Mwenya
5	The National Prosecutions Authority	
6	The Legal Aid Board	
7	The Judiciary	
8	The Zambia Prisons Service	Fergus Kerrigan
9	The Justice Sector	
10	Criminal Justice Issues	Fergus Kerrigan, with input from Mr. Wilfred Mwenya
11	Children in the Criminal Justice System	Fergus Kerrigan, based on initial work by Wilfred Mwenya and Miriam Møller
12	The Local Courts	Dr. Lungowe Matakala and Fergus Kerrigan
13	Traditional Courts	Fergus Kerrigan, with input from Mr. Charles Dinda
14	Family Law	Dr. Lungowe Matakala with input from Fergus Kerrigan
15	Land and Property Law	Fergus Kerrigan, based on initial work by Miriam Møller
16	Labour and Employment Law	Mr. Wilfred Mwenya, edited by Fergus Kerrigan

Anne Louise McKay contributed greatly in the early stages of the project to conduct the studies and develop the study. Mr Soyapi Mapulanga provided invaluable help with the conduct of field studies, production of quantitative and qualitative data summaries, and gathering of information and technical and administrative support throughout most of the pocess. In addition, the team received assistance from Ms. Margaret Tembo, statistician, analyst Mr. Jairus Chanda and to Ms. Sofie Gry Fridal Hansen in Copenhagen for her help with layout and for compiling the bibliography.

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Special thanks are due to the Governance Secretariat, particularly Mr. Davies Chikalanga and to Christian Eldon, without whose patience, assistance and kind encouragement it would have been impossible to produce this study.

Few justice systems, even in rich countries are fully accessible to all sectors of the public. For poor countries, the challenge is still greater. Praise and thanks are due to the many officials in the Zambia justice system who, while constantly striving to improve the system, were open to taking a critical perspective on where and when the system does and does not meet its own high aims.

TABLE OF CONTENTS

List of abbreviations

ACC	Anti-Corruption Commission
ACHPR	African Commission on Human and People's Rights
AHSI	African Human Security Initiative
AIDS	Acquired Immune Deficiency Syndrome
ARRS	Arrest, Reception and Referral Services
CCCI	Communication, Cooperation and Coordination Initiativeh
CCJDP	Catholic Commission for Justice Development and Peace
CFI	Commission for Investigations
CJF	Child Justice Forum
CPC	Criminal Procedure Code
CPU	Child Protection Unit (Police)
CPFZ	Crime Prevention Foundation of Zambia
CSO	Civil Society Organization
DC	District Commissioner
DIHR	Danish Institute of Human Rights
DLCO	District Local Courts Officer
DNA	Deoxyribonucleic Acid
DPP	Director of Public Prosecutions
DSW	Department of Social Welfare
ESC	Economic and Social Rights
FNDP	Fifth National Development Plan
HIV	Human Immuno-Deficiency Virus
HRC	Human Rights Committee
IG	Inspector General (of Police)

IG	Investigator General (of the Commission for Investigations)
ILO	International Labour Organisation
KPI	Key Performance Areas
LAB	Legal Aid Board
LCA	Local Courts Act
LCM	Local Court Magistrate
LAZ	Law Association of Zambia
LRF	Legal Resources Foundation
LSP	Legal Service Provider
MCA	Marital Causes Act
MOU	Memorandum of Understanding
NAPCIZ	National Audit of Prison Conditions in Zambia
NAP GBV	National Action Plan on Gender Based Violence
NGO	Non – Governmental Organization
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders (South Africa)
NLACW	National Legal Aid Clinic for Women
NPA	National Prosecutions Authority
MTR	Mid-Term Review
PAN	Paralegal Alliance Network
PPC	Police and Prisons Commission
PPCA	Police Public Complaints Authority
SCA	Subordinate Court Act
SNDP	Sixth National Development Plan
SUB. COURT	Subordinate Court
OIC	Officer in Charge (of Police Station)

PLCO	Provincial Local Courts Officer
TC	Traditional Court
TL	Traditional Leader
VH	Village Headman (or Headwoman)
VSU	Victim Support Unit
WG	Working Group
WRC	Women's Right Committee
YWCA	Young Women's Christian Association
ZLDC	Zambia Law Development
ZIALE	Zambia Institute of Advanced Legal Education
ZHRC	Zambia Human Rights Commission
ZLDC	Zambia Law Development Commission

Executive Summary

Chapter 2. Zambia's dualist legal framework

At independence, Zambia inherited two separate worlds of customary and state law that to a large extent had separate existences with a dividing line based on race. To deal with the challenge of melding society and state, Zambia created a dualist legal system that aimed to provide legal protection to Zambians according to their values. The form of dualism adopted was not necessarily an end in itself, but a means for developing a uniquely Zambian combination of African customary law, the common law tradition and modern constitutional principles. The present study aims *inter alia* to examine the extent to which the interaction of customary and statutory law provides effective legal protection according to the basic values of the constitution of Zambia.

The system aimed at a gradual weaving together of Zambian and common law legal worlds under the overall umbrella of the Constitution and the Bill of Rights. In order to achieve the aim of creating this Zambian legal system, the dualist framework incorporated several means by which law could be developed by Zambian jurists and legislators. These included:

- The recognition of customary law as the law of the land;
- The primacy of the written law and constitution;
- Executive and judicial measures of oversight of customary law and institutions, as well as statutory ones;
- Mechanisms of free choice by citizens regarding which legal regime they wished to use to regulate important aspects of their lives (especially as regards family and property).

More recently, Zambia availed of African and international human rights standards and mechanisms to hold a critical lens up to its own practice and to provide a source of inspiration and good practice. Maintenance of the dualist doctrine of the relationship of national to international law means that the international human rights obligations accepted by the Government and the National Assembly do not translate into readily justiciable guarantees. In the area of women's rights, the provision in Article 23 (4) of the Constitution whereby many facets of customary and personal law are shielded from judicial scrutiny as to the constitutional guarantee of equality will eventually be compelled to give way to legal equality and equal protection of men and women. The consequences for customary law will be far reaching. Preparations for this will have to be made sooner rather than later.

The constitutional and legal framework and the justice reforms of recent years encourage the Zambian public through a host of civil society organizations and independent institutions to provide legal services, policy input and critical analysis to the functioning of the system. In recent years, Zambia has adopted a sectoral approach to analysis and development of the legal system. This has provided an improved framework for justice agencies to cooperate to solve problems and improve laws, practices and procedures.

Chapter 3. Administrative Justice Institutions and Oversight Bodies

A modern democratic state based on the rule of law where public authority is exercised by a multiplicity of persons and agencies requires administrative law and processes of justice to ensure that public power is used for the purposes set out in law.

Despite the creation of new institutions since the advent of multiparty democracy in the 1990s, administrative law and justice remains relatively undeveloped in Zambia. This is true both of the legal framework and the institutional environment. The country lacks legislation providing for transparency, accountability and principles of justice in relation to the exercise of public authority. While there are some Zambian judicial precedents, constitutional standards and some general principles from the common law (especially the *ultra vires* rule), Zambian jurisprudence in the area remains limited. Statistics from the High Court do not indicate a significant amount of cases concerned with the proper exercise of public authority brought by private or legal persons, though it is possible that there are more cases than is immediately apparent (especially if they are classified as civil cases rather than administrative ones).

While there have been improvements in the institutional framework, especially through the active work of the Zambian Human Rights Commission and the Anti-Corruption Commission, these are insufficient without a body or bodies that work specifically to promote administrative justice and good administration. The Commission for Investigations, which formally has this role, is unable to properly fulfil it because of outdated legislation that stifles the independence of the Commission and its Investigator General, especially in regard to matters of recruitment, personnel management and institutional planning. Its funding, infrastructure and facilities are inadequate to its task. As a result of these insufficiencies, the Commission has not moved significantly beyond its traditional case load in the area of personnel issues of public employees.

There have been welcome moves and plans in recent years towards decentralizing the CFI so that it can be operational outside Lusaka but the Commission's case management routines and practices, as well as its professional capacity are in need of significant improvement if it is to meet the organisational challenge of managing offices, staff and case management in diverse locations.

Organisational capacity building of the CFI must go hand in hand with reform of its founding legislation. This should ideally aim at the transformation of the Commission into a parliamentary ombudsman institution.

Chapter 4. The Zambia Police Service

The police often find themselves in the position of scapegoat for the larger problems and challenges facing the criminal justice system, caught as they are between public demands to fight crime and a legal framework that respects the rights of suspects.

Despite notable efforts to improve its working methods, procedures and public image, the ZPS has hitherto not benefitted sufficiently from the larger efforts to reform the justice system in Zambia. The ZPS needs to strengthen its emphasis on improving quality in all areas of its

management and operations, including recruitment, training, information management and analysis to the prevention and investigation of crime.

A far greater degree of transparency is needed to permit public debate on policing priorities and service provision. Annual reports should be provided every year without fail to the National Assembly This is linked to the ZPS' internal capacity to produce and analyse information on crime statistics and case disposal rates.

Chapter 10 contains lengthy discussions and recommendations on community policing, police diversion and many issues relating to the roles of the police in the criminal justice process.

The founding legislation of the PPCA should be revised with a view to strengthening the independence and powers of the Authority. The PPCA should be empowered and given sufficient resources to investigate and tackle systemic issues within the police as well as individual cases. Nevertheless, the main effort of control of policing should be the task of an internal affairs unit located within the police but possessing sufficient organizational autonomy and authority to demand the opening of all relevant files and other access to information as necessary, and, where necessary the suspension of officers. Recommendations of this internal inspectorate should be made a part of the annual report of the ZPS to the National Assembly.

Chapter 5. The National Prosecutions Authority

The creation of the NPA responds to long-standing demands and recommendations for an improved and more independent prosecution in Zambia. The scheme of the legislation on the NPA calls for independence of the prosecution function and for decentralization of decision-making on prosecution. This requires a clear set of guidelines and a system to ensure that they are known, followed and supervised in practice. It is important for the credibility of this new institution that decisions on prosecution are seen to be clearly based on objective legal criteria. Success in this regard can do much to build the confidence of the public in the criminal justice system. The chapter makes a number of recommendations to enhance independence and a smoothly functioning decentralization process.

Chapter 6. The Legal Aid Board

Even prior to the completion of this study, its recommendations and contributions to the process of developing a national legal aid policy and strategy for Zambia have commenced. The work of the Legal Aid Board has been largely focused on providing representation in High Court criminal and civil cases. The Board has hitherto lacked the strategic direction of a clear set of organizational and operational priorities based on an assessment of needs. Priorities need to be set based on an assessment of: i) the kinds of legal services to be provided (only or mainly court representation or other services such as advice and assistance) ii) the identities of providers of those services, iii) particular beneficiaries and groups and, iv) legal domains (which kinds of criminal and civil cases) and v) legal forums (the High Court, or also the Subordinate Courts).

Some shift in priorities towards a greater focus on criminal representation in the Subordinate Courts is recommended, especially where juvenile defendants and other particularly vulnerable persons are concerned. Providing more criminal representation in Subordinate Courts would require new forms of work, including perhaps the institution of a "public

defender" model present at the court at busy times and based on a high volume of pleas (including guilty pleas under the Plea Agreements Act) and motions in cases. Devising a scheme for this would require cooperation with the judiciary to develop a pilot scheme. It would probably require changes in Subordinate Court (and DPP / NPA) practice regarding disclosure. A greater use of legal assistants and paralegals would be required under the supervision of experienced counsel.

Similar considerations apply to schemes to provide legal services in police stations and prisons, which is also recommended. The LAB should promote and engage in a regular working forum with other legal aid providers, particularly within LAZ and the PAN network to see how it can contribute to such efforts. Even if LAB does not take the lead in implementing these schemes, it should follow them closely and contribute through advocacy in forums where it is represented, including the CCCI initiatives and the Access to Justice Programme.

For civil legal aid, the LAB should find ways of ensuring that its services are directed towards benefitting the poor to the maximum extent possible. This may mean shifting the focus of the services provided towards strategic litigation in the higher courts and advice and legal information, through cooperation with other service providers.

Chapter 7. The Judiciary (excluding the Local Courts)

Much of the effort towards capacity building and reform of the judiciary in recent years has focused on the High Court. While this was no doubt necessary and worthwhile, we take the view that there is a great need to devote attention and resources to the Subordinate Courts, especially outside major urban centres.

Given current caseloads, the systems of bifurcated responsibility between the Subordinate and High Courts in the areas of sentencing powers and confirmation of sentences seem in the long term to be anachronistic and an unnecessary drain on the resources of the judiciary. These practices are associated with lost files and significant delays in case management. For these reasons, there should be a long term strategic aim to eliminate these systems and practices, and to allocate full responsibility for sentencing of all cases within the jurisdiction of the Subordinate Courts at those courts. The effects of this would include freeing the resources of the High Court for appellate work and for its regulatory functions. Any necessity of supervision of the Subordinate Courts could be exercised through the establishment and operation of a functional courts inspectorate.

This strategy cannot be put into effect without planning and a number of supporting measures. These include improvement of the courts and working conditions of Magistrates in outlying areas in order to make positions in these courts more attractive. (Though in fact, most Subordinate Courts are urban based.) It also requires systematic attention to induction and in-service training of Magistrates. Significant improvements have been made regarding the gender balance in Subordinate Courts, and there are some indications that this is leading to greater popularity of these courts among women litigants. Like other justice agencies, the judiciary is in sore need of reliable systems for production and transmission of data for planning purposes.

Chapter 8. The Zambia Prison Service

Prison conditions as such were outside the scope of the study and have been dealt with in other studies in recent years. A comprehensive overview of percentages of remand detainees and convicted prisoners in the Zambian prison system is presented. Analysis of justice processes of relevance to the prisons service is presented in chapter 10.

Chapter 9. Sector perspectives

A major issue facing the sector as a whole is the lack of data as a basis for justice planning and strategy. The efforts in recent years towards stronger sector cooperation through the Access to Justice programme are strongly appreciated by stakeholders. These, and the more recent CCCIs and openings towards civil society participation deserve sustained and strong support.

Chapter 10. Criminal Justice Issues

It is difficult to effectively summarise the multiplicity of issues arising in the criminal justice process. Please refer to the tables of recommendations annexed to the main report.

Some observations that arise at all phases are that:

- Bottlenecks and lost files are worst where cases are transferred between institutions;
- Insufficient use is made of the numerous mechanisms that exist at all phases to filter cases out of the criminal justice system;
- Engagement with communities needs to be worked on consistently and with long term strategies, while testing innovative approaches on a pilot basis. Cooperation with civil society actors that are well-established in local communities is particularly relevant when attempting to pilot community cooperation approaches.
- Diversion by the police, especially for juvenile offenders - should be piloted with a view to developing a specific legal basis for it based on experiences. A model is proposed.
- The use of legal services at a far greater number of points in the system can contribute greatly to reducing remand detention, reducing costs and acting as a filter to remove cases from the system or channel them into alternate avenues or processes.
- The KPI focus on remand detention is very positive as an indicator of functionality, but remand percentages should be supplemented by indicators of time spent in remand, with particular attention to long-stayers.
- A system should be put in place to track trial delays and the reasons for them. A model for doing this is provided. Once the major causes of delays have been identified, they should be systematically addressed.
- The VSUs have made a very valuable contribution not only to the protection of victims of crime, but to the improvement of relations between the police and the community. This should lead to gains in law enforcement efficacy.
- Greater decentralization is necessary in all justice agencies. This must go hand in hand with the development of operational guidelines and reporting and feedback systems.

11. Children in the Criminal Justice System,

The chapter makes a number of recommendations that are to be found in the annex to the study. Efforts made hitherto to improve juvenile justice have tended to founder for a number of reasons, including the lack of community links and the under-resourcing of the DSW. While NGOs (with development partner support) have done excellent pioneering work in this regard, this tends to be financed on a project basis so that funding is unstable. There is no substitute for government programmes in this area that build strong community links.

A serious problem is that the sentences of juveniles are not considered to begin until they have arrived in juvenile institutions, despite their being held in detention awaiting transport, sometimes for months at a time. The excess time in custody amounts to arbitrary detention and is a clear violation of these minors' human rights. It should be addressed urgently.

As to child victims of crime and to a lesser extent child offenders, the issue of defilement is of major concern to society and the criminal justice system. Where there is defilement by adults against minors, the need, on the contrary, is for the police to inform the public, and especially persons in a position of authority or influence such as traditional leaders, that defilement is a criminal offence and should not be the subject of compensation or settlements between families. In this, there is a need for a renewed national campaign against predatory defilement involving law enforcement, public health authorities and civil society organizations.

The lack of a clear legal distinction in the Penal Code between so-called "peer to peer" defilement and obviously predatory abuse of children by adults is a weakness in the legislation. While courts may find a way around this by relying on the Juveniles Act in many cases, this is not done universally. Imprisoning minors for consenting relationships between teenagers of similar ages should be stopped by legislation. Until legislation has been adopted, the DPP / NPA and the Chief Justice should issue guidelines to their respective agencies on recommended non-custodial sentencing in these cases.

Chapter 12. The Local Courts

The Local Courts directorate at the High Court of Zambia deserves praise for being more forthcoming than any other section of a justice agency in terms of providing information about the numbers of courts and their staffing. This makes it possible in Chapter 12 of the study to conduct some analysis of the priorities of the judiciary in establishing and maintaining Local Courts. Comments on this are made in the chapter.

The Local Courts are the single most important section of the Zambian judiciary in terms of the number of civil litigants served. They remain severely under-resourced and to some extent neglected by the rest of the judiciary. The hybrid nature of this institution where state appointed Magistrates apply a combination of customary and statutory law requires a particular combination of skills and tact. The Zambian model of combining customary and state authority offers interesting potentials for arriving at a creative and viable weave of customary and statutory law.

Mechanisms for the development of customary law in the Local Courts through support and supervision, appellate mechanisms to the higher courts and the primacy of written law are too often not working as intended. Local Court Magistrates lack training and materials regarding

both written and customary law. Family law matters and relatively minor matters of personal conduct account for a large number of the cases before Local Courts.

Local Courts could benefit from increased formal cooperation with NGO legal aid providers (especially qualified paralegals) and traditional courts. Models for this cooperation should be developed through pilot projects. A model for conditional recognition of African arbitration and mediation settlements in accordance with the spirit of Sec. 50 of the LCA is proposed.

The judiciary's recent efforts to rejuvenate and improve the qualifications of Local Courts staff are a very positive step deserving supported and maintenance. Continued efforts should be made to improve the qualifications and gender balance of Local Court Magistrates and to induce traditional leaders to support an open and transparent process to select candidates for the position of Local Court Magistrate, on a basis of gender equality also in rural chiefdoms,.

Support should be given to training of Local Court personnel and to developing effective ways of supporting, monitoring and supervising Local Courts. An updated Local Courts Handbook should be developed and distributed along the lines of the training curriculum for LCMs. It should contain specific guidance on the meaning and application of the repugnancy clause and the primacy of written law.

Chapter 13. Traditional Courts and traditional leaders

The law enforcement functions of traditional leaders should be made subject to a set of guidelines issued by the Ministry of Chiefs and Traditional Affairs, developed in cooperation with representatives of the House of Chiefs. Expanding the role of the House of Chiefs as an advisory body on matters of customary law should be done more generally.

The adjudication function of traditional courts is recognized by customary law and hence indirectly by sec. 50 of the Local Courts Act. Like the other functions of traditional leaders, it is subject to the so-called "repugnancy clause" of sec. 10 of the Chiefs Act. This clause should be applied with inspiration from the Bill of Rights in the constitution. Other requirements of natural justice and the Bill of Rights are the requirement of a fair hearing and the right to a remedy. Interaction among traditional leaders, Local Courts and suitably qualified paralegals should be fostered by all possible means. There should be specific rewards and inducements for traditional leaders to engage in cooperation aimed at promoting constitutional values.

Chapter 14. Family law

Without measures to make statutory institutions more accessible, Zambia may remain with only 10% or less of the population availing of state law in order to enter into marriage. The government of Zambia should pursue a two-pronged strategy of on the one hand, making statutory institutions, remedies and legal processes in the area of family law (including civil marriage itself) more understandable and accessible to ordinary Zambians. This would have consequences for the authority of state officials and the jurisdiction of the courts, so that a greater number of state officials, possibly including clerks and Magistrates of Local Courts should be able to conduct civil marriages. Civil divorce should be made actionable in some Subordinate Courts. The second prong of a government strategy should be to use state legislative, judicial and executive authority to make customary law more compliant with constitutional, human rights and legislative standards. A minimum age for customary marriage

of at least 16 (and possibly older) should be imposed as a condition of recognition of the marriage. The downward trend in polygyny should be encouraged towards gradual elimination through a number of strategies rather than an attempt to outlaw it through legislation.

Chapter 15. Land and Property Law

As in other areas of law and justice in Zambia, the largest single challenge for property justice is how to successfully harmonize the norms, structures and mechanisms of law and society, or of statutory and customary law. In the areas of family and property law, the role of customary norms, structures and processes remains primordial. The lack of outreach of the state, and the historical lack of familiarity and legitimacy of state law and justice contrasts with the persistence of social and customary mechanisms and patterns of order, justice and fairness. In a changing society, both have their weaknesses and their strengths. The two worlds represented by state and society operate according to different philosophies, norms and rules. The challenge is not to treat this opposition as a question of "choosing" one or the other, but of finding and developing models for how these two can work in harmony with one another. This will require creativity flexibility, pragmatism and perhaps a need to experiment on a small scale to find workable models.

Legislation should be adopted to provide for a mechanism of recognition of customary title. CSOs should be encouraged to work with communities to begin processes of customary titling. The development of models for participatory processes of this kind should be encouraged by the Ministry of Lands, CSOs such as the Zambia Land Alliance, institutions of custom such as the House of Chiefs and foreign technical partners. Good practices should be highlighted, and inspiration perhaps drawn from processes in countries such as Mozambique, Tanzania and Uganda.

Additional safeguards are necessary to preserve acquired property rights, especially rights of use, (both collective and individual) when converting customary land into leasehold or alienating customary land. The leasehold conversion process is very poorly accessible to low income holders of customary title. The Lands Tribunal is not succeeding in being an accessible forum. Even after being given competence in matters of customary land, it suffers from weaknesses of resources and mandate.

Chapter 16. Labour and employment law

Zambian labour and employment law is well-developed in some respects and for some sectors. It is however primarily adapted to the needs of two categories of workers: industrial wage earners and public servants. There is a major gap in legal protection for casual workers that needs to be closed through legislation. The Subordinate Courts should be given jurisdiction in a large number of labour disputes as the Industrial Relations Court.

1. Introduction

The framework and terms of reference of the study

The present study was commissioned within Government of Zambia's Access to Justice (AtoJ) Programme, which has the overall goal of providing better access to justice for the people of Zambia. Within this overall goal, the AtoJ programme has a number of objectives that seek to improve the performance of justice agencies and institutions. The present study is specifically concerned with the accessibility of justice agencies. The study is motivated by the process of expanding the AtoJ Programme to an Access to Justice Basket Fund. Out of this arose the need to conduct a thorough baseline survey as the basis for an expanded access to justice reform programme.

The terms of reference (ToR) for the study acknowledged that access to justice includes aspects of:

- Effectiveness and efficiency of justice delivery agencies – the delivery of quality services within a reasonable time;
- Physical access – how close the users are to justice and law enforcement agencies;
- Financial terms – how affordable legal services are to the users;
- Other dimensions of access, including:
    - how comfortable users are with legal language and procedural requirements;
    - the treatment of users by law enforcement and justice personnel;
    - their representation by experts in law;
    - the techniques and procedures of the system and the user's ability to afford them i.e. cost (including opportunity cost, as in time spent away from economic and family activity).

1.1 Goals and Objectives of the study

The overall goal of the study was to produce recent documentation on the status of the justice sector and the linkages among formal and informal justice to inform an expanded access to justice reform programme and facilitate decisions on what aspects of justice systems should be included in addition to criminal justice based on an improved understanding of the target group and their needs.

The study has the following specific objectives:

To provide a better understanding of the various constraints faced by different segments of society currently disadvantaged and assess the extent to which the AtoJ could address them.

To provide more information about the nature, scope and qualitative importance of the informal justice mechanisms operated by traditional leaders and religious institutions and thus provide an analysis of the linkages between formal and informal justice that would better equip the AtoJ programme to develop intervention strategies within this important area.

To produce recommendations to assist the AtoJ programme to strengthen linkages with other justice service providers such as, but not limited to, GIDD and the implementation of the National Gender Policy as well as between social welfare and probation officers, Zambia Human Rights Commission, Law Development Commission, Immigration Service, DEC, Juvenile Justice Forum as well as Legal Aid Service Providers including LAZ and relevant training institutions including UNZA, ZIALE, NIPA.

To identify through the process of conducting the study any areas in need of legislative and/or administrative reforms.

- To make recommendations for additional research necessary to address the areas in need of change.
- To outline the total cost of the criminal justice sector and make recommendations for any efficiency saving mechanisms or low cost/no cost initiatives that could be supported by the AtoJ programme
- To provide a more recent assessment as well as data to inform the definition of baselines for monitoring the key results of planned interventions.

The study was thus intended to benefit the people of Zambia, through contributing to the development of a more efficient, transparent, fair and equal justice system based on their needs.

The overall method proposed by the team and adopted by the Governance Secretariat for the conduct of the study looked at access to justice through an analytical framework involving four aspects:

i) The appropriateness of legal frameworks;

ii) The availability of necessary legal resources to providers and users;

iii) The availability of appropriate forums for handling of cases (civil disputes and criminal offences);

iv) The effectiveness of remedies.

The text attempts to analyse and point out defects and to propose remedies based on these four parameters.

The goal of the survey is thus to provide a better understanding of the various constraints faced by different segments of society that are currently disadvantaged and to assess the extent to which they could be addressed by the AtoJ programme. The study team was expected to provide information about the nature, scope and qualitative importance of the informal justice mechanisms operated by traditional leaders and religious institutions. This would lead to an analysis of the linkages between formal and informal justice, equipping the AtoJ to develop intervention strategies. Recommendations following from this analysis should also assist the AtoJ to strengthen linkages with GIDD and the implementation of the National Gender Policy as well as between social welfare, probation officers and other justice service providers. In addition, the survey should provide information to better equip the Programme

to expand beyond a focus on criminal justice – as the current focus area – to include aspects such as civil and administrative justice. It would also look at the work of independent monitoring institutions such as the Human Rights Commission and other independent bodies. Finally, the survey will provide a more recent assessment as well as data to inform the definition of baselines for monitoring the key results of planned interventions.

1.2 Organization of the report

As the study deals with institutional, procedural and substantive aspects of the justice system, a key challenge was to organize the information in the report without overlaps and confusion.

The sections on the justice agencies are mainly confined to institutional issues, whereas practical and operational issues are dealt with in chapter 10 on the criminal justice system. The section that deals specifically with juvenile justice is confined as far as possible to issues that only affect juveniles, whereas juvenile aspects of general criminal justice issues are as far as possible dealt with in the sections of the criminal justice chapter. An exception is made in relation to diversion, as there was an advantage in discussing police and court diversion as a single topic. Cross-references are provided wherever relevant.

The report has two main sections, the first dealing with institutions (both formal and informal), the second dealing with legal domains (areas of substantive law). A word or two of explanation is necessary about the organization of these two sections. When dealing with criminal justice, it is customary to follow the path of a typical criminal case, from the police to the prosecution, the defence (legal aid), the court system and the prisons, with some space also given to other state authorities such as social welfare. The text more or less follows this model. Doing so however meant that the section on the Local Courts is separated in the text from the remainder of the judiciary. While there are some disadvantages to this, it permits the text on the Local Courts to be immediately followed by that on the Traditional Courts. Since the main caseload of the Local Courts is civil in character and the interaction of the Local Courts system with Traditional Courts and community level legal services is in focus, it was felt that this choice was the right one.

1.3 Methodology

The study comprised three main methods: (i) a field study (ii) a desk study and (iii) a series of stakeholder workshops. Methodological information is provided for each chapter.

1.3.1 Field study

The original intention to carry out the desk study before embarking on the field study had to be changed. Provisional agreements endorsed by the Access to Justice Technical Committee and the Governance Secretariat had been made to coordinate the field study data collection with a legal aid baseline conducted by the Paralegal Alliance Network (PAN). PAN had time constraints for thie conclusion of this activity that meant it had to be carried out in 2009 and at the latest by early 2010. A delay in the conclusion of the contract for the present study (in September 2009) meant that the field study had to be carried out at a time when the desk study had not yet begun. Extensive questionnaires consisting of open and closed questions were prepared quickly so that the two field studies could be carried out in cooperation. While

these were broadly satisfactory, some issues that later emerged from the desk study were not able to be fully tested.

A set of 13 survey instruments were specially developed for the survey and pre-tested prior to implementation. They are listed in Table 1.3 below, and figures are given on their application according to geographical area. Three separate instruments were developed to survey the attitudes and perceptions of justice users and beneficiaries: one for users generally, one for women, one for children and one for prisoners and detainees.

The provider survey instruments focused on issues related to the accessibility and smooth functioning of the justice system, particularly including issues of inter-institutional cooperation. An attempt was made to systematically address gender equality and women's access to justice.

All nine provinces of Zambia were visited. Teams of survey assistants were selected from among civil society legal aid providers trained in the use of the instruments. They were supervised by experienced team leaders responsible for collating the data. Data entry then took place of quantitative data and specially designed formats (for qualitative data). An experienced data consultant was contracted to supervise the data entry and to extract data from the STATA programme into Excel spreadsheets from which the study team carried out their analyses. A quality check revealed errors in data entry, leading to a substantial cleanup of data in late 2010. Some loss of usability occurred, though the figure of 690 user interviews was still considered to be large and comprehensive.

While representatives of justice agencies were found to be very helpful and cooperative, providing statistical information was a general problem (see also below under desk study). Attempting to cover many issues simultaneously was a challenge that sometimes drew heavily on the time and resources of justice officials.

The surveys were supplemented by thematic stakeholder workshops held with the help and support of the Zambia Human Rights Commission in February and March 2010 in Lusaka and a consultation workshop held in December 2010. Further input was provided through a validation workshop conducted at Fringilla Lodge in May 2011. The workshops permitted detailed discussion of issues of substance and procedure and testing of working hypotheses. The main focus was on criminal justice and family law. Workshops on these subjects were well-attended by stakeholders. Success in other areas, such as administrative and labour law was more limited. In depth semi-structured interviews were carried out with senior representatives of justice agencies in Lusaka in 2010.

Table 1.3.1a : Districts surveyed, by province

Central	Copperbelt	E	Luapula	Lusaka	N	NW	S	W
Kabwe	Kitwe	Chipata	Mansa	Luangwa	Luwingu	Mwinilunga	Gwembe	Senanga
Mkushi	Ndola	Lundazi	Samfya	Lusaka	Kasama	Solwezi	Livingstone	Mongu

Table 1.3.1 : Field survey instruments and responses, by province											
No.	Target Group	No. of respondents	CE	CO	E	LUA	LUS	N	NW	S	w
1	Justice beneficiaries / users	690	Evenly spread among provinces								
2A	District Commissioners	20	22	4	2	2	2	1	2	3	2
2B	Gov.t Officials – Province and District	10	1		1	2	2		2	2	
3A	Magistrates Court	26	4	2	4	4	3	4	1	1	3
3B	High Court	5	1	1	2					1	
4	Legal Practitioners	12		7	2		1			1	1
5	Prison Officials	16	3	3	2	2	1	1	1	1	2
6	Police	31	3	3	4	4	3	2	3	4	5
7	Local Court – Magistrates and Clerks	48	4	9	8	7	7	1	3	5	4
8	LAB	6	2		1		1		1		1
9	Children	4 – 5 per province									
10	Legal Service Providers (Civil Society)	See PAN baseline survey									
11	Traditional Leaders	59	8	5	5	9	4	8	6	9	5
12	DPP Officers	10		1	2		1	1	1	2	2
	Prisoners and detainees (FGD)	57									
	Women										

1.3.2 Desk study

The desk study relied on three sources of information:

- Literature, in the forms of reports and studies, academic writing and informational material made available by stakeholder institutions, including comparative literature on justice reform;
- Legislation and case records;
- Institutional information on issues such as resources and caseloads.

Study of the functioning of the justice system in Zambia is significantly hampered by the lack of academic research on current issues of law and justice. The annexed bibliography lists materials accessed and used for the purposes of the study. A significant limitation encountered was the difficulty of obtaining information on:

(i) caseloads of the justice institutions (including numbers of applications / cases filed, numbers disposed of in various ways, including on the flow of cases from one institution to another, numbers pending at various stages of the justice process), globally and by province and district;

(ii) financial and personnel resources of the institutions, broken down by province and district, as well as institutional infrastructure and assets.

The study team made repeated efforts to obtain this information, including by providing forms on which the data could be entered at national, provincial and district level and making repeated requests in writing and in person. However, despite the goodwill shown by many individuals in the various institutions, this was by and large unsuccessful. The main reason is that the institutions themselves lack the information as the systems in use are incapable of producing it. This was documented in a 2008 study[1]:[i] in the following terms:

"Obtaining accurate counts of crimes and cases is impossible: the numbers given to the team for reported and processed crimes varied across institutions, and no one was able to offer a precise number of open cases at each level of the system."

It is hard to overstate the extent of this problem. Those working in the system have become so inured to the lack of planning information and transparency that it is not surprising if they stop thinking of the great costs of this gap. A simple matter such as obtaining up to date information on the filing and other fees in the various courts of Zambia took at least four visits by a research assistant, who was asked to produce a letter justifying the request. One is tempted to ask what chance an ordinary Zambian has of assessing whether (s)he should file a complaint in court.

[1] Access to Justice Programme in Zambia: Toward an Integrated Case Flow Management System, Situation and Gap Analysis Report, Transparent Business, December 2008

2. The Zambian Legal and Justice Framework

2.1 Sources of Law

Zambia, like many other post-colonial countries, faces the challenge of melding at least three sets of legal norms and standards. Very roughly, these are as follows:

i) The common law justice and state machinery that is part of Zambia's colonial inheritance, and which it shares with a large number of countries in Africa and around the world, as developed and supplemented by Zambian lawmaking and jurisprudence;

ii) The legal instruments that emanate from an increasingly globalized world that is seeking to standardize norms and procedures in a number of fields, including human rights, commerce, banking, insurance, environmental protection, intellectual property and transnational crime;

iii) The customary norms and laws of a diversity of ethnic groups in Zambia that still hold considerable sway in Zambian society and enjoy constitutional recognition.

Specifically, Zambia has ten material sources of law, most of which are listed in section 6 of the Laws of Zambia Act.[2] Seven of these are primary and thus carry binding authority, while the three secondary sources are merely persuasive.

The Terms of Reference for this study call for a pragmatic view, so that that these sets of standards are assessed for what they contribute to securing access to justice for the people of Zambia, rather than from any preordained sense of "what has to be". None of the three alone can fully address the individual and collective legal needs of Zambians today, and yet each has a role to play in building a state and society that Zambians can thrive in. While the common law gives Zambia membership in a rich and constantly renewing legal world shared by many of its neighbours, some of its norms and procedures are outdated today and have long since been changed in the country that devised them. Some of them have vestiges of colonial thinking and fail to conform to the modern standards of human rights found in Zambia's constitution and international treaties. Still others are unnecessarily complicated in language and procedure and are socially and culturally alien to Zambia.

The standards of international law, in human rights and other fields, while being an essential yardstick to examine law and practice, are inevitably general in nature and leave much leeway as to how they should be realized in the national context. As this study shows, there are areas of tension between their ideals and practical reality that are not easily changed simply by amending legislation. Thirdly, the customary law developed by Zambian ethnic communities over generations to settle disputes and maintain order in tightly knit, homogeneous rural communities may often express what is most familiar and right-seeming to Zambians.

[2] Laws of Zambia Act 9 of 1968, as amended by Act 21 of 1971 CAP.2 Laws of Zambia Vol. 2.

However, it is not always appropriate to the needs and values of a republican form of government, a modern society and a cash economy where people move and mix as never before. Custom and its institutions, like the rest of society, were changed and influenced by colonial government, the independent Zambian state, education, democracy, and modern life. Thus, the challenge for Zambian lawmakers and jurists is to use and sometimes to meld these sources into laws that meet Zambian needs and aspirations.

2.2 Customary law and legal pluralism in Zambia – facts and aspirations

Upon independence, Zambia, like most African countries had two distinct types of legal system in existence. On the one hand was indigenous custom as developed by Africans themselves to suit their needs, forms of life and social structures, and on the other were the laws of the colonial state. Each of these systems of law had its characteristic set of institutions. Each had strengths and weaknesses when examined through the lens of current needs and human rights standards.

Customary law and institutions: The indigenous institutions were originally based on highly developed kinship networks and reciprocal social obligations. It is often said of customary justice and law that it places a high value on community harmony, but it is nevertheless concerned with adjudicating disputes between parties. Customary institutions used an ordered process incorporating elements of negotiation, mediation and arbitration guided by customary norms. Custom and law changed and developed through these processes.

State law on the other hand was designed primarily for three purposes: one was to uphold the colonial state structure as such, a second was to serve the legal needs of the colonists according to their values and economic and social systems, and the third was to provide a basis for the gradual spread of those values and economic social systems to the indigenous population. The European inspired colonial state used its characteristic tools to respond to changes and challenges: legislation command-based executive action, and the development of jurisprudence. Gradual development through jurisprudence of the type found in the common law could not take its outset in Zambian conditions only, as it was tied to jurisprudential developments in the metropolis. More so than customary law, state law is based on the application of non-negotiable rules and standards to concrete situations.

In the colonial era, choice of law depended on perceptions of race. While there was some crossing-over between the two worlds, the two systems generally co-existed side by side rather than mixing to create a new hybrid. The indigenous structures were used as an instrument of control by the colonial state. They remained intact in many respects upon independence. Although racial distinctions disappeared, the upward link that was created to the central state in colonial times and preserved and developed after independence may however have interfered with the traditional process of adaptation and change of customary law and institutions.

The existence of these two distinct systems is evident in the three major areas of law dealt with in this study: criminal law, family law and property law. Of the three, criminal law represents the most statist tendency, in that this is where state law is least tolerant of the co-existence of an alternate system. This remains true today.

Zambia faced the challenge of accommodating or reconciling the two systems and their respective sets of institutions. Zambia chose a pragmatic path rather than a radical one in this regard. Going back to the pre-colonial situation was not an option, as it would effectively have meant dismantling the state itself. Abolishing the customary entirely was not seen as a viable option either, as this would have been both practically impossible and a repudiation of all that is valuable in African tradition. The only remaining way forward was some accommodation between these two systems, in terms of norms and rules and their respective institutional frameworks. It is impossible to understand law and justice in Zambia today without some understanding of this challenge and the approach adopted to face it.

Legal dualism / legal pluralism: Zambia opted for a so-called dualist legal model, where both systems continued to exist within an overall constitutional framework. This is an expression of so-called "legal pluralism" in that people are subject to more than one body of law.[3] Important legal instruments for the Zambian dualist model are the Constitution and Acts of Parliament such as the Local Courts Act, and the Chiefs Act, as well as legislation on land and family law.

The dualist model does not answer all questions. In fact it also raises new ones. While it tells us "what is", it does not tell us "what ought to be."

Three important questions are:

(i) What aims are to be achieved by the dualistic system?

(ii) What means were chosen to achieve those aims? and,

(iii) Is this system as it currently stands, achieving its aims?

The third of these questions is a key concern of the present study.

2.2.1 Aims of Zambian legal dualism

We must start by trying to answer the question of what legal instruments such as the Constitution and the Local Courts Act are trying to achieve. While this is not an academic study, some brief words on legal pluralism are called for. Academics try to create clarity by distinguishing between "state" or "weak" legal pluralism" on the one hand, and "strong" or "deep" legal pluralism on the other. "Weak" legal pluralism generally refers to a view whereby the state is seen as the only ultimate source of validity. The state permits the existence of subsidiary bodies of law to regulate particular substantive areas for particular groups, on terms dictated and circumscribed by the state. Any authority that the subsidiary bodes of law have is derived from this sanctioning by the state. This is distinguished from the "deep", or "strong" legal pluralism view, where there is more than one source of legitimacy, and the different sets of rules overlap with one another, rather than being regulated according to an agreed hierarchy.

Which of these does Zambia best exemplify? Representatives of the Zambian justice system would undoubtedly maintain that the legal validity of customary law today derives from its

[3] G. R. Woodman "Legal Pluralism and the Search for Justice" *Journal of African Law* 40 no. 2 (1996) 157.

recognition by the law and the Constitution. It would presumably not be disputed that it is legally within the power of the legislature to alter the status of customary law. To this extent, Zambia would seem to exhibit "State" or "weak" legal pluralism. Running counter to this would be an argument based on Article 23 (4) of the 1996 Constitution, which shields customary law from constitutional scrutiny in relation the requirement of equality. This is discussed below.

We take the view that If Zambia had wished for separate development of customary and statutory law it would have left customary law in the hands of traditional leaders and would not have imposed constraints on customary law, as long as it remained within the bounds defined for it. As demonstrated in the following section, Zambia's founders and legislators did not do this, but instead provided the means for a level of integration between customary and statutory law.

Within the overall aim of increasing integration, many questions remain however. Is the legal system ultimately seeking to permit and accommodate difference and diversity in customary law and its institutions under an overall national umbrella? Or is it pursuing the political aim of "One Zambia, One Nation" that will one day be united under a single set of laws (legal centralism)? Is legal pluralism thus a temporary measure pending the realization of a uniform national polity? Or is it to be a permanent feature of a diverse society? These questions are the major "unfinished business" facing the country's justice and legal systems. They reflect democratic policy choices for Zambians rather than a question of logic with one correct answer. There are undoubtedly differences of opinion among Zambians on this question, and attitudes to it will continue to change and evolve. Thus we do not try to give a definitive answer to this conundrum. The study merely seeks to refocus the debate.

Conclusion: Gradual integration, primacy of statutory law and the constitution, preservation and development of customary law, and freedom of choice.

We propose the recognition of **three aims** of the Zambian dualistic legal order that are found in the Zambian law and constitution:

(i) The dual legal order should not only **preserve** custom and tradition, but **develop** it within the framework of principles laid down in the constitution and the laws;

a. The Bill of Rights and all written law have **primacy**. Mechanisms of development are provided for so that custom and written law can develop according to this framework.

(ii) Unless the contrary is provided by law, Zambia respects **freedom of choice as to whether people wish to be governed by customary or statutory law.**

a. This is seen in the freedom to choose to live according to civil or customary marriage for example, or choose to convert their customary tenure into leasehold. There is much less freedom in the area of criminal law.[4]

[4] As discussed in chapter 14 of family law however, the dualist legal order also affects criminal law. Only those who enter into civil marriages are subject to a conviction for bigamy.

(iii) By joining traditional and state institutions, Zambia aimed at a **gradual weaving together** of customary and statutory law in most areas that are of legislative concern.

a. By turning Chiefs into state agents and handing the adjudication of customary law to state appointed Local Court Magistrates, Zambia adopted mechanisms to weave the two systems together.

2.2.2 The means of development of the dualistic system

If we are correct regarding the aims of the dualist order, we must now turn to the means adopted to achieve those aims. Four sets of means are available to develop and regulate customary law and justice. Three of these are within the classical state powers (executive, legislative and judicial), and the fourth is the self-regulating mechanisms that exist within customary law, justice and governance.

Executive control of customary institutions: The main institution of custom and tradition, the traditional leaders, were brought into the state framework, linking them to the executive through the Chiefs Act and other legislation, as well as more recently through consultative bodies such as the House of Chiefs. Chiefs and their retainers were thus given law enforcement functions. These issues, as well as compliance with the Bill of Rights, are discussed in Chapter 13. Since adjudication by Chiefs is largely unacknowledged in the law, it is difficult to say whether executive influence or authority has significantly influenced customary law as applied by Chiefs and the institutions they lead.

Legislative provisions: such as sec. 12 of the Local Court Act[5] (LCA) and sec. 16 of the Subordinate Courts Act[6] (SCA) instruct Local Courts and Magistrates' Courts respectively to subject all African customary law to written law, morality and other legal concepts, and to apply customary law only if it is in line with these standards. This "repugnancy clause" is also contained in section 10 of the Chief's Act, by which traditional leaders exercise their powers and functions. They may do so "in so far as the discharge of such functions is *not contrary to the Constitution* or *any written law* and *is not repugnant to natural justice* or *morality.*

The National Assembly may directly legislate in almost all areas regulated by of customary law. In contrast to the power of the judiciary to interpret and apply the principle of equality, Art. 23 (4) of the Constitution does not restrict the National Assembly's power to legislate for equality, and written legislation has undisputed primacy over customary law (see *inter alia,* sec 12 (1) (a) of the Local Courts Act). The only limits to legislative power are those of what is practically feasible and what is otherwise permissible under the Constitution. Attempts at use of lawmaking power to direct the development of customary law are seen in legislation such as the Intestate Succession Act, the penalization of defilement and domestic violence or, in the area of real property, conversion to leasehold tenure under the Lands Act. Codification of custom remained for a long time an aspiration of the Government, or at least some of its representatives[7], but the ZLDC found codification to be impracticable and undesirable[8].

[5] The Local Courts Act 20 of 1966, as amended by Act 18 of 2003.
[6] The Subordinate Courts Act 36 of 1933, as amended by Act 5 of 1995.
[7] See the Chona report, 1972, para. 96.

Codification of customary law across ethnic groups has been more or less rejected as a policy option in recent years in other countries in the region.

Effectiveness of legislative development of customary law: For a number of reasons, legislation adopted to intervene in areas of customary law, such as the Intestate Succession Act, has not always resulted in changes on the ground. Local Courts may not have copies of the written laws that they are supposed to apply and there may be social resistance to change. It remains to be seen whether the coming ZLDC proposals in the area of legislation on customary marriage will fare better. Social resistance to legislation is of course is a phenomenon not unique to Zambia.

Judicial development of customary law: Customary law, although given a wide area of autonomy, is subject to a requirement of conformity with state law. Institutionally, the legislators handed responsibility for the application of customary law primarily to a state institution with state appointed adjudicators – the Local Courts. These are subject to numerous mechanisms of judicial appeal and oversight. The colonial era "repugnancy clause" was retained, even if its interpretation – by Zambian jurists instead of colonial administrators, and according to constitutional and legislative standards rather than vague European values - might be different. Here, we must remember the important role of judicial lawmaking in Zambia's common law system.

The power of the judiciary to shape customary law according to constitutional principles of equality and non-discrimination is nevertheless severely constrained. The general guarantee against discrimination in Article 23 (1) of the Constitution is thus subjected to a number of restrictions found in clauses (4) to (8) of the article. Thus, by virtue of clause (4), *Clause (1) shall not apply* to any law so far as that law makes provision…:

(c) with respect to adoption, marriage, divorce, burial, *devolution of property* on death or other matters of personal law;

(d) for the application in the case of members of a particular race or tribe, of *customary law* with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the case of other persons…

Similarly, although clause (2) of Article 23 protects against discriminatory treatment by any person acting *by virtue of any written law* or in the performance of the functions of any public office or any public authority, this is made subject to clauses (6), (7) and (8) of the article. As a result, clause (2) shall not apply to "*anything which is expressly or by necessary implication authorised to be done by any such provision or law as is referred to in clause (4) or (5)*. The actions of persons exercising public authority may legally discriminate if this is necessary to apply discriminatory customary or personal law, including 'devolution of property', (i.e. inheritance). This exempts state officials who play roles in relation to customary law from scrutiny under Art. 23 (2), including for example Local Court Magistrates.

[8] The ZLDC opted for Re-Statement of Customary Law rather than codification. See ZLDC, Briefing Paper on Restatement of Customary Law Project.

Effectiveness of judicial development: As seen above, the judicial power to shape customary law that is given with the one hand by the repugnancy clause is to some extent take away again by the restrictions in Article 23 (4) and (6). The interpretive authority of the judiciary is heavily circumscribed in personal and African customary law matters when it comes to discrimination. However, this does not stop the judiciary from using the repugnancy clause to enforce other constitutional guarantees found in the Bill of Rights. Thus, the repugnancy clause can still serve Zambian jurists as a tool to shape and mould customary law according to constitutional principles.

As explored in Chapters 12 – 15 of this study though, the difficulty is that the Zambian courts and legislature have only rarely been able to develop customary law.[9] As discussed elsewhere in this study, there is relatively little in the way of case law coming from the Higher Courts on issues of the "repugnancy clause", the Bill of Rights or the application of Article 23 (4) (c) and (d) of the Constitution. There is thus insufficient guidance in the form of jurisprudence available for Local or Subordinate Court Magistrates, traditional leaders or NGO activists who might be seeking to develop the law in the way intended. Academics and commentators are also starved of material to ponder over and question, in the way that a dynamic legal system needs.

The Zambia Law Development Commission points out that Local Courts generally resort to common sense in determining cases rather than using to customary assessors. Thus, while Local Courts perhaps seldom explicitly invoke the repugnancy clause as a reason not to apply a particular custom, they may do so more indirectly, and in their interpretation of customary law.[10]

Organic development of customary law: What happens when customary law is domesticated by making instruments of state government the primary means of development of customary law? Are these means sufficient to allow customary law to develop and respond to challenges and changes? Is the traditional discursive process of change still viable and necessary? [11]

Custom is sometimes portrayed as a subject of complete consensus among traditional communities living in total agreement on time honoured values. This picture does not stand up to serious examination, especially today. All adjudication processes are about contests between different interests, points of view and values. Customary law may place a greater emphasis on community harmony than state law does, but it is essentially no different than other systems in this respect. Secondly, laws change and develop in all societies. It is simply the means of changing and developing them that differs. Traditionally, change was possible, both in terms of institutional structure and substantive norms and rules. Customary laws and institutions had their own ways of developing and responding to change. Traditionally, custom developed and changed in an organic way, using the discursive processes that are inherent in it. If called upon to respond to a new situation, elders would discuss the issue and find a solution in a process where input from many stakeholders was welcome.

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[9] See ZLDC, Review of the Local Courts System, 2006, p.10, saying that "no meaningful appeals challenging the application of certain repugnant customary law practices have taken place since the establishment of these courts".

[10] ZLDC, Restatement, pp.5-6.

[11] ZLDC, Restatement, pp.5-6.

The aim of Zambian legal dualism is thus not to preserve a mythical idea of harmony, but to provide forums and processes where contests take place and the law develops in a transparent, fair and constructive manner.

The ZLDC noted that an organic process of change of customary law where a "long and consistent practice graduates into a principle". [12] The discursive nature of customary institutions meant that change perhaps most often took place through gradual adaptation. This is not completely dissimilar to how judge-made law develops in the common law system.

Today, customary law is adjudicated and developed in two main forums: the Local Courts and the Traditional Courts.[13] In the Local Courts, it is formally subject to written law and is applied in a way that owes more to the statutory law method of seeking a rule and applying that rule to the facts. In traditional courts, the method is more likely to be the traditional one of ordered negotiation, arbitration and mediation.

There are undoubtedly many influences at play in the development of customary law today. Customary laws today are derived from the mores, values and traditions of indigenous ethnic groups. However, they are heavily influenced by other sources, such as Christian values, central government administrative policy, pronouncements of superior courts of record (who have jurisdiction to interpret customary law), customary court records where these are kept, and district council and chiefdom bylaws, as well as the personal views of adjudicators. Conflict resolution techniques and advocacy activities of community based organizations, social workers, marriage and community counsellors, and even changes in social attitudes through the media may play a part. All of these factors impact on the evolution, interpretation and application of customary laws because they influence the views of members of Zambia's communities.

Effectiveness of organic, discursive development today: The ZLDC observes that the process of a long and consistent practice graduating into a principle, may often be too slow to cope with the fast pace of social change today.[14] The complexity of modern economies and society, with a greater diversity of viewpoints and a demand for democracy may also make it impossible for the same mechanisms to be effective today. The ZLDC points to a divergence between "official" customary law, as what was practiced in former times, and the "living" customary law that has arisen in response to current social conditions. This would seem to indicate change and adaptation, but sometimes the hand of the state may also act as a brake on adaptive change, as discussed in the case of the "marriage interference" doctrine (see below and in Chapter 14).

Risk of chaos and divergence: It is clear that if customary law is left to develop in the traditional way, it will not do so in a uniform way, but will adapt to the needs and perspectives in the various social contexts found in rural and urban Zambia. What is more, the erosion of customary law and authority can lead to confusion as to what is customary law and what is simply a practice that has developed. Examples of this are seen for example in the increase in

[12] ZLDC, Restatement, pp.5-6.
[13] As seen in Chapter 14, family elders also play a part.
[14] ZLDC, Restatement, pp.5-6.

the size of *lobola* (bride price) payments as discussed in chapter 14, or even in highly negative phenomena such as toleration of property grabbing.

Elsewhere in this study, we discuss how a judicially developed doctrine of "marriage interference" – arguably a dynamic development in customary law - was developed by Local Courts but ultimately prohibited by High Court instruction (not a judgment in a case). The judiciary saw a risk of inconsistency from one court to another, even of ad hoc responses based more on ideas of common sense, morality and public policy rather than of law. However well-meaning, the courts applying the "doctrine" were, the High Court saw an encroachment by Local Courts into the province of the legislature. Thus the judiciary responded prohibitively.

Ways forward: This brief section has looked at four ways of developing customary law, each of which has something to contribute. These methods are discussed in much greater detail in chapters twelve to fifteen of this study.

2.3 The place of international law in the Zambian legal system

The 1996 Constitution does not contain a provision setting out the status in domestic law of ratified treaties. As a matter of practice however, Zambia adheres to the so-called *dualist* common law doctrine, according to which ratified international treaties do not form part of domestic law. The Government of Zambia made this clear in its 2008 national report to the UN UPR process: "*international instruments are not self-executing and require legislative implementation to be effective in Zambia as law. Thus, an individual cannot complain in a domestic court about a breach of Zambia's international human rights obligation unless the right has been incorporated into domestic law*".[15]

Thus ratification of human rights instruments does not translate into domestically enforceable rights on the part of Zambians. Domestication of the instruments is required – transformation or incorporation into national law – in order for the rights to become enforceable. To a significant extent, especially in the area of women's rights, incorporation has not taken place.

The provisions of Article 23 (4) (c) and (d) of the constitution remain a bone of contention between international treaty bodies and domestic human rights activists on the one hand and politicians and state officials on the other. In recent years, some statements have been made indicating a willingness to consider changing this position. The SNDP governance chapter includes a commitment to facilitate the domestication of provisions of the international human rights instruments into law (SNDP, 3.2). This is to some extent a follow-on from the gender indicators in the original FNDP. Indicator One covered the *Percentage of declarations and Conventions domesticated.* After the MTR, this was replaced by the *Number of Gender-related Bills passed.* In 2008, a bill on human trafficking was passed by the National Assembly.

The responses of the Government of Zambia to the Working Group of the UN Human Rights Council's Universal Periodic Review in 2008 expressed[16] support for the recommendation (by Austria) to strengthen the prohibition of discrimination in the context of the current

[15] A/HRC/WG.6/2/ZMB/1 Page 3
[16] UN document A/HRC/8/43/Add.1, paragraphs (b) and (j)

Constitutional review process and the adoption of legislation to ensure full implementation of the CEDAW and the recommendation (by Italy and Canada) relating to equality before the law and prohibition of any culture, custom or tradition that undermines the dignity, welfare, interests or status of women. These issues were to be tackled in connection with the Constitutional review process that concluded in the 2010 draft bill. The new provisions proposed in the draft constitution of 2010, would have gone far in improving the constitutional position, though without providing for full equality. On the face of it, this draft constitution would have retained (in Article 48 (2) (d) and (e) a form of the clause exempting inheritance matters and customary law from the ambit of the non-discrimination clause. However, this would have been balanced by the adoption of a new Article 49 specifically guaranteeing the equality of women and men in relation to a number of issues, including land ownership and marriage. If a text similar to this is finally adopted in the context of the new (2012) discussions on a new constitution, it remains to be seen how these two provisions would be interpreted against one another.

2.3.1 Ratification and domestication of international human rights instruments

Table 2.3.1 : Ratification by Zambia of Major UN Human Rights Instruments[17]

CERD	CERD Art. 14	CCPR	CCPR OPT. PROT	CCPR 2ND OPT. PROT	CESCR	OP. ESCR	CAT	CAT ART. 22	OPCAT	CEDAW	CEDAW OPT PROT	CRC	CRC OP SC	CRC OPAC	CMW	CRPD	CRPD OP.	CPPED
Y	N	Y	Y	N	Y	N	Y	N	N	Y	N	Y	N	N	N	Y	N	N

Explanation: Y = ratified, N = not ratified. The abbreviation “OP” refers to optional protocols. In the case of the ICCPR, ICESCR and CEDAW, ratification of the protocols means acceptance of the right of individuals to complain to the committee in question. Articles 14 of CERD and 22 of the CAT have the same function. The ICCPR and CRC have optional protocols involving substantive international law, the ICCPR on the abolition of the death penalty, the CRC on the sale of children (OP SC) and children in armed conflict (OP AC).

[17] Source: UN, Office of the High Commissioner for Human Rights. The information is up to date as of January 2011. See table of abbreviations for meaning of abbreviations.

Table: 2.3.1.a ratification by Zambia of African Human Rights Instruments[18]				
Y	Y	Y	N	N
African Charter	AC – Prot. Rights of Women	African Charter Rights & Welfare of the Child	AC Court of Human Rights	Prot. Court of Justice of the AU

The Protocol on Women's Rights of the African Charter on Human and People's Rights, now ratified by Zambia (2006) commits the country to protecting against gender-based violence, as well as guaranteeing a range of economic, social and cultural rights to women. Most of the Protocol's provisions have not yet been translated into national laws. Zambia has at the time of writing not ratified the 2008 SADC Protocol on Gender and Development. This instrument focuses on themes that include the elimination of all forms of Gender Based Violence (GBV) and the promotion and protection of women's reproductive and sexual rights.

There is no doubt that a move to full equality of men and women in Zambian law would have far reaching consequences for the legal and justice systems. It would require revision of a number of statutes and a wholesale rejection of many doctrines currently accepted in customary law. There can be little doubt that the exemption of customary law from constitutional equality provisions will have to be abandoned at some point in the not too distant future. The justice system should be making preparations for this event now.

[18] Source: Website of the African Union Last accessed 15.5.2011: http://au.int/en/treaties.

3. Administrative Justice Institutions and Oversight Bodies

3.1 Overview

A number of institutions are established under the Constitution or by law with the broad purpose of protecting the rights of citizens, the rule of law and the integrity of governmental processes and bodies. Among these are the Commission for Investigations (CFI) and its Investigator General (IG), the Zambia Human Rights Commission (ZHRC) and the Anti-Corruption Commission (ACC).[19] Unfortunately, the NCC process culminating in the 2010 draft constitutional bill did not avail of the opportunity to enhance the constitutional standing of the ZHRC by explicitly referring to the functions of national human rights institutions as laid down in the UN Paris Principles. Nor did it anchor the ACC in the constitution. While the draft does mention the Investigator General, the text could have gone further in securing the autonomy and institutional effectiveness of the CFI and IG. The NCC draft also aimed at creating a Commission for Gender Equality.

The **ZHRC** was established after the adoption of the 1996 Constitution. Its founding legislation[20] lives up to the international Paris Principles on National Human Rights Institutions so that as of 2011, the ZHRC was accredited by the International Coordinating Committee of National Human Rights Institutions (ICC NHRI) with so-called "A" status. This was confirmed as recently as October 2011. [21]

The **ACC** dates to 1980 and the Corrupt Practices Act.[22] The legislation was overhauled in recent years, with the 1980 Act replaced by the Anti-Corruption Act of 2010. This has in turn been recently replaced by a new Act of the same name in 2012.

The ACC and ZHRC are better funded and staffed and operate with legislative frameworks that better safeguard their independence and functionality than the CFI, which dates from 1974. Of the three existing oversight institutions, the ACC enjoys the highest levels of funding and resources. The ZHRC, while also under resourced in relation to its mandate and tasks, enjoys some support from development partners and is exposed to a relatively high level of international attention through international human rights reporting processes. For these reasons, it can generally be said that Zambia is comparatively well served with institutions for combating corruption and documenting human rights abuse, while suffering from a significant gap in relation to promoting good administrative practice and combating maladministration. For these reasons, as well as others related to the scope of the present study, the present chapter focuses primarily on the Commission for Investigations and at times more broadly on mechanisms to promote and protect administrative justice in Zambia.

[19] Another important body, the Police Public Complaints Authority (PPCA) is discussed in chapter 10.
[20] The Human Rights Commission Act, Laws of Zambia, Chapter 48.
[21] http://nhri.ohchr.org/EN/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20(DIC%202011).pdf
[22] Act no. 14 of 1980.

3.2 Substantive legislative mandates of oversight institutions

Human Rights: The ZHRC relies on a clear set of human rights standards found in the Constitution and in global and African human rights treaty (and international customary) law, supplemented by national legislation. The various chapters of the present study refer to substantive standards in a number of thematic and group-oriented areas. The human rights reporting systems of the UN and the AU provide a framework for monitoring and efforts to improve legislative compliance with the international standards.

Anti-Corruption: The ACC relies on its own founding act as well as provisions of the Penal Code. International standards such as the United Nations Convention against Corruption, the African Union Convention on Preventing and Combating Corruption, and the Southern African Development Community Protocol against Corruption are now being domesticated through the 2012 legislation referred to above.

Administrative law: As compared to the areas of human rights and Anti-Corruption, the area of administrative law, administrative justice and prevention and combating of maladministration suffers from a lack of statutory law. While various public bodies have their own founding legislation outlining their powers, Zambia has no statutory administrative code or other administrative legislation as such. Legal standards in this area are to be found in judicial precedent, both Zambian and British, which lays down standards such as the *ultra vires* doctrine and the requirement of reasonableness. The right to a fair hearing is laid down in the provisions of Article 18 of the 1996 Constitution. The extent to which *civil rights and obligations* in [23]Article 18 (9) and (10) applies to administrative acts has not yet been fully clarified by case law, though the reference to other adjudicating authorities in 18 (10) appears to indicate that it does. Case law confirms this view. The right to an impartial hearing is found in precedents from the UK that are generally thought to be considered persuasive in Zambian courts. While these judicial and constitutional standards are of great importance, they do not go far enough in laying down rules of accountability for a modern democratic state based on the rule of law. Zambia is in need of a more developed framework governing the exercise of public authority by state officials and their interaction with members of the public. The recommendations at the end of the present chapter set out a number of principles that could, in line with international good practice, be adopted in legislation.

3.3 The Commission for Investigations

3.3.1 Mandate, structure and functions

The CFI was established in 1974 essentially as a presidential watchdog that enabled the Head of State to monitor and control the actions of public servants. It was modelled on a similar institution in Tanzania in the context of single party government in both countries. The contrast between this presidential watchdog to institutions that are conceived of as public, or parliamentary bodies remains present in many respects.

Chapter 5, Article 90 of the 1996 Constitution established the IG as a corporation sole and provides for his or her appointment. The functions, powers and procedures of the Commission

[23] Kangombe v A.G., 1972 Z.R. 1

are regulated by an Act of Parliament.[24] The Investigator General is equivalent in rank to a judge of the Supreme Court. The CFI sits as a tribunal rather than having a single post of an Ombudsman. Besides the Investigator General, the Commission is supposed to have three commissioners but has for a long period of time operated with only two.

Functions: the Act mandates the CFI to protect members of the public against abuses of rights or freedoms or legitimate expectations. It authorizes the CFI to inquire into any case in which it considers that an allegation of maladministration or abuse of office or authority by any person in public office ought to be investigated. To this end it may carry out investigations with a view to finding out whether the decisions have been taken in a way that is lawful, fair and reasonable.

Where the Commission arrives at the finding that an individual's rights, freedoms or expectations have been infringed, it will make recommendations for the complainant to be offered some form of redress and to make recommendations for appropriate remedial and/or punitive action.

The CFI made submissions to the NCC to the effect that it should be given specific responsibility to act as a watchdog under the Code of Ethics and Conduct of Public Officers in the 2010 Draft Constitution, so that the enforcement mechanism of administrative remedial and disciplinary measures could supplement criminal prosecution of alleged offenders under the Anti-Corruption legislation. This would be necessary in relation to maladministration that does not amount to a prosecutable offence, which is often rather difficult to prove. These measures would then effectively fall under the ambit of the Ombudsman (Investigator General). The CFI made submissions to the NCC to the effect that its functions should be set out in the Constitution. This would be in line with good practice from the African continent.[25]

Independence: Unlike Ombudsmen in many other countries the CFI reports directly to the President, i.e. the head of the executive branch of government. There is an inherent structural difficulty here in that it is, as in every country, the executive branch of government that will most often be the subject of complaints of maladministration. The result is a "chilling effect" in relation to the practical independence and "civic courage" of the CFI.

Beyond the risk of interference in particular cases, a lack of independence on the part of the CFI is manifested in other ways, including in matters of internal organization, personnel management and recruitment. For the Office of the Investigator General there are no legislative or constitutional provisions providing for administrative or financial autonomy, let alone independence.

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[24] Commission for Investigations Act (Vol 4 ch 39). In establishing the CFI, Zambia took its inspiration from the Permanent Commission of Enquiry in Tanzania, which was seen as an innovative institution at the time, being seen as Africa's first Ombudsman institution. Tanzania noted the need to improve and modernize the PCE some years ago, by abolishing it and transforming it into the Commission on Human Rights and Good Governance, which combines Ombudsman and National Human Rights Institution functions.

[25] Article 218 of the Ghanaian Constitution sets out the functions of the ombudsman, as do article 123 of the Malawian Constitution, article 91 of the Namibian Constitution, article 182 of the South African Constitution and article 225 of the Ugandan Constitution.

The 2010 NCC draft constitutional bill contains somewhat ambiguous provisions on the accountability of the Investigator General. Art. 253 of the draft provides that the office of the I.G. shall not be subject to the direction or control of any person or authority, and Art. 254 provides for reporting to the National Assembly but stipulates that the I.G. should be "accountable to the President".[26] In practice, this would seem to leave the CFI and IG subject to the Cabinet Office in practice. Article 138 of the Draft Constitution provides that the Secretary to the Cabinet shall be Chief Advisor to the President on Public Service Management. Thus, the IG and CFI would remain ultimately accountable to the executive branch of government which it is mandated to monitor and investigate.

Reporting and relations to the public: At present the CFI cannot release its reports to Parliament or the press on its own initiative. This demonstrates its conception and orientation as a *presidential* rather than a *public* watchdog body. Art. 254 of the 2010 draft constitutional bill should in principle allow the CFI to release its reports directly to Parliament without waiting for presidential approval, but this is not completely clear from the text and would perhaps require confirmation in legislation in order to provide a cast-iron guarantee on this point. This can be contrasted with law and practice in other countries in the region, including the Ombudsman Office in South Africa, which investigates acts of maladministration committed by public officers, as well as breaches of their equivalent of the Code of Ethics and Conduct of Public Officers. The office of the Inspector General of Government in Uganda has a similar construction. In both of these jurisdictions the Constitution provides for reporting to Parliament for purposes of the enforcement of the Code of Ethics and Conduct of Public Officers in a transparent, accountable and independent manner.

3.3.2 Institutional resources

Although the CFI has been operational for 34 years it still only has a single office, placed on the third floor of the Bank of Zambia Building in Central Lusaka. The building is very run down, and the placement of the Commission's offices is not conducive to accessibility by the general public (access by handicapped persons is nigh on impossible). The Commission has a limited number of functioning and up-to-date computers and other electronic equipment, and most of its operations are done manually, with typists employed to type documents. As of 2011 there was no email access at the office premises.

One of the main priority areas of the 1997 Strategic Plan was greater outreach through the establishment of offices at provincial level, which it lacks, in contrast to some other oversight bodies. CFI's outreach is therefore very limited although it does receive Government funding for two provincial circuits per year. The Commission has not received adequate funding for expansion to the provinces to date, but hopes that an increase in its budget will make this possible. Article 251 of the draft NCC constitutional bill would have helped by mandating the establishment of provincial (and progressively, district) offices, though this would not alone have solved the problem of funding.

Funding: The Commission receives funding from the Government, being treated in this regard as part of the executive. It is thus subject to a budget ceiling set by the Ministry of Finance, rather than being considered independently by Parliament. CFI's lobbying has so far only

[26] Article 254 of the draft.

resulted in minor budget increases. Even these modest increases rarely materialise when it comes to the actual monthly disbursements from the Ministry of Finance. The low levels of funding released on a monthly basis, combined with the current competencies of the staff, make it difficult to maintain direction in the work of the Commission.

Staffing levels & competencies: The CFI did not have any investigations officers employed until 1994/1995. Despite a revised and approved larger establishment (personnel allocation), CFI has not been able to recruit the needed personnel due to a lack of funding. The 2009 capacity assessment found that an expansion in the number of offices would need to be accompanied by structural and organizational changes to avoid creating further bottlenecks in case management. The Commission has among its current staff and management very few with educational and professional backgrounds corresponding to its core function area of investigations and case handling. Only the Investigator General and the Assistant Senior State Counsel have legal backgrounds. While only two staff members have the official title of Investigations Officer, administrative staff have been re-allocated to the Investigations Section, giving a total of 5 investigation staff in practice. However, none of them has formal training in investigations.

The balance between professional and administrative support staff is very unequal and does not respond to the core functions of the Commission. There have been very few opportunities of continuing education to correct this deficit. No members of staff have any experience and professional skills in strategic planning and strategic management. As of 2010, the Commission lacked an accountant, so that financial management was overseen by an assistant accountant. A major personnel challenge is that the Public Service Commission, rather than the CFI itself, controls the appointment of all members of staff. Staff can be assigned to the Commission and removed from it entirely independently of the will of the CFI. This is clearly not in conformity with the functional independence required by an Ombudsman institution. This difficulty, addressed above in relation to law reform, is essential for the Commission to progress as an independent institution.

3.3.3 Substantive mandate and caseload

The CFI is mandated to investigate all public institutions except the Head of State without any undue hindrance. The CFI's mandate includes affording redress to any individual, corporation or institution aggrieved by a public institution or office. However, the actual caseload of the CFI contrasts with this mandate in that most of the complaints actually received and dealt relate to issues of the employment status and benefits of public employees. Typical cases include non-payment of pensions, non-promotion, and unfair transfers. Complainants are thus either current or former public sector employees. With the exception of the IG, current members of staff have built up knowledge and expertise only in this area.

Approximately 1600 cases are registered per year. Due to a general lack of resources, manpower, and lack of specialisation, as well as slow response from involved parties, the yearly case resolution statistic is only about 30-40%. This leaves a substantial and growing backlog of unresolved cases. As part of a short-term solution, so-called on-the-spot investigations could assist in clearing the backlog, whereas the potential longer term strategy of increased decentralisation of the Commission has to be carefully thought through in relation to the challenges and issues mentioned above. The existing case registry system leaves a lot to

be desired, but there has been no funding available to implement improvements. Like other justice institutions (see for example the discussion of missing dockets between the police and prosecution) there is a sizable problem of missing files. Until recently as many as 20-25 % of case files were mislaid every year, at least temporarily.

Remedies: The redress provided can take the form of recommendations for:

- Corrective action (re-instatement, procedural re-organisation),
- Reversal of decisions,
- Compensation, or
- Censure of the offender (demotion, re-deployment, removal from office).

Referrals and linkages: A portion of the registered cases fall outside the CFI mandate, but the Commission attempts to resolve these cases by interceding with the relevant institutions. The institutions concerned are often the Public Service Commissions, the Industrial Relations Court, the Anti-Corruption Commission, and the Human Rights Commission. However, despite some attempts, formalised coordination among these institutions has not yet been established. Steps to address this weakness were identified in the 2008 work plan.

Capacity building on case handling procedures

The Government made some commitments to releasing funds for computerisation of the CFI. Improvement of case management was also an important element of the former Danish support programme to the CFI. This programme aimed to assist CFI to develop a reliable, effective and transparent case handling system that is capable of generating useful data for analysis and management. To this end, the cooperation aimed at supporting:

- Identification of in-service training needs of the investigation officers related to their function and development of an in-service training plan
- Improvement of the registry system
- Improvement of case handling procedures and daily working routines
- Support to development of a case handling manual and its implementation.

A process of implementation of IT in CFI was begun and some equipment purchased. Some cooperation was begun with a local company for procurement of hardware, software, training, support and maintenance.

3.3.4 Perceptions and linkages - the Institutional environment

Wide knowledge and understanding of the Commission's mandate is lacking in government institutions. The limited mandate exercised by the Commission in practice strengthens the perception that this is its true role in a vicious circle. To counter this trend, the willingness that is found in parts of both the executive and the legislature to allow CFI to fulfil its mandate as an Ombudsman institution, must be harnessed to produce results in relation to its funding and legal basis. In June 2009, CFI became a member of the International Ombudsman Institute which provides the Commission with an opportunity to build institutional links to other ombudsmen. Within Zambia, the Commission is aware of the need to build and reinforce links

to other public and independent institutions to advocate for support to this important area. CFI's goal of developing realistic strategies for outreach and availability of its services to the general population, especially the poor, could also be supported, once the necessary measures have begun to be taken by government.

3.3.5 Planning and development initiatives

As part of Public Service Reform Programme of the 1990s to improve service delivery to Zambians, a Strategic Plan for the Commission for Investigations to cover the period 1997-2003 was initiated in 1997 through a management audit and strategic planning workshop.

The major reasons for non-implementation are the lack of funds for implementation of the strategic plan and the approved new structure from 1998, and the requirement to do so before new proposals for strategic direction and an appropriate structure can be approved. Conditions such as this, imposed by the executive organs of government, underline the lack of independence of the Commission. The resulting Strategic Plan – now out of date in many respects - was not implemented. In July 2008, the Commission developed a work plan that addressed several strategic priorities, including constitutional and legislative reform, internal capacity building, improvement of the complaint handling process, and external awareness raising and accessibility.

The Danish Embassy provided some support to CFI in 2009 – 2010 to assist the CFI in developing proposals for legislative changes and to conduct provincial hearings in cooperation with the ZLDC for this purpose. This process would have to be renewed as part of any law reform effort in this regard. This was followed by a Capacity Assessment, carried out in 2009 and an analysis of CFI's founding legislation. This has been drawn upon for the present chapter. A more in-depth institutional analysis was not completed at that time. It aimed to conduct participatory seminars arriving at a needs assessment on:

- The applicable rules and law;
- The skills needed;
- The knowledge needed;
- The working routines as currently practiced and as deemed appropriate;
- The IT support;
- The number and categories of personnel available and deemed necessary;
- The organizational structure;
- The legal and documentary resources available and deemed necessary;
- The budgetary resources available and deemed necessary;

The Commission was also agreed to be in need of support in relation to general administrative capacity, particularly in respect of:

- The development of regular operational plans for the organization and at individual level.
- Developing evidence based and realistic budget submissions for increased resource allocation from government

- Prioritization and implementation of the four strategic themes identified by CFI in the Work Plan 2009-2011
- Systems and procedures for organizational learning
- Improving and documenting internal procedures and systems for management and administration of the institution

3.4 Recommendations

3.4.1 Administrative law generally

Parliament and the ZLDC should cooperate with the CFI and other experts and stakeholders to examine Zambian legislation with a view to strengthening legislation administrative law and justice generally, including the possible adoption of an administrative code or law that recognizes the following principles:

- A general right of the public to good administration and to justice: (the 2010 NCC draft constitutional bill secures this in Article 43 of its draft, adoption of which would be a very positive step);
- More detailed provisions regarding the requirement of impartiality in administrative decision making, (sec. 28 of the Anti-Corruption Act includes provisions on disclosure of interests and disqualification, and Art. 75 of the NCC draft Constitutional Bill states a general principle on conflicts of interest), but the requirement of procedural impartiality – particularly the obligation to hear all parties could be improved;
- Access to information regarding any decision or action that would affect the rights or legitimate interests of members of the public;
- Requirements of reasonableness and proportionality in decision making,
- Requirements to provide decisions in writing identifying the officer making the decision, the legal and factual basis of administrative decisions and of the procedure to follow in case of disagreement with the decision or action;
- Requirements of timely decision-making and the legal consequences of failure to respond to applications;
- Rights of appeal against administrative decisions;
- Requirements to maintain accurate and updated records regarding receipt of applications and complaints;
- A general obligation of best efforts to refer complaints to other institutions in case of wrongly addressed complaints, together with the possibility of a suspension or setting aside of time limits for complaints or applications wrongly addressed in good faith.
- A general prohibition against discrimination in the exercise of public authority (see discussion on Article 23 of the Constitution elsewhere in this study).

3.4.2 Recommendations on CFI mandate and functions

Making the CFI into the strong and independent institution it could be ideally requires action at the level of both the constitution and legislation. The renewed constitutional drafting process in 2012 should examine the submissions made to the NCC in 2009 – 2010 by the CFI to strengthen its independence and functions.

Legislative level: Recommendations on changes to the CFI Act

Specifically, Consideration should be given to transforming the CFI into a **parliamentary ombudsman** institution of the kind known internationally. If political support for this is still lacking, ways of strengthening the role of the legislature vis-à-vis the CFI should continue to be explored in order to increase the legitimacy and visibility of the CFI when investigating offices of the executive.

3.4.3 Investigative functions

- Sections 3 and 8 of the CFI Act should be amended to make it clear that the mandate of the CFI is to investigate the **acts and omissions of public authorities** listed in section 3 of the Act in the broadest sense rather than investigating individual wrongdoing by public servants.
- **Autonomy in regard to investigations**: The CFI Act should clearly provide that the CFI may take up matters within its mandate on its own initiative. In the same vein, and consistent with Art. 253 of the 2010 NCC draft constitution, the power of the President to direct the CFI to investigate matters should be transformed into a power to propose or request an investigation. This power should also be held by other institutions, including Parliament, or a section of it (i.e. the requirement of a particular number of votes in parliament). In any event, the power of the President to direct the CFI to discontinue an investigation should be removed.
- All rules relating to the CFI, including constitutional provisions, should be included or clearly referenced in the CFI Act itself.

3.4.4 Case handling process

- **Exhaustion of remedies**: Section 10 of the CFI Act should be amended to reflect the current practice of the CFI, namely that it is not prohibitive for taking matters to the CFI that they could have been brought before a court or tribunal of law.
- **Standing and representation**: The CFI Act should clearly state that complainants may be represented, advised or assisted by persons of their choice in all proceedings before the Commission and that complaints may be brought on behalf of other persons.
- Similarly, **the right of the complainant to be heard** (similar to the right of the persons and institutions being examined) should be entrenched in the CFI legislation.
- **Information to complainants**: The CFI Act should be amended to oblige the CFI to provide reasons when a complaint is declined or discontinued.
- **Access to information and premises**: The power of the President to forbid such access without providing justification should be reconsidered with a view to establishing a more evenly balanced separation of powers and the independence of the CFI. One option is to subject the President's power in this regard to judicial review. Another is to give blanket access to the CFI, subject to a requirement of enhanced confidentiality safeguards for documents and information considered particularly sensitive.
- **Enforcement**: The enforcement mechanisms of the CFI should be clarified and strengthened. Possible measures in this regard could include involving the relevant ministers or heads of institution before going to the President, introducing enforceable

deadlines for reaction to reports, publication of reports with names of involved institutions and the power to transfer matters to the DPP / NPA.

- **Linkages and referrals:** The Act should specifically require the CFI to exercise its best efforts to refer or transmit complaints wrongly addressed to it that nevertheless raise a valid complaint under Zambian law to the correct institution.

3.4.5 Proactive role and functions

- **Reporting**: The annual reports of the CFI should be used to establish closer links and interaction between the CFI Act and the National Assembly. Thus, the National Assembly should consider placing the report of the CFI as a recurrent annual item on its agenda. The CFI Act should specify that the annual reports shall be made available to the public at the same time as it is transmitted to Parliament.
- **Outreach**: The CFI should be specifically mandated to conduct outreach and publicity activities with respect to the existence, mandate and work of the CFI and generally the promotion of good administrative practice. Likewise, the CFI should be mandated to carry out hearings in public and to give the CFI the rights and means to establish a presence outside of Lusaka (cf. NCC 2010 draft referred to above).
- **General proposals**: The CFI should be explicitly authorized to provide advice and proposals to national and local decision makers on changes to legal and administrative provisions, procedures and practices that would improve public administration in Zambia. This will assist the CFI to address systemic issues as well as particular cases.

3.4.6 Qualifications and appointment

- The specific **qualifications**, experience and qualities required of the IG and the Commissioners should be reflected in the CFI legislation.
- **Other posts**: The Act should exclude from the Office of IG and Commissioner only holders of those posts that could call into question their independence and impartiality (which would normally not be the case for mere public officers). Likewise, provisions should be included on what posts, if any, an IG and a Commissioner may maintain and accept during the tenure as IG or Commissioner, as the case may be.
- **Tenure**: The issue of the term of office of the Commissioners should be addressed, possibly by prolonging the current renewable three year term to a non-renewable term of five, six or seven years, in order to further safeguard independence and secure experience of Commissioners.
- **Procedure of appointment**: The appointment procedure for both the IG and Commissioners should be made more transparent and more inclusive of views other than those of the President of the Republic.
- **Removal of Investigator General and Commissioners**: The criteria for removing the IG and the Commissioners should ensure that they are sufficiently clear to prevent abuse. The procedure for removal of the IG be maintained and broadened to include the Commissioners.

3.4.7 Management autonomy

- **Staff**: The CFI should be provided with the same autonomy to make decisions on staffing needs and to recruit and employ staff, including persons not already in public employment, as is currently enjoyed by the Human Rights and Anti-Corruption Commissions (rather than needing approval for changes in structure and relying on seconded employees).
- **Funding**: Provisions on funding should be included in the CFI Act, worded to secure the financial independence of the CFI, with respect to both allocation and use of funds. This should ideally include direct appropriation of funds (a specific budget line) from the National Assembly. Within this framework, the CFI could perhaps explore cooperation arrangements for financial and personnel administration with other independent institutions for the purpose of savings.

3.4.8 Recommendations on programmatic support

With government willingness to take the necessary steps towards reform and support of this important institution, the CFI has the potential to make important and highly necessary contributions to the public life of Zambia. The work plan and strategic processes initiated under the Danish cooperation programme in the period 2008 – 2010 laid a solid foundation for future work with the CFI.

3.5 Conclusion

While the current users of the CFI mechanism – public employees – are not among the poorest section of Zambian society, an expanded role for CFI in fulfilling its true mandate could bring it closer to the needs of the poor. The de facto mandate of the CFI should be seen together with the very small administrative law caseload of the courts. In effect, this means that administrative law and justice is a very undeveloped field in Zambia, and that the courts are not contributing as it should be to the development of the rule of law in the country. While this is an important and worthy goal, the CFI should perhaps see its contribution to the Zambian public as helping to secure the integrity of government institutions. Doing so may be an indirect, but nonetheless vital contribution to governance for the people, including the poor.

4. The Zambia Police Service

Methodology:

Desk and field studies were carried out. 31 police officers were interviewed in 18 police districts covering all provinces, as shown in the table below.

Table 4: ZPS respondents District			Province		
	%	No.		%	No.
Chipata	7	2	Eastern	13	4
Lundazi	6	2			
Gwembe	7	2	Southern	14	4
Livingstone	7	2			
Kabwe	3	1	Central	10	3
Mkushi	7	2			
Kitwe	6	2	Copperbelt	9	3
Ndola	3	1			
Luangwa	3	1	Lusaka	10	3
Lusaka	7	2			
Luwingu	3	1	Northern	6	2
Kasama	3	1			
Senanga	10	3	Western	16	5
Mongu	6	2			
Mwinilunga	3	1	North Western	9	3
Solwezi	6	2			
Mansa	6	2	Luapula	13	4
Samfya	7	2			

A thorough desk study of the Zambian Police Service was hindered by the unavailability of information on a range of matters from budgetary and personnel resources to allocations of personnel at province, station and post level or the distribution of staff according to rank. There were similar hindrances at the level of reported crimes and case loads. It is not clear to the team to what extent the police itself is in possession of this information at central level for planning and budgeting purposes. The MoHA indicates a wish to improve documentation and analytical capacity.

The study was able to benefit from access to some previous studies which however encountered similar difficulties in accessing information. Where the previous studies provide

general background on issues such as mandate and functions, we have tended to omit detailed repetition of such information from the present text.

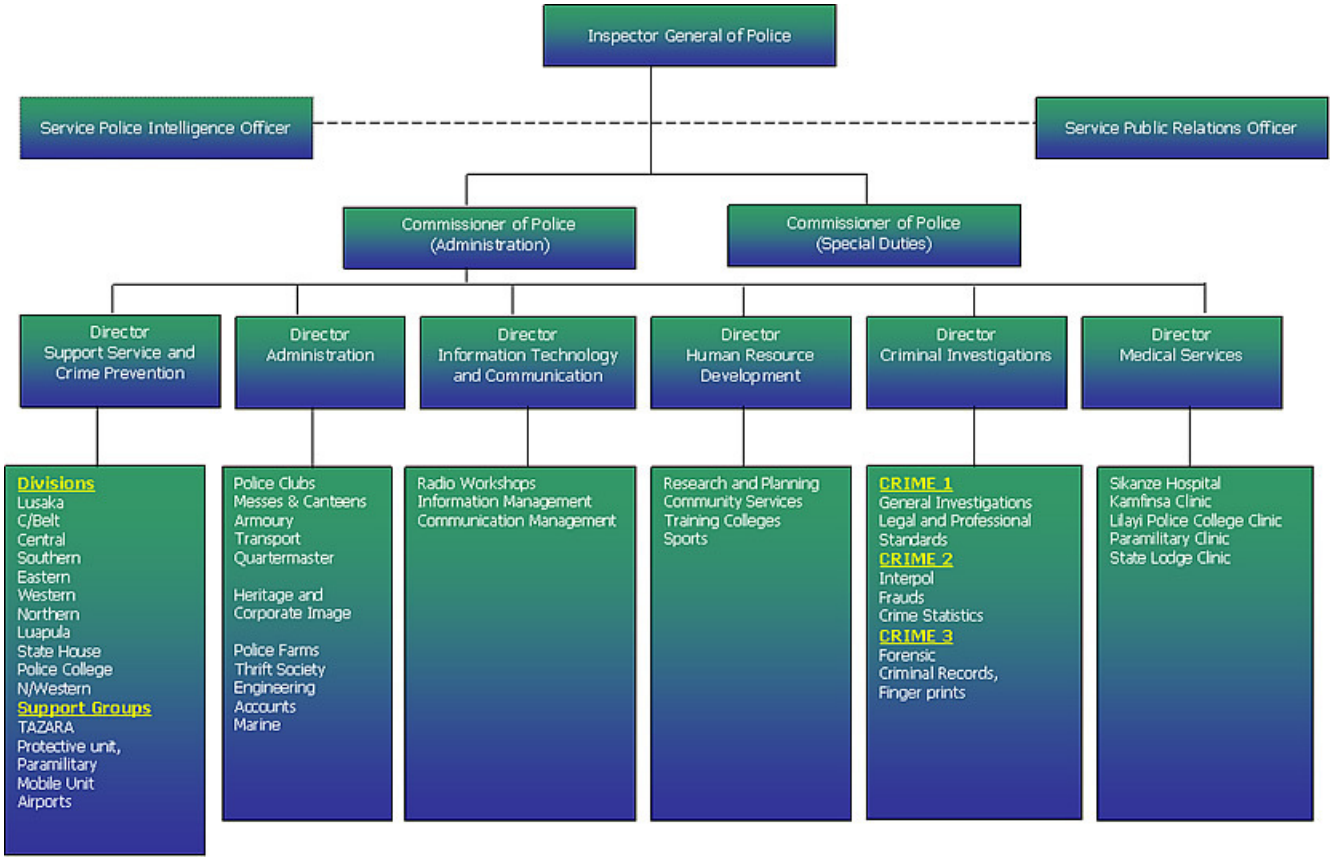
4.1 Police Service mandate, structure and functions

The Zambia Police Service is established under Article 104 of the Constitution to protect life and property, preserve law and order, and detect and prevent crime. It is governed by the Police Act (Cap. 107 of the Laws of Zambia), as amended. The Zambian Police Service is placed under the Ministry of Home Affairs, headed by an Inspector General and subject to the ultimate authority of the President The Minister of Home Affairs has regulatory authority over the police, but not operational command, which is vested entirely with the IG, subject to the directions and authority of the President (S. 3 of the Act.) The IG serves at the pleasure of the President, and other studies have pointed to the vulnerability of the office to direct operational intervention by the Executive. The Commissioner and Deputy Commissioner are also appointed by the President. [27] Table 4.1 shows the main ranks in the ZPS, and an organizational chart for the police is shown on the next page.

Table 4.1: Ranks in the ZPS[28]

Numbers	Main grades	Rank
1	Chief	Inspector-General
2[29]	Commissioner	Commissioner
6		Deputy Commissioner
20		Senior Assistant Commissioner
23		Assistant Commissioner
N/A	Superintendent	Senior Superintendent
N/A		Superintendent
N/A		Assistant Superintendent
N/A	Inspector	Chief Inspector
N/A		Inspector
N/A	Supervisory ranks	Sergeant
N/A	Constable	Constable

[27] Transparency International, National Integrity Systems, Zambia Country Report, 2006 – 2007.
[28] Source: Website of the Zambia Police Service
[29] Figures taken from ACHPR report on visit to Zambia, 14 – 18 April 2008, interview with Ms. Malundu, http://www.achpr.org/english/Mission_reports/Zambia/mission_Zambia.pdf



4.1.1 Reforms and modernization

Developing and promoting community services and community policing has been an important thrust of the attempts to modernize and reform the police in the past decade or more. The creation of Victim Service Units (VSUs) and, more recently a Child Protection Unit (2007), a schools liaison unit and a chaplains unit have been part of this effort. An intellectual property unit also falls under the Community Services Division. Reforms in the previous decade included the introduction of custody officers and the PPCA. These are discussed below.

More than one study has recommended a more inclusive system for the appointment, accountability and removal of the Inspector-General of Police (TI, 2006 – 2007, p.42, AHSI 2009) involving parliament and a tribunal (for removal). Relative security of tenure for the IG (i.e. based on a set term of office, specific grounds for dismissal and an established procedure), coupled with greater involvement of parliament, could contribute to greater professionalism and broader accountability. These recommendations were not addressed in the 2010 draft constitution, and the existing constitution poses no difficulty in allowing them to be addressed through legislation.

The question of the accountability of the I.G. is linked to the question of providing information on policing to parliament and the public. The police service recognizes in principle that it should provide annual reports, though the last one available at time of writing was for 2005. Requests for information are sometimes met with assertions about confidentiality and the

preservation of official secrets. Both officials and members of the public need clear rules concerning what is public and what is not. Providing information about police service strength, according to the country's administrative divisions, as well as about resources, caseloads and case disposition, is much more likely to strengthen policing and public security than to weaken it (including by strengthening the case for providing necessary resources). Making information more available and accessible will also greatly benefit justice sector actors themselves by permitting them to engage in professional and policy discussions, as well as operational planning, on a more qualified basis. Failure to provide annual reports for reasons of resources, capacity or organizational effectiveness needs to be addressed appropriately.

Recommendations on ZPS mandate, structure and functions:

1. The recommendations on greater security of tenure and predictability in relation to the position of the I.G. are endorsed. The same recommendation is made in respect of the positions of Commissioner and Deputy Commissioner.

2. The I.G. and / or Ministry of Home Affairs should without fail provide an annual report to Parliament according to an officially adopted format and description of contents. Adequate resources must be set aside for this purpose.

4.1.2 Police prosecution

The Police Service has until now also prosecuted criminal cases in the Subordinate Courts. This is discussed in more detail in chapter 5. Police prosecutors at station level were generally lower in rank than those in charge of investigations. Subsequent to the establishment of the National Prosecutions Authority, almost all prosecution will take place under the authority of the NPA, and it is expected that many police prosecutors will join the new body. At time of writing, detailed plans in this regard were not available. The establishment of the NPA will mean greater separation of the prosecution and investigative functions. While it may free some resources within the police to permit greater concentration on investigation, it will also place higher demands on the police to cooperate effectively with the new institution. The 2008 case flow analysis study identifies a functional gap in that police do not currently differentiate cases according to whether a defendant or accused person is planning to plead guilty, meaning that resources may be being used to investigate cases unnecessarily. Similarly, the study points out that a simple and early assessment of whether a case is "prosecutable" could be made on the basis of a checklist that would also determine whether it is objectively justifiable to expend resources on the case.

The 2007 HURID study documents a significant problem of dockets going missing between the police and prosecution. The lack of a standardized form for dockets and their management is surely a factor here.

4.2 Resources and institutional capacity

As mentioned, budgetary and expenditure information was not made available to the team, though some information is to be found in the FNDP MTR report from October 2009.

FNDP Projection	Allocation	Releases	Release as % of planned allocation[30]
371.16	155.37	124.53	33.7%

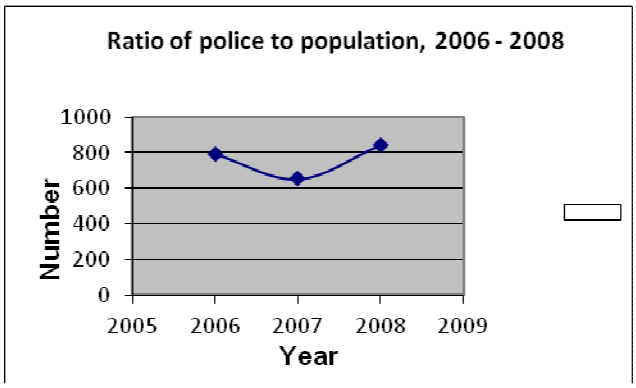
Much of the released funds were applied to infrastructure development (85.2 billion) and crime prevention (21.94 billion). The FNDP MTR paints a bleak picture, finding that "*Over the years, the working environment and functionality of these law enforcement agencies have continued to deteriorate. The agencies lack basic operational requisites while the housing situation for officers has persistently been a worsening scenario. Consequently, this has compromised the credibility and integrity of the law enforcement officers and has resulted in low morale of officers, rendering them less effective and efficient in the execution of their mandates. During the FNDP period, Government plans to lay emphasis on crime prevention, capacity building, and infrastructure development and rehabilitation*." As a consequence, infrastructure development under the FNDP focused on constructing 500 police housing units.

4.2.1 Personnel strength

Staffing levels in the police service have significantly increased in the past fifteen years, but training and capacity in crime investigation techniques has not kept pace with the increases. Various reports set the strength of the Zambia Police Service at levels between 13,000[31], 15,000[32] and more recently, 17,400.[33] Despite several requests to the police to provide information on staff numbers at national, provincial and district level, the information was not forthcoming.

The AHSI estimates that the ideal size of the service would be 27 000 officers in order to meet the UN Goal of 1 police officer per 400 head of population[34], but points out that current levels of recruitment are insufficient to meet this goal. For 2008, the government (in the FNDP) set a goal of 1 police officer to 580 people. The FNDP MTR provides figures showing that following an increase in police strength from 1:792 (one police officer per 792 people) in 2006 to 1: 653 the following year, the number dropped again in 2008 to 1: 843. The team did not receive information to explain this sudden drop-off in police numbers.

[30] FNDP Public Safety, Law and Order Sector, ZPS (amounts in billions of Kwacha)
[31] AHSI 2009, p.45.
[32] USAID, Zambia Rule of Law Assessment Report, 2009.
[33] US DOS report on human rights in Zambia for 2010.
[34] AHSI Policy Brief, No. 16, Oct. 2009, p.45.



There is a need to gradually build up the size of the ZPS. Without reliable figures on the disposition and use of the police personnel, qualified recommendations cannot be made. In addition, a discussion on prioritisation between **quantity** and **quality** ought to take place. No specific recommendations on police numbers are made the information available makes measures to enhance performance and quality more appropriate. There is a strong need to focus on the quality of the personnel recruited and their initial training, working facilities and professional development and working conditions rather than purely on numbers. A better trained and equipped police service with improved working conditions will be more capable of assessing the policing needs of the country in the years to come. Recruitment training should place greater emphasis on principles of detection and community relations in fighting crime as well as legal and constitutional rights in criminal justice, gender issues, juvenile justice and diversion.

The **gender balance** within the police service also appears to have suffered from 2006 to 2008. The ZPS has adopted the national gender policy of aiming to achieve 30% women in senior positions. Whereas 12.5% of police officers were reported to be female in 2006 – 2007, the percentage declined to 11% in 2008.

Distribution of police services: There are reportedly some 350 police stations and posts spread throughout the Zambian national territory. Information on numbers of police stations and police posts by province and district was not made available to the team. It is thus not possible to comment on the distribution of police among rural, peri-urban and urban locations, or by province and district. The previous recommendation to make such information available and accessible is repeated here.

Recommendations on police personnel

1. Recommendations in previous studies to review and improve pay and conditions within the ZPS are endorsed. Initiatives to improve police housing and conditions should be continued.

2. It is not clear if the overall drop in police numbers from 2007 – 2008 was due to newly recruited women leaving the police again. The ZPS should clarify this and if so, determine why women disproportionately leave the police service and what can be done about it.

3. No immediate recommendation is made to increase police numbers. A renewed focus should be placed on quality of personnel, training and working conditions, as well as performance based evaluation that includes compliance with rights safeguards (such as APP book etc).

Table 4.2.1 a: ZPS, Principal Divisions

Geographical Division	HQ	Districts	Stations	Police posts	Community police posts
Central	Kabwe	6: Mumbwa, Chibombo, Kapiri mposhi, Mukushi, Serenje, Kabwe	N/A	N/A	N/A
Copperbelt	Ndola	5: Ndola, Mufurila, Kitwe, Luanshya, Chingola	32	17	37
Eastern	Chipata	7: Chipata, Katete, Chadiza, Petauke, Nyimba, Mambwe, Chama	N/A	N/A	N/A
	Mansa	6: Mansa, Samfya, Kawamba, Nchelenge, Kaputa, Mwense, Chiengi,	N/A	N/A	N/A
Lusaka	Lusaka	4: Lusaka urban, Chirundu, Siavonga, Luangwa	19 (10 in Lusaka urban, 9 in Lusaka rural)	N/A	N/A
Northern	Kasama	5: Kasama, Chinsali, Mbala, Nakonde, ?	N/A	N/A	N/A
North Western	Solwezi	7: Solwezi, Mwinilunga, Kasempa, Kabompo, Zambezi, Chavuma, ?	N/A	N/A	N/A
Western	Mongu	6: Mongu, Kaoma, Lukulu, Senenga, Sesheke, Kalabo	N/A	N/A	N/A
TAZARA Unit	Mpika	Operations in Mpika, Muchinga, Lwitikila and Mpanda	9	N/A	N/A

Table 4.2.1.b Other Divisions / Special Units				
SSG 1	Kitwe	Mobile Unit Kamfinsa	Training to "quench riots and demonstrations"	
SSG 2		Protective Unit	Provides security to vital installations, Government Ministers and senior officials, found in all 9 geographical divisions	
SSG 3		Paramilitary Unit	Quasi-military strike force. Under support services and crime prevention directorate at Lilayi.	
SSG 4		Tazara Unit, above	See above	
SSG 5	Lusaka	Airports Unit, Lusaka, Ndola, Livingstone, Mfufwe, Mansa, Kalulushi, Mongu, Solwezi, Kasama, Chipata		Airport policing functions
Police College	Lilayi, Lusaka	Responsible for training of recruits and for in-service training		

4.2.2 Capacity, equipment and infrastructure gaps

The police lack capacity in a number of inter-related areas, including knowledge, equipment, operational budgets (including for fuel) and infrastructure, but at present, no documentation seems to be available that clearly sets out needs and projections as compared to actual resources. The FNDP MTR recommended enhancing the capacity of training institutions for the sector[35]. This very much applies to the police.

Training: A 2009 analysis[36] found police training to be severely under resourced, with "*a dearth of teaching aids, lack of suitable facilities – and poorly stocked libraries*". According to this study, trainee police officers do not, per se, have induction courses - they are immediately posted to their respective stations upon completion of training.

Investigative capacity: Writing in 2009, the AHSI found an urgent need to improve investigative capacity. The Police lack capacity in crime-scene preservation and forensics, including in relation to DNA testing equipment. At the time of conducting this study, a forensic laboratory in Lusaka West was still being constructed and equipped. While investments in such technology are undoubtedly necessary and should help in solving serious crime, they should not deflect attention from more basic needs. The point was frequently made that the police lack not only sophisticated equipment for forensic testing, but even more importantly, basic resources such as transport and communication facilities to investigate complaints, and

[35] FNDP MTR Table 14.5.
[36] Legal and Judicial Education, A Situation and Gap Analysis December 2009 NCG Denmark

budgets to provide food to detainees. Poor investigations affect access to justice for accused persons and victims of crime and are a cause of delays in the system. (See chapter 10.) As pointed out in the FNDP and MTR, police housing was also an urgent requirement (which has partly been addressed – see below).

The introduction of police custody officers was a reform introduced by amendments to the Police Act in 1999 (sections 18 A and 18 B) with a view to ensuring decent and humane treatment in custody, as well as access to medical facilities. It is discussed below in the overview of the criminal justice system in Chapter 10 under the heading of protection against arbitrary detention. Information was not provided on any specific training being provided to custody officers.

4.2.3 Programmatic responses to capacity development

Donor programmes, including the Access to Justice Programme, have assisted the police with capacity building, vehicles and equipment. Previously, training was provided in crime scene investigation through a scheme where officers were sent to Scotland for training, but this had fallen off at the time of interviews for the present study. During the period under review (seemingly the year 2008 as regards Public Safety, Law and Order), the FNDP MTR reported that the important initiatives on crime prevention implemented by the Zambia police included "computerization of records and finger prints; establishment of more police posts; offering evidence of forensic nature; laboratory consumables as well as the provision and preservation of evidence of chemical and pathological nature. The Zambia Police Service was further strengthened through the acquisition of communication equipment and motor vehicles for operational efficiency and effectiveness."

As discussed below, the FNDP MTR of 2009 attributes slightly lower crime figures to various crime prevention programmes. Several of these initiatives were undertaken by bodies other than the police, including the establishment of an investigation and prosecution unit and issuance of machine-readable passports under the National Registration, human and child trafficking control under the DEC, digitalization of national travel documents under the Passport Office and the parole system and extension services for prisoners under the Zambia Prisons Service. Other programmes included public awareness campaigns against various crimes, establishment of the Child Protection Unit, monitoring of migrants and visitors, and border controls under the Immigration department. Programmes such as the ARRS and support to the VSUs have also been useful, but suffer from the lack of a holistic approach to the police as such. As a result, their sustainability is vulnerable when staff are transferred or promoted or when donor funding dries up. Police representatives praised the Access to Justice Programme for improving dialogue among the institutions. Prior to the CCCI initiative, the programme was seen as focusing mostly at the top levels.

4.2.4 Documentation, information management and research capacity in the ZPS

"*The police have a lot of data, but too little knowledge*". [37]

[37] Interview with Ms. Susan Malundu, Director, Research, Planning and Information Department, MoHA, 17.3.2010.

An FNDP goal was to reduce crime by 2%. Goals such as this require information gathering and management systems, as well as analytical capacity. At present, police stations provide weekly letters to their superiors giving status reports on offences and other security related occurrences, as well as on personnel and administrative matters. (The format for these letters was not made available to the team for analysis.) At central level, the police receive information on issues such as the rate of murder cases by province, but the system suffers from significant weaknesses. The information is not provided or collated electronically, reducing its usability. Secondly, there is little disaggregation by offender type, or victim profile for example, so that it is difficult to design responses in a systematic way (how many murders are due to gangland crime, how many due to domestic disputes, how many are alcohol related etc). The same goes for the issue of victim profiles in sexual offence cases, including defilement. "Scares" on actual or alleged increases in defilement prompted changes to the law in 2005 and increases in penalties for these offences. These issues could be better addressed with improved knowledge of offence and offender profiles. (See chapter 11 on children in criminal justice.)

The FNDP MTR, 2009 acknowledges the need to design and implement effective systems for monitoring and evaluating the effectiveness of crime prevention mechanisms. It recommends modernizing / computerizing the database on crime on crime with and periodic updating for easier recording and tracking of criminal occurrences and their association to criminal groups and/or individuals. This also calls for improvement of mechanisms for reporting/disseminating information on crime.

Interviews with senior MoHA officials revealed a wish to be able to gather information and conduct research on crime trends.[38] This could be done initially as desk research. In the longer term, the MoHA would like to develop a national security information system. There would seem to be a clear wish on the part of the ZPS and MoHA to conduct such research "in-house", at least to begin with. Improved institutional appreciation of the value of information should strengthen support for taking on the burden of documentation internally within the police. Such in-house research could contribute valuably to the streamlining of information management within the police.

In a situation of resource poverty on a large number of fronts, prioritisation is always a dilemma. Quite legitimately, interest groups, donors and political actors compete for attention to particular public safety issues in setting the agenda. This can result in resources being applied in a skewed and unsustainable manner, where unsustainable issue based programmes terminate when donor interest shifts. Thus, the ZPS could benefit from a relatively comprehensive needs assessment and plan to build capacity which could then be the focus of programmatic discussions with government and donors. Crime prevention is addressed more specifically below.

Recommendations on training, documentation and analysis

1. Police training, while not specifically a topic of analysis for the present study, is in need of sustained attention and support. Many of the problems noted in chapter 10 of this study cannot be helped without serious attention to the selection, recruitment and training of the

[38] Ibid.

police. The police should develop a staff development and training plan. A needs assessment is required to comprehensively assess the capacity of the three existing police training institutions, to assess training needs based on projections for recruitment and law enforcement challenges according to geographical and social sectors.[39]

2. Training of VSU officers (see below) is necessary to fulfil the promise of these units.

3. The establishment of in-house capacity to produce statistical information on crime and law enforcement, and to conduct national research on crime profiles and trends should be supported in the framework of a clear and convincing project design. Transparency and public information should be built into the project design (including through an annual report to Parliament), so that information on crime and law enforcement informs public and political debate.

4.3 Caseloads

The police were not able to provide statistical data on crime levels at national or provincial level to the team for the purpose of the survey. It is clear that this data is necessary as the only reliable basis for serious law enforcement planning. The figures from the 2005 annual report are provided in Table 10.3, giving figures for the provinces. This is the last year for which figures could be obtained. Police caseloads are discussed chapter 10.

Public perceptions of the police

In gauging perceptions, it is important to note that members of the public do not necessarily see justice agencies only in terms of their legal mandates. Thus, the police might be seen as an institution that should or does solve disputes, and not only one that enforces the law by bringing cases before the courts.

Results from other surveys over the past decade have shown the police to have worryingly low levels of public trust.[40] The 2003 UNODOC victimisation survey revealed dissatisfaction with the police among over 50% of Zambians. 69.3% were dissatisfied with the police's handling of crime.

The results of surveys for the present study show 54% of the public survey respondents expressing wariness about approaching the police because of a feared bias against the poor. 76% feared approaching the police because of an intimidating attitude. On this indicator, the police scored worse than any other justice provider. 23% feared the police might be biased against women. 24% would be reluctant to approach the police because of the cost.[41] Only 11% considered the police to be generally impartial. While this figure is by no means high, it should be compared against relatively low scores for all institutions (the highest scorer was 23%, for the Local Courts).

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[39] An education situation analysis was carried out under the AtoJ programme in 2009, but it does not provide information in any detail on the curriculum or numbers trained.

[40] Transparency International, 2006 – 2007 p. 41, UNODOC Victimization survey, 2003.

[41] This could refer either to transport costs to travel to the station or, more likely, the fear that people would be asked to make contributions for fuel and telephone talk time. This is discussed above.

On the more positive side, the police scored highest among justice providers (27%) when they needed protection of their rights, and were cited more often than any other agency as the institution that solved disputes in the respondent's area. 38% cited them as the agency that solved most disputes. 33% thought the police were fastest in solving a dispute (65% thought that police generally resolved a matter in under three weeks). 17% thought that solutions brought by the police were lasting, and 18% thought that the police dealt with cases in the best way for them.[42] The police were generally perceived as being more likely than other institutions to allow children to speak in disputes concerning them (62% where boys were concerned and 58% with girls.)

4.4 The Victim Services Unit – mandate and functions

The Victim Services Unit (VSU) was established by the Zambia Police Amendment Act No. 14 1999, as a specialised unit handling crimes against vulnerable people. The VSU is also mandated to give counselling to all victims of crime. Women, children and the elderly are especially targeted though others may also avail of the unit's services.

Caseload: The Unit deals with a large number of cases each year (more than 8,000 in 2006, the last year for which specific information is available). Most cases in the VSUs concern female victims (women & girls), and relate to (gender based) violence and abuse. The VSU also works with cases involving juvenile offenders, creating a need to train VSU officers in juvenile justice administration. Juvenile justice efforts are coordinated through the Child Justice Forum (CJF). The VSU also aims to work closer with custody officers in the future.

Organisation and resources: There are VSU officers at all main police stations at provincial and district level, but not at police post level. For the community centre post the VSU was in the process of recruiting officers in 2010. The VSU is a relatively new unit, with many gaps in infrastructure, as it is just being fit into the existing police structure. VSUs generally don't have separate facilities for interviews and counselling, so possibilities to ensure privacy and confidentiality often don't exist. Building of new VSU structures, including interview and counselling rooms has been initiated under the AtoJ programme. A new structure has been finished in Mansa, and work was underway in Mongu and Lusaka in 2010. It has also been reported that whereas the VSU seems to be working well in Lusaka they face difficulties in rural areas due to lack of means of transportation, logistics and material resources.[43]

Good practices: The introduction of VSUs has spearheaded and ensured the development of a number of good practices**, c**onducting outreach activities to fight many of the types of crime that they are typically concerned with through partnerships with CSOs, visiting schools and communities, etc. Through these activities they aim to sensitise groups separately (children, the elderly, etc). The VSU considers these activities a success as far as awareness is concerned, noting a steady rise in the number of cases reported to the VSUs since their establishment. The handling of victims of crime, including sexual and gender based violence (SGBV) is discussed in chapter 10.

[42] Naturally, this response is very imprecise, as all kinds of disputes had to be considered together for the purpose of the question.

[43] See Shadow Report submitted to the Human Rights Committee, OMCT, 2007, p. 5

Capacity and training: Rape and defilement cases demand special training on the part of VSU officers. Defilement cases often involve juvenile perpetrators as well as victims, and the protection of the rights of both in a criminal investigation demands special knowledge and skills. All VSU officers are trained police officers. They should all in principle undergo a 3-day orientation training that includes components on how to receive & treat victims and on gender & development issues. Out of the current approximately 300 VSU officers across the country, only about 1/3 had undergone this orientation training as of 2010.

Based on the need for counselling for many of the victims a one-year diploma programme in psycho-social counselling has been developed with the Chainama College of Health Sciences. 20 VSU officers were expected to graduate from this programme in 2010. In 2005 approx. 40 obtained a certificate after a 3-months programme. Training in juvenile justice administration is coordinated by the CJF. So far only very few VSU officers have undergone training in juvenile justice.

A small number of VSU officers received training some years ago in prosecution of VSU specific cases. The officers involved were junior and the number of cases too limited to gain sufficient experience. As a result, they were included in the general pool of police prosecutors. Training materials under development (2010) included a practice manual on sexual & gender based violence, and an investigations handbook[44], as well as a set of Minimum Guidelines for Survivors of Gender Based Violence[45].

Stakeholders' perceptions: No stakeholders were encountered who did not appreciate the positive change in the police which the VSUs exemplified, as well as their practical work. CSOs nevertheless pointed to some weaknesses: the first point of contact for a criminal complaint is usually the desk sergeant, who may not have received VSU training. A negative first impression here can negate the positive impact that the VSU is working for. ZLDC made the same point about police investigation skills, and ZHRC found that the justice system remains very oriented to perpetrators rather than victims.

Separate recommendations on VSUs are not made. Recommendations related to training are included above, and recommendations on the treatment of victims are made in chapter 10.

4.5 Police discipline and conduct and control mechanisms

Reference is made to sections of chapter 10 dealing with criminal justice issues. The 2009 AHSI study on the Criminal Justice System in Zambia[46] deals with police oversight mechanisms in some detail, so reference is made generally to that publication for an overview.

In interview and workshops, police representatives displayed honesty and sometimes courage in their frank acknowledgement of problems, but also pointed to the persistence of a culture of jealousy and blame-shifting. This would seem to reflect the same intentions at high levels of the police command.[47] Some of the difficulties that the police are confronted with in this

[44] Both with support from USAID.
[45] By the Ministry of Health and the Gender in Development Division, under the ASAZA programme
[46] Op cit. AHSI 2009.
[47] See Malundu, 2004 at: http://www.itc.nl/library/papers_2004/msc/upla/katantamalundu.pdf, p. 39

regard are external and real. The police are caught in the middle between community expectations that action should be taken against criminal suspects and an often dysfunctional criminal justice system. Members of the public expect the police to keep the peace by helping to settle civil disputes, as the user survey figures show. Police may feel a need to engage in this in order to maintain peace and their own credibility. As long as the system suffers from these dysfunctions it is pointless to simply blame the police as the most visible face of the system for all of the problems encountered.

At least four different independent statutory bodies have some mandate to monitor the police: the Anti-Corruption Commission, the Zambian Human Rights Commission, the Commission on Investigations and the PPCA. In addition to these, the Police Professional Standards Unit (PPSU) is an internal control mechanism.[48] Finally, the Legal Resources Foundation has pursued many cases concerning police misconduct and frequently publicizes abuse in its newsletter.

While these bodies have differing mandates, there are areas of overlap and a potential for cooperation. The 2009 AHSI report recommended (in view of the weakness of the PPCA – see below) that the ZHRC be empowered to assist in oversight of the police and be given powers to pursue its own independent investigations, including the power to access police records, interview witnesses and take corrective action in cases of torture or unlawful shootings. It also pointed to the need to make the paramilitary police more accountable. The African Commission on Human and People's Rights, reporting on its 2008 mission to Zambia noted little cooperation between the police and other human rights stakeholders and other law enforcement agencies.

4.5.1 The PPCA: Mandate, structure and functions

The establishment of the PPCA was one of several responses by government to the poor perception of the police as an instrument of repression. The 2003 UNODOC victimization survey found that its establishment had done contributed to improving the image of the police. The PPCA does not have a separate founding act of parliament. It is established according to Chapter 107 of the laws of Zambia, in the Police Act, which was amended in 1999 to establish the PPCA[49]. Many in the high ranks of the police were reportedly opposed to the idea. The PPCA was not actually established until 2002. While the PPCA can be criticized for not being a truly independent body (see below), its main difficulties lie elsewhere, especially in its mandate, resources and relations with the police.

Structure: The members of the PPCA are appointed by the Minister of Home Affairs from a list of persons compiled by the Permanent Secretary. There are no stated procedures to be followed in the compilation of the list and/or appointment of the members. Members are appointed for a period of three years and may be reappointed. They work part-time. The Chair should be qualified to hold the position of a judge of the High Court. Members can be dismissed by the Minister for a number of stated reasons related to conduct. The PPCA has five members of staff, with no investigators or management staff other than the executive secretary. It has no lawyers or investigators apart from the Executive Secretary.

[48] The AHSI report pointed out in 2009 that the PPSU had only dealt with 3 cases since its inception.
[49] Sections 57A – 57T.

Operational mandate: The PPCA is mandated to receive and investigate all complaints against police officers (including police reservists) and to make **recommendations** concerning punishment to the I.G. When the Police Act was amended in 1999 to create the PPCA, the Authority was given the power to issue **directives** concerning the punishments or discipline which the Authority found appropriate to the offence. Many in the police were unhappy with this, and the PPCA had to go to the President to secure enforcement of its directives on dismissal of offending officers. Some police officers won a High Court case against dismissal – reportedly because of a technicality related to double (disciplinary) punishment for the same offence. They were reinstated. There were defects in the original law relating to confusion about who could impose punishments on senior officers: the IG or the Police and Prisons Commission (PPC). In 2008 amendments were passed to the law regulating the PPCA, weakening its powers by removing its power to direct punishment. Defects in the law appear to remain in that the IG states that he has no power to discipline officers above the rank of Assistant Superintendent. Sec. 29 (1) of the Police Act refers to the Constitution for discipline of officers above this rank, but the Constitution does not appear to lay down a clear procedure.

Cases: The low rate of disposal of cases seen in the figures below is symptomatic of the lack of resources. Added to the low disposal rate of cases at the PPCA is the lack of information on the fate of the Authority's recommendations: figures were not available on which recommendations are actually accepted and implemented by the IG (though Human Rights Watch reports that there was settlement or punishment in 27 out of 245 cases). Most complaints come from Lusaka, Copperbelt and Southern Provinces, though the visits help to bring complaints from other provinces. Victims reportedly face procedural barriers. The AHSI cited an LRF case where victims of police abuse struggled to obtain recommendation that victims of police abuse ought not to be required to obtain police medical reports or forms as proof of their experience is endorsed. This discourages victims from speaking out against police brutality**.**

The common perception within the police has been that the PPCA is not working and there is little cooperation between the two. While there has been some improvement in relations between police and the PPCA through sensitization, there are also continuing reports of police officers threatening or suborning witnesses against them through bribery (see torture and mistreatment, below). The ACHPR, in a very critical report, noted that the PPCA has had little or no impact on the police.[50] It found moreover that the PPCA is completely undermined and has been unable to make any impact in monitoring the activities of the police. With the weakening of the PPCA mandate, this situation would only seem to have got worse since the ACHPR report. There had been some hope that the PPCA would be strengthened in the constitutional review process, but the (now rejected) draft new constitution did not contain measures to strengthen police accountability for conduct through the PPCA.

In an interview, the PPCA did not find particular fault with its powers to investigate complaints, (it can take on cases *ex officio*) pointing more to its lack of resources, especially personnel. The PPCA has tried to address the problems it faces through a variety of means. It obtained some donor support, lobbied for legislative change, and carries out visits to provinces and districts

[50] ACHPR Zambia, 2008

once or twice a year to deal with cases. This is necessary in order to spread knowledge of the institution and the remedies it can assist in providing. The PPCA sometimes refers cases to the DPPs office or the ACC, and cooperated in efforts to establish an informal network of administrative justice institutions. It would like to see this initiative receive donor support.

Findings: The ZPS still clearly suffers from a problem of image and credibility among the public and justice sector stakeholders, despite the good work of many dedicated officers. An institution like the PPCA is a necessary check on the negative aspect of group solidarity and silence in the face of wrongdoing in the police. The PPCA has faced entrenched resistance from the police, mostly in terms of its legislative mandate, but also as regards its operations. Its resources are pitifully weak in comparison to the task it is supposed to fulfil.

The PPCA needs a strengthened mandate in order to be a truly credible, but the more fundamental need is to improve the quality of the police through selection, training and internal discipline. Without addressing these aspects, the PPCA will not be able to effect significant change. The AHSI recommended empowering the ZHRC to independently investigate police abuse but this does not mean it should be a substituted for a specialized independent mechanism. Even if it were possible to succeed on the legislative front in giving these powers to the ZHRC, the resource burden placed on it would be significant. Realistically though, battles have already been lost surrounding the PPCA legislation and there seemed to be no immediate prospect of improvement in this regard.

Recommendations

1. The onus is on the government to demand a police complaints mechanism that is independent, objective and transparent. Within this framework, the police should be stakeholders in the development of the scheme.

2. A complaints mechanism alone is insufficient –there is a need for more systemic inspection, both internal to the police as well as external to it in order to insure against bad practices. An OPCAT mechanism (as discussed in chapter 10) is one element of this.

3. The PPCA should be strengthened, initially through legislation that avoids the pitfalls of previous reforms. Once a more robust legislative framework is in place, the PPCA should be supported in the framework of the AtoJ programme or similar initiatives. Pending this, the PPCA should be supported and assisted to cooperate as much as possible with other independent mechanisms such as the Investigator General, the ZHRC and the Anti-Corruption Commission (ACC). The AHSI recommendation that victims of police abuse ought not to be required to obtain police medical reports or forms as proof of their experience is endorsed.

4.5.2 Statistics on police complaints

The tables below provide an overview of complaints against police handled by the PPCA in the years 2003 – 2006, and concerning corruption allegations to the ACC in the period 1998 - 2002. Total figures for PPCA received complaints were 267 in 2007, 212 in 2008 and 282 in 2009, 88

of which were concluded. The US DOS reports for 2010 that "the PPCA between January and September, received 143 complaints: 31 were related to unlawful detention; 50 to unprofessional conduct; 20 to police brutality; 20 to abuse of authority; 20 to unlawful debt collection; one to interference in a marriage; and one to death in police custody. The PPCA recommended to the MoHA permanent secretary disciplinary action in the form of punishment or dismissal in 26 of the 143 cases. Of the remaining complaints, the PPCA recommended nine for other disciplinary action while it dismissed the allegations in 94 cases and continued to investigate 14 cases. Many cases of abuse went unreported due to citizen ignorance of the PPCA and fear of retribution." The 2005 police annual report provided statistics on complaints against police officers handled by the ACC. These are summarized in table 4.5.2.a.

Table 4.5.2a Complaints against law enforcement officers to the ACC, 1998 - 2002	Category / Year		1998	1999	2000	2001	2002
	Received		972	986	933	823	1000
	Completed	No.	345	312	694	684	720
		%	35,2	31,6	74,3	83,1	65,4
	Pending	No.	625	674	239	139	380
		%	64,5	68,4	25,7	16,9	34,6

Table 4.5.2. b : PPCA: Handling of Police Complaints , 2003 – 2006 (Source, PPCA annual reports, 2003 – 2006)																		
Nature / year	2003				2004					2005					2006			
	Rcvd	Pd	Fin	% Fin	Rcvd	Rfd	Pd	Fin	% Fin	Rcvd	Rfd	Pd	Fin	% Fin	Rcvd	Pd	Fin	% Fin
Unlawful detention	83	76	7	8,4	171	7	161	3	1,8	141	1	133	7	5,0	83	80	3	3,6
Brutality / torture	56	45	11	19,6	49		47	2	4,1	37	0	36	1	2,7	40	38	2	5,0
Debt collection	8	7	1	12,5	15		15	0	0,0	21	0	20	1	4,8	18	16	2	11,1
Police inaction	45	35	10	22,2	14		13	1	7,1	13	1	1	20	153,8	15	15	0	0,0
Unprofessional conduct	138	101	37	26,8	128	8	115	5	3,9	140	1	135	4	2,9	100	91	9	9,0
Abuse of authority	32	19	13	40,6	37	3	31	3	8,1	23	1	21	1	4,3	11	11	0	0,0
Death in custody	7	4	3	42,9	3		3	0	0,0	5	0	5	0	0,0	0	0	0	
Total	369	287	82	22,2	417	18	385	14	3,4	380	4	351	34	8,9	267	251	16	6,0

Rcvd: Received Rfd: Referred Pd: Pending Fin: Finalized %Fin: Percentage of cases finalized

5. The National Prosecutions Authority

Methodology

A long interview with the DPP took place in Lusaka, and ten officials of the DPP's office were interviewed in structured interviews (two each in Eastern, Southern and Western Provinces, and one each in Copperbelt, Lusaka, Northern and North Western Provinces). Figures on staffing, expenditures, inventories and caseloads could not be obtained, so secondary sources were used where possible.

5.1 Mandate, structure and Functions

The importance of the prosecution function in upholding the rule of law is recognized in the constitution through provisions designed to uphold the independence of the office of the DPP. Upholding the rule of law and fair and equitable criminal justice is acknowledged to be a fundamental purpose of the NPA in the NPA Act. The significant discretionary power of the DPP and of prosecuting officers, in order to avoid the perception or the risk of abuse, should be subject to measures of transparency and accountability that ensure public trust.

Public perceptions: The 2009 study by AHSI found very little knowledge of DPP's functions, and not only in the provinces where there was no DPP presence. Among justice sector stakeholders, the office of DPP in Zambia has not avoided the perception of political control in recent years. While the Chiluba case has been the most prominent, the use of the *nolle* power and more generally of prosecutorial discretion without public transparency has been a subject of public debate, concern and criticism in a number of high profile cases. There was general concern among all stakeholders that these perceptions are highly damaging to the justice system. The problem of public perceptions could be addressed by introducing greater consistency and transparency in decisions on prosecution and non-prosecution. This is discussed below.

Appointment and security of tenure: The DPP, (as with most high offices in Zambia) is appointed by the President, subject to ratification by the National Assembly. Protection from arbitrary dismissal of the DPP is provided by Article 58. The Institute of Security Studies recommended in 2009 that the method of appointment of the DPP be changed so that a list of candidates be put forward by a panel drawn from the judiciary. This proposal was not adopted in the 2010 draft constitution bill.

The functions of prosecution authorities can broadly be divided into those concerned with criminal proceedings and other ancillary functions.

5.2 Criminal proceedings

According to sec. 8 of the NPA Act, the DPP may *(a)* institute and undertake, (b) take over and continue *(c) or* discontinue such proceedings, at any stage prior to delivery of judgment and to review decisions to prosecute or not to prosecute. The various prosecution roles and functions

relating to conduct of criminal proceedings are set out in Table 5.1 below. It is apparent from the table that the DPP enjoys very broad discretionary power.

Functions in criminal proceedings The constitutional mandate under Article 56 (3) and (5) [51] to prosecute criminal cases lies with the Director of Public Prosecutions (DPP). By virtue of Article 54 (4) the DPP may appoint Public Prosecutors to discharge his or her functions where necessary having regard to public interest and the administration of justice, thus delegating prosecution powers. Other institutions are authorized by legislation to prosecute cases on behalf of, and under the direction and control of the DPP. They include the Anti-Corruption Commission,[52] Zambia Wildlife Authority[53] the National Pension Scheme Authority,[54] Workers Compensation Commission,[55] Zambia Police Service[56] and the Zambia Revenue Authority.[57] Prior to the enactment of the National Prosecution Authority Act of 2010,[58] the principal legislation on the conduct of prosecution were sections 81–89, 241–243, 251 and 321A of the Criminal Procedure Code, which still constitute the main operative basis for the prosecution of cases. The legislative foundation for prosecution of offences and the role and independence of the DPP has been strengthened by the National Prosecution Authority Act of 2010.[59] Subject to the Constitution, the DPP has authority over the exercising of the powers, duties and functions of prosecutors by the NPA Act or other laws.

Exercise of functions: By virtue of the first clause of Art. 56 (7), the DPP enjoys general functional independence. The second clause provides for an exception to this where – in the judgment of the DPP - the exercise of the DPP's powers involve "general considerations of public policy". In this case the DPP *shall* bring the case to the attention of the Attorney General (AG), and (our emphasis again) *shall* act in accordance with any directions received from the Attorney General. Like the DPP, the AG (as with most high offices in Zambia) is appointed by the President, subject to ratification by the National Assembly. While the AG is a member of the cabinet, and thus subject to influence by political considerations, article 54 (7) provides that the power to direct the DPP shall not be subject to direction or control by any other person or authority. Qualified functional independence is retained in the draft constitution of 20010.[60] As shown by public perceptions though, formal institutional independence is in itself insufficient to win the confidence of the public and of justice sector actors.

Case loads and institutional focus: In practice, the DPPs office and its state advocates have generally handled prosecution of cases in the High Court, while cases in Subordinate Courts have been handled by police prosecutors, with occasional requests for advice to the DPP's office. The focus on High Court work is reflected in the location of offices, so that besides its main office in Lusaka, the DPP has maintained offices in Livingstone, Kabwe, Ndola and Kitwe,

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[51] Constitution of Zambia, 1996.
[52] Anti-Corruption Commission Act, Cap 91, Laws of Zambia, sec. 9
[53] Act No. 12 of 1998
[54] Act No. 40 of 1996
[55] Act No. 10 of 1999
[56] Zambia Police Act Cap 107
[57] Incomes Tax Act Cap 323
[58] No. 34 of 2010
[59] No. 34 of 2010
[60] See Art. 236 (8) and 238 (6).

where there are permanent High Courts.[61] High Court cases in other provinces have been covered through rotation of State Advocates, who have spent periods of 2 – 3 months in provinces to deal with cases. As discussed below, rotation has resulted in fairly frequent transfers of cases from one State Advocate to another. The crime most frequently prosecuted by state advocates is murder, followed by aggravated robbery, according to the surveys conducted.

The organizational scheme of the NPA according to the NPA Act promotes **decentralization** of prosecutorial functions by making **Deputy Chief State Advocates** (DCSAs) at provincial level responsible for supervision in the area of their authority. The DPP and Chief State Advocates should support the DCSAs with advice, support and direction. Thus sec. 8 of the NPA Act provides that the DPP has **advisory and assistance functions** towards *(e) and (i)* Deputy Chief State Advocates and prosecutors in relation to criminal offences and achieving the effective and fair administration of criminal justice as well as towards *(g)* the Minister on all matters relating to the administration of criminal justice. The DPP also has authority to (k) appoint experts to assist the DPP to carry out any functions under the NPA Act. The NPA Act establishes a Board, which plays a role in appointments of State Advocates, CSAs and DCAs, but not in relation to criminal proceedings (see sec. 6). At the time of the surveys, State Advocates generally responded that priorities were set at the central level.

The functions of the **Chief State Advocate** are not clearly described in the Act. The 2008 Transparent Business study describes them as including i) reallocating active trials (among State Advocates), allocating appeals from the Magistrates Court and iii) prosecuting trials in the High Court and appeals in the Supreme Court. The CSA also provides support, supervision and advice to State Advocates in the DPP's chambers.

Table 5.2 : Prosecution powers in criminal proceedings

1996 Const.	NPA Act	CPC	Power	Eligibility	Conditions
56	8	81	Nolle prosequi - discontinuance		
		82	Delegation of nolle power, withdrawal from prosecution in Sub. Ct. and in committal cases	State advocates, S.G. and Parliamentary Draftsman	
		83	Lay informations before the court		
		84 - 85	Issue fiat for prosecution	DPP may delegate these powers to CSA and DCSA	Delegation in writing. May be for certain categories of offences.

[61] AHSI, 2009, report s the presence of an office in Central Province, but that there was no staff to manage it.

54	10	86	Appointment of public prosecutors	Any person in the public service	Remains subject to the directions of the DPP
56	8	87	Appearance in any court / case	Any public prosecutor	No written authority required
		88	Withdrawal from prosecution in Subordinate Courts	Any public prosecutor	Subject to court consent or DPP instruction
		89	Power of Magistrate to permit any person to act as prosecutor	Any person	
		241	Receipt of records on committal for trial by High Court	DPP	
		242	Direct return of case to committing court for further investigation or trial	DPP	
		243	Require Sub. Court to compel additional witnesses & take depositions in cases committed to High Court	DPP	
		244	To return case for trial in Subordinate Court	DPP	
		321A	Appeal against acquittal by Subordinate Court	DPP	
	8 (2)		(e) Advise prosecutors on all matters relating to criminal offences	DPP	
	8 (2)		(f) Review decision to prosecute, or not to prosecute	DPP	
	8 (2)		(i) Assist DCSAs and prosecutors in achieving effective & fair criminal justice	DPP	

5.2.1 Issues related to independence and integrity in criminal proceedings

One measure to allay fears of political interference and corruption would be to require that directions issued by the AG be made in writing and be public. This would be in line with the standards of professional responsibility of the International Association of Prosecutors, which recommend that where non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be transparent, consistent with lawful authority and subject to established guidelines to safeguard the actuality and the perception

of prosecutorial independence. The standards provide similarly that any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

Directions to State Advocates: By virtue of sec. 10 (4) of the NPA Act, State Advocates and Prosecutors are under a duty to give effect to general or specific directions issued by the DPP. They are subject to strict rules of confidentiality (sec. 13). At the same time, they do not enjoy protection from dismissal that is similar to that of the DPP. The requirement of strict deference to authority, if unchecked by measures to ensure professional standards and transparency, creates a risk of abuse of power. It is important that measures be adopted to protect against such abuse. (See recommendations below.)

5.2.2 Professional Standards for Prosecutors and State Advocates

In the light of considerations of professional ethics and the rule of law, an important question is whether the duty of obedience to the authority of the DPP is subject to any checks or limits. State Advocates and prosecutors not subject to the rules of professional responsibility that apply to legal practitioners in general. They are not bound by the provisions of the Legal Practitioners Act, not required to be members of LAZ and thus not bound by rules of professional responsibility pertaining to other lawyers.[62]

Impartiality and non-discrimination: Prosecutors are obliged by sec. 10 (6) of the NPA Act: to act impartially and avoid discrimination of any kind, to protect the public interest, to act with objectivity, considering the position of the suspect and the victim, to consider the interests, views and concerns of victims and ensure that victims are informed of their rights. They should moreover pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect, to maintain confidentiality, unless a duty or the needs of justice require otherwise.

While the NPA Act is a progressive step in attempting to outlaw discrimination in respect of prosecution decisions, its provisions remain weakened by Article 23 (8) of the 1996 Constitution of Zambia. Article 23 (2) protects against discriminatory treatment in the exercise of public authority under law, but this is subject to a "clawback" clause in sub-article (8), which explicitly excludes "*any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any Court"* from the ambit of the non-discrimination provision.

Lawsuits against prosecutors for discriminatory exercise of prosecutorial discretion could run into a counter argument that the constitutional protection afforded by Article 23 (8) overrides sec. 10 (6) (a) of the NPA Act. A more serious weakness is that the NPA Act, while outlawing discrimination by prosecutors, leaves gender discrimination by State Advocates, DCSAs and the DPP untouched. The 2010 draft constitution produced by the NCC would have removed this discrepancy. Article 48 of the draft no longer contains an exception in relation to prosecutorial discretion.

[62] Response to enquiry from LAZ. Although State Advocates in the DPP's chambers are not mentioned as being excluded from the provisions of the Legal Practitioners Act Cap 30 by virtue of sec. 3, this is considered to be an oversight and the provisions of sec 3 are in practice considered to apply to them.

Cooperation: Moreover, by virtue of subsection (7)prosecutors are obliged to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions. Nevertheless, in order to ensure that these standards are respected, it is necessary to introduce measures of transparency and accountability into prosecutorial decisions in practice.

Fair Trial Standards: Some of these obligations would seem to be taken directly from the IAP Standards on Professional Responsibility.[63] The NPA Act does not mention others, which would seem to be binding upon them, including constitutional standards on the right to a fair trial. The international standards mention for example the duty to safeguard the rights of the accused in co-operation with the court and other relevant agencies, to disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial, to examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained, to refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment and to seek to ensure that appropriate action is taken against those responsible for using such methods. The UN Guidelines on Prosecutors and the IAP standards contain specific guidelines against initiating or continuing prosecution when evidence shows the charge to be unfounded.[64] The standard relating to disclosure is of particular relevance in trials before the Subordinate Courts, as discussed in section 10.3.14.

Code of Conduct for prosecutors: Beyond these general obligations, sec. 14 of the NPA Act provides for the development of a Code of Conduct, to be binding upon Chief State Advocate, Deputy Chief State Advocates, State Advocates and prosecutors. This should be seen in conjunction with section 5 (b) of the Act, which provides that one of the functions of the NPA is to develop, promote and enforce internationally comparable practice standards for prosecutors.

5.2.3 Decisions on prosecution and non-prosecution

As mentioned, Zambia uses a so-called “opportunity principle” in relation to prosecution, meaning that, as well as assessing the strength of the evidence against the suspect, prosecutors may legitimately take public interest criteria into account in deciding whether to prosecute. Prosecutorial discretion requires a careful balancing between the need to ensure consistency from case to case and region to region on the one hand, and sufficient flexibility to allow legal professionals to act according to the law and the particular circumstances of the case.

There is currently no set of clear written guidelines for prosecutors on the exercise of prosecutorial discretion. This gives rise to two seemingly contradictory problems. The first is over centralization. Police prosecutors in cases committed for trial from the Subordinate Court are unsure, reluctant or not authorized to drop charges in cases, even if there is no clear or

[63] Standards of professional responsibility and statement of the essential duties and rights of prosecutors adopted by the International Association of Prosecutors on the twenty third day of April 1999.

[64] UN Guidelines on the Role of Prosecutors, Guideline 14.

sufficiently strong evidence on which to proceed. Cases are sent to the DPP's office in Lusaka for a decision on prosecution, but the lack of insight into the details of the case by officers far removed from the events and investigating officers, as well as a lack of time and resources among State Advocates means that cases pile up or are forgotten. Cases continue in a kind of "half-life" where suspects are supposed to appear for regular mention, but where there is little real progress. Institutional resources are consumed on formalities such as this, hampering effectiveness. The second problem is that the lack of action on cases can lead to a public perception that the case is being deliberately dropped, possibly for the wrong reasons. This can harm the image of the DPP's office and the justice system in the eyes of the public.

Most actors are aware of the need for a prosecutions policy that permits decentralization and delegation of authority within a clearly delineated framework of guidelines. Thus decentralized discretion is necessary in order to avoid bottlenecks, and transparency and accountability are necessary so that it is possible for organizational hierarchies and justice stakeholders to see whether the guidelines are being respected, both in general and in any particular case. Thus decisions made by prosecutors on whether or not to prosecute should clearly identify who has made the decision, when, and which factors the decision is based on. It is fundamentally the job of the investigator to gather all of the available evidence. The decision of the prosecutor consists of two steps first, assessing whether the evidence gathered is sufficient and second, whether it is in the public interest to prosecute. By its nature, the public interest criterion is likely to give rise to public discussion and sometimes controversy, so, if the NPA and the justice system is to keep its good name, it must show that these decisions are based on good faith public policy considerations, and not on individual interest.

Tables 5.2.3 and 5.2.3 set out typical factors employed in other countries where the opportunity principle is used.

Table 5.2.3 Strength of evidence / case				
Witness testimony	Motive of witness Impression of truthfulness, certainty Consistency, Impeachability	Willingness and availability	Likelihood of guilty plea by accused	Vulnerability (child witnesses etc)
Material evidence	Availability	Is evidence tainted by illegality, forensic error etc. Exclusion		
Law	Do the acts complained of clearly fit the definition of the offence	Are there defences that the accused could avail of?	Statute of limitations	

Table 5.2.3a Some public interest criteria in prosecuting offences				
Offence	Victim	Effects on the Public	Accused	Justice agencies
Gravity of the offence, Aggravating circumstances, Mitigating circumstances	Consequences of offence for the victim,	Consequences for the public, public order, etc	Consequences of prosecution for the accused his family etc. Vulnerability; (child, aged,, sick / handicapped etc)	Diligence of justice agencies in investigating / prosecuting offence
Time elapsed since offence	Identity of victim - Public officer? Vulnerability	Deterrence effect of prosecution, Public perceptions of victim and accused	Character: likelihood of reoffending? Repeat suspect / offender?	Time spent on remand (esp. in detention)
Organized crime?	Contributory wrongdoing by victim	Public confidence in the justice system	Degree of criminal intent Role of accused in crime Did accused also suffer?	Cost of prosecution weighed against other crimes
Was crime a betrayal of public trust	Desire for reconciliation, Forgiveness by victim?		Measures of compensation towards victim, sincere regret etc.	Cooperation of accused with justice agencies

A recommendation is made below for the development and systematization of criteria for decisions on prosecution that would permit greater decentralization and transparency. Forms or templates based on the above or similar factors could be adopted and put into practice by the NPA. It is not possible here or in the abstract to set out how these various factors should be weighed against one another. While no precise mathematical formula is possible, use of the criteria and written records on decisions have the potential to improve the internal decision making process, to sharpen and develop institutional thinking, policies and debates and to reduce the space for arbitrariness.

In general, it would be a positive step to facilitate more transparency towards the public when decisions are taken not to prosecute. Nevertheless, this is a sensitive issue. There has been a reluctance to publicize reasons for non-prosecution that is sometimes legitimate and well-founded. A public statement by a State Advocate that prosecution was not pursued because a witness was deemed unreliable for example may make it appear that the prosecution (and perhaps the police) considers the person to be guilty, without them having had the benefit of a trial to show their innocence. This is thus a matter to be handled with care and sensitivity. In

some circumstances it may be possible to provide some information to victims without necessarily making public statements.

5.2.4 Police prosecutors and prosecution in the Subordinate Courts

The DPP has faced two main interconnected challenges with the delegation of prosecutorial powers to other agencies (mainly the police service). The first has been the difficulty of ensuring proper supervision, and the second has been in ensuring the independent authority of the prosecution function. The challenge of supervision is linked to sheer numbers. Police prosecutors report delays in processing of requests for assistance.

Independence and impartiality: Approximately 90% of current prosecutors have worked under the police service. These police prosecutors have been hierarchically inferior to the commanding officers in police stations who are in charge of criminal investigations. Thus, while in many countries the prosecution exercises power and authority over the investigation[65], the opposite has often effectively been the case in Zambia. Hierarchically junior police prosecutors may be reluctant to go against the wishes of a superior officer, so that decisions on whether or not to undertake a prosecution are not always objectively based on the strength of the case. This can affect the quality of both prosecution and investigation work. The absence of an objective check on police investigations has been observed to be a problem in countries far beyond Zambia. Supervision and support of police prosecutors has been too poor and difficult by the Director of Public Prosecutions resulting in cases that should not be prosecuted being prosecuted. Likewise, it is reported that where defence lawyers do appear before Subordinate Courts, police prosecutors fare poorly against them because of their lack of legal knowledge and courtroom skills (AHSI 2009). Police officers tend to see their core function as being investigation rather than prosecution of offences, and the ZPS has by and large not invested resources in prosecution. We are not aware of specific in-service training for police prosecutors.

The 2010 NPA Act was a package of changes to address these problems. It adopted long-standing recommendations to create an independent, one-roof prosecution service that separates the prosecution and investigation functions. Creating the one-roof prosecutorial system will demand significant resources which may prove to be a great challenge. Beyond its clear role in relation to appointments, the exact role and functions of the NPA board remain somewhat unclear. It also remains to be seen whether holders of the DPP office will succeed in leveraging the greater institutional independence to create a truly independent office that is credible in the eyes of Zambians in fearlessly upholding the rule of law and holding the powerful and influential to account. The NPA Act does not require that reasons be given for entering a *nolle* or indeed for deciding not to file an information in the first place. While this omission is regrettable, its absence as a requirement does not prevent the DPP from establishing it as a practice.

[65] This is also foreseen in some circumstances in Zambia. See CPC sec. 243.

5.2.5 Implications of the Plea Negotiations and Agreements Act of 2010[66]

Anecdotal information confirms that even prior to the adoption of the Plea Negotiations and Agreements Act in 2010, plea agreements have been informally used to conclude cases where there is strong evidence against an accused person and it has been possible to obtain guilty pleas. The Act provides (sec. 7) that a plea agreement that is brought before a court shall be in writing, contain certain information set out in the schedule to the Act and be signed by a public prosecutor, the accused person and the accused person's legal representative in each other's presence.

As noted earlier in this study, the Plea Agreements Act is explicitly premised on the availability of legal aid prior to discussions on pleas with the prosecution,[67] and provides that negotiation takes place with the accused's legal representative. Thus sec. 6(2) of the Act provides that plea negotiations shall be held by a public prosecutor with the accused person only through the accused person's legal representative. A major problem with the implementation of the Act is thus apparent, as most criminal defendants are without means, especially in the Subordinate Courts.

In order to be successful in reducing the caseload of the courts (also the High Court, as many of the cases will likely be referred to the High Court for sentencing or confirmation), there needs to be a significant expansion of legal assistance at the level of the Subordinate Courts. This is discussed in chapter 6.

5.3 Ancillary NPA functions and institutional resources

The main function of the NPA Board is in the appointment of professional staff and to play a role of overall supervision in relation to some other functions, including the witness management fund.

[66] Act No. 20 of 2010.
[67] Section 6 (2).

Table 5.3: Non-prosecution functions of NPA & DPP					
	Board	DPP	CSA	DCSA	Minister
Appointment of CSAs, DCSAs, SAs and other staff	X				
Appointment of Prosecutors under CPC (s.86)		X			
Develop, promote and enforce standards (Code of Conduct)		X	X	X	X
Promote integrity, status and public confidence		X			
Implement an effective prosecution mechanism for fair and equitable criminal justice		X			
Research for prosecution to contribute to establishment of rule of law, human rights & best practices		X			
Cooperate with justice agencies		X			
Supervision of NPA operations in province				X	
set the qualification for the appointment of prosecutors					
advise the Minister on all matters relating to the administration of criminal justice;					
Liaise with legal profession and institutions on common practices and co-operation on complaints in respect of NPA		X	X	X	
Liaise with AG re: extradition and mutual legal assistance in criminal matters					
Appointment of experts to assist DPP					
Management of Witness Management Fund		X			

Funding: The NPA Act provides the legal means for the NPA to manage its own funds and assets. Prior to this, responsibility for funding and physical and institutional location of the

office has continued to be within the MoJ.[68] Some consider that this has negatively affected the independence of the office (AHSI 2009). With autonomy comes responsibility, so that the focus of attention on the NPA will shift to internal integrity and transparency.

Staff: The second schedule to the NPA Act provides (sec. 2) for NPA staff to be employed by the Authority, rather than of the Ministry of Justice. This is also a step towards institutional independence. The power of appointment of Chief State Advocates, Deputy Chief State Advocates, State Advocates and other staff is expressly reserved to the NPA Board (sec. 9 (1). The DPP should also *(d)* set the qualification for the **appointment of prosecutors**, and *(h)* liaise with the Chief State Advocate, the Deputy Chief State Advocates, the prosecutors, the legal profession and legal institutions to foster common practices and to promote co-operation in handling complaints in respect of the Authority.

The study team did not receive comprehensive figures on staffing for the NPA / DPP's office. The following figures on staff are from 2008 and 2009 (Transparent Business, 2008, USAID 2009**).**

Table 5.3.a : Figures on NPA staffing

	Total Establishment	Total filled	Lusaka	Livingstone	Ndola	Kitwe	Kabwe
State Advocates	< 50[69]	N/A	20	N/A	N/A	N/A	N/A
Secretaries	N/A	N/A	6	N/A	N/A	N/A	N/A
Registry Officers	N/A	N/A	6	N/A	N/A	N/A	N/A
Other staff	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total	N/A	N/A	32	N/A	N/A	N/A	N/A

The system of rotation of DPP officers in areas without permanent High Courts is acknowledged to be deleterious to ensuring quality and completion of cases. Representatives of the DPP's office expressed the hope that increased resources to allow a greater number of State Advocates, as well as offices in more remote areas, would assist in solving this problem.

Other resources: It was not possible to get systematic and detailed information on inventory and resources. Four of the DPP offices responded that they had office vehicles. A total of 21 computers were tallied in the offices visited, and four offices responded that they had internet access. Six had operational telephones and two had fax machines. The offices of the DPP visited generally had access to legal materials (especially laws). Under 50% of them said that they had been provided with written guidelines for their work, however. That prosecutors

[68] Matibini, Access to Justice and the Rule of Law, p.13.
[69] See USAID 2009.

enjoy relatively good office and communications facilities should allow for a relatively high degree of decentralization and reporting.

5.4 Recommendations

In view of the changes that the NPA / DPP's office were undergoing during the period when this study was undertaken, detailed institutional recommendations are not made. It is important that government and development partners give momentum to the positive developments regarding prosecutorial reform.

Prosecutorial discretion: The DPP / NPA should ensure the completion of the work of developing a set of guidelines for all prosecutors on the use of prosecutorial discretion. The ambit of discretion of the various levels of the NPA, from ordinary prosecutors (former police prosecutors) to State Advocates, DCSAs, the CSA and the DPP, should be clearly set out in a document that is available for public scrutiny. Likewise, the guidelines or policy should set out a list (not necessarily exhaustive) of factors on which discretion may be based using the two-step categories of sufficiency of the evidence and public interest. The guidelines should inform decisions at all stages of the criminal justice process, including the use of the *nolle prosequi* power.

Regular and timely monitoring and evaluation of experience with delegation and / decentralizing of authority / prosecutorial discretion should be given support in cooperation programmes.

Transparency and accountability: From the A.G. to the DPP and throughout the NPA organization, there should be a clear policy that all instructions / directions on prosecution should be in writing and (to the extent that this is compatible with the protection of the legitimate interests and rights of all persons) subject to public scrutiny. Any prosecutor should be entitled to ask, without fear of any kind, to ask that directions regarding prosecution be put in writing and that reasons should be provided. The transparency that is necessary to restore and maintain public confidence in the prosecution must begin at the top. Issues relating to the exercise of prosecutorial discretion should be systematically analyzed at the CSA / DPP level so as to ensure a continuous loop of documentation to policy response and implementation.

Disclosure of evidence: In connection with taking over responsibility for prosecution of cases previously handled by the police, devise and implement a policy of systematic disclosure of evidence in cases before the Subordinate Courts, even if not strictly required by current law, in cooperation with the courts, LAZ and the LAB. Based on experience with this, actively work for law reform in this area.

Code of Conduct: The Code of Conduct for prosecutors should fully incorporate fair trial standards derived from the Constitution and international human rights standards binding on Zambia, including the obligation to disclose evidence to the defence in all courts. These standards should explicitly also cover practice in relation to plea negotiations and agreements. It should attempt to be fully in line with relevant recommendations and good practices in the area of Violence Against Women, and the protection of child perpetrators, victims and witnesses. The Code of Conduct should likewise ensure adherence to the fundamental principle of non-discrimination in the use of prosecutorial discretion.

Programmes of training and capacity building: for prosecutors should emphasise the above areas in their design and implementation, including the development of the prosecutors' manual.

Institutional cooperation issues: The DPP's office should continuously work to manage rotation of State Advocates so as to minimize harmful delays in disposing of cases. Part of the solution to this problem would be to cooperate with the High Court so as to develop the practice of improved trial and case management.

With the ZPS, the NPA should assist the police in developing good practices for identifying and expeditiously handling cases where a guilty plea is probable, and thus reducing the need for lengthy investigation in guilty plea cases.

The NPA should ensure effective cooperation with police, the LAB and defence counsel as to witness management. The witness management fund should benefit defence as well as prosecution witnesses.

The NPA should work closely with the police through the Access to Justice Programme and the CCCI to develop best practices in relation to management of cases and tracing of dockets.

The NPA should support, through its good offices, the introduction of legal aid at Subordinate Court level and in police stations (starting on a pilot basis). This is necessary in order for plea bargaining to work as intended in the new legislation.

6. The Legal Aid Board

Methodology:

Six ordinary LAB officials were interviewed in structured interviews (one each in Kitwe, Chipata, Lusaka, Mongu, Ndola and Solwezi), and a longer individual interview was held with the Director of the Legal Aid Board. In addition, it draws on interview material with other stakeholders concerning the provision of legal services and the knowledge of the team members. The text also draws on the 2008 Mapping Study and the 2010 Baseline Study carried out by the Paralegal Alliance Network (PAN), as well as other sources where noted.

6.1 Mandate, including services, providers and beneficiaries

The Legal Aid Board ((LAB) is established under the Legal Aid (Amendment) Act,[70] which came into being on 7th October, 2005. The core function of LAB is to provide legal aid to persons whose means are not adequate to engage a private legal practitioner to represent them in the Courts of Law. The FNDP MTR: underlines that there is need to strengthen the capacity of the State to extend Legal Aid to those that cannot afford to pay legal costs.

The Legal Aid Act defines the scope of legal aid provided by the LAB as (a) "the assistance of a practitioner including all such assistance as is usually given by a practitioner in the steps preliminary or incidental to any proceedings or in arriving at or giving effect to a compromise to avoid or bring to an end any proceedings"; and (b) representation in any court.[71]

This definition, within which the LAB is mandated to operate, is important in relation to the needs of Zambians for legal services and the LAB's role in meeting them, as well as its cooperation with others, especially lawyers, the LAZ and civil society organizations such as those represented by the PAN network. In this regard, three questions are important:

(i) Which legal services are included in the definition of legal aid used by the Board;

(ii) Who can provide those services;

(iii) Where (i.e. before what courts and bodies) the services can be provided.

6.1.1 Legal services included in the definition

Legal aid under the Act could include not only all assistance given preliminary or incidental to actual proceedings, but also assistance given out of court to avoid proceedings by arriving at a compromise or giving effect to any such compromise.

[70] Act No. 19 of 2005
[71] Section 3.1.of the Act.

However, the definition does not seem to include legal information, education, advice or assistance where there is no suggestion of a dispute. In practice, people often need legal services for many reasons not related to a current dispute. (Including information or advice on how to write a will, how to understand or negotiate a contract, mutual obligations in a customary or civil marriage, or how to understand land law are all examples.) Services of these kinds are especially important when the law is not written in the native language of most of the population, as is the case in Zambia. In fact, the need for services of this kind usually far outweighs the need for legal assistance in connection with an actual dispute, yet it is often not much reflected in government spending or policymaking.

Most of those interviewed accepted the need for a broad view of legal services. Of the six ordinary LAB staff interviewed, 3 felt that dissemination of legal information was among legal aid services, although the LAB is not currently engaged in providing it. Among providers of legal services in civil society, 20 of those interviewed considered legal representation to fall within the definition of legal aid, 22 considered that legal advice was included, and almost as many, 17, considered that dissemination of legal information and creation of awareness on human rights were a part of legal aid.

It is well-known that the LAB is suffering from resource constraints and difficulties in retaining legal staff in order to fulfil its core mandate. Thus, there may be many good reasons why it cannot currently take on the challenge of providing a wider range of legal services by itself. Nevertheless it is important for purposes of policy and strategy that the wider definition is taken into account. If the LAB – or any other government agency - is to play a role in relation to policy formation and implementation, it needs to have this wider view of services and providers and some ideas about how these needs are to be addressed. In fact this is required precisely because of the weaknesses of the LAB. Its own limited capacity compels it to reach out to other actors.

A wider range of criminal legal services: The 2008 Transparent Business report on automating case flows points out,[72] legal aid enters into a case only at a late stage in the case cycle – this is partly due to the **reactive** rather than **proactive** role currently played by legal aid. The model of service provision now is to wait for a request in a case from a court before proceeding. This is only one way of providing legal services in criminal justice. Other approaches could provide much needed legal assistance while also serving as a much needed filter in the criminal justice system.

At police stations: Legal assistance and advice could be provided at busy police stations at fixed times, whereby arrested persons are advised about their rights, assisted to contact sureties or to apply for police bond. 83% of police respondents to questions concerning legal aid agreed that provision of advice was part of their understanding of what legal aid is. Only 30% of police interviewed thought that all those liable to prison sentences had access to legal services. As high a figure as 97% of police interviewed were of the view that the assistance of a qualified paralegal would be useful to accused who do not have legal representation. Indeed, this is foreseen by the 2010 Plea Agreements Act, which provides that (s.19) legal aid may be granted to— any person who is detained at a police station or in a lock up, correctional

[72] See p. 35.

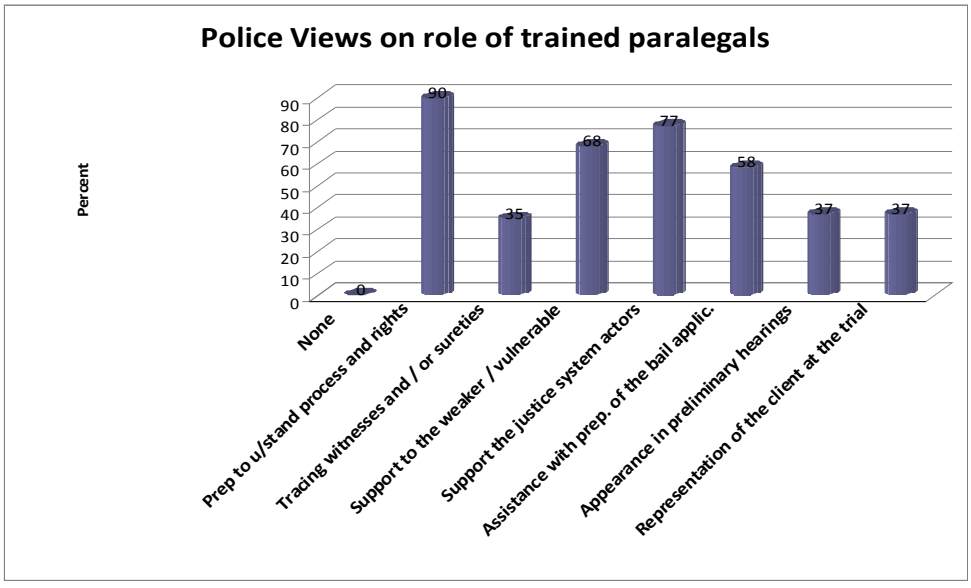
institution or other similar place; or an accused person in respect of the conduct of any plea negotiation under section four.

State advocates surveyed were likewise overwhelmingly positive about the contributions that could be made by properly qualified paralegals, but also by the provision of basic information and self-help, through brochures and posters. Almost all state advocates interviewed agreed that properly qualified paralegals could perform functions such as helping to prepare parties for court appearances, tracing witnesses and sureties and providing support to the justice system in a number of ways too numerous to specify.

In Subordinate Courts: Another example would be a "public defender" function at a busy Subordinate Court, where a LAB lawyer is present to advise on pleas and defend summary cases as they come up. Both of these kinds of service would be clearly within the definition above. This kind of service will be especially relevant in view of the requirements of the Plea Agreements Act of 2010, which provides in sec. 6. (2) that: "Plea negotiations shall be held by a public prosecutor with the accused person only through the accused person's legal representative."

Thus, the Plea Agreements Act is premised on the availability of legal aid, as most criminal defendants are without means (especially in the Subordinate Courts).

In Prisons: Many Zambian justice sector actors now have some familiarity with the kinds of work done by paralegals in prisons in other countries, including in neighbouring Malawi. The Zambian Prisons Service has indicated openness to having paralegals work in similar ways in Zambian prisons, and NGOs have already gained access for these kinds of programmes. These models are often not compatible with working on a traditional lawyer – client basis. The LAB should determine what its role should be in this regard and how it can support the work of other actors.



6.1.2 Providers of services according to the definition in the Act

The definition in the Act appears to be narrow in respect of who can be a provider of legal aid. The explicit reference to a practitioner seems to limit the mandate of the Board and the Legal Aid Fund that it administers to remunerating practitioners within the meaning of the Legal Practitioners Act.[73] Thus, Section 2 of the latter Act defines a legal practitioner as: "*a person who has been admitted to practice as an advocate under the provisions of this Act and whose name is duly entered on the Roll*". Likewise, Section 7C of the Act, dealing with the Legal Aid Fund, limits the use of the Fund to court representation, the services of practitioners, and expenses incurred in connection with provision of services by practitioners.

These provisions may be interpreted to limit the scope for the Legal Aid Board to engage with provision of those legal services that can be or are normally provided by actors other than practitioners (including NGOs, paralegals and students at university law clinics). If the LAB wishes to engage with these providers, an adjustment to these legislative provisions seems necessary. Without these changes, development partners who wish to assist in financing the development and provision of these kinds of service will have to look elsewhere. In this regard it can be noted that half of those interviewed at the Legal Aid Board thought that the legal framework did not adequately guide the relationships among all legal aid providers.

In this connection, it is interesting to note that the CPC takes account of the lack of lawyers to serve as prosecutors, and permits non-lawyers to fulfil this function. Section 86 of the CPC permits the DPP to appoint officers as public prosecutors. The CPC does not place qualification requirements on the appointment. Any person employed in the public service may be appointed as a public prosecutor. Similarly, 89 of the CPC provides that a magistrate may permit any person to conduct a prosecution. The section does not impose qualification requirements. The law does not give similar powers to the Director of the LAB, or otherwise make provision to fill the gap left by the small number of lawyers in the country. A similar point may be made regarding the large numbers of magistrates who do not possess degrees in law. If one sees the trial as a three-legged stool of prosecution, judge and defence, we see that the law ensures the presence of two of these legs, even in the absence of a sufficient number of lawyers. No such provision is made for the third.

6.1.3 Legal domains

As to legal domains, LAB is mandated to represent accused persons in both criminal and civil matters. The Act would seem to permit the LAB to provide assistance in cases involving administrative law as part of its powers to grant legal aid in civil cases under the Act. In practice, LAB staff interviewed were not aware of examples of this kind of case, so that the LAB has not yet had to contend with the potential sensitivities that could arise through a state agency being involved in actions against executive organs of the state.

6.1.4 Beneficiaries – vulnerable groups

The Legal Aid Act does not differentiate according to beneficiaries or target groups, beyond the focus on persons whose means are inadequate, referred to in numerous sections of the

[73] See Section 2 of the Act, defining "practitioner". See generally the discussion of this in the 2008 Study "Mapping of Legal Aid Service Providers in Zambia"

Act.[74] For this reason it was not possible to obtain information on, for example, the priority accorded to particularly vulnerable groups such as mentally handicapped persons facing criminal charges or on the issue of the continued detention of persons detained "during the President's pleasure" under sections 160 – 167 of the CPC. This is clearly a category of persons where the LAB, as well as the rest of the criminal justice system, needs to be especially vigilant.

Victims: The LAB has not assisted victims of GBV to a significant extent because of human resource constraints.

Minors: Figures from the 2008 HURID survey indicate that most minors do not benefit from legal representation in court. Most social welfare officers and prison officials estimated that less than half of juvenile remandees had access to legal services. Other reports state that up to 73 % of juveniles have never had legal representation.[75] 82% of user survey respondents for the present study said that it would be difficult for them to access legal services. They were far more likely to have encountered and used legal services from NGOs than from the LAB. Distance was the greatest single obstacle cited by respondents (over 60%), followed by cost (over 25%). Less than 20% of respondents knew of paralegals working in their area. Only 9% of respondents were aware of any legal information having been provided by justice agencies.

Recommendations on beneficiaries of legal services:

1. As part of the process of development of a national policy on legal aid and an LAB strategy, consideration must be given to how to meet the needs of vulnerable persons and groups, including minors and the mentally handicapped.

2. As part of a strategy to bring legal services to the people of Zambia, it is very important to recognize the role played by CSOs, and for effective cooperation to be established among the LAB, LAZ and CSOs, including those in the PAN network.

6.1.5 Forums where the LAB can provide services

The LAB may grant legal representation in the Subordinate Courts, the High Court and the Supreme Court. No legal representation is allowed in the Local Court as the Local Courts Act excludes legal representation in the court, [76] except in criminal cases under the laws, by laws and regulations which the Local Courts are permitted to administer. In reality, lawyers virtually never appear in Local Courts.

For criminal cases committed to the High Court, it is mandatory that legal aid be provided to persons who lack the means to pay for a lawyer, according to s. 9 of the Legal Aid Act. The law contains no such guarantee in relation to cases in the Subordinate Courts. In contrast to relevant international standards[77], which require legal assistance "where the interests of

[74] See preamble of the Act, as well as *inter alia* s.8, s.12.
[75] See Zambia Prison Report, Arasa, PRISCA and HRW 2010
[76] Section 15 of The Local Courts Act Cap 29 of the Laws of Zambia
[77] ICCPR Art. 14 (3) (d), African Commission on Human and Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, § H 1-2, Doc/ OS (XXX) 247 (2001).

justice so require", and those found in many constitutions[78], the 1996 Zambian constitution does not provide much guidance on when legal aid should be provided, instead referring the question back to ordinary legislation.[79] The Constitution Review Commission attempted to remedy this omission in its 2010 draft constitution. Article 39 (1) (h) of the draft provides for the provision of legal assistance at public expense at "*if substantial injustice would otherwise result*"

The authors fully support the need to set down clear constitutional standards on this important question and endorse the wording proposed in the draft constitution of 2010.

6.2 Application of the mandate - analysis of data, criminal cases

Due to inadequate levels of professional staffing, the LAB limits the number of criminal cases it takes up. A consequence of this has been a prioritizing of the representation of accused persons in criminal matters in the High Court and the Supreme Court. The cases mostly taken up are capital offences such as treason, aggravated robbery and murder, as well as theft, death by dangerous driving and offences against public morality such as defilement, rape and indecent assault. An examination of the returns from LAB offices shows that close to 100% of requests for legal aid in High Court cases are complied with[80] office. It is far more rare for criminal cases before the Subordinate Courts to be attended to by the LAB.

In the following tables, an attempt is made to provide overall annual figures concerning cases taken up by the LAB for the past four years. These figures are provided with certain reservations, as errors and omissions were found in some of the statistics provided to the team, and corrections were made based to some extent on supposition.

[78] Constitution of the Republic of South Africa, Art. 35 (2) (c), Constitution of the Republic of Malawi, Art. 42 (1) (c).
[79] Article 18 (2) (d) of the Constitution.
[80] There are occasional exceptions. The figures from Kitwe for 2010 show that 43 out of 51 requests for legal aid were granted, meaning that legal representation seems to have been refused in 8 cases by this office. The statistics do not indicate reasons.

Table 6.2. a LAB, Criminal Cases, 2007 – 2010

	Applications								Cases											
	Received				Granted				Completed				Withdrawn				Pending			
Court / Year	07[81]	08	09	10	07	08	09	10	07	08	09	10	07	08	09	10	07	08	09	10
Supreme Court	143	198	91	100	143	198	91	100	121	102	86	44	0	1	0	4	22	95	5	54
High Court	1024	1543	1201	1510	1024	1536	1190	1509	562	539	929	1017	14	21	29	15	448	937	224	444
Subordinate Court	98	153	235	249	93	140	221	249	9	31	63	73	1	5	9	14	83	166	149	170
Total	1265	1894	1527	1859	1260	1874	1502	1858	692	672	1078	1134	15	27	38	33	553	1198	378	668

[81] The figures received by the team for 2007 were not divided into separate sets for civil and criminal cases. All cases for this year are recorded in the table for criminal cases.

Analysis of the figures for criminal cases

Table 6.2. b: Where criminal legal aid is granted								
	2007		2008		2009		2010	
	Granted	%	No. Granted	%			No. Granted	
Supreme Court	143	11,3	198	10,6	N/A	N/A	100	5,4
High Court	1024	81,3	1536	82,0	N/A	N/A	1509	81,2
Subordinate Court	93	7,4	140	7,5	N/A	N/A	249	13,4
Total	1260		1874		1078		1858	

The figures show that it is still overwhelmingly in the High Court that legal aid is granted by the LAB.

Subordinate Courts: While there is a positive upward trend in granted requests at Subordinate Court level (from about 7.75% in 2007 up to approximately 13.4% in 2009), this is from a very low base. What is also striking is the low figure for *requests* for legal aid emanating from the Subordinate Courts. The figures show that close to 100% of requests for legal aid in criminal cases are granted, irrespective of which court they come from. Thus the LAB does not turn down many requests. Rather, its caseload is limited by the relatively low number of requests coming from Subordinate Courts.

It suggests that beyond the issue of the resources of the LAB, there is an issue of defendants at Subordinate Courts not applying. While no figures are available to explain why this may be so, interviews indicated that Magistrates are (i) either not aware of the possibility of defendants to apply for legal aid, (ii) aware of the legal avenue, but also that the chance of Legal Aid being granted are small (iii) in some cases perhaps not overly interested in a procedure that will make the disposition of the case more complicated. The lack of awareness of legal aid at Subordinate Court level is reflected in the (otherwise very useful) process descriptions in the 2008 case flow management situation analysis.[82] These don't mention anything about responsibility for informing defendants of the possibility of applying for legal aid. In practice, it is reportedly rare for legal aid to be granted by way of the formal issue of a certificate by the Courts, and even more seldom that Subordinate Courts would do so. It is far more usual for the LAB to take up the case of its own volition after receiving a request. Where certificates are issued, they are often given to the family member or other person assisting an accused, and then taken to the LAB:

[82] 2008 Transparent Business. Op cit.

If the legal system continues to develop in the direction of greater access to justice in accordance with the aims of the FNDP and SNDP, it is to be expected that more defendants in Subordinate Courts will learn about their rights to request legal aid and start doing so, more Magistrates, paralegals, NGOs and fellow defendants will start to advise defendants of these rights or, in the case of Magistrates, issue legal aid certificates.

In this case, the LAB will need to adopt clear criteria for when to accept cases and when not to, and to ensure consistency in how these criteria are applied. It is clear that authority to apply these criteria will have to be placed at provincial level, as any requirement to refer to the authority of HQ in Lusaka will constitute an unnecessary and effectively impossible bottleneck. Managers at provincial offices will need to ensure that these criteria are applied and to be able to stand up to requests for transparency in this regard.

Recommendation:

1. At the Subordinate Courts, defendants should be made aware of the possibility to apply for legal aid. This can be done through a variety of means, including brochures and posters, systematic provision of information by Magistrates or other court officials, or, where relevant, access by paralegals.

Recommendation:

2. Systematic information in Subordinate Courts is likely to lead to more requests than the LAB can handle. The LAB should, in consultation with the judiciary, develop criteria for when legal aid should be granted to defendants at Subordinate Courts. The criteria should be based upon the “interests of justice” guideline and its elements of (i) seriousness of the case (i.e. length of sentence) (ii) complexity of the case and (iii) the vulnerability of the accused, as well as on the resource estimates of the LAB and realistic assessments of the numbers of cases that can be taken on. Chapter 10 (section 10.5) contains recommendations on an eventual aim of extending legal aid to all cases carrying a penalty of more than five, and later three, years in prison.

Table 6.2. c: Completion of criminal cases[83]										
Court / Year	2007			2008			2009	2010		
	Granted	completed	% completion	No. Granted	No. completed	% completion		No. Granted	No. completed	% completion
Supreme Court	143	121	85	198	102	52		100	44	44
High Court	1024	562	55	1536	539	35		1509	1017	67
Subordinate Court	93	9	10	140	31	22		249	73	29
Total	1260	692	55	1874	672	36	1078	1858	1134	61

As seen in the above, after a low in 2008, completion rates improved in 2010, especially in the High Court. It is striking that completion rates of cases for the LAB are consistently lowest in the Subordinate Courts. The authors were not able to obtain figures for completion of Subordinate Court cases where there is no legal representation, so it was not possible to see whether there is a significantly slower rate of disposition when legal representation is provided by the LAB. Nevertheless, it is possible that this is the case. As pointed out (Kahn-Fogel, 2011), this may reflect factors such as the greater complexity of case management when another agency is involved, the seriousness of the cases taken up by the LAB and the burden on the latter. The practice of so-called "trial by ambush" in the Subordinate Court, whereby prosecution evidence is not disclosed to the defence in advance of the trial hearing, also requires the defence to seek adjournments. Defence counsel also note that working with non-jurist magistrates can also complicate matters. Thus, a slow rate of disposition does not necessarily reflect badly on the LAB itself. Nevertheless, it is a severe failure of the system if defendants may be tempted to refuse the possibility of legal aid because it will delay their case. This is also relevant in relation to the requirements of the new legislation on plea negotiations. The procedure requires legal representation and a written agreement. While this is necessary from the point of view of protecting the rights of the accused it means that the legislation may be of limited use without sufficient legal aid resources and effective procedures.

With low professional staff levels, LAB is faced with an ever growing case load, compounded by a slow rate of disposal of cases in the courts. The view of the LAB Director [84], was that a lawyer

[83] Final report will contain figures for 2009 also.

should not have more than six grave offence cases in a year for quality, effective representation to be achieved. In fact, LAB lawyers have more than one hundred cases each per year including grave cases.[85] The high case burden means that LAB lawyers often cannot meet and interview their clients before trial.

6.2.1 Civil cases

Sec. 11 of the Act provides for applications in civil cases to the LAB Director (or to a legal aid committee). Sec. 12 sets out eligibility criteria. The Director may grant legal aid to any applicant who in his opinion "*is in need of or would benefit from the services of a practitioner* … and (b) *has insufficient means*". Subsection (2) imposes two additional provisos: the Director should be satisfied, "that (a) an applicant has reasonable grounds for taking, defending or being a party to these proceedings"; and (b) "it is in the interests of justice that the applicant should be represented in these proceedings". This mandates the LAB to undertake an assessment of the strength and importance of the applicant's case. Assessments of this kind require resources in the form of work time by qualified staff who would need a good knowledge of case law, so that the availability of legal materials (law reports and academic texts) would allow the LAB to make assessments that stand up to scrutiny. Interviewees said that in practice, the criterion is whether the applicant is considered a member of a vulnerable group. This determination is currently made by the particular branch office of the LAB. Tables 6.2.1 / 6.2.1.a show the rates at which requests for civil legal aid are granted by the LAB.

Table 6.2.1: LAB Approval of civil legal aid requests, 2008 - 2010

	2008			2010		
Court / Year	Received	Granted	% granted	Received	Granted	% granted
Supreme Court	25	23	92	3	3	100
High Court	270	184	68	323	315	98
Sub. Court	163	142	87	271	271	100
IRC	17	14	82	1	1	100
Lands Tribunal	4	4	100	0	0	0
Total	479	367	77	598	590	99

[84] Mr. Adrian Nkausu, February 2010,
[85] Data from survey rsponses of LAB personnel.

Table 6.2.1 a LAB, Civil Cases

2007 – 2010

	Applications								Cases											
	Received				Granted				Completed				Withdrawn				Pending			
Court / Year	07[86]	08	09	10	07	08	09	10	07	08	09	10	07	08	09	10	07	08	09	10
Supreme Court		25	23	3		23		3		10		1		0		1		13		3
High Court		270	113	323		184	102	315		28	48	288		3	9	28		175	36	271
Sub. Court		163	165	271		142	137	271		23	28	85		8	18	13		111	93	193
IRC		17	12	1		14	10	1		5	5			3	0			7	5	1
Lands Tribunal		4	0	0		4	0	0		0	0			0	0			4	0	0
Total		479	313	598		367	445	590		66	81	374		14	27	42		310	134	468

[86] As previously mentioned, the team could not obtain separate figures for civil cases for 2007.

Findings: The figures above appear to show that most requests for civil legal aid are accepted fewer denied. Thus, eligibility criteria do not seem to be rigorously applied at present. The majority of the civil cases reportedly related to land disputes (Kahn-Fogel, 2011). This raises questions of priorities. The exclusion of lawyers from the Local Courts means that the LAB and Legal Aid Fund is excluded from providing services to the vast majority of Zambians who do not or cannot access courts superior to the Local Courts, even if it had the personnel resources to do so. Few indigent Zambians would ever commence civil actions in the Subordinate Court or High Court because of the costs involved.[87] **Thus, it is probably fair to say that the civil legal aid given by the LAB does not go to those whose need is greatest.** IN response to this, LAB staff argued that civil legal aid was often granted where there was a disparity in wealth and power between two disputing parties, (including those involving widows and orphans), and where there is a risk of a substantive injustice.

Relatively well-to-do property owners sometimes apply for legal aid. Allegations were heard that LAB lawyers sometimes act as private lawyers, accepting personal payments for representation. While no facts were presented to substantiate such rumours, their circulation should be a matter of concern to the LAB. Transparency and fairness in the administration of this public service is important for the credibility of the LAB. Two-tier justice where relatively well to do, though occasionally vulnerable people can access publicly funded legal aid while the poor, whose cases are (at best) heard in the Local Courts cannot should be avoided. While the "power disparity" argument carries some weight as a justification for providing legal aid to vulnerable persons in High Court civil cases, and there may be arguments in favour of a simplified legal procedure in the Local Courts, other kinds of legal services could be provided to the poor that would arguably be as beneficial to them as representation. Civil legal aid that demands significant LAB time and resources should be subject to a means test and perhaps a requirement of some reimbursement of costs. The willingness of the LAB to provide legal aid in civil cases could be a spur to NGOs to avail of this opportunity by aiding deserving parties to make applications to the LAB. These figures also seem to show an upward trend in provision of civil legal aid at Subordinate Court level. It is interesting that the LAB seems more willing or geared to engage with the Subordinate Courts in civil than in criminal matters.

Table 6.2.1.b Where civil legal aid is provided

	2008		2009[88]		2010	
	No.	%	No.	%	No.	%
High Court	68	43,9			315	53,8
Sub. Court	87	56,1			271	46,2
Total	155				586	

[87] See infra, for information on court fees in the various courts.
[88] Figures were not obtainable for 2009.

6.2.2 The balance between civil and criminal cases

Table 6.2.2: LAB: Balance between civil and criminal cases

	Requests Received				Granted			
Year	07	08	09	10	07	08	09	10
Civil		479	313	598		367	445	590
Criminal	1265	1894	1527	1859	1260	1874	1502	1858
Total cases		2373	1840	2457		2241	1947	2448
% Civil		20,2	17,0	24,3		16,4	22,9	24,1
% Criminal		79,8	83,0	75,7		83,6	77,1	75,9

As seen in the above, the percentage of criminal cases being taken on by the Board has diminished to about three quarters of the total caseload. Especially from 2009 – 2010, the increased civil caseload may be due to the judicare agreement with LAZ whereby privately practicing lawyers are paid to take criminal cases in the High Court. Given the scarcity of the "public good" of state-funded legal representation, and the many competing and legitimate needs (for example, of juvenile criminal defendants, defendants in the Subordinate Courts, legal representation of victims of crime, pursuing cases where important matters of principle are involved through strategic litigation, etc) it is important that decisions on allocation of this resource are made through explicit policy choices. There should be transparency and consultation both at the policy level and the operational one.

The mix between service provision by the LAB and by privately practicing lawyers can be productive and creative. It is not necessarily the best division of work that the LAB takes on the entire civil caseload, leaving only High Court criminal work to the LAZ lawyers. For many reasons, it may be difficult for LAB staff, as public servants, to pursue some civil cases zealously. The same is particularly true for civil or administrative claims against state agencies. One possibility would be to use the "judicare" avenue, where private lawyers pursue cases, to facilitate strategic litigation on matters of public interest, or to pursue class actions in civil cases. This could be done in cooperation with NGOs that have a particular expertise in some areas, such as family law, land, environmental pollution etc. There might also be gains in terms of relatively junior lawyers from the LAB working together with experienced private counsel to gain experience. In the event that the NCC draft constitution of 2010 is adopted more or less according to the final draft as issued, Article 306 of the draft is relevant. This article explicitly provides for the granting of legal aid for the purpose of enforcing respect for the constitution, including constitutional rights.

Recommendations:

There is a need for clear and express policy choices for prioritisation of LAB resources, and operational criteria for decisions in individual cases.

The partnership with LAZ should be developed through in-depth discussions regarding the division of work between the two. Cooperation with CSO partners should also be explored. One possible aspect of cooperation could include applications by CSOs for LAB financed legal aid in cases of principled importance or that might benefit a group or class of peope. A special mechanism could be devised for this purpose.

6.3 Structural issues: Legal Aid Committees

Section 7 of the Legal Aid Act[89] provides for the establishment of Legal Aid Committees at district level to perform legal aid functions in relation to civil causes and matters. Applications can be made to a committee (Section 11, Section 14 for appeals), which would make a recommendation to the LAB Director. Applications for legal aid must be in writing and contain particulars (GeneralLegal Aid Regulations, 1967[90] Section 8.) Members of legal aid committees, appointed by the Minister and (if not public employees) be entitled to an allowance. The district secretary should be secretary to the district legal aid committee, which should include no more than six other district residents. The Regulations foresee that some of them should come from outside the public service.

Members of the committee should help applicants as necessary to complete a prescribed application form, and state in writing whether they have good reason to believe the applicants' statements. Applications made to members of the committee would be forwarded to the Secretary, who should forward them to the LAB Director, with a positive or negative recommendation, and, if negative, the reasons why. The secretary has discretion whether to consult with any one or more members of the committee for this purpose, but is not obliged to do so.[91] Applications for legal aid may bypass the Committees and be made directly to the LAB Director, though the Director may refer the application to an appropriate legal aid committee for advice or information. Thus the Committees should act as a channel of access to the Board as well as a filter in relation to applications, though the main power in this respect remains with the district secretary.

In practice, no such committees are in existence. The consultancy team was unable to determine when (if ever) they last existed and operated in the country, or if this mechanism has been a dead letter ever since its adoption in 1967. In any case, they have not operated for quite some considerable time. A relevant question is whether it would be worthwhile to revive them in the form set out in the legislation. Doing so would likely require a process to (a) provided guidance to the district secretary in all 72 districts on the functions required by sections 5 – 9 of the Legal Aid Regulations, (b) make available a form fulfilling the requirements of s. 8 of the Legal Aid Regulations, (c) recruit and appointing members of the District Legal Aid Committee, (d) obtain funding to remunerate members of the Committees who are not public servants, (e) ensure personnel and a system for the transmission and processing of requests

[89] Cap 34 of the Laws of Zambia

[90] Statutory Instrument no. 264. For the information in the following paragraphs, please refer to sections 5 and 6 of the regulations.

[91]

(→ district secretary, processing by the secretary, → Board, processing by the Board, → replies by the Board to the district level, → the applicant), (f) devise an effective system for the appointment and remuneration of counsel where applications are granted, and (g) make sufficient personnel and funds available of to make the system meaningful.

This would require making an estimate of approximately how much resources (personnel time, necessary equipment and administrative resources and funds) out of the LAB budget (including the Legal Aid Fund) are to be applied to civil legal aid per budgetary year and how many grants of representation in the Subordinate Courts there are likely to be. It would also require adopting criteria for which cases should be eligible. These criteria might involve factors relating to type of case; target groups and vulnerability (including minors); prioritisation according to the different provinces and districts of Zambia, to ensure a relatively even distribution, and prioritisation among the levels of the court system, and especially, how many cases are likely to be granted representation and Subordinate Court level. The arguments in favour of reviving District Legal Aid Committees could be that the legislation and regulations already exist and the committees could provide a channel and a filter for applications for civil legal aid to the LAB Director. This could contribute to increasing the attention given to civil cases by the LAB. The District Legal Aid Committees could provide a forum in which attention is given to issues of access to justice at district level.

Arguments against attempting to revive District Legal Aid Committees are that the Committees would only be relevant in relation to civil matters before the Subordinate Courts. The LAB is currently devoting about 25% of its resources to civil cases, and especially not in the Subordinate Courts. It is pointless to revive a mechanism for applications for legal aid in civil cases unless resources are devoted to providing assistance. As the Committees only have authority to make recommendations, and most of that authority is vested in the District Secretary, members of the Committees apart from the District Secretary would have very little authority. The real decision-making power remains far away with the Director in Lusaka, who has no direct knowledge of the case and of local circumstances. The role of the district secretary as the sole person authorised to make recommendations (under the existing regulations) and as a representative of the executive does not sit well with the independence of the Legal Aid Board. Moreover, the system of transmission of requests and centralized decision-making is bureaucratic and inefficient and was geared to a country with a smaller population a much lower burden on the courts, the non-existence of provincial offices of the LAB and the non-existence of modern information technology. An up to date system would include the possibility of electronic applications that are transmitted immediately, as well as for more decentralized decision-making. At present, the LAB is not geared to the electronic transmission of applications, however. Lastly, civil society organizations and practicing lawyers can more easily transmit applications for civil legal aid directly to the LAB in Lusaka without going through a Legal Aid Committee.

Recommendations

Instead of reviving District Legal Aid Committees in the form prescribed in the 1967 regulations, we recommend that: Priorities should be set at national level on the funds and personnel resources to be devoted to civil legal aid and on the kinds of case, target group and courts to be prioritised. Consideration should be given to the handling of cases of legal principle that have the possibility of wide impact. Within this overall budgetary and policy framework, a set of guidelines should be produced at national level to guide decision-making on eligibility in particular cases. Within the guidelines, decisions on eligibility should be taken

by the provincial office of the LAB. These are closer at hand to the district where the request is coming from.

If the LAB at national level has sufficient resources and allocates sufficient sums and personnel to civil cases at Subordinate Court level, a mechanism should be worked out in consultation with the judiciary (High Court and Subordinate Court) and legal aid providers for applications to be made, transmitted and processed. It remains to be seen whether the executive (District Secretary) or the judiciary is the best channel for communicating applications. The LAB at national level should promote the application of good practices developed in one province in other provinces.

Developments in this regard should take place within the framework of any national policy on legal aid that is developed. There is merit in the idea of some organ at district level for discussing access to justice in the district. The PAN NGO network has made some efforts to promote cooperation among its members, at provincial as well as national level. A structure of this kind could complement the CCCI structure at provincial level and promote referrals of cases, pro bono service provision, cooperation among justice agencies and various initiatives designed to enhance access to justice. This could be a more up-to-date version of the district committees in the Act.

6.4 Resources – human, material, intellectual and budgetary

6.4.1 Personnel

At the time of the field studies, LAB had at least one resident lawyer at each provincial centre although the ideal number of lawyers per province excluding Lusaka, Kitwe and Ndola should be three. Our estimate is that effective representation of indigents at Lusaka LAB requires at least eight lawyers, at Ndola and Kitwe five lawyers.

The labour turnover of lawyers in LAB is very high – in 2009 at least 40%. This needs to be addressed for stability in case management to be maintained. Survey respondents at the LAB consistently identified lack of personnel as a major constraint on their effectiveness. Government measures addressed to deal with the situation such as the provision of the Legal Aid Fund are rather temporary in nature. They do not seem to provide long term solutions and are very costly. With budgetary allocations for the Legal Aid Fund not being guaranteed in terms of yearly increases, LAB must devise ways of dealing with the increased case load.

Another important issue is the gender balance of LAB staff. Of the present staff countrywide, female lawyers accounted for less than 10% of lawyers as at 31st December 2009. While most criminal defendants are male, the availability of women lawyers is likely to be very important when it comes to providing various forms of legal assistance to victims of sexual violence. Achieving a gender balance is also important in its own right, and a greater number of female employees is likely to lead to greater sensitivity to women's legal needs, also in civil cases. In 2009, the AHSI report noted that the LAB did not recruit or discipline its own staff or determine their conditions of service. This has since changed, according to interviews conducted, meaning that the LAB now has the freedom to shape its personnel profile.

The availability of Legal resource materials for use in law research leave much to be desired. Survey results had shown that LAB was facing a serious shortage of legal books, laws, law

reports and other reference materials to be used by lawyers. This trend is not only at Lusaka but in all offices countrywide. This situation poses a lot of challenges on the lawyers as the presence of a good and updated library is not an extra option for a lawyer. Most LAB staff interviewed had not received any in-service training since starting to work for the Board.

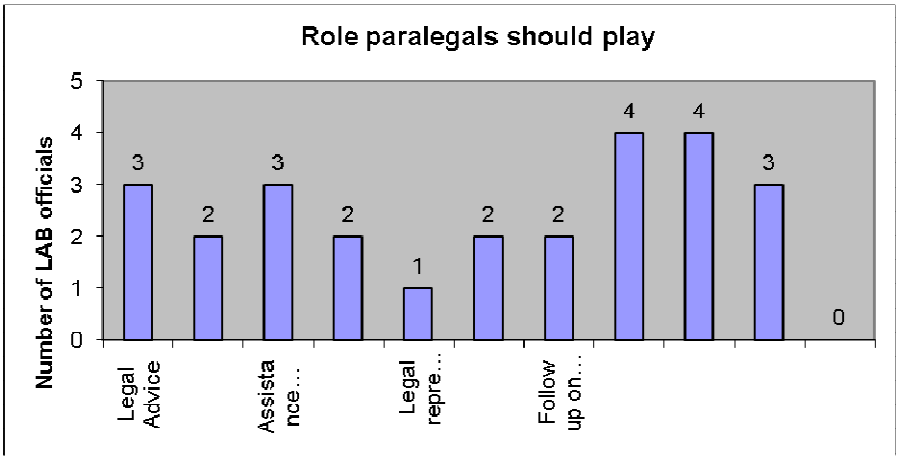
Office facilities: some respondents at the LAB mentioned poor office facilities as a hindrance to their work. Other hindrances were a lack of transport and communication facilities to permit contacting families and witnesses.

The 2009 Capacity Assessment of the Access to Justice Institutions[92] noted the presence of a "functioning financial administration establishment" at the LAB, in the form of a management accountant and two assistants, as well as the presence of an internal auditor. The comments made in the assessment report on financial and procurement procedures are noted below under policies.

6.5 Legal assistants and paralegals

It is very clear that the challenges that LAB is facing today (2010) will not be overcome in the next 5 to 10 years. This is because a lot of resources are required coupled with serious capacity building in all sectors of access to justice institutions. However stop gap measures may be taken which may improve access to justice for the vulnerable especially women and children. The use of paralegals is one such measure. Ways and means must be explored how paralegals may fill in the gap that LAB is not able to deal with presently. For example, the presence of paralegals at Police Stations and Prisons to deal with certain aspects of procedural matters may enhance access to justice. Issues of police bond and bail applications need not be matters strictly for advocates to deal with; paralegals may handle these matters. What is needed is to be proactive in the area of providing access to justice for all and not sticking to old traditions that are becoming costly to manage.

Two thirds of LAB staff agreed that the LAB should employ paralegals (as noted, the LAB already can and does employ legal assistants). In the surveys, LAB personnel were questioned about the roles that could be played by suitably qualified paralegals. It remains to be discussed and settled what a suitable level of qualification would be for the various roles that could be played.



[92] Munich Advisors Group, sponsored by GTZ (GTI), October 2009, pp. 5,

Reference is made elsewhere to the broad acceptance of the idea of suitably qualified paralegals playing an enhanced role in the Zambian criminal justice system by a variety of justice system actors. The functions that can be fulfilled by students and non-practitioner law graduates (ZIALE students, and legal assistants under the act should be made clear. Legal assistants have limited rights of audience under Section 5 of the Act.

6.6 Policies, strategies and planning

At present (2010) LAB has no national policy framework to guide the provision of legal aid services despite the existence of the enabling statute. This has caused a great challenge in the administration of legal aid services by all players. The absence of a national policy has also led to a proliferation of a number of LASPs which are not regulated in their conduct and service provision. However LAB has developed a Strategic Plan to provide guidance on the achievement of the core values for the existence of the institution.

The 2009 Capacity Assessment noted the lack of developed policies, procedures or a manual for financial management at the Board. At the time, the LAB was suffering from the suspension of key personnel subsequent to allegations of fraud in connection with procurement. While an assessment of financial management capacity is outside the scope of the present analysis, a trustworthy set of rules, procedures and officers is a necessary prerequisite to any more ambitious programmatic approaches by the LAB.

The response to this problem up to now has been the use of the Legal Aid Fund, through an arrangement with the LAZ, to contract to privately practicing lawyers to take on LAB cases for a flat fee of 4.5 million kwacha per case. In addition to this, LAB has partnered with the Law Association of Zambia (LAZ) under a pro bono programme which begun in mid 2010 wherein LAZ members are handling criminal sessions on behalf of LAB to help clear the backlog of cases. This programme is at national level. Its impact is yet to be assessed.

While putting the relationship with LAZ on a better footing is a useful step, this needs to be supplemented by discussion and planning on how the LAB can usefully work with other providers of legal services. 50% of respondents at the LAB thought that the current law did not adequately guide the work of and relationships among all kinds of legal service providers. LAB personnel and other justice actors recognized the excellent work being done by CSOs in providing a lifeline of free legal services to poor people. At the same time, they pointed to the activities of unregulated and sometimes fraudulent actors giving themselves the title of lawyers, paralegals, or human rights officers, and taking money from the public under false pretences.

6.5.1 Analysis

Although the Legal Aid (Amendment) Act,[93] read together with the principal Act, (the Legal Aid Act[94]) provide for the representation of the indigent in the courts of law, section 15 of the Local Courts Act[95] prohibits legal representation of the parties involved in civil litigation. Legal representation is permitted where the LC is applying by-laws and regulations under the Local Government Act or any other written law that the LC is authorised to apply. Under section 12

[93] Act No. 19 of 2005
[94] Cap 34 of the Laws of Zambia
[95] Cap 29 of the Laws of Zambia

of the Local Courts Act, the Local Court has jurisdiction to administer in addition to the African Customary Law, provisions of all by laws and regulations issued under the Local Government Act and the provisions of any written law which the Local Court is empowered to administer such as the Intestate Succession Act.[96] We observe that with the jurisdiction of the Local Courts on given provisions of the written law, it is inevitable that legal representation to that extent of the administration of the written law may be granted. Regardless of the legal position, legal practitioners are unavailable in practice.

The greatest challenge that LAB currently faces is limited professional staff (lawyers) to represent the indigent in criminal matters. The survey showed a serious dearth in the area of legal representation in rural, peri-urban and urban areas. This lack of representation begins from the time a person is apprehended/arrested[97] right through to the conclusion of the case in the courts of law. One of the effects of lack of legal representation at the various stages of the criminal justice system is the high remandee/inmate population which is very costly on the part of the Government to manage.

Coupled with the limited staffing levels, LAB is only present in provincial centres (including Kitwe) countrywide. This translates to 10 districts out of 73 districts in the country. A number of respondents regarding this distribution of offices stated that it was very expensive to seek legal representation from LAB as they had to cover long distances to reach the offices. The situation was worse for people in rural areas. For example people in Lufwanyama rural (Copperbelt province) have to cover not less than 70km to the nearest LAB office in Kitwe.

6.6 Perceptions

According to the interviews conducted with the Zambia Police Service, most of the inmates in police custody if not all, have no access to legal aid services generally because firstly, these services are not available at police stations and posts. Secondly, there is a serious shortage of LAB lawyers and non existing offices for LAB in most parts of the country. It was however pointed out that Legal Resources Foundation visits some rural parts of the country for example Senanga where their services are appreciated. This was also echoed by the judiciary who conceded that due to this shortfall in lawyers at LAB, a number of court cases take long to be concluded where it is mandatory for the State to provide legal aid services. Delayed conclusion of cases obviously leads to a backlog of cases and increases the remandee / inmate population in prisons.

The research findings from the Office of the District Commissioner revealed that legal aid service provision at district level is hampered due to lack of legal aid clinics, illiteracy, lack of public sensitisation programmes, inadequate funding from Government to support the scheme. Among those that are aware of the services, very few of them can afford to pay the required minimum contribution towards legal representation.

6.6.1 Users' Perceptions

Many users of legal aid services are of the view that the LAB service favours those who have money and is not targeted at the indigent. Some LAB staff interviewed on this themselves

[96] Cap 59 of the Laws of Zambia

[97] See chapter 10, section 10.4.2 for discussion and recommendations on arrest and the legally unfounded distinctions that are sometimes attempted between "apprehension" and arrest.

pointed out that their clients are not always confined to the poor and indigent, though in principle, a means test is applied. Those in prisons observed that except when the High Court is sitting, LAB lawyers are not seen at prisons and when they come they only meet with those scheduled to appear in court. The worst scenario for inmates appearing before courts was that prisons located outside the provincial centres are not visited by LAB resulting in their denial to seek legal advice and subsequent representation. However, there was an acknowledgement by some inmates that there is a well coordinated process for accessing legal aid services for those seeking appeal against convictions of the lower courts as prison officials make arrangement for inmates to meet LAB lawyers. This facility only exists in towns were LAB has established permanent offices.

Sections of communities visited country wide expressed different views on the existence of LAB. Some acknowledged the presence of LAB whilst others within the same towns expressed ignorance of the existence of LAB. Among the towns visited respondents from these towns, Mkushi, Solwezi, Mwinilunga, Samfya, and Lufwanyama stated that no legal aid service providers operated in their areas resulting in those in need of the services to go to provincial centres to get legal assistance in some cases covering very long distances.

The very fact that the legal aid services were perceived to be free, respondents had reservations as to what extent they are free. Firstly indigents were made to pay K20,000.00 as consultation fee and then K160,000.00 as legal aid contribution fee. In addition to these two payments indigents were made to pay filing fees at court. It was argued that at the end of the case, one would pay over K2,000,000.00! All survey respondents at the LAB confirmed that fees were asked of clients.

6.7 Towards the development of a National Legal Aid Policy

Recently, several countries in Africa and beyond have begun to develop national policies on legal aid.[98] A policy can be forward looking and set out national aims and ambitions even if current resource levels do not fully match the aims. A legal aid police would recognize)i) the diverse needs for legal services, that a variety of legal service providers have roles to play in providing these services, (i) that all justice institutions (even those whose primary purpose is not to provide legal aid) have a contribution to make in making legal information available to the public in appropriate forms (iii) that even where the state does not currently have the means and resources to provide legal services itself, that it can facilitate the provision of these services by creating an enabling policy environment / framework. It can be the focus for achieving a consensus among institutional stakeholders, such as the various justice agencies, as well as the LAB, LAZ, Civil Society Organizations of all kinds and the general public.

We recommend that Zambia embark on the process of developing a national legal aid policy, followed by a strategic plan for its implementation. The policy on legal aid can address a number of relevant issues, including the following:

- Forms of official recognition of different kinds of legal services, including legal information and education, legal advice and assistance (including mediation) and legal representation before courts and tribunals.

[98] Kenya, Uganda, and Rwanda are currently in the process of developing policies on legal aid. Malawi and Sierra Leone have recently adopted new legislation on legal aid.

- The policy should endeavour to address the roles and responsibilities of different legal service providers, including ethical and conduct issues;

- Different kinds of paralegals: qualifications, regulation, recognition and services provided (see the table below for a framework for this process);

- Cooperation among legal aid providers (LAB, LAZ, CSOs (for example, as represented in the PAN network)

- Process of developing a national legal aid policy.

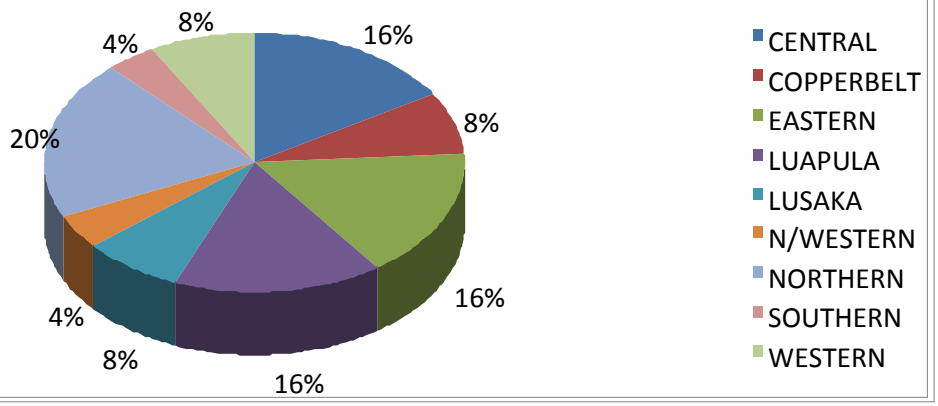
At the validation workshop held at Fringilla Lodge in June 2011 the Danish Institute for Human Rights was requested to prepare a concept paper and work plan for the development of a national legal aid policy. These draft documents were developed and presented to a working group composed of LAB, PAN and LAZ in July 2011. On the basis of them, a process of developing the policy tentatively commenced in late 2011.

7. The Judiciary

The present chapter provides an overview of the judiciary in Zambia. For purposes of ease of reference however, it was found to be better to deal with the Local Courts in a separate chapter. Likewise, the discussion of the Lands Tribunal is placed in the chapter on property and the (brief) discussion of the Industrial Relations Court is in the chapter on Labour and Employment Law. It was not possible to analyse the Small Claims Court for the purposes of the study.

Methodology

Table 7: Distribution of interviews with judicial officers by province



The table shows the geographical distribution of interviews with judicial personnel. There were 26 respondents in interviews with the Subordinate Courts, though not all were able to provide answers to all quantitative questions. Secondary sources were often relied on for the information obtained. Interviews were carried out with senior representatives of the judiciary (the High Court) in Lusaka. Magistrates and judges participated in thematic workshops and in sector level consultations and validation seminars.

The chapter is divided into a general section on the judiciary as a whole, with individual sections on the High Court and the Subordinate Courts, with much shorter sections on other courts. We do not describe the levels of the Zambian court system here as this information is easily available, though some space is devoted to recent changes introduced to improve management and oversight. A separate chapter is devoted to the Local Courts, so that they are by and large not dealt with here. Many substantive issues relating to the Subordinate Courts and the High Court are dealt with in chapter 10, so the current chapter focuses mainly on institutional aspects. There is some discussion of the various functions of the High Court below and some brief discussion of the appellate role of the Supreme Court.[99] Before turning to issues facing the various levels of the court system, some observations are made concerning the judiciary as a whole.

[99] The very limited original jurisdiction of the Supreme Court, in relation to presidential petitions, is not relevant to the current study.

7.1 Mandate, structure and functions

The Judicature Act[100] of December 1994 provides for the independence of the Judiciary. Proposals were made in connection with the constitutional review process to establish a Court of Appeal between the High Court and the Supreme Court.

Independence: The process of ensuring the institutional independence of the judiciary that was begun in 1997 is now said to be complete, with full separation from the main civil service, so that support staff are now employed independently by the judiciary. Nevertheless, the 2009 USAID Rule of Law Assessment notes that senior members of the judiciary are still paid by the President from a "leadership" account or fund rather than by the judiciary. The same study points to the incomplete independence of the Judicial Service Commission in its membership (most of the members are presidential appointees to executive functions, while the judiciary is in a minority with two members) or in terms of its functioning. The JSC is responsible for appointment and disciplinary functions in relation to all but the senior levels of the judiciary, also making recommendations as to High Court appointments. The Service Commissions Act allows the President to issue instructions to the Commission and obliges the latter to obey them. The Chief Administrator of the Judiciary is also a presidential appointee, and has the right to be heard by the Commission.

7.2 Institutional resources and strategies

Key strategic goals: The Judiciary Strategic Plan and Development Programme for the period 2009-2013 seeks to achieve improved delivery of justice through progress in seven priority result areas:

(1) Adequate appropriately qualified and highly motivated human resources; (2) Improved and conducive physical working environment (infrastructure and equipment); (3) Improved information and communication technology (ICT) facilities and systems; (4) Improved management of court cases; (5) Enhanced ethics and integrity in the Judiciary; (6) Increased public awareness and understanding of judicial procedures; and (7) Fully funded recurrent and development budgets.

A number of judiciary committees have been established to provide expertise in the planning and supervision of thematic areas. There are committees working in the following areas: (i) Training and Continuing Education (ii) Public Relations and Information (iii) Establishment and Conditions of Service (iv) Finance and Budget (v) Court Operations and Administration (vi) Gender and Development (7) Administration of Civil and Criminal Justice (8) Policy. [101]

[100] Cap 24 of the Laws of Zambia

[101] The terms of reference of the various committees are set out in a circular of January 2006 (CJ/2/61, No. 1 of 2006).

Table 7.2: Judiciary, Overview of adjudicative positions[102]			
Court level / tier	Locations / no.	Establishment	Filled
Supreme Court	1	11	10[103]
High Court	5	50	28[104]
IRC		5	4
Subordinate Courts	54	251	156[105]

7.2.1 Personnel[106]

Three quarters of the positions in the new judiciary establishment had been filled as of March 2010, reportedly giving a total of some 5,000 employees. There have been some difficulties in filling new positions. The figures in the table above are surrounded by some uncertainty. See also below in the sections on the High Court and Subordinate Courts.

Personnel management systems: The question of staff conditions, retention and development is linked to the issue of institutional independence, as well as resources. The judiciary now has its own personnel division, composed of highly qualified staff. Nevertheless, the judiciary is still in a teething stage in regard to many issues of personnel management. Support staff are permanently seconded to the judiciary, so that the judiciary is now fully responsible for recruitment (under the Judicial Service Commission) and professional discipline. Negotiations took place with the Public Service Management Division[107] on the issue of improved pay and conditions of service. The latter would not implement the improvements proposed by the judiciary, afraid of the precedent setting effect that this would have. Thus, the judiciary needs to run its own payroll in order to implement a pay increase. The judiciary cannot begin to run its own payroll until it is confident that it will be fully functional. An attempt to do this was made in 2009 though outsourcing (which is necessary at present, as the judiciary does not have sufficient internal capacity). It did not work, and the judiciary had to cancel a contract for a payroll system.

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[102] Figures for the Local Courts are provided in Chapter 12.
[103] The figure of ten positions filled comes from an interview in 2010. Requests for updated figures were not responded to. As of late 2011, the judiciary's website gives a figure of 9 positions filled.
[104] The source for this figure is the judiciary's website, accessed February 2012: www.judiciary.gov.zm . In 2010, the study team was provided with a figure of 31.
[105] Here also we had some difficulty in obtaining accurate updated figures. This figure is from the judiciary's website, accessed February 2012, apparently updated in Sept. 2011. USAID's 2009 Zambia rule of law assessment provides an establishment figure of 251 with 156 positions filled. In 2010, the team was given a figure of 135 by the judiciary.
106 The information in the following sections is drawn from a number of sources, including an interview with the Registrar of the High Court, Ms. Mwamba Chanda, in Lusaka on 17.03.10.
[107] Under the Cabinet Office.

Personnel are generally divided into "adjudicators" on the one hand, and other personnel categories on the other. With improvement of conditions for adjudicators in recent years, retention of staff and work satisfaction are said to have improved for this category. Challenges in this respect remain in relation to clerks and other support personnel. When the judiciary went independent, staff had the option of leaving the judicial service or remaining with the general public service. Some trade unions opposed the creation of separate representation for judicial employees. Court action was necessary to achieve this. Some support staff opposed the move to institutional independence, preferring to remain as part of the general public service.

Personnel performance: As long as staff remained part of the general public service, disciplinary processes were subject to a very large and unwieldy system that included the entire civil service – the "bad eggs" stayed in the system. After the separation, some former staff were let go, including some so-called "poor performers". The personnel division is now working on a performance evaluation system that will attempt to measure the value added to the judiciary of the particular employee. Performance monitoring and evaluation may be linked to the suggestion of establishing an inspectorate. As concrete steps in this direction have not yet been taken, it is too early to say whether an inspectorate would have functions in relation to financial administration, personnel matters, judicial procedure, or a combination of these aspects.

Retention of staff: As the conditions of service are still not considered good enough, there is still a tendency among staff to use the judiciary as a stepping stone. Upgrading of qualifications must go hand in hand with an improvement in conditions of service, if the investment in upgrading is not to be lost to the judiciary. The judiciary has worked to develop a career ladder, so that vacant positions are advertised internally. While the ladder system is reasonably well-established for adjudicative personnel, it is just starting for administrative staff. The challenge of getting qualified professional magistrates to serve in rural areas is addressed below in the section on the Subordinate Courts.

Budget and staffing: Figures on finance and budgets. While global amounts for the different levels of the judiciary are available in national budget figures, breakdowns of how they were applied to different purposes within the judiciary were not provided to the study team, so there is no analysis of this aspect here. Likewise, receipts. Only 60% of court revenues have to be remitted to Lusaka. The remaining 40% is administered at provincial level. Subordinate Courts in rural areas complained of inadequate funds and a lack of transport and other facilities.

While the overall budget for the judiciary has increased, further increases are still being sought. An example of how budget and staffing are related is seen in relation to Local Court Magistrates. Previously, they were on three-year renewable contracts. That was very costly because they had to be paid a gratuity after the three-year contract expired. This was not viable, so the judiciary sought and obtained permission from the JSC to employ them permanently, with pensionable salaries. This gives a better basis to invest in the staff through training. These changes have had an effect on the profile of Local Court Magistrates (LCMs), so that they are now employed at about the age of 40 and retire at 65.

Education and Training: The judiciary training unit is in need of expansion. It carries out courses and induction training, but Zambia has not had a judicial institute for a long time. At present, tasks like this – including the development of curricula and syllabi have to be

outsourced to other institutions. NIPA provides a two-year diploma training for lay magistrates, but a specialized institute attached to the judiciary could arguably do more to reinforce the link between practice and training. Similarly, the specialized functions of the judiciary (as compared to the general civil service) often require specialized training for support personnel.

7.3 Institutional Performance

Users' Perceptions: The surveys conducted revealed a strong concern among ordinary citizens that access to justice through the courts is paramount and in need of strengthening. A number of studies in the recent past have indicated that Zambians are losing faith in the judiciary and opting to settle disputes outside the courts to elude the tedious and laborious proceedings that go with accessing justice in the courts of law. The public's perception of the judiciary is well captured by a member of the public, who stated[108] that issues such as prolonged court cases, rampant reports of missing prosecution files and allegations of corruption eroded the public's confidence in the Zambian judiciary. There is an urgent need for the Judiciary to recognise that a key dimension of strengthening the capacity of the judiciary consists in investigating more efficient ways of handling the case load and backlog and speeding up the processing of cases. Improving court administration through improved caseload management, measures facilitating rapid court proceedings and introducing more efficient case management and tracking systems contribute to reduce backlogs and accelerate disposition of new cases.

Monitoring and integrity: A number of monitoring mechanisms are discussed in various parts of the present study, including the bifurcated criminal sentencing and confirmation procedure (section 10.4.5) and the functions of Local Court Officers and Provincial and District levels, discussed in chapter twelve on the Local Courts. The Judiciary has made some efforts to intensify its focus on integrity within its rank and file. The Chief Justice has emphasised this in public speeches, including one to a meeting of senior judges[109] working to promote the effective implementation of the United Nations Convention against Corruption, to which Zambia is a party. The Convention identifies the integrity of judges and prosecutors as a key ingredient in upholding the rule of law and fighting corruption.

Two proposals for new and improved mechanisms have been made. Firstly, there has been discussion of the possibility of establishing a **courts inspectorate**. The proposal was discussed and agreed to in principle, but has lain dormant for some time. The registrar will be making efforts to revive the idea with the administrator. Structures such as this are in operation in some other African countries, including Uganda, where the registrar and deputy registrars, whose responsibility is geographical, carry out visits to courts and monitor performance and quality. At present, the inspection function is limited to the work of internal auditors, who only look at matters of financial management. There is a gap in the system in relation to the possibility of cross-checking information from presiding justices or justices in charge as to revenue receipts and numbers of cases with information from sheriffs and bailiffs. It is currently not known whether there are disparities.

In order to gain credibility among Magistrates and justice stakeholders in provinces and districts, the inspection should be based on the sense of a "contract" between the judiciary at

[108] Times of Zambia, 30 July 2007
[109] The Group on Strengthening Judicial Integrity gathered in Lusaka on 21 and 22 January 2010

local and central levels and a two-way process of dialogue, where Subordinate Courts should also be empowered to raise issues of concern to them as well as being subject to criticism for their failures.

Another proposal, recommended in the FNDP MTR, is to pursue the **decentralization of the judicial complaints committee**. Although this question was not examined in any detail for the present study, we generally support the trend towards decentralization. This could be commenced in the provinces where the High Court has a permanent presence.

Case flow management: On a general level, the study found strong support among the judiciary as well as other justice agencies for the cooperation and dialogue processes that the Access to Justice Programme has brought as a way to tackle case flow problems and issues. The extension of these to provincial levels through the CCCI processes has been a welcome response to earlier criticisms that this was a very centralized and top level phenomenon.

Analysis of case handling effectiveness is hampered by a lack of reliable statistics and documentation. The 2008 by Transparent Business[110] study saying that last report on caseloads is from 2001. Information is being painstakingly compiled by court staff, but not being converted into usable databases that can inform planning difficult. This question is dealt with primarily under the sections on the High Court and Subordinate Courts below, as well as in Chapter 12 on the Local Courts.

Table 7.7.2 : SNDP KPIs on backlogs

Court /Year	Baseline 2010	2011	2012	2013	2014	2015	Overall Target
Small Claims Court	N/A	30%	25%	20%	15%	10%	10%
Local Courts	N/A	30%	25%	20%	15%	10%	10%
Subordinate Courts	N/A	30%	25%	20%	15%	10%	10%
High Court	62%	30%	25%	20%	15%	10%	10%
Supreme Court	27%	30%	25%	20%	15%	10%	10%

As seen in the strategic plan and development programme and the FNDP MTR, the improvement of case handling procedures and tracking, including proposals to introduce electronic tools, has been recommended and discussed in a number of official papers and analyses. The most thorough analysis of what a gradual move towards electronic processing and data management would entail and require is in the 2008 Transparent Business report.[111]

[110] Op cit.
[111] Situation and Gap Analysis Report, Transparent Business, December 2008

There is no doubt that use of paper files is associated with many difficulties: case files can only be accessed by one person at a time, causing difficulty for preparation of orders by court secretaries. As the report points out, preparation of orders involves transcribing information that is already contained in the case file, but not stored on secretaries' computers. Computerized files and records would obviously save time in this regard.

In terms of storage and information management, cases are stacked without writing case information on outside of case file, making it more time consuming to find the correct file. Case files are moved from place to place without maintaining a paper trail. Files are often lost or information removed.[112] Registry offices do not maintain indexes of open, closed and archived files. The system is currently extremely vulnerable to the risk of losing files. Problems are greatest when data or case information needs to be transferred or shared between different parts of the same agency (e.g. the Subordinate and High Courts) or the between agencies (the police and prosecution, for example).

Many things are necessary for the judiciary to assert its authority over the trial process and to move from prosecution driven trials to effective judicial management of them. Tackling delays in criminal trials is discussed in chapter 10.

Recommendations

Structure and Independence: While no specific comment is made on the proposal to establish a court of Appeal, the general focus of this study reveals a need to empower and improve the lower courts and to decrease the burden on the Higher Courts before adding capacity and resources at the top end of the system.

The remaining barriers to judicial independence contained in the Judicature Administration Act and the Service Commissions Act should be amended to ensure the independence of the judiciary. Zambia should have regard to international practice in regard to court administration and work towards the establishment of a courts administration service that is not dependent on the executive.

Accessibility, transparency and accountability: The judiciary's attractive website is without a doubt one of the better institutional web portals in Zambia. The judiciary could build further on this first achievement by making certain other information available that it can access without too much difficulty and that can enhance the accessibility of the institution and justice services to Zambians. Updated information on such matters as Court forms,[113] filing fees in the various courts and the Rules of Court should be provided. Likewise, public accountability and transparency should be improved by starting the work of making figures on judicial receipts and spending publicly available in a way that makes spending priorities clear.

Judicial administration / administration of justice: As stressed elsewhere in this study, the sector approach promoted by the Access to Justice Project has shown positive results and is strongly endorsed. While it was beyond the scope of this study to make a detailed analysis of procedures within the individual justice institutions or recommendations on this, the need for increased resources and capacity building in this area is an urgent priority. It should not wait

[112] This problem is obviously not unique to the judiciary. The issue of lost dockets is an issue in police – prosecution cooperation too, as discussed elsewhere in this report.
[113] Mentioned as a heading on the website but not accessible in practice.

until conditions for the introduction of electronic systems are present. Basic filing and documentation systems in the courts should be standardized and rigorously implemented throughout the judiciary as a prerequisite to the development of cross-institutional tracking systems. Identifying good practice in this area is, and should continue to be a key focus of the judiciary and the CCCI.

Monitoring, integrity and performance: Proposals on the holding of an annual gathering of Magistrates to discuss issues of court administration and the criminal justice process are tentatively endorsed. In order for an initiative such as this to yield results that are of value, it is necessary that discussions are based on facts and documented results to the highest extent possible. Thus, any such gathering should be based on a project or process that includes documenting identified issues of concern and collating of an analytical document or documents that summarizes results and findings. The establishment of a courts inspectorate is tentatively endorsed, but discussion is necessary on the resources required, the precise mandate, and the terms of the relationship between the provincial and central judiciary. The proposal could be discussed at the first annual gathering of Magistrates. Recommendations on education, training and personnel are made in the section on Subordinate Courts. See also chapter 12.

7.3 The Supreme Court

As mentioned, the study did not encompass an analysis of the Supreme Court. Comments are limited to the issue of knowledge building through production and distribution of judicial research and case reports. A proposal has been made for the establishment of a judicial research office in the Supreme Court[114] As the author of this proposal notes, the promotion of research is linked to the use of precedent in criminal appeals, which needs to be enhanced.

Table 7.3: Supreme Court performance on FNDP KPIs[115]

KPI		Baseline	2006		2007		2008	
		(2005)	Target	Real	Target	Real	Target	Real
1. Av. case disposal time (days)	Criminal Cases	100	95	N/A	85	N/A	75	640
	Civil Cases	100	95	N/A	85	N/A	75	820
2. Case Backlog[116]	Criminal Cases	100	90	79	70	46	75	55
	Civil Cases	100	90	79	70	46	75	55

[114] See http://www.pamodzi.ie/documents/Zambia%20Observation.pdf. The team is not aware of the specific details of the proposal, which are with the Supreme Court.
[115] Source: FNDP MTR, Oct. 2009
[116] Combined civil and criminal

7.4 The High Court

The High Court of Zambia is created under Article 94(1) of the Constitution[117] and except as to the proceedings in which the Industrial Relations Court has exclusive jurisdiction[118], it has unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by the Constitution or any other law. Further the High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.[119] Pursuant to section 3 of the High Court Act[120] all judges have and may exercise, in all respects, equal power, authority and jurisdiction and any judge may exercise all or any part of the jurisdiction under the High Court Act unless there is any express statutory provision to the contrary to exercise those powers. Most criminal justice issues affecting the High Court are discussed in chapter 10.

Besides its strictly adjudicative functions, the High Court is the central powerhouse of the Zambian judiciary, exercising a wide range of functions relating to judicial administration. These include **Standard setting and legal development:** the High Court has an important role to play by issuing circulars (including to the Local Courts). It exercises **supervisory functions** especially over the Subordinate and Local Courts (through Local Court Officers and Magistrates). The High Court also possesses **powers of review**. Independently of the possibility of appeal, sec. 338 of the CPC gives the High Court a power of review concerning decisions of the Subordinate Courts. These wide ranging powers allow the High Court to confirm, vary or reverse Subordinate Court decisions, to substitute its order or sentence for one made by the Subordinate Court, to order the Subordinate Court to impose a particular sentence or to order the Subordinate Court to take further evidence or to take such evidence itself. It may not reverse an acquittal made by the Subordinate Court.

7.4.1 Institutional resources

Expansion and capacity building of the High Court has been a focus of judicial development in recent years with the expansion of the number of judges and ensuring a permanent presence in five provinces. The five permanent High Courts, in Lusaka, Ndola, Kitwe, Kabwe and Livingstone, are on the face of things, unduly concentrated in the most urbanized areas in the centre of the country along the railway line. They are supplemented by circuit visits to Kasama, Chipata (Eastern), Mongu (Western), Solwezi (North Western), Mazabuka (Southern) and Mansa (Luapula). It was mentioned from the survey that plans are under way to establish permanent High Courts in all provinces.

Personnel: There would still appear to be a shortage of support personnel, and the lack of stenographers in court contributes to case flow bottlenecks. Detailed figures on support personnel were not provided to the study team.

[117] 1991 Constitution of Zambia as amended in 1996
[118] Under the Industrial and Labour Relations Act - Cap 269 of the Laws of Zambia
[119] Article 94(7) of the 1991 Constitution of Zambia as amended in 1996
[120] Cap 27 of the Laws of Zambia

Table 7.3.1. High Court Personnel – Filled positions as of 31.12.2010[121]						
	Judges			Deputy Registrars		
	Male	Female	Total	Male	Female	Total
Lusaka	6	10	16		1	
Ndola	3	3	6	1		1
Kitwe	2	3	5	1		1
Kabwe	1	1	2			
Livingstone	2	0	2			
All	13	17	31	2		2
Establishment			50			

7.4.2 Accessibility

While geographical accessibility has been improved through the expansion of recent years, distance and other factors still mean that the High Court is beyond the reach of all but a very small number of Zambians for their civil claims. Familiarity and cost are among the most important additional barriers. **Costs** are another major aspect of accessibility. While fees are beyond the reach of most Zambians, they are not in themselves the primary barrier. One is simply knowledge, including of basic issues such as court fees. It has been remarked elsewhere that it was difficult for the study team to obtain basic information on court fees in Zambia. The following are the figures that were obtained:

Table 7.4.2 **Court Fees in the High Court** **Civil Matters**	Fees	Cost
	Writ of summons	K100,000
	Divorce Certificate	K15,000
	Divorce Petition	K 100,000
	Affidavit	K15,000
	Originating Summons	K 100,000
	Summons	K15,000

[121] Source: Figures obtained from the judiciary, 9 Feb. 2011

The real costs to the user of going to the High Court are generally much higher, as it is virtually impossible to take up a case in the High Court without costly legal assistance. The limited availability of assistance from the LAB and other providers is discussed in Chapter 6.

7.4.3 High Court Caseloads

The criminal case load in the High Court is from three sources, appeals from the lower courts, cases from the lower courts for confirmation of sentences and for sentencing, and cases that fall within the original jurisdiction of the Court. These three categories pose very different demands on the time and resources of the High Court, and any discussion of case data needs to differentiate among them. Counting confirmations from second and third class Subordinate courts and original jurisdiction in murder trials each as "cases" tells little. While isolated sets of figures are provided here and there in some reports and studies, the lack of data is again a problem in analysing caseloads and trying to draw findings from them. Ideally, information should be available on the numbers of new cases per year, categorized according to kinds of case, legal domain (broadly, criminal and civil, with further specification according to domain), and the kind of legal action or procedure involved. The following estimates on numbers and rough categories of new cases per year are from the 2008-09 situation analysis carried out by Transparent Business[122]

Table 7.4.3 : Lusaka High Court annual criminal caseload estimate	
Original jurisdiction	800
Remanded from the Subordinate Courts (incl. confirmation and sentencing under sections 7 and 9 of the CPC)	700
Appeals	200
Total	1700

800 new cases per year within the original jurisdiction of the High Court is a strikingly high figure compared to the number of judges, and ought on its own to force consideration of legislative amendments. Discussion and recommendations on confirmation and sentencing in Subordinate Court cases are made in section 10.4.5. Less can be said here about the appellate jurisdiction and caseload of the High Court. It was not possible to examine this in detail in the study.

Disposal rates and backlogs: The mentioned report does not clarify the disposal rate of cases. The SNDP sets out KPIs on backlogs as follows:

[122] Transparent Business, 2009 Case Flow Situation Analysis Report.

Table 7..4.3a : SNDP KPIs on High Court backlogs							
Court /Year	Baseline 2010	2011	2012	2013	2014	2015	Overall Target
High Court	62%	30%	25%	20%	15%	10%	10%

Progress on achievement of the KPIs requires reliable data. The FNDP MTR set out performance targets and achieved figures on case disposal times and backlogs but these were of limited use.

It was not easy to obtain clarity on the meaning of the achieved figures in the FNDP MTR. A set of figures is provided in the 2009 USAID Rule of Law Assessment, seemingly covering the entire country. It mentions 5,618 cases filed on the general list (civil and criminal), and 2014 cases disposed (a disposal rate of 36%, which would be close to the 2010 62% baseline figure in the SNDP). A High Court official gave the figure of a backlog of 3,000 cases carried over from 2009 into 2010 for the Lusaka High Court alone.

Impressionistic accounts from respondents indicated that the most prevalent civil cases in the High Court are property disputes including those concerning land, and matrimonial causes. Cases on inheritance and maintenance of spouses and children figured prominently. Prominent among criminal cases are offences of defilement, rape, manslaughter and causing death by dangerous driving. Theft cases come next (broadly comprising all forms including aggravated robbery and robbery). Labour and employment cases are few whilst a small proportion accounts for cases from the local court on lobola and cases relating to marriage that are heard on appeal. Lawyers and judges acknowledged that civil cases take too long to conclude. They point to the lengthy procedural formalities in civil matters.

Table 7..4.3b: High Court performance on FNDP KPIs – Criminal Cases[123]							
Av. Case disposal time	Baseline	2006		2007		2008	
	(2005)	Target	Real	Target	Real	Target	Real
	100	95	N/A	85	N/A	75	30
Case Backlog	100	90	67	70	57	75	66

[123] Source: FNDP MTR, Oct. 2009

Table: High Court performance on FNDP KPIs – Civil Cases[124]							
Av. Case disposal time	Baseline	2006		2007		2008	
	(2005)	Target	Real	Target	Real	Target	Real
	100	95	N/A	85	N/A	75	360
Case Backlog	100	90	67	70	57	75	66

Recommendations:

Case handling requirements: The High Court should produce figures of the numbers of cases that it should reasonably be expected to handle in each of the three main functional categories (original jurisdiction, sentencing / confirmation and appeals) in a given year, based on assumptions as to personnel, infrastructure and administrative support / services. Rough estimates should be made of the expected time (person hours for adjudicative and support staff) it should take to complete a case in each of the three areas. As experience accumulates, these can be refined and made more accurate. They should be used as a basis for planning, budgetary negotiation and internal monitoring by the judiciary.

Reform of civil procedure: While it was beyond the scope of this study to make a detailed examination of civil procedure, recommendations on widening the jurisdiction of the Subordinate Courts are made in relation to family law matters, including matrimonial causes. A reform of civil procedure is a matter to be examined by the Zambian Law Reform Commission.

Expansion of courts: While there are no easy solutions regarding presence and accessibility, there are many areas where improvements could be made. The move to establish permanent High Courts at provincial level and the increase in the number of High Court judges from twenty to fifty is a positive step, though not all positions had been filled at time of writing. The challenge this poses is the need to acquire new facilities, support staff and infrastructure for the expanded number of Judges. Future expansion should carefully consider factors such as the presence of Subordinate Courts with Resident Magistrates and their sentencing powers. The question of confirmation of some sentences from the Subordinate Court and sentencing in relation to some offences that are tried in the Subordinate Courts is discussed below under the Subordinate Courts and especially in section 10.4.5.

[124] Source: FNDP MTR, Oct. 2009

7.5 The Subordinate Courts

7.5.1 Mandate and functions

Subordinate Courts are recognised under Article 91 of the Constitution, though established by section 3 of the Subordinates Courts Act.[125] They are divided into first, second and third classes and should in principle be present in every district of the country (see further below). The geographical jurisdiction of the court is delineated by district. Within the district, each Magistrate exercises jurisdiction and powers provided under the enabling act and any other written law in force –the Criminal Procedure Code and the Juveniles Act are of particular importance to the present study.

Criminal jurisdiction: The Subordinate Court conducts summary trials in criminal cases and can impose a maximum sentence of nine years imprisonment with hard labour. Limitations on the sentencing powers of the Subordinate Courts, their consequences for the functioning of the criminal justice system and recommendations in this regard are discussed in section 10.4.5. By virtue of Sec. 11 of the CPC, the Subordinate Court has no mandate to hear murder, aggravated robbery, treason and manslaughter cases (capital offences) which are triable in the High Court, though the High Court may give special authority to do so. Cases of economic crime involving sums of over 500m Kwacha are tried in the High Court.[126]

Civil jurisdiction: In civil matters the Court can generally determine any matter where the claim does not exceed K35 million. However, there are some important limitations on the civil jurisdiction of the Subordinate Courts. According to sections 20 – 22 of the Subordinate Courts Act, these courts do not have jurisdiction in cases involving contestation of a will or its provisions. As discussed in the Chapter on family law, jurisdiction for marital causes arising from civil marriages is vested in the High Court only.

Supervision functions: Subordinate Court supervision of detention of suspects under Sec. 34 of the CPC, by examining the APP book to be maintained by the police is discussed in section 10.4.6. Supervision of the Local Courts is discussed in Chapter 12. The Subordinate Courts are also charged with supervisory functions in relation to the Local Courts. These functions are exercised by Local Court Officers located at the Subordinate Courts. They are discussed in Chapter 12.

Appellate jurisdiction and confirmations: The Subordinate Courts (class II and above) are courts of appeal for matters arising in the Local Courts by virtue of sec. 56 of the Local Courts Act. There are also possibilities under sec.s 53 – 56 of the LCA for cases to be referred from the Local Courts to the Subordinate Courts, whereby the Subordinate Court shall hear the cases *de novo.* The powers of the Local Courts of search, seizure and detention can be appealed to and reviewed by the Subordinate Courts. There were conflicting statements from Subordinate Court representatives as to whether referral should be automatic in these cases, or whether it is by application, as set out in the relevant LCA provisions. Some magistrates were of the understanding that any sentence of imprisonment automatically had to be confirmed by a Subordinate Court.

[125] Cap 28 of the Laws of Zambia
[126] Interview with the Deputy Registrar of the High Court.

7.5.2 Distribution of Subordinate Courts and personnel

There are reportedly Subordinate courts to be found in 54 districts of Zambia, but not in all 72.[127] The team was not provided with precise information on the districts in which there is no Subordinate Court present or on the numbers and locations of Subordinates Courts of the first, second and third classes.[128] It is estimated that on average, 15% of the Magistrates serve rural areas whilst 85% are in urban areas. These figures are appreciated if one considers that over 65% of Zambia's population is rural based.[129]

There are now nearly forty Resident Magistrates (possessing a legal education), up from a figure of only 7 for the whole country a decade or so ago. Retention of professional staff has been a problem. One obstacle is the requirement to accept postings in remote areas. For adjudicators, there is a rotation system in place, so that people should stay a maximum of three years in the remotest areas. After a rural posting, people should go to a town, and those in remote rural areas have priority for urban vacancies. Those in remote areas also have priority when it comes to training opportunities. There has been a particular challenge with retaining married women in the judiciary. Although positions are advertised internally, many women do not want to be separated from their husbands to take up postings in remote areas, and it is often difficult to satisfy their wishes to be posted close to their husbands. Men do not refuse in the same way, often confident that their wives will accompany them. The judiciary tries to give priority to women employees for new posts in remote areas that they move to in order to accompany their husbands, but it is not always possible.

In an interview, the Deputy Registrar of the High Court said that a goal of 100% professional magistrates was still unrealistic for the present. This was happening in Lusaka, but it is currently practically impossible in remote areas, as law graduates do not consent to stay there. What constitutes a particular problem for access to justice is the combination of the lack of a permanent High Court and few 1st Class Magistrates Courts (and professional magistrates) in Eastern, Western, North Western and Luapula provinces. Most outlying areas lack resident Magistrates, (e.g. Gwembe and Kaputa). This greatly impacts on the delivery of justice to vulnerable rural populations.

[127] The number of districts was Increased to 74 in 2011 and to 79 in early 2012. Sources for the figure of 54 are the judiciary's website, the USAID 2009 Rule of Law Assessment and the 2007 HURID baseline study on criminal justice.

[128] The 2007 HURID criminal justice baseline study refers to the lack of Subordinate Courts in what at that time were "new districts". It is unclear if this refers to urban municipalities.

[129] Main Zambia Census Report, vol. 10, Central Statistic Office

Table 7.5.2: Subordinate Court Staffing, Adjudicators, 2006 - 2010[130]							
Courts	Magistrates		Est. 2006 [131]	Filled 2006	Est. 2010	Filled 2010	% Change (filled)
1st Class	Professional Magistrates	Chief Resident Magistrates			N/A	N/A	
		Principal Resident Magistrate	9	7	N/A	N/A	
		Senior Resident Magistrate	15	5	N/A	N/A	
		Resident Magistrate	48	9	N/A	N/A	
		Total, Professional	72	21		App. 40	+26.4%
2nd Class	Lay Magistrates	Magistrate Class I	63	66	N/A	N/A	
		Magistrate Class II	52	19	N/A	N/A	
3rd Class		Magistrate Class III	55	36	N/A	N/A	
		Total, Lay	170	121		App. 116	
		Grand Total	242	142	251[132]	156	+3.5%

[130] A table showing the sentencing powers (imprisonment) of Magistrates is shown in section 10.4.5.
[131] The 2006 figures are taken from 2006 – 2007 HURID Baseline Survey Report on the Criminal Justice System.
[132] Here, we are using the figure from the 2009 USAID Rule of Law Assessment.

The gender balance among Magistrates has improved significantly, rising from 21.6% in 1999[133] to 29.6% in the figures above.

Table 7.5.2 a: Gender balance among Magistrates

Province	No. of Magistrates	No. of Women Magistrates	% Women Magistrates
Lusaka	22	9	41%
Copperbelt	28	15	53.5%
Central	10	4	40%
Eastern	N/A	N/A	N/A
Western	N/A	N/A	N/A
North-western	N/A	N/A	N/A
Luapula	N/A	N/A	N/A
Southern	N/A	N/A	N/A
Northern	N/A	N/A	N/A
Total	135	40	29.63%

Many lay magistrates are drawn from the police and teaching professions. They complete a two-year full time diploma in law at NIPA. It was not possible to get a complete profile of magistrates that included age, educational background, and career experience, and it is thus difficult to make general comments on the educational level and professional quality of lay magistrates.

Knowledge resources: There is a serious shortage of legal resource materials for Magistrates to use as most of the Chambers and libraries if any lack books and reference materials. Those interviewed generally said that they attempted to find guidance by discussing things with colleagues. Those in urban areas who were lucky enough to have access to the internet or to High Court libraries used them. Most of the materials available are old and some are outdated. Magistrates across the country do have at least one resource book they can rely on, the Magistrates Handbook (1993). The Registrar (at time of interview, Ms Chanda) stated that all Subordinate Courts should in principle have a copy of the Handbook. given to every newly trained Magistrate. The Handbook is indeed a valuable tool for effective justice delivery, though it is in need of updating on a number of issues, including use of the reconciliation procedure, juvenile justice issues and other issues.

[133] WLSA Zambia, Justice in Zambia: women and the administration of justice, Lusaka: WLSA Research Trust, 1999.

Recommendation: The Subordinate Courts are the backbone of statutory law in the country. The study team was generally impressed with the quality of (especially professional) Magistrates in the country. In the view of the study team, they and the Local Courts should be the main strategic focus of improvement of judicial services. A comprehensive and multi-year plan should address capacity and resources at all levels, with the aim of creating a modern, knowledgeable and well-equipped magistracy, as aimed for in the Judiciary's development plan.

Recommendations are made in chapters 10 and 12 to increase the jurisdiction of First Class Subordinate Courts in respect of habeas corpus applications, matrimonial causes and sentencing / confirmation of sentences. Special incentives should be put in place to get legally qualified magistrates to accept postings in provinces without a permanent High Court. These could take the form of pay and professional conditions, but also to giving priority to construction, infrastructure and legal resources in these provinces.

Recommendation: The Subordinate Courts Handbook should be updated to reflect several matters, including procedure in juvenile justice cases. It should be made available electronically in a user friendly, searchable format.

7.5.3 Subordinate Court case loads

Civil caseloads: The Deputy Director in charge of Subordinate Courts estimated that the civil case load of most Subordinate Courts comprises cases arising from dissolution and breakup of marriage and appeals against property settlements upon dissolution of marriage from the Local Courts. Others are cases on custody and maintenance of children, as well as land and property disputes, succession disputes, particularly after the death of a spouse.

Generally, courts along the line of rail, where population density is greater, have higher case loads than those in peri-urban and rural districts. Along with the continuous increase in the case load there is the ripple effect of poor witness management especially on the State. Many scheduled trials rarely commence on the date set as witnesses fail to attend court. Adjournments during the course of the trial lead at times lead to witnesses failing to appear before court on the next hearing date. Most witnesses in fact contend that it is very expensive to be a witness as all expenses related to attendance in court are borne by the witness.

Lack of modern computer (and even typing) equipment greatly impacts on the preparation of court records for cases being transmitted from the Subordinate Courts to the High Court. Confirmation of sentences is discussed in section 10.4.5.

7.5.4 Subordinate Courts performance and goals

Table 7.5.4: Subordinate Court performance on FNDP KPIs – Criminal Cases[134]							
	Baseline	2006		2007		2008	
Av. Case disposal time	(2005)	Target	Real	Target	Real	Target	Real
	100	95	N/A	85	N/A	75	138
Case Backlog	100	90	69	70	83	75	39

The reality has been that the Judiciary lacks capacity to adequately carry out its mandate due to inadequate resources. Most of the programs planned for are rarely achieved as the needed resources have not been made available when needed. This situation is also reflected in the human resource allocation for the Judiciary.

Table 7.5.4 a: Subordinate Court performance on FNDP KPIs – Civil Cases[135]							
	Baseline	2006		2007		2008	
Av. Case disposal time	(2005)	Target	Real	Target	Real	Target	Real
	100	95	N/A	85	N/A	75	146
Case Backlog	100	90	69	70	83	75	39

Policies, strategies and plans (at institutional level): The study team was not made aware of any specific plan for the development of the Subordinate Courts. Chapter 10 contains a discussion and recommendations on working to Increase the number of SRMs and RMs and amending the CPC to reduce the necessity of confirmation of sentences by High Court. In the exercise of its jurisdiction in criminal cases, the Subordinate Court can greatly help with the filtering of convicts ending up in prisons by use of the provisions of section 8 of the Criminal Procedure Code and alternative sentencing methods. Guidelines on the use of this section in cases of assault could provide for more appropriate and increased use of this provision, though it should be avoided where there are aggravating circumstances. Community sentencing provided under the law must be applied in deserving cases as opposed to custodial sentences.

[134] Source: FNDP MTR, Oct. 2009
[135] Source: FNDP MTR, Oct. 2009

7.5.5 Accessibility

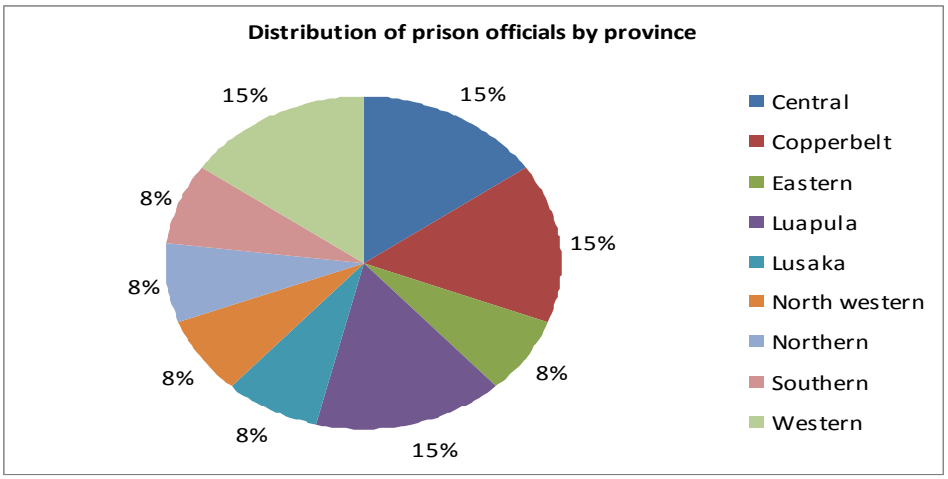
Court fees in the Subordinate Court: According to officials from in the Subordinate Court criminal registry the court does not demand any form of payment from defendants in Criminal matters in order to access cased documents. Thus, there are no fees for copying of documents or obtaining copies of the court judgment in criminal matters.

Table 7.5.5 Subordinate Court Fees Civil cases	Writ of Summons	K 100,000
	Commission of Affidavit	K 5,000
	Notice and order	K 10,000
	Deferred Judgment	K 15,000
	Originating summons	K 105,000
	Copy of the court judgment	K 15,000
	Other (please specify)	K 25,000

8. The Zambia Prison Service

The present study's focus on access to justice, involving issues of substantive law and procedural accessibility and effectiveness, means that it does not examine issues such as prison conditions. These issues have been addressed in reports in recent years such as the National Audit of Prison Conditions in Zambia.[136]

Methodology: A total of 16 officials of the Zambia Prison Service were interviewed for the study. In addition, 57 semi-structured focus group discussions among detainees and prisoners were conducted and their responses captured in a qualitative survey. Furthermore, officials of the Zambian Prisons Service participated in workshops arranged for the study and a senior official of the ZPS was interviewed on an individual basis.



Mandate and functions

The Zambia Prison Service is established under the Prisons Act.[137] The object of the Prisons Act is to provide for the establishment of a prison service and mandates the Prison Service to manage and control prisons in the country. Currently the Prison Service manages 53 three prisons, 10 medium security prisons, and 3 remand prisons.[138] The current prison population averages 15,000 in comparison to bed capacity of 5,500 countrywide.

Resources – human (including gender balance), material, intellectual and budgetary (including geographical breakdown)

There is a fair distribution of prison officers country wide in comparison to other justice institutions which are grappling with low professional staff levels (see pie chart below). The 2009 FNDP MTR noted that the Zambia Prisons Service had a ratio of 1: 7 (one officer for every seven prisoners), thus failing to meet the annual target of 1:6, suggesting a worsening situation

[136] Zambia Prisons Service and Governance Secretariat, 2009.
[137] Cap 97 of the Laws of Zambia
[138] Baseline Survey Report of the Criminal Justice System in Zambia prepared by the Constitute of Human Rights Intellectual Property and Development Trust (HURID), reference is also to Dr. Matibini work on Access to Justice and the rule of law.

since 2007. This was largely because of the non-recruitment of additional staff and a lower number of inmates released by Presidential pardon or amnesty.

3.11.2 Case loads

Tables: Numbers of Convicts and Remand Prisoners

Source: National Audit of Prison Conditions in Zambia (2009 – 2010)

In general, this study does not look at issues of prison conditions. Nevertheless, there is one issue that requires mentioning. This is the use of penal blocks to punish juveniles in prison. The use of these blocks for juvenile offenders was observed in Katombora Reformatory and in Lusaka remand prison. Punishment by confining inmates in water filled cells without toilet facilities amounts to serious mistreatment. In the case ofjuveniles, it probably amounts to inhuman and degrading treatment. The Ministry of Home Affairs should ensure that this practice is stopped as a matter of urgency.

Central Province				
Prison	Remand	Convicts	Total	Remand %
Kabwe Female	3	53	56	5,4
Kabwe Maximum	319	1107	1426	22,4
Kabwe Medium	0	593	593	0,0
Mkushi State	93	127	220	42,3
Mpima Remand	113	107	220	51,4
Serenje State	18	125	143	12,6
Mumbwa State	75	272	347	21,6
Province Total	621	2384	3005	20,7

Copperbelt Province				
Prison	Remand	Convicts	Total	Remand %
Chingola State	121	234	355	34,1
Kamfinsa State	467	1014	1481	31,5
Kansenshi State	56	304	360	15,6
Luanshya State	107	138	245	43,7
Mufulira State	44	171	215	20,5
Ndola Central	177	87	264	67,0
Province Total	972	1948	2920	33,3

Eastern Province				
Prison	Remand	Convicts	Total	Remand %
Chipata Central	219	383	602	36,4
Katete State	31	112	143	21,7
Lundazi State	18	119	137	13,1
Nyimba State	9	148	157	5,7
Petauke State	45	130	175	25,7
Province Total	322	892	1214	26,5

Luapula Province				
Prison	Remand	Convicts	Total	Remand %
Kawambwa State	7	41	48	14,6
Mansa Central	98	182	280	35,0
Mwense State	22	66	88	25,0
Nchelenge State	33	72	105	31,4
Samfya State	40	58	98	40,8
Province Total	200	419	619	32,3

North Western Province				
Prison	Remand	Convicts	Total	Remand %
Kabompo State	16	79	95	16,8
Kasempa State	15	79	94	16,0
Mwinilunga State	36	58	94	38,3
Solwezi Central	179	144	323	55,4
Zambezi State	9	90	99	9,1
Province Total	255	450	705	36,2

Northern Province				
Prison	Remand	Total	Convicts	Remand %
Chinsali State	47	104	151	31,1
Isoka State	80	165	245	32,7
Kasama / Milima Central	153	199	352	43,5
Luwingu State	0	67	67	0,0
Mbala State	1	91	92	1,1
Mpika State	91	120	211	43,1
Mporokoso State	3	61	64	4,7
Province Total	375	807	1182	31,7

Southern Province				
Prison	Remand	Convicts	Total	Remand %
Choma State	72	141	213	33,8
Kalomo State	32	65	97	33,0
Kafombora Reformatory School	0	131	131	0,0
Livingstone Central	111	397	508	21,9
Mazabuka State	67	177	244	27,5
Namwala State	37	107	144	25,7
Province Total	319	1018	1337	23,9

Lusaka Province				
Prison	Remand	Convicts	Total	Remand %
Lusaka Central	540	346	886	60,9
Lusaka Remand	389	43	432	90,0
Mwembeshi State	0	360	360	0,0
Province Total	929	749	1678	55,4

National Totals				
Province	Remand	Convicts	Total	Remand %
Central	621	2384	3005	20,7
Copperbelt	972	1948	2920	33,3
Eastern	322	892	1214	26,5
Luapula	200	419	619	32,3
North Western	255	450	705	36,2
Northern	375	807	1182	31,7
Southern	319	1018	1337	23,9
Lusaka	929	749	1678	55,4
Western	385	643	1028	37,5
Total	4378	9310	13688	32,0

Western Province				
Prison	Remand	Convicts	Total	Remand %
Kaoma State	37	178	215	17,2
Mongu Central	196	319	515	38,1
Senanga State	96	88	184	52,2
Sesheke State	56	58	114	49,1
Province Total	385	643	1028	37,5

9. Sector perspectives

This brief chapter covers a few areas of interest to the sector as a whole.

9.1 Common planning frameworks and cooperation among institutions

The Zambia Access to Justice Program supported by the Danish Government and more recently the European Union and GIZ has promoted and facilitated enhanced interaction among the justice sector institutions. The programme aims at coordination, communication and cooperation to improve service delivery.

One notable result of the programme is the clearance of a backlog of cases before the High Court. The backlog is immediately related to the prison population as accused persons facing capital offences have no recourse to bail under the law. Anecdotal information says that whereas it would previously take over a year before an accused person would first appear in the High Court for commencement of trial after committal from the Subordinate Court, that this period has been significantly reduced. In most parts of the country cases are reportedly now cause listed for hearing in the High Court within three months after the alleged occurrence of an offence. Precise data on this was not available. The improvement seems to be mostly due to improved communication and transmission of documents and records leading to more efficient calendaring.

Of great importance is the CCCI initiative, implemented in five provincial centres: Kabwe (Central), Kitwe and Ndola (Copperbelt) Lusaka and Livingstone (Southern). Participants in the CCCI initiative have been uniformly positive about its processes and effects. NGOs interviewed also praised it, though there was some dissatisfaction with failure to open CCCI initiatives such as the work on prison conditions up to civil society participation.

Funding overview: The FNDP MTR, noted that during the period 2006-2008, "Government allocated K598,837,359 to the Governance sector against the target of K1, 129, 207, 579, 621, representing 53 percent. Out of this amount, 89 percent was reported to have been spent."

9.2 Problem of absence of data

At the level of KPI measurements, the FNDP MTR found that the sector failed to report on most or many indicators due to the absence of data, but nevertheless concluded that that there still remain clear major challenges regarding access to justice for all and accountability and transparency in national systems are yet to be improved upon as there continues to exist serious capacity weaknesses in bodies that are mandated to provide accountability and transparency in public sector management.

Fundamentally, data would allow Zambia legislators and officials as well as stakeholders, the public and international development partners to systematically compare justice service provision and the allocation of resources to justice needs, province by province. The lack of data has hindered this study and others from making such an objective assessment. Below, a

framework for what this might look like is set out, so that future studies and discussions could take it into account.

Table 9.2 : Assessment framework for prioritisation of criminal justice resources

Criminal Justice needs – key indicators						
Pop.	Statistics on reported crimes	Qualified estimates, unreported crime	Remand rates	Case disposal time	Conviction rate	Needs quotient

Criminal Justice resources – personnel strength in key categories								
DSW	ZP	NPA	LAB	Judiciary	ZPS	LAZ	CSO LAP	Resource quotient

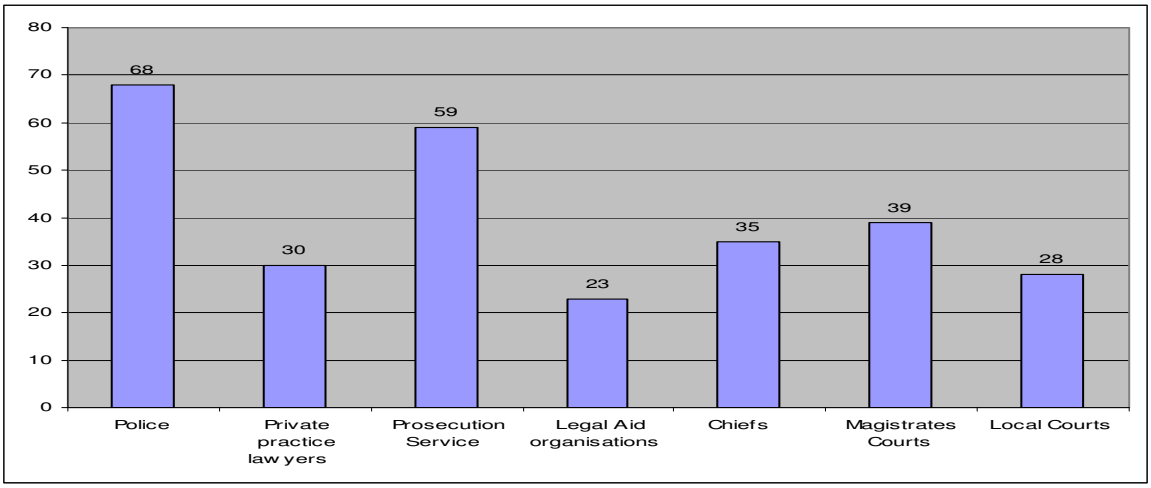
As seen in the above, some key indicators on criminal justice needs could be gathered by province. 100% reliance should not be placed on reported crimes, as a low justice sector presence could hinder reporting of crime. The different figures could perhaps be put together to arrive at an overall "criminal justice needs quotient" for illustrative purposes, though this might not be necessary. (In some cases, policing needs might for example be reasonably well met, while judicial needs might be only poorly met, so an aggregate figure could be misleading.) These figures could then be compared with the personnel strength of the main justice agencies. Once again, these could be combined into an aggregate "resource quotient". A similar analysis is also possible in the area of civil justice.

Progress on the design and development of an electronic case-handling system has been held up by delays in the public procurement process. The need for improvements in this area is the subject of a recommendation in the 2009 FNDP MTR from, and the SNDP has a specific strategy of implementing the case flow management system as part of the means to achieve the objective of enhancing access to civil and criminal justice. (SNDP, Table 7, Objective 1.)

9.3 Perceptions on integrity and corruption of justice agencies

Most of the justice sector stakeholders interviewed did agree that corruption was a problem. Many frankly admitted that it was present in their own agencies. Perceptions were expressed by the respondents concerning serious levels of corruption among the Justice agencies in their areas. The Police were perceived to be the most corrupt justice agency by 68% of respondents, followed by the Prosecution Services (59%), with the various legal aid providers ranked as the least (23%) corrupt justice agency in their areas.

Table 9.2.a : Perceptions of corruption among Justice Agencies



Source: Field Survey

Internet presence of justice institutions

The table below presents a quick overview of internet presence of justice institutions, undertaken in May 2011. The justice institutions not mentioned in the table below were not found to have functioning websites at the time the test was undertaken. (Some of them, including ZLDC, have had working websites at some times within the project period.[139] Other institutions such as the ZHRC, which have working and informative websites, are not included here.)

[139] In a subsequent check, carried out in August 2011, the Zambia Police Service website functioned.

Table: 9.2.b Internet presence of Justice Institutions
Availability on website of:

Institution	Annual reports	Updated institutional information	Legal guidance on how to avail of services	User information: (fees, requirements, locations, opening hours)	Self service: electronic versions of forms	Possibility to make enquiries by email
Judiciary	NO	YES	YES	YES (limited)	YES	YES
MoHA	NO	YES	NO	NO	NO	YES
MCDSS	NO	YES	NO	NO	NO	YES
LAZ	NO	YES	YES	NO	NO	YES
UNZA (Fac. of Law)	NO	NO	NO	NO	NO	YES
ZIALE	NO	NO	NO	NO	NO	YES
WLSA	NO	YES	YES	NO	NO	YES
LRF	NO	NO	YES	NO	NO	YES
ZCEA	YES	YES	NO	NO	NO	YES
ZLA	N/A	YES	YES	N/A	N/A	YES

While the majority of Zambians lack internet access and the possibility to make use of internet based services, it is estimated that among justice system users, there is a relatively high level of internet access. For this reason, establishing a presence on the internet could be a worthwhile step by justice institutions. It is not surprising that CSOs have been quicker to embrace the internet than government institutions as there are many administrative and security demands that have to be satisfied in the case of the latter, and funding is often inflexible. Nevertheless, government institutions need to follow the lead shown by civil society in establishing an internet presence.

Even if problems in gathering and collating institutional and system-wide data do not permit immediate dissemination of statistical information, some rather low cost improvements could be made. The availability of Zambian legislation and some jurisprudence on the saffli website is a measure of benefit to a great number of practitioners and researchers. The benefit of this could be augmented by making reports and analytical and programmatic documents more widely available. It is surely counterproductive that professionals within the justice system who wish to know more and access information are currently unable to do so.

Justice users and their distribution : Population figures from 2010 National Population Census					
	Male	%	Female	%	Total
Central	626823	49.4	640980	50.6	1,267,803
Copperbelt	973770	49.7	984853	50.3	1958623
Eastern	836165	49.0	871566	51.0	1707731
Luapula	467613	48.8	491363	51.2	958976
Lusaka	1080152	49.1	1118844	50.9	2198996
Northern	861628	49.0	897972	51.0	1759600
North Western	345025	48.8	361437	51.2	706462
Southern	786394	48.9	820399	51.1	1606793
Western	416885	47.3	464939	52.7	881524
Total	6,394,455	49.0	6,652,053	51.0	13,046,508

An initial intention of this study was to analyse the allocation of justice resources (staffing and funds) relative to population figures. The lack of figures from justice institutions on staffing and resource allocation made this impossible. Disaggregated data on the gender profile of justice users (criminal complainants, litigants in different courts and by legal domain) would also provide valuable insights. Data of this kind is not available in Zambia at present. More data of this kind would be helpful in mainstreaming gender into justice sector strategies.

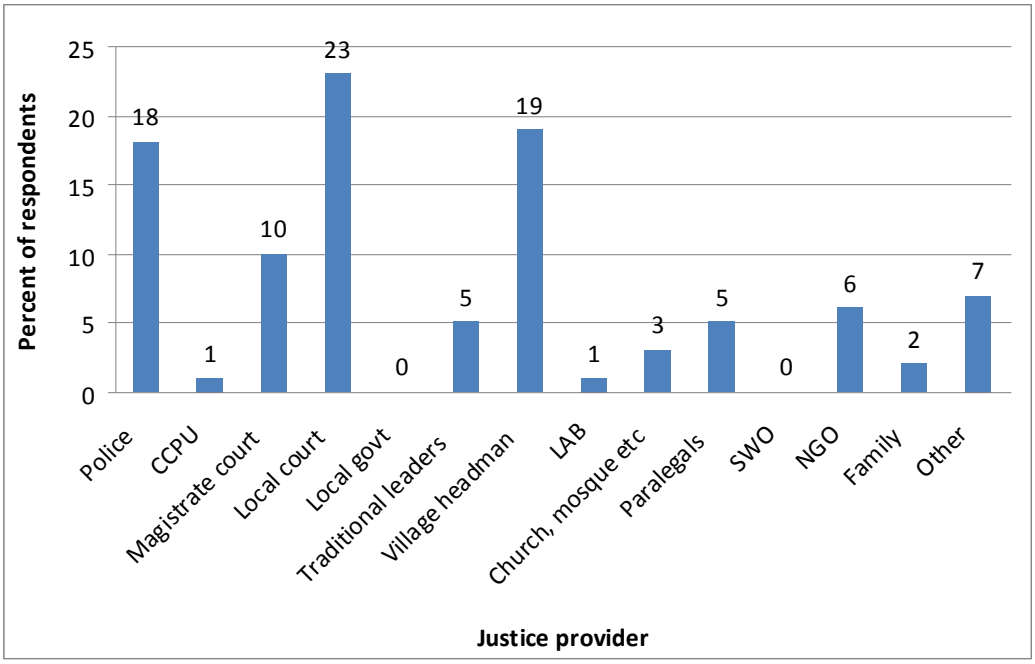
The poverty level in Zambia remains high at 64% of the population, while extreme poverty stands at 54%. Rural poverty increased from 78% in 2004 to 80% in 2006, while there was a slight decline in urban poverty.[140]

Use of justice institutions:

Predominantly, the justice providers and services that are readily accessible to the surveyed users are limited to the customary traditional justice structures, including the chief, the village headman and the family. In the survey, when asked who to approach to best deal with their disputes, 49% indicated the traditional justice structures, representing the chief (5%), the village headman (19%), the local court (23%) and the family (2%).

[140] Source: FNDP MTR, Oct. 2009.

Preferred Justice Providers (all kinds of disputes)



Recommendations:

Documentation: A substantial number of high quality documents and analyses have been produced in the framework of various justice reform initiatives, including the Access to Justice Programme. It is recommended that these be made available on a single website. The establishment of this site, with suitable backup, should be a supported programmatic intervention. In the future, the Government of Zambia, including through the Governance Secretariat, should make it a standard clause of consultancy contracts that copies of studies, reports and analyses be made available to the institution hosting the web domain, unless the study is specifically intended to be confidential. The hosting of such a website could be done by the Governance Secretariat itself, confided to an institution such as the UNZA faculty of law, or the ZLDC, or made the subject of a national tender. Alternatively, an existing website, such as that of the Judiciary should be used

2. Justice Sector Institutions should incorporate the establishment of an internet presence into their institutional planning.

Research capacity on justice issues in Zambia: needs to be improved. The Zambian Law Development Commission has produced very serious and high quality work in a number of areas, but the links between its work and the justice institutions do not seem to be sufficiently strong. The above suggestions on making documentation available should feed into a larger plan to support research on justice issues. While useful work has been done in this field (ZLDC studies, PAN mapping and legal aid baseline, legal education situation analysis, AHSI report, prison audit, legal empowerment etc), it happens too much as once-off efforts. Discussions could be held with academic institutions to support justice research on a more systematic basis within a number of key themes and with clear systems and criteria for quality control etc. The various justice institutions have their particular needs for information gathering and

analysis, but it is important that at least some of the research have a system-wide perspective. The Access to Justice Programme could continue to be a framework in which some research needs could be formulated and tendered.

10. Criminal Justice Issues

This chapter presents an overview of issues in the criminal justice system that go beyond single institutions. Issues pertaining to particular groups, including juveniles, are presented at the end of each topic. Because of the special relevance of diversion for juvenile offenders, and in order to present police and court diversion together, the topic of diversion is discussed in chapter 11.

10.1 Legal frameworks, social norms and law reform

We attempt to assess the criminal justice system according to its effectiveness in protecting the interests of the public, the state and of natural and legal persons by criminalizing and effectively punishing harmful conduct. The principal legislation in this regard is the Penal Code,[141] supplemented by a number of discrete statutes creating penal offences. The Penal Code sets out the notions of criminal responsibility and punishments for offences in forty-four chapters clustering offences of a similar nature in each chapter and is applicable to all courts.

Two questions are essential in designing criminal laws to govern public conduct. The first is concerned with the conformity of laws to widely held ideas of morality. The second is institutional in character, and has to do with the capacity of the criminal justice system to enforce the laws adopted by parliament. In most countries, criminal justice systems are overburdened, and adopt various means to deal with the problem. These can include decriminalization of certain acts, or the adoption of simplified procedures to deal with minor offences, such as traffic violations. Prior to adopting penal legislation, an analysis should ideally be made of its resource implications for the justice system and the capacity to handle the caseload.

A first question is whether existing criminal laws as written adequately protect private and public interests. A certain social consensus on moral norms is founded in Christian moral values, widely held in Zambia.[142] Most serious offences are common knowledge among the people. In regard to most serious offences, including violence against the person and offences against property, there is a working assumption that Penal Code broadly conforms to social norms and /or to have contributed to setting them. Gaps can arise in that many laws were written in colonial times and may not necessarily reflect current social values. Public opinion is of course not monolithic in Zambia any more than it is anywhere else, and many issues are contested. The two decades since the introduction of multiparty politics greatly improved possibilities for political participation but still leave some way to go before the Zambian legislative process is driven by issue-based discussions in society.[143] In the area of justice, much

[141] Cap 87 of the Laws of Zambia

[142] 97% of those interviewed in the user survey described themselves as Christians.

[143] Afrobarometer's 2010 Working Paper no. 21, put voter turnout in the preceding election at 56 - 64% (depending on whether figures were based on official turnouts or self-reporting). Attendance at community meetings was somewhat lower than in Zambia's neighbours (Malawi, Mozambique and Zimbabwe). Little information is available on the development of political party programmes or on the membership base of political parties, in Zambia as well as in most African countries. See: Political Parties in Africa: Challenges for Sustained Multiparty Democracy, International Institute for Democracy and Electoral Assistance 2007.

of the major legislation still dates to the colonial or the immediate post-independence periods, and the justice system could benefit from greater legislative and political dynamism. Law reform (and support to such institutions as the Law Reform Commission) has moved slower in Zambia than in neighbouring Malawi, for example.[144] To some extent, this is because Zambian actors were awaiting the outcome of the (currently stalled) constitutional reform process before drafting new legislation.

Public debate and campaigning has nevertheless resulted in new criminal legislation in some areas. The 2005 amendments to the penal code in the area of offences against morality are discussed later in this chapter in the section on gender based violence.

The key question for government and society is whether people trust and use the law. Do they avail of the criminal justice system to deal with crime and conflict? Criminal complaints by the public regarding certain crimes may indicate a growing appreciation and use of the penal law, so that social problems are addressed through the sanctions imposed by the law. Use of the penal law by the public is evidenced by the number of complaints filed at police stations for offences such as assault, aggravated robbery and theft. Equally, reluctance to file some complaints, including regarding defilement and gender based violence, also reflects social attitudes and the degree to which people believe that the law will provide them with an appropriate solution.

An analysis of the degree to which the criminal justice system adequately reflects social needs would, among other things, require figures and analysis. The current very limited ability of the justice system to produce this kind of information has already been referred to in this study. In some particular focus areas, such as corruption and gender based violence[145], some justice sector actors are making concerted efforts of this kind, prompted by their inclusion as key performance indicators. A model for gathering and analysing this kind of information is presented in section 10.5.1 Analysis of this kind could be applied in all areas of criminal (and even civil) justice.

In carrying out law reform, the other vital aspect is the resources and capacity of the justice system. Laws that the system is incapable of enforcing or that will impose undue burdens on agencies must be considered very carefully before adoption.

Recommendation: The present study, and especially this chapter make many suggestions for law reform, as have other studies and reports. There is a need for serious study of the form that amendments would take and reflection on their likely consequences. It is recommended that support be given to the ZLRC to examine these issues with justice sector stakeholder groups. Support should especially be given to analytical work on the capacity of the justice system and to the systematic production of estimates on the caseload burden that law reforms are likely to involve.

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[144] Malawi's law reform commission drafted a host of proposals for new laws over a period of several years that were blocked because of political disagreements in parliament until 20010. Since then, a raft of changes has been made and the resources applied to law reform have born legislative fruit. Examples are the Legal Aid Act and Local Courts Act, as well as important changes to the Criminal Procedure and Evidence Code and the Police Act.

[145] See infra, section on protection of victims in the criminal justice system and especially on gender based violence.

10.2 Case flow: the use of filtering and diversion mechanisms

Analogies or images illustrating the criminal justice process as a flow or river are often invoked by criminal justice analysts. In this regard, the need for filtering mechanisms that unburden the system and channel cases correctly are obviously necessary at each stage, from the occurrence of an offence, the making of a complaint, investigation, prosecution and adjudicating the offence as well as punishment and eventual release and social reintegration of the offender. Case flows and processes are largely regulated by the procedural rules found in the Criminal Procedure Code,[146] supplemented by rules laid down by the Courts (the Chief Justice) and by case law. Section 65 of the Criminal Procedure Code mandates the Courts of Law to bring any person charged for any criminal offence to appear before them. [147]

Experience from other countries shows that it is helpful to coordinate performance targets among different criminal justice agencies (especially the police and prosecution) to avoid the situation where police, for example, are measured only on the number of persons arrested or charged, or prosecutors are tempted to take only "easy" cases to court. This will be especially necessary with a greater separation between the police and prosecution functions. Thus success in relation to conviction (rather than charge) rates should be seen and presented as a success for the police, and not only the prosecution. This has been done with the overall KPIs in the SNDP, but the justice sector institutions could also do this in a more detailed way. Moreover, the choice of most relevant KPIs to set is inevitably linked to the question of information gathering and production by the justice system.

We present them in the form of the table below for the purpose of illustration. It is also to be emphasised that it is not possible to describe these processes exhaustively here, but rather in the form of an overview.[148]

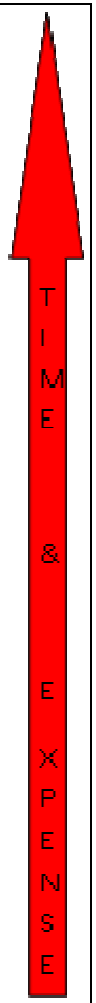
[146] Cap 88 of the Laws of Zambia

[147] "65. Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction, and is charged with an offence committed within Zambia, or which, according to law, may be dealt with as if it has been committed within Zambia, and to deal with the accused person according to its jurisdiction."

[148] For a detailed picture of most of the steps in the criminal justice process, we refer to other reports and studies See especially Transparent Business, December, op cit 2008 and the sections dealing with case flow process overview for the various institutions.

Table 10.2 Criminal Justice System Phases	Findings - Major Bottlenecks	Filters – alternative ways of channelling cases as provided by law	Policy and programme options
Release	Effectiveness of correctional system (rates of recidivism)	Effective rehabilitation – non-recidivism	Improve prison educational programmes
Imprisonment	Restrictive rules on use of parole Limited outreach of parole system	Parole	Expand legal frameworks Expand outreach of parole system
Appeal	Costly appeal processes, lack of legal assistance, delays in producing transcripts.	Acquittal on appeal	Improve effectiveness and availability of legal aid
Confirmation of sentence	Delays in transmission, files mislaid, delays in confirmation	Elimination of errors through confirmation mechanism	Is confirmation mechanism necessary in all cases? Make confirmation more effective;
Sentence	Distrust of non-custodial sentencing due to ineffectiveness of supervision mechanisms	Fines, non-custodial sentencing, suspended sentence, probation, community service	Examine alternative community supervision options Build community supervision capacity
Judgment	Courts lack legal materials. Laws, court infrastructure	Acquittal	
Trial	Scheduling largely controlled by prosecutor. Adjournments, poor communication, witnesses, remandees in prisons, lawyers (defence and prosecution) not available / prepared, lack of court infrastructure, Social welfare reports delayed (juvenile cases); Delay between committal and trial, due to transfer of records under CPC sec. 241	Plea bargaining, presence of defence at trial	Court should control trial scheduling. Strengthen defence presence, improve trial procedures, improve notification of trial dates, strengthen CCCI and prison conditions WG, witness programme, prisons should maintain updated remand lists and improve prisoner data, improve records management
Court – preliminary hearing	Lack of legal representation at this stage and for “mentioning”	Case thrown out?	Strengthen CCCI, strengthen legal services
Prosecution	Decisions on prosecution very centralized Screening / perusal of cases could be more effective, differentiate between guilty plea cases and those needing investigation, those for summary committal etc.	Decision not to prosecute Reconciliation	Build capacity to gradually devolve authority in (new) NPA, Need for guidelines on prosecution Legal services

	Reconciliation underused?			
Court - first appearance	Repeated renewals of remand warrants (Transport costs, criminalization of youth)	Bail / Bond	Strengthen CCCI Legal services and community capacity building to improve surety system	
Police custody	No legal services at police station, suspects not informed of rights, anomalies regarding custody; Need to differentiate between guilty plea cases and those needing investigation	Charges dropped by police?	Improved police investigation Improved legal services	
Arrest	"Apprehension" and arrest	Police bond, Summons instead of arrest	Improved monitoring of detention (incl. APP book) and policing, Legal services and community capacity building to improve surety system	
Police – initial inquiry	Inquiry not carried out (high cost to community)	Police disposal by warning, informal settlement etc	Legislation needed on diversion of juveniles cases; Improve police inquiry, Community supervision options	
Crime reported to police or magistrate	Unreported crime (high cost to community, if not to legal system)	Local settlement	Improve police outreach and community services, improve police capacity	
Crime Committed	High cost to community of unreported crime	Crime prevention	Improve CCPUs and similar, improve legal services	



10.3. The process from offence to trial

Analysing case flows across institutions

Gaps in reporting and information gathering are mentioned in Chapter 4 on the Zambia Police Service. 2005 is the last year for which caseload figures are available.

Table 10.3 : Returns from Police during 2005

Division	Number of Offences	Number Prosecuted	Prosecution Rate (%)	Number of Convictions	Conviction rate (%)
Lusaka	22 683	8811	31.1	7170	81.4
Copperbelt	41,553	19, 714	33.6	15 794	80.0
Southern	12 032	2 279	13.7	1 566	57.4
Eastern	4 299	2 232	37.5	1 497	67.1
Central	6 786	1 922	25.5	1 395	43.6
Western	4 513	2 487	24.3	1 085	72.6
North-Western	3 406	1 258	24.3	1 109	88.2
Luapula	1 751	-	-	171	-
Northern	3595	652	9.5	532	81.6
Total / Nat. Average (%)	100618	30544	24,9	23149	71.5

The 2005 figures do not show rates for arrest / pre-trial custody. In more recent national figures, these are provided at national level. AS LAB figures going back to 2005 are not available (and rather out of date in any case), it is not possible to correlate conviction rates with the availability of legal aid. In future years, this should be done. The 2005 figures are nevertheless striking in respect of the high prosecution and conviction rates in those provinces (Lusaka and Copperbelt) where legal aid is often most available. The overall conviction rate, at 71.5%, is high. Figures on conviction rates for different kinds of offences were not available. Reference is made in the section on children in criminal justice to the difficulty of securing convictions in sexual offence cases, particularly defilement.

The following figures (table 10.4.a below) on police performance on four key performance indicators (KPIs) are provided in the FNDP MTR for 2006 - 2008. Only some of the figures are available in the report (none were available for 2006), accounting for the gaps below

Table 10.4.a : Police Performance on KPIs, 2006 - 2008							
Indicator		Year		% change 05-07	% change 06-07	Year	% change 07-08
		05	07			08	
1	Offences reported	100618	149489	+48.6%	2.8%[149]	148589	-0,6%
2	% Increase in arrests for reported offences		93281			98670	5.8%
3	No. arrests resulting in prosecution	30544	45776	+46.9%		43228	-5.6%
4	No. / Increase in prosecutions leading to a conviction[150]	23149	34881	+50.7%		40907	
	Conviction rate (cases prosecuted)	71.5	76.2	+4.7%		94.6	+17.3%

While the MTR speaks of "a noticeable decline in criminal activities throughout the country" as a consequence of these measures, the same report refers to existing crime prevention mechanisms having failed.[151] The figures on which this is based (see below) seem to show a decline of some 900 crimes reported to the police from 2007 – 2008.

Assuming that the above figures are reliable, some interesting observations can be made. The relatively impressive improvement in the number of reported offences between 2006 and 2007 coincides with the increase in police numbers in the same period. Even with the drop in police staffing numbers between 2007 and 2008, a modest improvement was still made in performance on this indicator. Naturally, the public plays a strong role in the reporting of offences, so increases and decreases on this indicator are subject to many variables. Taking the increase in reported offences together with indicator 2, it is noteworthy that **approximately 900 fewer criminal complaints nevertheless yielded the arrest of almost 5400 more persons**. What is more, when one looks at these figures together with indicator 3, it is seen that the percentage increase in arrests corresponds closely with the percentage decline in prosecutions. There would seem to be a clear indication that the eagerness to arrest was not matched by a combination of well-foundedness in the cases and capacity to prosecute. It is also possible that the higher number of convictions (Indicator 4) achieved meant that, among prosecutors (including police prosecutors) greater attention was paid to ensuring that a smaller number of cases were prosecuted on the basis of a solid case.

[149] This percentage is given in the MTR, but no concrete figure for 2006 is provided.
[150] The MTR refers to "successful verdicts". From the point of view of the police and prosecution, this means a conviction.
[151] FNDP MTR, 2009 Table 14.5, challenge 2.

Given the lack of information on the offences which these persons were charged with (and the possibility of a higher no. of more serious charges), it is not possible to draw proper conclusions from these figures. However, they seem to reveal a risk of **perverse incentives** in the indicator system. Systemic pressure on the police to show good performance by arresting more people in the absence of quality assurance can lead to a serious decline in respect for the constitutional rights of Zambians, who by and large do not have the benefit of legal assistance when arrested, and are thus vulnerable to abusive practices. The arrest of thousands more people should not take place without safeguards to ensure that cases are well-founded. In other countries, balancing measures typically comprise both checks and balances within the police (the requirement to pay compensation for unjustified deprivation of liberty, negative performance evaluation for unjustified arrest), and measures to secure the right of defence, by facilitating forms of legal assistance at police stations.

Conviction rates are generally high for cases taken to prosecution, rising to over 94% in the latest year for which figures are available. It would be nice to conclude that this reflects solely the quality of investigation and prosecution. As discussed below however, it must be recognized that the figures stem from a system from which the defence function is often absent in reality. The problem of imbalance of power (absence of equality of arms) in criminal justice, is discussed below.

Types of Offences

In the absence of data on frequency of offences, we present here the responses of police officers to a question asking officers to rank the most serious crime issues they faced. It is important to note that these responses were impressionistic rather than statistical, and they reflect the frequency with which respondents encountered them rather than the numbers of cases they were dealing with. As such, the figures do not tell us very much. We do not propose that they be used as a basis for planning. Nevertheless, they are presented here for whatever value they may have.

The 31 police officers interviewed tended to view the following as the most widespread crime issues. Beatings and assaults were ranked as the most offences that most police had encountered, followed by domestic violence, defilement, murder and rape. Road traffic accidents (which can of course have the character of either criminal civil or both kinds of offence, and are nevertheless dealt with by the police) were also high on the list, followed by theft and robbery. [152]

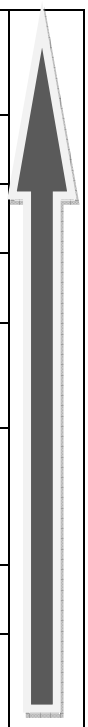
10.3.1 Crime Prevention and linkages to community structures

The FNDP set a goal of reducing crime by 2%. As the figures above in Table 10.4. a show, the number of reported offences showed a slight decline from 2007 – 2008. As emphasised in the national plans, community policing is key to crime prevention. Community engagement holds great potential to reduce burdens at all stages of the criminal justice process. Ideals and realities are both important in this regard. The ideal is a Zambian Police Service enjoying trusting and constructive relationships with community or neighbourhood structures for their

[152] The police were also asked to identify causes of conflict and types of civil conflicts occurring in their areas. Although dealing with these is not their mandate, the information gathered may be of use. It is discussed in the section on users later in the report.

protection against crime. The reality is that there is a potential for abuse, as well as a gain. Issues of control and accountability must be systemically addressed to avoid policing becoming corrupted by private interests.

Stage of Criminal Justice Process	Potential of community engagement
Release	Use of reintegration strategies facilitated
Sentencing	Use of non-custodial sentencing facilitated
Trial	Witness management facilitated
Investigation / prosecution	Community assists police to gather evidence
Arrest / custody of suspect	Use of summons or release on bond facilitated, reducing pre-trial detention
Criminal act	Timely and accurate reporting to police
Local conflicts leading to crime	Conflict resolution that prevents crime
Potential criminal acts	Prevention through education and early intervention



Representatives of the Zambian Police Service were generally positive about the potential of community cooperation, but could point to few concrete success stories. Section 48 of the Police Act provides for the establishment of Community Crime Prevention Associations (under the Societies Act) to assist the police and work under their direction and control. An officer of Inspector or above may be assigned to a CCPA, which may also be provided with equipment by the police. According to sec. 51 of the Act, members of CCPAs have the power to arrest persons they reasonably suspect of having committed an offence.

Until recently, there have been very few linkages between the police and communities aiming at prevention of crime by children. Such contacts could also serve as the basis for diversion measures, ensuring that young offenders comply with requirements to compensate for damage or to reform their ways. Due to incapacity it is almost impossible to identify any success story respecting preventive measures. In early 2010 the Ministry of Community Development and Social Services has been conducting television programs to sensitize communities on the law regarding the protection of children. They have also been conducting sensitization programs in schools and displaying posters. This is an ongoing program under youth reform. At the December 2010 consultation workshop, participants were, given the right conditions, positive about exploring links to traditional leaders and others, such as school headmasters, in relation to diversion schemes.

Local structures and rough justice

Reference is made to the discussion of the law enforcement functions of traditional leaders in Chapter 15.

It is not clear whether or to what extent CCPAs have been established in practice according to the Act. AHSI notes the efforts of the Crime Prevention Foundation of Zambia (CPFZ) to replace neighbourhood watches, which were often accused of engaging in vigilantism[153], with Citizen Crime Prevention Units. The units may not have constituted themselves as CCPAs under the Act, though this is unclear from the report. The AHSI study notes the establishment of more than ten units in Ndola, among others. No review or evaluation of the experience with the CCPUs was available to the team, and it is thus difficult to make recommendations as to good practice, or whether the work of the CPFZ in this regard can be considered a success.

Depending on the particular context, whether urban, rural or peri-urban, a mix of local structures will be typically involved in dealing with disputes, order and justice at the local level. There may not be a clear understanding or respect of the respective powers of village headmen, village councils, ward chairmen, CCPAs, CCPUs, neighbourhood watches and police reservists. Local Courts may very likely also enter the equation. De facto power on the local level may effectively trump legal authority and respect for the law, and distinctions between civil disputes and criminal matters may not be respected. The following news item is by no means unusual in this regard[154]:

[153] -E.g. a juvenile respondent to our surveys, Katesha village, Kasama, responded that neighbourhood watches deliver beatings.

[154] From the Legal Resources Foundation newsletter, December 2010. Slight editing has been done on the item.

Mumbwa police detain man without charge

By Brian Malambo

Police in Mumbwa may have to pay if the suit of a man they detained without charge successfully sues them through Legal Resources Foundation.

Facts are that Bene Nakapuku had engaged in business of charcoal burning with a friend, one Brian Mweemba in February 2009.

Mweemba however could not get actively involved in burning charcoal but instead left everything to be done by Bene while he only purchased firewood.

However, underway in business, Brian changed rescinded his decision of doing business with Bene after which he claimed for money he had put in.

"We had arguments over the matter so I was surprised on 9th August, 2009, Brian Brought a tasking me to appear before the village council who ruled in my favour. On 10th August one of the neighbourhood watch apprehended me and handcuffed before taking me to Mumbwa Police Station where I was detained and later discharged with any charge," Bene charged.

Bene has told LRF Paralegal Lucy Phiri that he wants the cops to pay for their actions as he believes he was unlawfully arrested.

Lucy referred the matter to LRF Chambers for further action.

At face value, the village council, an informal justice structure, seems to have functioned correctly in arbitrating or mediating a minor civil dispute in the instance described in the text box. The neighbourhood watch appears to have acted without authority from the village council, as it seemingly went against the solution adopted there, suggesting a division of effective power in the village. It is not clear who provided the members of the neighbourhood watch with handcuffs, though it would appear to have been the police. The neighbourhood watch member carried out an illegal arrest. The police seem to have failed to take steps such as correcting or disciplining the neighbourhood watch member or liaising with the village council to determine the rights and wrongs of the situation or find out what had been done at village level. Instead of preventing an illegal arrest arising from a purely civil matter, the police seem to have endorsed and compounded it by detaining a man. Cooperation can all too easily degenerate into clientelism in the absence of known rules and accountability structures.

Rough justice: Survey responses indicated that "rough justice" is widely practiced around the country as a means of ensuring social order. The police may order people to pay informal "fines" or compensation to complainants or opposing parties. Some respondents reported the police using cells as prisons to punish people or hold them until they pay debts or fines. Ward chairpersons and village headmen may order people to till fields, carry stones or make bricks, besides fining people by giving a chicken or a goat or, more seriously, banishing a person from the village.

In other instances, including some described in the chapter on traditional courts, the traditional leaders overstep the mark of what is allowed, sometimes abusing the rights of citizens. People are tied to trees or "dipped" in water. It is often difficult to see how these practices could have operated without some knowledge among the police. ZHRC told of a case where police who were informed of the murder by villagers of a man for witchcraft responded by asking the traditional leader to determine the truth of the witchcraft allegations.

Conclusion: Police engagement with community structures is an essential part of the way forward, but it is also fraught with difficulties. Although unorthodox and often illegal, local "rough justice", ordering and security is to some extent both necessary and inevitable as long as the outreach and popular legitimacy of the justice system remains limited. There is no perfect solution to the dilemmas posed by informal ordering and security. Police, close to realities on the ground, will inevitably find it difficult to oppose local groups whose actions enjoy the support of communities or the most powerful elements in them. The social reality is that the law and state justice system actors do not enjoy a monopoly of legitimacy in the use of force and the imposition of order. Negotiation takes place, and the best strategy for the police and other justice actors may well be to contain the phenomenon, curbing excesses while gradually drawing it into the fold of legality. In some contexts, a wholesale attempt to repress these mechanisms may not succeed and may even be counterproductive. In others, failure to act would be unconscionable. The terms of the mutual engagement must be made clear, understood and enforced. As is so often the case, it is easy to set out principles. The challenge is to enforce them. Realistically, this is dependent on resources for police mobilization, and for information and training on all sides: in communities, with CBOs, traditional authorities, and the police. These issues are discussed further in chapter 11.2.3 in relation to pre-trial diversion.

Recommendations

1. A mapping and **evaluation** of experience with community level crime prevention structures should be carried out, with mandate to examine their practices, including success in eliminating vigilantism, promoting transparency and local participation, accountability and sustainability. The structures should be examined with a view to analysing their potential contribution **at all stages of the criminal justice process**. This should incorporate the study of existing informal police diversion practices proposed in chapter 11.

2. Good practices should be identified particularly as regards avoidance of vigilantism and corrupt practices and promotion of sustainability, consideration should be given to developing and supporting a best practice model for community links. Consideration should be given to the different nature of needs and environment in urban and rural areas. A best practice model would be based on respect for the law, community dialogue and influence over policing.

2. The system of nominating a **police officer to liaise with community level structures** should be evaluated and probably strengthened. A handbook or other brief information material should be developed on community involvement in law enforcement and justice, clearly setting out the requirements of the law, the limits of the powers of community structures, and the supervision duty of police. Any such information material should endeavour to cover all stages of the criminal justice process and the difference between civil disputes and crimes. If a police diversion scheme is adopted in line with the recommendation in chapter 11 of this study, this guidelines on this should form part of the handbook.

3. That the question of police interaction and engagement with traditional justice and security providers be documented in the context of an overall "primary justice" pilot project. While representatives of the justice system will typically take their outset in a monitoring and supervision approach, this faces constraints of capacity and on the ground presence. A more inclusive model that recognizes respective strengths and weaknesses may be more effective in achieving change and development.

4. It is important that gender aspects and empowerment of women be built into initiatives on community linkages and crime prevention in order to ensure that crime prevention and diversion efforts fully incorporate the concerns of both genders. Combating GBV should be an explicit part of such programmes. The police, DSW and national level NGOs should build gender awareness concerns into their choice of community level partners.

Community linkages are also discussed in section 11.2.3 on children and diversion.

10.3.2 Arbitrary arrest and detention / poor initial investigations

While statistics were not available to the team, it appears that most arrests in Zambia take place without a warrant.[155] Police interviews and stakeholder workshops provided strong indications that the police tend to arrest first and investigate later.[156] As noted above, it may be confirmed by the criminal justice statistics available. This tendency is strengthened by the lack of trust among police of the summons system. Police voice the fear that the suspect will abscond before he can be brought to trial. Accused persons are sometimes detained prior to completion of the investigation of the initial complaint and subsequent transfer of the docket to the prosecution. Police officials said that it was often impossible in practice to investigate a complaint to a sufficient degree – even to confirm the basic complaint - within the 24 hour limit for bringing a suspect before a judge.

Police reported that they explain suspects' rights at the time of arrest. Neither confirmation nor contradiction of this was obtained from other sources. There is a widespread impression of the misuse of the discretionary power of the police powers to detain and investigate (for example in treason and capital offences). The police have the right to question anyone regarding an offence, and may invite someone to the police station to answer questions. The person is not obliged to answer questions or to accompany the police to the station, and the police may not detain them, unless they have been lawfully arrested. Workshop participants reported that the police abuse this process by detaining people for long periods of time to 'assist with their inquiries', and use spurious and legally unfounded distinctions between time of "apprehension" and time of "arrest" by the police that are designed to evade the 24 hour rule. They then detain them for long periods on the basis that they have not actually been arrested, sometimes shunting the detainee from one police station or post to another.[157] When this happens, the officers at the station where they are detained may not even feel that

[155] According to the CPC, warrantless arrests may be carried out for cognizable offences or, in the case of non-cognizable ones, for reasons including not providing a name and address, for breaches of the peace committed in the officer's presence. See CPC sec. 26. Sec. 27 gives wider powers of arrest to OICs. In the surveys, Magistrates responded 79% - 21% that most arrests are carried out without warrants.
[156] Notes, stakeholder workshop on criminal justice, Lusaka, 17.3.2010.
[157] 2nd Draft Best Practices Handbook prepared by BEMVI Associates, rewritten by Greg Moran for Ministry of Justice- 2010

it has the authority to make decisions concerning release or other legal rights.[158] The apprehension / arrest distinction, though entirely without legal basis, would appear to have become so institutionalized that it is, according to one police official, even taught at the police training school.

Despite measures such as the appointment of "integrity officers" a serious lack of accountability remains in the system. Police officers who attempt to insist on respect for rules or legal guarantees may see few or no incentives or rewards for doing so, and many risks in challenging the authority of superiors in the hierarchy.

A further issue is that the lack of resources may often prompt the police to ask complainants to pay for necessities such as fuel and "talk time" for mobile telephones, or to accept contributions for these purposes.[159] Even if police officers are not personally corrupt, the "client" relationship that is created by such payments can very easily have a corrupting effect on the police and the justice system, turning the perception of police and legal protection from public goods into private services to be bought, and risking putting the police on the side of the highest bidder.

Recommendations:

1. The CPC should be amended to impose a clear legal obligation upon police officers to explain legal rights to suspects at the time of arrest. The obligation to issue a caution in the Judges Rules should be enacted as legislation. (The guarantee in Article 13 of the Constitution that an arrested person be informed of the reasons for their arrest does not explicitly include a reading of rights or a caution.) Recommendations on controls on detention by police are made below.

2. **Police powers**: The Inspector General of Police should issue an instruction making it clear that there is to our knowledge no legal basis in the CPC or anywhere else for a police power to deprive people of their liberty by "apprehending" that is distinct from the power to arrest and detain. Thus, arrest should be clearly stated to take place at the moment of deprivation of liberty. Such an instruction could set out steps to be followed by the police following arrest / deprivation of liberty, including the procedure for bringing a detainee to the police station, noting the arrest in the APP book and issuing the warn and caution statement, and bringing the person arrested before a court. The High Court or Supreme Court should avail of any judicial opportunity afforded by a concrete case to make it clear also and to take a clear stand against illegal deprivation of liberty by the police. At the same time, the CPC and Police Act should be examined and possibly revised to give the police the reasonably necessary powers to hold suspects.

3. Arrest of juveniles: In many respects, procedural requirements involving juveniles are not significantly different from those of adult offenders, except for the protective role that the Social Welfare Office is supposed to play. The Supreme Court nevertheless laid down that a parent or guardian should be present when a statement is taken from a juvenile.[160] Juvenile suspects should normally be released on recognizance (Juveniles Act s. 59).

[158] Notes, December 2010 consultation workshop.
[159] The user surveys showed that 24% of respondents said that cost issues would prevent them from resorting to the police with a complaint. Many made reference to demands such as these.
[160] Mbewe v The People (1976) ZR 317 (Supreme Court)

Police officers are required to contact guardian(s), parent(s) and/or a social worker when arresting a juvenile for the purpose of attendance in court.[161] Social workers assist police officers with locating the parent(s) or guardian(s) as well as preparing the juvenile for the court appearance. An insufficiency of personnel and transport facilities stands in the way of this being done sufficiently in practice.[162] A majority of DSW officials interviewed said that alternatives to custody were to their knowledge generally not used in juvenile cases. Half said that juveniles were not detained separately from adults. Participants in workshops for the study revealed a lack of clarity as to whether responsibility for tracing of parents is the responsibility of the police or of social welfare officers.[163] The uncertainty creates a risk of neglect of this duty. The Juveniles Act seems to place the responsibility for ensuring that tracing is done on the government agency that is taking the child into custody.[164]

The Arrest, Reception and Referral Service (ARRS)

This project was one of the components of a Swedish funded programme under the umbrella of the Child Justice Forum.[165] The ARRS programme attempted to centralize the arrest of children at particular police stations in the city with the aim of improving processing, service provision and monitoring. An evaluation found that the centralization assisted in improving cooperation between police and social welfare officers, as it was easier for the latter to focus and concentrate their efforts. While negative effects of such a policy might arise (such as making it more difficult for family members to contact or access their arrested children because of greater distance), it would seem that these problems are probably outweighed by the positive effects, particularly if the centralization is accompanied by an improvement in services and case processing.

The ARRS programme was implemented together with the Child Friendly Court, which centralized juvenile cases in Lusaka courts and was later rolled out to 14 districts. The 2010 CJF evaluation speaks of Child Justice Forums being established in 25 districts, though it does not appear that all elements of the programme (CFC, ARRS and diversion scheme) were operational. Within the police, staff liaising with the CJF often tended to be from the VSU or CPU. In some places, despite the introduction of the CJF, the APPB book did not appear to be maintained, personnel did not seem to be aware of child detainees and facilities for child detainees remained poor.[166]

10.3.3 Use and availability of police bond

Section 33 (1) of the CPC deals with release on police bond, but is worded to apply mainly to cases where a person cannot be brought before a judge within twenty four hours. The police should release the person on bond, but this is subject to an exception, if “the offence appears to the officer to be of a serious nature”. The vague language of the section creates uncertainty.

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[161] Juveniles Act, s. 127 (2).
[162] CFJ Evaluation Report, 2010.
[163] UNICEF, Dec. 2010
[164] Cap 53, sec. 127 (2).
[165] The other two components, the Child Friendly Court scheme and a court diversion programme, are discussed in later sections of this study.
[166] CJF Evaluation Report, 2010. Choma is mentioned in the report as being problematic in these respects.

Statistics on the use of police bond were not available either centrally or locally in the police stations visited. Police were thus asked "impressionistic" questions on the use of police bond. The authors do not vouch for the factual accuracy of the responses. Police were favourable towards using police bond in cases involving juveniles, mothers of young children and first offenders, and in less serious offences. Most police respondents said that they are willing to give bond in relation to minor offences where two sureties can be found[167]. Police mentioned a number of factors making it difficult to use police bond and sureties. In urban areas the police may not trust the system because many people live without a fixed address. Suspects (and sometimes even sureties) give false names and addresses. This made the procedure very unreliable and increased the need for detention pending investigation and trial. In rural areas, the more tightly knit social networks made the bond and surety systems more reliable in principle, though distances and communication are a challenge. The ZHRC reported on its visit to Lusaka prisons (2004) that many officers do not consider the issuance of police bond to be a right. They consider it as a privilege to be granted at absolute the discretion of the police. Even where a suspect has proper sureties to sign for it the police are still hesitant to give bond. This does not only infringe on the rights of suspects but also causes unnecessary congestion in police cells.

This suggests a worrying arbitrariness rather than the professionalism and respect for the law that should guide a justice agency. It also suggests that police officers may be treating pre-trial custody as a form of punishment, violating the constitutional guarantee of the presumption of innocence. The ZHRC emphasised the importance of placing an obligation on police officers to fully explain to the suspects their rights at the time of conducting a formal arrest. On the other hand, there are also factors that impede the police. A lack of communication facilities among detainees (telephones and talk time) makes it difficult for them to contact relatives. Some police reported having allowed detainees to use their personal phones and talk time to call family.

Provision of information on the possibility of police bond: HURID (2008) reported that 18.6% (60 out of 322) of incarcerated children interviewed said that they were informed by the police of the possibility of police bond.

It appears that the police itself lacks information allowing comparisons between various police stations, districts and provinces on practices in the granting of police bond. The lack of information affects the development of policies and guidelines at a more central level.

Recommendation: (1) Section 33 (1) of the CPC dealing with bond should be amended. The police decision not to release the person on bond should not be based only on the "appearance" of seriousness of the accusation to the police officer, but on an objective indication that this is the case, based on evidence that has prima facie value. A written record should be kept of the date, time and person making this assessment and the reasons underlying it.

(2) At the local level, police stations and middle-level authorities would benefit from information gathering on the factors leading to bond conditions being respected or disrespected. This would permit the development of good practices and guidelines in this

[167] Some police mentioned three sureties, or one. Sec. 33 of the CPC leaves a discretion to the police as to whether sureties should be demanded.

regard. While guidelines based on experience could to some degree be made at a national level, there are many factors making knowledge of local conditions necessary for good policing, so some flexibility is necessary.

(3) Information must be systematically provided to police detainees about the possibility of and the conditions for obtaining police bond, especially – but not only - where juveniles are concerned. The senior levels of the ZPF should issue instructions to this effect and be vigilant in ensuring that they are followed.

(4) Simple steps such as ensuring that the police station has a list of names and, where possible, telephone numbers of ward chairpersons who could confirm that the detainee is resident in their ward could be of help in facilitating use of bond.

10.3.4 Combating arbitrary and unlawful detention

Please note that the law enforcement functions of Chiefs and *kapasus* are dealt with in Chapter 13.

A number of measures could be taken within the police structure. Sections 18 (A) and 18 (B) of the Police Act require the custody officer to record the name, the offence for which the person is arrested and the state or condition of the person; and to (b) make such recommendations as to that person's well being as are necessary. The law does not impose a clear requirement for the custody officer to note the exact date and time of the taking into custody. This is a weakness, especially in the light of reported abusive practices whereby detainees are moved from one police station to another to avoid inspection by Magistrates (see discussion on APP book inspection below). In a system where hierarchy and authority may count for more than adherence to the letter of the law, OICs or other superior officers can overrule the concerns of custody officers. They may not even need to do so explicitly. The mere fact of hierarchical superiority and a shared sense that the official rules are inappropriate or do not work may be sufficient to quell protest.

Recommendations:

1. The police should do more to ensure that the intention of these amendments to the law is achieved. This seems to depend to a large degree on will within the police, the Ministry of Home Affairs and ultimately, the executive branch of government. Specific training for custody officers on their role and responsibilities might be of help, but it needs to be part of a package that include guarantees and action by the senior levels of the police to show that adherence to rules will be rewarded and violation punished. OICs need to show by example that on matters within their competence, the authority of custody officers will be treated with the utmost seriousness.

2. The Zambia Police Service should (a) ensure that existing measures designed to ensure against arbitrary arrest and detention (custody officers, inspection of APP Book by Magistrates) are functional and complied with. Internal systems of performance evaluation should ensure that reward and promotion systems are based on indicators of quality (well-founded actions, completed investigative steps) as well as quantity of arrests. Integrating compliance with the weekly APP book procedure into performance evaluation of OICs would be a positive step. This would require systematic record keeping on compliance with this

requirement by the Subordinate Court Magistrates, and making such records accessible to senior levels of the police.

3. The Zambia Police Service should enter into discussions with the LAB and other legal service providers on how legal services can and should be extended to police stations (including as foreseen by the Plea Agreements Act of 2010). This could be tested on a pilot basis in particular stations, preferably in one of the areas where the CCCI mechanism is in operation. If capacity is insufficient in the LAB and LAZ schemes to ensure the presence of lawyers, paralegal arrangements should be explored.

10.3.5 Judicial control of detention - bringing before a judge

The justice system contains a number of mechanisms and provisions by which the judiciary can exert control over detention at various stages of the criminal justice process. The virtual absence of legal assistance for most detainees means that control by the judiciary – most often by Magistrates - is effectively the only form of check on the abuses outlined above.

For arrests with a warrant, the requirement is to bring the person before a court without unnecessary delay. [168] The Government of Zambia, in its reports to the UN Human Rights Committee, says that section 33 (1) of the Criminal Procedure Code requires that a suspect be brought before a court within twenty four hours of arrest.[169] However, the section is far from clear in requiring this. Firstly, it does not apply to offences for which the death penalty is applicable. Secondly, it requires the police "if it does not appear practicable" to bring the person before a court within twenty-four hours after being taken into custody" only to inquire into the case. Where the person is retained in custody, section 33 (1) actually only requires that (s)he be brought before a court "as soon as practicable". Thus, the legal protection afforded by section 33 is very weak. The elasticity of the provision may contribute to a culture of non-compliance.

Changes to the law, however desirable, will not solve the problem on their own. The Government report acknowledges that it is difficult to ensure the 24-hour time limit because of logistical problems such as transport, court infrastructure and human resources. It frankly admits that "*most accused persons are not taken to Court in time*". On the one hand it could be argued that even a forty-eight hour limit (as is the case in Malawi, Namibia[170], *South Africa and Zimbabwe) that is complied with is better than a twenty-four hour limit that is not respected. Failure to respect the limit occurs both for good and bad reasons. In some parts of the country and in some circumstances, a longer limit could be justifiable. In other areas (especially in urban areas and where the distance to the nearest functioning court is not long), twenty-four hours is enough, and introducing a forty-eight hour limit would result in a loss of legal protection for some.

It is reported that suspects do not personally appear before Subordinate Courts in order for the court to approve or deny the detention. Especially outside of Lusaka, a number of interviewees said that it is more the exception than the rule for the person to be brought before the court – even for first appearance. In Lusaka, personal appearance was said to have become the norm, though figures were not available on this. The US DOS cited human rights

[168] CPC sec. 108
[169] See 3rd periodic report, January / April 2006. CCPR/C/ZMB/3 p. 65
[170] Criminal Procedure Act Namibia, No. 51 Of 1977, section 50.

groups as saying that, prison administrators "*routinely altered paperwork to make it appear as though prisoners had appeared before a magistrate when they had not, often because prison authorities had no fuel to transport prisoners to courts.*"[171]

Abuses such as these can be uncovered by various means, including better access to legal aid and better transparency and inspection mechanisms. Improvements will only come if they are punished effectively and severely. On the other hand, the police and prisons service should not be punished for lacking resources. Honest failure to comply because of a lack of resources should be openly admitted to by the police and prisons services.

Recommendations:

Even if circumstances and resource levels in Zambia still do not make it realistic to impose an across the board twenty-four hour legal limit, section 33 (1) should be strengthened to provide better protection against arbitrariness. We see no good reason to maintain the exception for offences carrying the death penalty. Zambia could consider following its neighbours and setting the limit for bringing a suspect before a judge at forty-eight hours instead of the vagueness of the current provisions.

The courts should never authorise the detention of people who have not been brought before them (first appearance). Doing so should be a disciplinary offence for judicial personnel. Pending legislative action, the courts should develop uniform practice on the time limit for bringing a person before a court. These could allow for some controlled flexibility to account for local conditions. Any changes in this regard should however be accompanied by improvements in the legal protection of the rights of detainees. Many such measures are discussed below and in chapter 6 on the Legal Aid Board.

Renewal of remand warrants and the challenge of ensuring the right of accused to attend hearings are discussed below in section 10.3.12.

10.3.6 Judicial control of detention - inspection

The report to the UN HRC mentions the APP book: "in order to avoid over detention of suspects and to ensure expediency in dealing with cases; Magistrates have developed a procedure obliging police officers to table a book known as the "Arrest and Prisoners' Property Book" (APPB) weekly. The APPB keeps a record of all suspects kept in police custody and informs the Magistrate of the status of the suspect. By this measure the Magistrate is able to check and compel police officers to bring suspects to Court in good time. The procedure is based on the requirement of section 34 of the CPC for OICs to report on all persons arrested without warrant to the nearest Magistrate and whether they have been admitted to bail or not. The judiciary deserves praise for putting such measures in place. However, they would carry more weight if given legislative authority in the CPC. Magistrates would seem to have no effective sanction against police for non-compliance, and no time limit is set down in the legislation for this reporting requirement.

[171] US DOS, HR report on Zambia, 2009 [hereinafter USDOS Zambia, 2009], *accessed at* http://www.state.gov/g/drl/rls/hrrpt/2009/af/135983.htm

The Criminal Justice in Zambia, Best Practice Handbook, 2010, sets out a number of requirements in regard to judicial inspection of police detention:

- Magistrates must check the Arrest and Prisoner's Property Book (APPB) regularly and should set aside a particular day and time to do so. When examining the APPB, the Magistrate must compare the date of arrest with the date shown in the 'disposal' column:

- "If the APPB does not say what has happened to the person since their arrest, the Magistrate must ask what has happened to them. If the Magistrate is not satisfied with the explanation, they must order that the prisoner be brought before the court at the next sitting.

- If the APPB shows the person has been kept in custody for some time and then released for 'insufficient evidence', the Magistrate should ask what the cause of the delay was before the person was released. They should also consider the possibility that the arrest was made without sufficient reason.

- If a large proportion of the arrests are followed by release for insufficient evidence, the Magistrate must consider reporting this to a higher authority.

- If a person has been kept in custody over a court day without having been brought before the court, the Magistrate must ask for an explanation. If the Magistrate is not satisfied with the explanation, they must order that the prisoner be brought before the court at the next sitting."

Recommendations:

1. There is no reason why records such as the APPB book should not be made subject to public scrutiny, and thus accessible by the media, the ZHRC and human rights NGOs. (Though any publicity would have to omit names of individuals or be subject to their consent). This would give a much needed measure of transparency and accountability. The CCCI under the AtoJ programme provides a possibility to improve the operation of such mechanisms. In some areas, it might be possible to introduce local citizen bodies with the power to visit and inspect police cells (see also following section on mistreatment and torture and the role of inspection mechanisms).

2. Schemes can be introduced to permit the presence of lawyers and qualified paralegals to visit police stations for the purpose of providing preliminary legal advice to detainees, helping to contact sureties etc. The presence of non-police officers regularly visiting police detention cells is among the most valuable measures that can be taken to reduce unlawful detention and misuse of police powers.

10.3.7 Mistreatment and torture in police custody, excessive use of force

ZHRC found evidence of torture having occurred during their visits to prisons and police stations in Lusaka province in 2004.[172] In 2008, the ZHRC again reported that torture was widespread and a routine part of interrogations by many police. Human Rights Watch reported

[172] http://www.hrc.org.zm/media/lusaka_prisons_report.pdf

in 2010 that torture was rife in police stations in Zambia.[173] The US DOS report on human rights in Zambia for 2010 takes up a number of specific instances and cases of what appears to be excessive force used by police resulting in death or serious injury, as well as torture and mistreatment.

There have been reports of severe mistreatment of juvenile detainees[174] as well as findings that juvenile suspects are generally met in a harsh manner.[175]

Police representatives in workshops and discussions should be commended for their openness and willingness to confront these problems. The police happen to be those on the front line of a poorly resourced justice system with many structural difficulties. It is unhelpful simply to engage in blaming. Any productive discussion of these issues must honestly examine causes and take a critical and realistic look at how to remedy them. It was beyond the scope of this study to engage in an in-depth exploration of the causes of police mistreatment of suspects, where it happens. They doubtlessly include factors within the immediate control of the police, including selection, training, internal culture, control and discipline, as those beyond their immediate control, such as the justice system's reliance on confession evidence, lack of resources and coordination challenges. The persistence of such abuse is linked to reliance on confessions as main evidence, but experience from other countries as well as the better elements of the ZPS shows that the use of torture and mistreatment is not dependent only on resource levels in the police. These negative practices can be combated and greatly reduced without sacrificing police effectiveness and without waiting for expensive technology. A lot can be achieved by learning and using better investigation techniques and tackling institutional culture, including corruption issues.

In this brief section, the focus is on measures of internal and external control and inspection. These include the custody officer scheme, PPCA, ZHRC and potential additional mechanisms. According to the PPCA, police officers are supposed to complete a report if a detainee arrives in a cell with injuries and refer the detainee to a hospital.[176] However, the custody officer system (also discussed in section 10.3.5 above) does not appear to be working to prevent mistreatment and torture. This may be due to ingrained tolerance of abuse within the police force, or to hierarchical and peer pressure on custody officers to remain silent. A more thorough investigation is required on this issue.

The US DOS report for 2010 also cites the PPCA to say that many complainants dropped their cases after involved police officers intimidated complainants or offered compensation to avoid a formal PPCA investigation. The need to strengthen the PPCA is dealt with elsewhere in this report in more detail.

The Government of Zambia, in its responses to the Universal Periodic Review, supported the recommendation to sign the **Optional Protocol to the UN Convention against Torture** (OPCAT)

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[173] Zambia: Police Brutality, Torture Rife, Sept. 6, 2010: http://www.hrw.org/en/news/2010/09/03/zambia-police-brutality-torture-rife. See also OMCT, Human Rights Violations in Zambia, Shadow Report UN Human Rights Committee 90th session July 2007, Part III, describing cases supported by LRF where compensation was awarded after children were subjected to police violence. (OMCT Report p. 5,6,7)

[174] AHSI 2009, p. 109 citing other sources.

[175] CJF Evaluation Report, 2010.

[176] See also the sub-section on the PPCA under the Zambia Police Service.

mandating a national inspection mechanism in respect of places of detention and a guarantee of access by a UN mechanism). Ratification and implementation of obligations under the Protocol could have significant effects in the reduction of mistreatment and torture of suspects and detainees in Zambia. It is clear that a functioning professionalized inspection mechanism would be expensive. The ZHRC cannot bear the entire burden of inspecting all places of detention alone. The maximum benefit from existing mechanisms of inspection can be derived from effective cooperation among a variety of bodies. Local independent inspection mechanisms close to conditions in districts and provinces seem to offer promise. Unfortunately, the ZHRC's previous experience with provincial committees has been negative.[177] The challenge is one of ensuring effective supervision and control by the ZHRC at central level.

Recommendations:

1. The recommendation of the ZHRC, echoed in other reports and studies, for domestication of the UN Convention against Torture (which has been ratified by Zambia) is strongly supported. Specific provisions should be made to criminalize the offence of torture in line with the convention definition, to forbid the use of evidence obtained through torture or mistreatment and to require an independent investigation whenever there is a credible allegation of torture.

2. A rollout of a national inspection scheme as envisaged by the **OPCAT** would require that the ZHRC and / or other cooperating bodies should be given sufficient resources to organize and supervise a system of civilian / NGO visiting mechanisms at provincial level (devised in consultation with the Police and Prisons Services), and to carry out its own programme of visits and inspections. Malawi introduced amendments to its Police Act in 2010 that include provisions on lay visitors.[178] It is recommended that Zambia gather information on this experience and explore this option too. Lessons learnt from the ZHRC experience with provincial committees needs to be incorporated into any new attempt at decentralized monitoring. Nevertheless, local bodies to ensure transparency and accountability still hold promise for progress, so renewed attempts in this direction should be made. NGOs present on the ground that have experience and knowledge of local conditions need to be a part of any renewed attempt, and an agreed code of conduct acceptable to all parties needs to be hammered out.

3. Recommendations made elsewhere for training of police to sensitize them on how to deal with children are endorsed here.

4. The present study did not attempt to examine the **private security industry**. Recommendations on the need to regulate this industry have been made by others (AHSI 2009, p.49). We endorse the recommendation to close this gap through appropriate legislation.

[177] The authority of at least one such committee was abused, leading to their abolition Notes on ZHRC remarks during workshop, June 2011 Fringilla Lodge.
[178] Act no.12 of 2010, s. 124.

10.3.8 Deaths in custody

As shown in the tables in the section dealing with the PPCA, complaints regarding deaths in custody are placed in a separate category. However, these statistics reflect complaints, rather than the total number of deaths in police custody[179] as such. The team was not able to ascertain what procedures are in place in the ZPS to record and enquire into the circumstances of deaths occurring in connection with contact with the police.

Recommendation: Police annual reports should be required to contain figures on all deaths in police custody. A clear procedure should be in place to ensure that all deaths that take place following police contact that in any way indicate that the death was connected to police action are promptly and impartially investigated by qualified medical personnel. Any indication of wrongdoing should be promptly and thoroughly investigated, whether or not a complaint has been made.

10.3.9 Bail

According to section 123 (1) and (4) of the CPC and section 43 of the Narcotic Drugs and Psychotropic Substances Act of 1993, no bail may be granted for certain offences including capital offences (murder and treason) or aggravated robbery and certain drugs offences. Repeat offenders for motor vehicle theft are also denied bail.

In principle, the idea of non-bailable offences as such would, under international guarantees binding on Zambia such as Article 9 of the ICCPR require at least that a serious examination of the well-foundedness of the charge – that there is some evidence for it. Under international law there is a presumption in favour of the right to remain at liberty, which the state agencies requesting detention are obliged to rebut, if requesting detention pending trial. The longer the detention continues, the more the onus falls on the state (the police and prosecution) to demonstrate a continuing need for detention and that they are indeed making progress in the case. A de facto presumption in favour of detention risks being an incitement to laziness on the part of the police and prosecution. The law should clearly protect liberty and it is up to the judiciary to give meaning to its provisions by enforcing them in practice.

In neighbouring Malawi, there is both legislation that provides guidelines for the courts in handling bail applications,[180] and judicial guidance. There has been a gradual move by the judiciary away from an idea of non-bailable offences and blanket refusal of bail – as laid down in the Act – and a placing of the on the accused to show why bail should be granted,[181] to judicial action based on the constitutional recognition of the right to bail, subject to the interests of justice.

The decision to detain or release pending trial should be based on an individual assessment of several additional factors. For currently bailable offences, these factors are set out on p. 104 of the Best Practice Handbook and will not be repeated here. Even for bailable offences, bail is reportedly seldom granted in practice (Best Practices Handbook 2010, p.84), for the same

[179] Definitions of what constitutes a ”death in custody” vary. An international good practice is to require a full examination of any death following police contact, rather than only deaths that actually took place while the person was detained.
[180] Bail Guidelines Act, 2000.
[181] The Mvahe decision is cited as relevant by Malawian lawyers: MSCA Criminal Appeal no. 25 of 2005.

reasons as the non-use of police bond and summonses: that the courts and justice system actors do not trust that the person will show up in court, they lack fixed addresses, that the accused is unfamiliar with the possibility of applying for it, etc. The Handbook points out that enhanced use of reporting requirements could be used instead of paying financial security. As discussed in the section on crime prevention, improved links to communities are one of the best means of tackling this problem.

Recommendation

In practice, denial of bail would not be a violation of constitutional and international guarantees if there is factual evidence of a certain standard of reliability and an objective need based on the investigation and prosecution of the case to keep the suspect in detention, as long as there is respect for all other procedural guarantees, including a regular review of detention and the possibility of a prompt and effective legal remedy against unlawful detention.

The justice system should move from blanket denial of bail to a presumption in favour of it and individual assessment based on the well-accepted factors.

Making bail more widely used and available would require changes such as:

(i) A change in the legal provisions noted above,

(ii) sufficient judicial personnel at the required level of qualification to assess bail,

(iii) educational and informational work to ensure the implementation of the changes;

(iv) devising and making available simplified forms for making bail requests;

(v) Making simple legal services more available to accused / defendants.

In order to minimise or avoid public backlashes against such a liberalization, data gathering and monitoring of practice would be very useful to ensure that increased use of bail does not lead to a lower level of protection for the public and the justice process.

10.3.10 Habeas corpus

Access to the remedy of **habeas corpus** is restricted in practice because applications and hearings must commence in the High Court. Section 18 of the Subordinate Courts Act provides that the Subordinate Courts have no jurisdiction to issue writs of habeas corpus. Section 116 of the CPC does give the courts (including the Subordinate Courts) the power to order an officer in charge of a prison to bring any person confined there before the court, but the section does not give the power to order release. This is a particularly serious weakness in areas where distance to the High Court is greatest.

Recommendation:

As the remedy of habeas corpus is also intended to be an urgent measure, consideration should be given to legislative changes making the remedy available from senior levels of the

Magistrates Courts where distance to the High Court is greatest (CRMs and SRMs).[182] The Chief Justice could be mandated by legislation to confer the power to issue writs of habeas corpus on particular Subordinate Courts. A rule of thumb could be that it should always be possible in principle to obtain a writ of habeas corpus that can be delivered to the place of detention within 48 hours. This recommendation is premised on the availability of sufficient numbers of CRMs and SRMS. In this way it is tied to issues of capacity building and recruitment in the judiciary.

10.3.11 Remand detention pending and during trial

Mr. Mchenga, the then Director of Public Prosecutions,[183] was concerned to point out that remand detention is a necessary criminal justice measure to protect society and the integrity of criminal investigations. Prolonged remand detention is a symptom of problems with the functioning of the system, so the emphasis should be on improving the system rather than on simply removing the symptom.

Numbers and targets

The FNDP set a target of achieving a remand population of a maximum of 25%, achieving a rate of 30% as best performance in 2010. The SNDP also sets out KPIs in this regard, with a goal of achieving and maintaining a 1 : 5 ratio, or no more than 20% remand population. The 2010 baseline is given as 30%. According to figures taken from the 2009 – 2010 National Audit of Prison Conditions in Zambia (NAPCIZ), this amounted to a total of 4378 remand prisoners at the time the audit was conducted. More detailed figures are set out in the Prisons chapter of the present study.

Table 10.3.11 Remand Rates – Figures and Targets, 2006 – 2015

Measured Figures[184]					Targets (SNDP)				
2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
39%	32%	36%	32%	30%	25%	20%	20%	20%	20%

Within the overall national target of achieving and maintaining a remand population of no more than 20%, attention must also be paid to the situation within particular provinces and prisons. While it is obvious that provinces with busy High Courts and remand prisons will have larger numbers of remandees, a look at the figures by province reveals large differences that cannot only be explained by this factor.

[182] An analysis of this could be based on figures showing where CRMs and SRMS are present, to draw conclusions on where access to the habeas remedy is weakest and thus protection against arbitrary detention is poorest. The team did not receive figures permitting it to illustrate this clearly.
[183] On 11th February 2010 in Lusaka
[184] The figures for 2006 – 2008 are taken from the FNDP MTR. The 2009 figure was calculated for this report using the NAPCIZ figures. The 2010 figure was taken from the SNDP.

Central province is currently the only province that comes close to the targets for 2012 – 2015, though Eastern Province is close to the 2011 target. The highly populated and urbanized Lusaka and Copperbelt provinces are far from the targets, but so are North Western and Western Provinces, where there is far less of a legal aid presence. It is not possible to judge from the above figures whether initiatives such as the CCCI have been successful in reducing remand detention and maintaining it at an acceptable level, as the programme had not been in operation for a sufficient time at the time these figures were gathered.

Table 10.3.11a National Totals, Remandees and Convicts[185]

Province	Remand	Convicts	Total	Remand %
Central	621	2384	3005	20,7
Copperbelt	972	1948	2920	33,3
Eastern	322	892	1214	26,5
Luapula	200	419	619	32,3
North Western	255	450	705	36,2
Northern	375	807	1182	31,7
Southern	319	1018	1337	23,9
Lusaka	929	749	1678	55,4
Western	385	643	1028	37,5
Total	4378	9310	13688	32,0

Length of remand detention: The number of persons held on remand is of course not the only indicator of importance. The length of time for which people remain on remand is also important. The team did not receive figures or any indication that the justice system is systematically tracking the average length of time for which people are being held in remand nationally, by province, by type of offence etc. This is another important indicator of the effectiveness or ineffectiveness of the remand and trial system. It would likewise be useful to have a way of identifying particular cases in which remand detention has continued for exceptionally long periods of time.

Judicial renewal of remand warrants: Reference has already been made (section 10.3.6 above) to the frequent non-attendance of accused at court hearings, whether it be for first appearance, mention / renewal of remand warrant, or actual trial hearings. Different considerations apply to these three. First appearance has been discussed above, and the right to a fair trial (here focussing more narrowly on the trial itself) is discussed below, so this

[185] NAPCIZ, 2009See prisons chapter for an explanation of the figures.

section deals with mention, adjournments and renewal of warrants. There are two main problems here. The first concerns the presence of the detainee in court and the second has to do with ensuring that the warrants are duly renewed, so that no one is illegally held in prison. Statistics were not available on either problem.

The cost and effort of transporting remand detainees for this purpose is a problem known to most criminal justice systems. Various responses can be observed,[186] some of them controversial. In some countries, personal appearance of the accused for remand hearings can sometimes replaced by a combination of remote video link to the court and oral or written submissions in court by defence and prosecution. South African legislation from 2008 made this possible for a court to permit this, though not for minors, in no circumstances for first appearance, and not for any hearing where any evidence or argument is going to be advanced. Detailed procedures were adopted and implemented to make the system work. Concluding trials quickly, fairly and effectively should be the main focus for solutions to these problems. No matter which measures are adopted, it is important to ensure a real review of the justification of continued detention and the opportunity to assert and enforce the rights of the accused. It seems unlikely that will be feasible in Zambia in the near future however.

In contrast to the law on bringing a person before a judge after arrest, the legal standards are clear in regard to renewal of detention, with s. 227 (1) of the CPC imposing a maximum length of fifteen days for the validity of a remand warrant. By international standards, this period is in fact relatively short. In Malawi (and in Denmark) for example, a remand warrant or order may be issued for up to thirty days at a time. [187] This would thus not be considered excessive by international standards. What is more important is whether it is respected in practice and whether other legal safeguards are in place and operational.

Warrants for juvenile remandees can last up to 21 days at a time, but there is an explicit requirement that they appear in court[188] in connection with extensions of the detention warrant. It has been reported that this does not happen in practice.[189] Orders to detain juveniles "in a place of safety" pending a care order are subject to renewal every fourteen days.[190] The study was not able to gather information on the extent to which this provision is used by the courts or the compliance with it in practice.

The point of departure here is enabling the accused to avail of the right to contest the continued deprivation of liberty and to force the police and prosecution, by showing good cause, to satisfy an impartial judge that continued detention is necessary for the purpose of investigation and prosecution. There is no difficulty where an accused in custody freely chooses to abstain from attendance for "mention" / renewal of the warrant.

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[186] Some state jurisdictions in the USA, the UK, South Africa and Australia. Pilot attempts are being experimented with in Denmark. The practice has been subject to some criticism and legal contestation in the USA. The South African Law Reform Commission adopted a report on video conferencing (Project 113) in 2003 and introduced it by legislation (Act 65 of 2008).

[187] Many other countries also permit adjournments or renewal of remand warrants for up to thirty days. South Africa does so in section 78 of the Criminal Procedure Act (in that section, for psychiatric examinations). Zimbabwe has a fourteen-day limit, similar to Zambia's, in sec. 165 of its Criminal Procedure and Evidence Act.

[188] Section 66(4)(a) of the Juveniles Act

[189] AHSI 2009 p. 106

[190] Juveniles Act, sec. 15 (2).

Responsibility for transport: As long as the main issue is one of resources and costs, there is no quick solution, but resources are not the only issue. There seems to be a problem of blurred responsibility and a lack of understanding concerning which institution is supposed to transport remand detainees from the prison to court. For those not convicted, the legal responsibility to ensure presence in court (and thus for transport) remains with the Police. In practice though, detainees are in the hands of the Prisons Service. An authority responsible for a prison may be left with a poor choice between continuing detention in the absence of a legal mandate or unilaterally deciding to release. Thus, the Prisons Service reportedly often comes to the aid of the Police by transporting the detainee to court.

The NGO PRISCCA has expressed a preference for providing the fuel allocations for this purpose to the prisons service, rather than the police, based on the view that the prisons service is less likely to under-prioritize this task.[191] While this may help an immediate situation, it may also blur lines of responsibility and the understanding of them. The 2010 Best Practice Handbook for example says that the Police are responsible for transporting the accused to court for plea, while responsibility for transport to hearings falls with the Zambian prison service for those who have been remanded in custody. This may reflect a practical understanding of responsibility sharing between some Prisons and Police in some areas. It is not completely clear from the Handbook whether this applies only in capital cases or in all cases.[192] Discussions carried out under the present study did not clarify this point either. The lack of a clear demarcation of responsibility could itself be part of the problem though, leading to inaction and low prioritization in budgeting and operations.

Special rules apply to female juveniles, who must be under the care of a woman when being transported to court.[193] It was not possible for the team to gain information on the extent to which this requirement is complied with in practice.

Time limits for pre-trial detention and trial: Some countries have chosen to tackle the problem of excessive pre-trial detention by introducing limits on the time for which people many be detained for various offences. Uganda has inscribed limits of this kind into its constitution. [194] Malawi took inspiration from the UK and introduced them in a series of amendments to the country's Criminal Procedure and Evidence Code in 2010. The permissible limits are determined by the jurisdiction of the court trying the case and by the seriousness of the offence. The applicable limits are set out in the table below.

According to the new Malawian rules, the prosecution may apply for an extension of the custody time limit, but its application must be lodged at least seven days before expiry of the custody time limits before the court that is seized of the matter. An extension can only be granted when the prosecution provides the court with "*good and sufficient cause*".[195] An

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[191] News item accessed at: http://zambia24.com/latest-news/breaking-news/explore-community-service-to-reduce-prison-congestion-malembeka.html

[192] Handbook, final draft, Sept. 2010, pp. 19 and 93. Participants at the Dec. 2010 workshop referred to practice and custom on this question rather than to any set of rules or guidelines.

[193] Juveniles Act, s. 58.

[194] Constitution of Uganda Section 23(6) (b) and (c)

[195] These terms have been given precise legal meaning by UK courts. See e.g. Kayira, "The legislative framework for pre -trial detention" in OSISA "Pre-trial detention in Malawi: Understanding caseflow management and conditions of incarceration", at: www.osisa.org/sites/default/files/sup_files/open_learning_-_pre-trial_detention_in_malawi.pdf

extension of custody time limits shall not exceed thirty days. At the expiry of a custody time limit or of any extension thereof, the court may grant bail on its own motion or on application by or on behalf of the accused person or on information from the prosecution.

When a trial does not commence or is not completed within the prescribed period, the accused shall be discharged, unless the cause of the delay cannot be attributed to the prosecution, in which case the court shall order an extension in time to ensure the completion of the trial. The measures show seriousness by Parliament in willingness to tackle the problems. It is too early to evaluate the effects as yet. For now, they may be of greatest benefit to petty offenders and the Subordinate Courts, as the limits for the commencement and completion of trials apply only to offences punishable by imprisonment for less than three years. This emphasis is perhaps very fitting, as it is most often these accused who do not have legal representation and risk excessive detention without trial.

Court / offences	**Table 10.3.11b Malawi: detention time limits: pre-trial**				**Trial**	
	Pending committal	Pending commence-ment	Extendable by	Maximum permissible	Commencement	Completion
Sub. Court		30 days	30 days	60 days	12 months from date of complaint[196]	12 months from date of commencement[197]
High Court	30 days	30 days	30 days	90 days		
Serious offences (murder, rape, defilement, robbery, genocide)		90 days	30 days	120 days	N/A	N/A

An attempt can be made to compare the targets in Malawi to the Zambian targets and reported achieved figures on average case disposal time in the Subordinate Court and High Court for criminal cases:

[196] For offences carrying terms of less than 3 years.
[197] For offences carrying terms of less than 3 years.

KPI	Table: Judicial performance on KPIs – Criminal Cases[198]							
Average case disposal time (days)		Baseline	2006		2007		2008	
		(2005)	Target	Real	Target	Real	Target	Real
	Sub. Court	100	95	N/A	85	N/A	75	138
	High Court	100	95	N/A	85	N/A	75	30

The MTR figures are not precise as to what is meant by the figures reported – and whether they represent the number of days that elapsed from the commencement of the trial to its completion or from first appearance. Nor do they distinguish between trials, sentence confirmations (in the case of the High Court) etc. Nevertheless, if the figure of 138 days reported by the Subordinate Courts are reliable, Zambia may well be capable of living up to targets such as those adopted in Malawi.

Recommendations:

1. In order to achieve the SNDP goals on avoiding abuses in remand detention, a number of measures will have to be taken within and among justice institutions. Better coordination, as exemplified by the CCCI, should help in achieving the effect. Particular attention should be paid to this indicator in the provinces where the CCCI is operating.

2. In **extending legal services** to prisons, police stations and Subordinate Courts, (see recommendations in chapter 6) priority should be given by the LAB to (a) provinces where the CCCI is operating, and (b) to "remand black spots" (see figures in chapter 8).

3. **Time limits: Especially f**or trials that have started, consideration could be given to changing the current fifteen day limit in the CPC[199] for adjournments and renewal of remand warrants to one of thirty days. It goes without saying that a thirty-day limit would be permissive rather than obligatory. There would be nothing to stop courts from setting shorter limits for the next hearing. Even without legislative change, targets could be agreed among justice agencies as to the maximum recommended length of remand detention for a particular offence, depending on seriousness. Based on these time limits, prosecutors and investigating officers could be specifically allocated responsibility for ensuring progress in the individual cases. Defendants could themselves be told what this period is at the time of their first appearance in court as a way of empowering them to object if the period is exceeded.

Zambia should seek information on the effects of the Malawian and Ugandan rules on time limits for pre-trial detention and commencement and completion of criminal trials and strongly

[198] Source: FNDP MTR, Oct. 2009, Table 12.1, KPI 1.
[199] S. 202

consider introducing similar rules once realistic plans have been made as to how to comply with them.

4. **Transport of accused / defendants:** The Ministry of Home Affairs should issue a circular or other instruction clearly allocating responsibility for transport of remand prisoners to court hearings for the various categories of detainees and stages of the criminal justice process. If such rules already exist, they should be made widely known to all relevant units and persons in the police and prisons services. Any practice of local or temporary deviations from any such instruction should be done on the basis of a written MoU between the two institutions.

5. **Infrastructure:** To tackle the distance problem, either detainees have to be held closer to courts or courts need to hold hearings close to major detention facilities. Where distance is an issue, consideration could be given to improving detention facilities close to busy courts or to building or improving court facilities close to the former and, where relevant, to increasing the frequency and effectiveness of court circuits.

5. "**Camp courts**": For mentioning, where problems of distance and transport cannot be solved in the short or medium term, there is the possibility of alternating between occasional so-called "**camp court" hearings**, where a Magistrate travels to a prison to review cases, and transporting larger numbers of detainees to the court. This would relieve some aspects of this problem, but it should contain safeguards and should not be overused. (In Malawi, it has been usefully carried out together with preparation of cases with the assistance of paralegals.) Otherwise, important fair trial aspects (that also apply in preliminary and other hearings), including the public nature of the proceedings, the right to put forward arguments against continued detention, the opportunity to call witnesses and the fundamental obligation on the part of the state to put forward reasons justifying detention should not be lost.

10.3.12 Children in pre-trial detention

The legal requirement is that that a child below the age of nineteen years only be detained during criminal investigations if either, the offence is a homicide for which no bail or bond is available under the law, is a grave offence such as aggravated robbery, or there is a belief that the release of the juvenile would defeat the ends of justice.[200] As noted in the discussion of police bond, statistics were not available on its use, either for juveniles or more generally.

Sec. 59 of the Juveniles Act provides an additional ground not to release juveniles pending trial, saying that release should take place: '*unless it is necessary in the interest of such person to remove him from association with any reputed criminal or prostitute*'. This colonial era provision mixes criminal investigation measures with child care and protection issues and is of very dubious compliance with the rights of the child and the right against arbitrary detention. It should be changed to conform to Zambia's international and constitutional commitments. Pre-trial detention cannot be seen as a solution to issues of removal of a child from the custody of parents or guardians where this is necessary.

Separation from adult detainees: Section 58 of the Juveniles Act prescribes that juveniles should "*as far as possible*" be separated from adults. Unfortunately, in practice state law enforcement agencies pay insufficient attention to this legislation. Juvenile suspects are often

[200] See Section 59 of Juveniles Act, Cap 53

detained in the same police cells as adults.[201] In many places, the problem is a lack of police cells allowing for separation. [202] Half of the social welfare officers interviewed for the study said that children in custody are not separated from adults due to lack of detention facilities for children. As noted, the ARRS project tried to address this by improving facilities at a number of police stations and centralizing processing of arrested juveniles there, but the three police stations in Lusaka[203] which have designated juvenile detention facilities share one vehicle to pick up children from other police stations and bring them to the designated juvenile detention facility. The CJF is piloting centres in Livingstone, Mansa, Kasama, and Ndola. A lack of communication among justice providers – the police not alerting Prisons Service or the DSW for example - can also result in children being kept in detention facilities with adults.[204]

There are no juvenile detention centres across the country, and as HURID (2008) points out, this means that there is a high likelihood of children being held in prisons. The locations of the only correctional institutions for children (Katombora and Nakambala in Southern Province for boys, and Insakwe in Copperbelt for girls)[205] makes it likely that children held there will be far removed from family members.

Transport: It is well-known among juvenile justice stakeholders that there is a particular problem in respect of transport – especially for child remand detainees from provinces not on the line of rail. The lack of transport results in delays of up to one year before a child is transferred to a correctional school.[206] Some participants even reported that this time is sometimes not even taken into account by the courts for the purpose of sentencing. Where this occurs, it is a blatant violation of children's right to equal protection of the law and against arbitrary detention and requires urgent remedial action by the judiciary to ensure that the law is understood and applied.

Recommendations:

1. Sec. 59 of the Juveniles Act should be changed to remove the possibility of pre-trial detention of children for purposes or removing them from harmful environments. Pending a change in the law, the courts should not use this provision and, if necessary, should instead apply on sec. 10 of the Act relating to care orders for juveniles.

2. An internal instruction should be issued by the Zambian Police Service to the effect that it is their responsibility to alert parents of minors arrested by the police. The responsibility should only be waived where there is a written agreement by a DSW officer (or other juvenile inspector) to alert the parents. (This could if necessary be indicated by ticking a box on a form by the DSW.)

3. In areas where statistics on juvenile crime indicate a need, donors should continue to support the building and development of special arrest facilities for children. The

[201] See section 58 of Cap 53 of the Laws of Zambia
[202] Survey responses, Zambian Police Service. See also report of HR Commission on
[203] 3 pilot centres have also been established in Lusaka: Central police station, Matero and Avondale.
[204] Interview notes from meeting with Chairperson of CJF, Lusaka
[205] HURID, 2008, reports a total of 10 girls in correctional institutions.
[206] See Zambia Human Rights Commission, Childrens Correctional Facilities Tour Report , 2009. Accessed on ZHRC website.

police should ensure that sufficient transport facilities are available to move children to the specialized facilities.

4. Delays in transporting juveniles to the three care centres should be tackled urgently by the Ministry of Home Affairs. In the meantime, the courts must ensure that all time spent in custody is considered for the purpose of sentencing and custody orders. Failing this, lawyers and NGOs should pursue claims against the Zambian state for arbitrary detention of minors for the remaining period. In the longer term, the Ministry of Home Affairs must determine the right mix of measures, from juvenile detention centres (or parts of them) in other parts of the country to improved transport facilities and systems.

5. The "*as far as possible*" caveat in Sec. 58 of the Juveniles Act should in principle be removed, but this needs to be done in conjunction with practical measures by the MOHA to ensure its implementation in practice, based on an examination of where there are genuine logistical and practical obstacles, and where there are no excuses.

10.3.13 The right to a defence

The Zambian adversarial system of criminal justice adopts procedures and a judicial role that are based on the assumption that a functioning defence is in place. Thus the role of a judge is to be a neutral arbiter of the facts and the law. The prosecutor is charged with adducing evidence tending to show the guilt of the accused in what is conceived of as a contest of equal parties pitted against one another where the state has the burden of proving its case against a zealous defence. As most observers and the figures adduced in the current study (see chapter analysing the Legal Aid Board) know well, the reality is quite different. From arrest to trial, there is a general lack of protection of the rights of the accused, particularly in proceedings before the Subordinate Courts. This is confirmed by the results of the field surveys carried out: more than two thirds of police officers interviewed agreed that there was a bias against poor people in the justice system due to lack of access to legal advice / representation. 50% of DPP officials agreed with this assessment.

For most ordinary criminal defendants in the Subordinate Courts, prosecution has been discharged by a police prosecutor subject to the authority of a senior police officer in charge of the investigation of the case. As previously pointed out, this may make it difficult for the police prosecutor to have a critical or independent attitude to the quality of the evidence.

In other words, once the decision to prosecute has been made and set in motion, neither the judge nor the prosecutor may see themselves as having the duty of finding the objective truth of what happened, seeing this as the role of the (theoretical) defence. The right to a defence, as an element of the right to a fair trial, arises from the beginning of the criminal justice process, and not only at the trial stage. The section dealing with the LAB and the provision of legal aid deals with the question of the general lack of legal aid prior to trial and at Subordinate Courts. Reference is made to the extensive treatment of these issues there.

Role of the Judge where there is no defence lawyer

Where accused persons are unrepresented, it is incumbent upon the court to ensure that the basic principles of fair trial as laid down in the constitution are observed. It is up to the magistrate or judge to ensure that the accused understands his or her rights and is not unduly intimidated by the hostility of the prosecutor, who may well be known to the accused from the

time of arrest and detention at the police station. There is much that magistrates can do to make sure that evidence presented by the prosecution is duly explained to the defendant and properly scrutinized, and the Code of Criminal Procedure is not restrictive in this regard. Section 205 of the CPC provides for the Court, where the accused is not represented, to ask the accused whether he wishes to put questions to each witness. This provision and others can permit the court to play an active role in ensuring that the accused is enabled to interrogate the evidence against him. In some countries, the practice is for the judge to appoint the court clerk to assist the accused in this situation.[207]

Recommendations

Magistrates should receive specific training on their own role in ensuring the fairness of the trial when there is no defence counsel present.

10.3.14 "Trial by ambush" in the Subordinate Courts

Lawyers and justice sector stakeholders in Zambia often refer to what is colloquially known as "trial by ambush", in summary trials in Subordinate Courts whereby there is no prior disclosure of prosecution evidence to the defence (if there is one) in trials before the Subordinate Courts. In some summary trials, in simple cases, this may not necessarily result in unfairness, but the imbalance between the prosecution and the defence is nevertheless obvious. Current practice in this respect is premised on the guarantee of access to depositions etc in sec. 235 and 258 of the CPC for High Court trials, and the lack of a similar provision in respect of trials before the Subordinate Court in Part VI of the CPC. The United Nations Human Rights Committee has made it clear that the fair trial guarantee in Article 14 3 (b) of the ICCPR of "adequate time and facilities" for the preparation of a defence includes access to all materials that the prosecution plans to offer in court against the accused or that are exculpatory.[208] While it is at first sight hard to see how the identical guarantee in Article 18 (2) (c) could be interpreted differently, this is what a single Judge of the High Court did in a 2005 reference from the Subordinate Court under Art. 28 (2) of the Constitution.[209] The High Court justice dealing with the application found that the opportunity to cross-examine witnesses, to look at documents in court and summon witnesses or produce documents on behalf of the defence satisfied the guarantee of adequate facilities. Thus, the High Court saw no contradiction between the absence of disclosure, in law and in practice, and the constitutional guarantee. It is unfortunate that the opportunity to appeal this ruling to the Supreme Court was not availed of. Nothing in the CPC forbids magistrates from ordering disclosure, and the matter could presumably be dealt with through rules issued by the Chief Justice without waiting for further contentious litigation on the question.

As long as this is not done, the lack of prior disclosure reportedly leads to delays caused by defence requests for adjournment to prepare the defence in cases where defendants are represented by counsel. Although unrepresented accused might not be capable of making adequate use of disclosed evidence in order to prepare a defence, it is hard to see how this can justify a rule against disclosure. Where there is no counsel present, there is a strong risk that the lack of disclosure will increase the risk of an unfair trial. This unfair rule may actually also

[207] See UNODC, Handbook on Improving Access to Legal Aid in Africa, 2011.
[208] See UN Human Rights Committee, General Comment No. 32, UN Document CCPR/C/GC/32, 23 August 2007.
[209] See HPR/01/05, Chiluba, Mwenya Kabwe and Chungu vs. The People, 16 May 2005.

act as a disincentive to lawyers who might otherwise consider taking pro bono cases in the Subordinate Courts.

Recommendation on disclosure

From a legal and human rights point of view, there can be little doubt that facilitating disclosure at the inquiry stage for the preparation of a defence is the correct and necessary way to go. Nevertheless, changes in this regard are unlikely to be meaningful in the absence of legal aid in criminal cases before the Subordinate Courts, as most defendants are unlikely to be able to assert their rights or use them effectively without counsel. As with other improvements to the protection of the constitutional and human rights of defendants, generalizing disclosure in Subordinate Court trials would have resource implications. As recommended in the chapter on legal aid, as long as lawyers are not likely to be available to defendants, the system (especially the courts and the police) should do everything possible to facilitate the provision of any other form of legal services to defendants, including those provided by properly trained and supervised paralegals.[210]

10.3.15 The Court and plea agreements:

The implications of the Plea Agreements Act for prosecutors and the Legal Aid Board have been discussed in previous sections of this study. This section will confine itself to some remarks on the implications of the Act for the Courts.

Section 10 of the Act provides that "A court shall not be bound to accept any plea agreement except where the non-acceptance would be contrary to the interests of justice and public interest." In our view, this section, doubtlessly well-intentioned, gives rise to some potentially troubling issues concerning the role of the judiciary and the separation of powers. It is legitimate and proper for the prosecution to take account of the public interest in common law systems. This is inherent in the discretionary or "opportunity" principle on which the prosecution operates. A court of law on the other hand should be able to take account of the interests of justice, but arguably, has no business considering the public interest beyond upholding justice and the law. Confusing roles in this way could lead to improper expectations and pressures on judges. It will be necessary for the higher levels of the judiciary to ensure that the understanding and application of this provision does not lead to confusion regarding the role and independence of the judiciary.

Disposal of minor cases

Section 221 of the CPC permits a quick case disposal procedure based on a written concise statement of the facts and an admission of guilt according to a prescribed form. The practice, known as plea of guilty by letter, involves a written admission of guilt by the accused and the payment of a fine to the police. They are then released and do not need to appear in court.

[210] We note that the Best Practice Handbook (the September 2010 draft received) seems to contain an error regarding conviction after preliminary inquiry. The text on p. 108 ("What happens at the end of the inquiry") speaks of "convicting the accused and sentencing them accordingly" if the Magistrate is of the opinion that the accused is guilty. This seems to contradict section 232 of the CPC, which says that the case should be heard according to the provisions of Part VI of the CPC, and not that the Sub. Court can proceed to a conviction on the basis of the preliminary inquiry alone.

The admission of guilt and the fine or security for payment of it is delivered is delivered to a police officer of or above the rank of sub-inspector. This procedure can be applied for people arrested without a warrant in minor cases where the maximum fine will not be more than 1 500 penalty units or imprisonment in default of the fine (of no more than six months), or otherwise in respect of offences specified by the Chief Justice. This is a useful way of disposing with cases, but a weakness is that it may not be available to indigent defendants who are unable to pay the fine, and who constitute a large number of the persons accused before Subordinate Courts. Thus, the question is whether this avenue could be extended somewhat to cover community service or other forms of restorative justice. It is strictly speaking not police based diversion, because the disposal of the case must be approved by the court.

Recommendations

1. Judicial personnel should be instructed as to the particular and limited scope of the "public interest" in section 10 of the Act as it applies to the judiciary. This is a different, and narrower matter than the public interest as interpreted and applied by the prosecution.

2. Application of these provisions will probably require continued education and training for members of the judiciary as well as interagency consultations among the judiciary and the LAB staff.

3. A review of experience with the legislation ought to be conducted two to three years after the entry into force of the Plea Agreements Act (whenever a sufficient number of cases based on plea agreements have been processed).

Section 11 of the Act deals with inducements, but does not explicitly mention coercion. The judiciary must therefore take care to apply the section as including negative inducements as well as positive ones (effectively, coercion). This interpretation is necessary to comply with a host of other provisions of Zambian law, including section 297 of the Penal Code Act, Article 15 of the Constitution as well as with Zambia's obligations under the UN Convention against Torture. Judicial training under the Act should include this aspect.

10.3.16 Challenges for providers: delays and adjournments

A measure of the number of adjournments is not specifically listed as a key performance indicator for the system as a whole, though this does not prevent the justice sector institutions from paying attention to this indicator. Adjournments can be caused by delays i) on the prosecution side, ii) on the defence side, iii) in bringing the accused to the court by the prisons / police iv) because of the non-appearance of witnesses called by either side v) because of delays on the side of the courts, including non-availability of courtroom facilities and personnel. In the table below, we attempt to set out a methodical approach to documenting the reasons for adjournments, which could be adopted by the courts.

Identifying causes of delays and adjournments

Any effort to address delays must start with documenting the reasons for them. At present, statistical information on the causes of adjournments is unobtainable. Systematic tracking of the causes of adjournments would enable the courts to coordinate with other justice system actors to deal with the most frequently occurring problems. System-wide problems can be documented at the court, as the meeting place of the various institutions. Noting of reasons

will mainly be limited to institutional responsibility and at a level of detail that does not exceed those in the above table. The purpose of this is not to assign "blame". Nevertheless, progress at system level cannot be achieved without pinpointing the location of the problems. A documentation effort can produce results for the court and justice system as a whole as well as at the level of a particular court or at province level. Once this is done, the reasons for delays within institutions can be explored and addressed. Some of these are discussed below.

Systematic tracking of delays of this kind requires electronic record keeping to be carried out effectively. Thus, some of the above factors should be measured subsequent to the introduction of the pilot scheme for electronic case management. This is currently pending. Within the police or prisons service, a more detailed notation of reasons for non-appearance of witnesses can be recorded, based on their knowledge, including for example, that the witness (a) deliberately disregarded the summons, (b) was not informed of a change in date / time / venue, (c) did not understand the summons or (d) was prevented from attending due to other reasons (sickness, lack of transport, other legitimate hindrances). Similarly, they will need to know the reasons why defendants were absent, differentiating between those in custody and those not. Likewise, other institutions might want to document reasons for delays in a more detailed way for the purposes of their own institutional management and planning.

Tackling delays and adjournments

Pending pilot schemes to document various aspects of justice-system management, some well-recognized causes of delays can be addressed more immediately. Some of the well-known reasons for delays include the failure of communication among justice sector institutions. This is being addressed by the CCCI initiative in five provinces. Even in the absence of data, some of the chief causes of adjournments are well-known, and some solutions have already been proposed.

Trial scheduling: The 2008 Integrated Case Flow Analysis study identified trial scheduling and particularly courts' lack of control over scheduling as a bottleneck. Scheduling will always present difficulties of coordination, but there are measures that can be introduced to improve efficiency. The court can require the parties to submit forms to the court (perhaps the clerk as trial coordinator) that they are ready to proceed, and providing an estimate of the duration of the trial.

The 2008 study recommends improving advance notice of hearings and more accurate court schedules. This would assist the Prison Service to get prisoners to hearings on time, especially in cases where it is necessary to move them to facilities closer to the relevant court, and assist the police to locate witnesses and ensure their appearance, or at the least, to inform the prosecution of their failure to do so.[211] The problem of delays is reportedly often worse in High Court cases because of the distance of the accused from the court, the necessity of ensuring the presence of defence counsel (though this should not be used as an argument against increased provision of legal assistance in cases before Subordinate Courts!), and the greater complexity of cases.

Witness protection and management: Witness management is one of the major difficulties encountered by the criminal justice system, causing adjournments and contributing to a low

[211] See pp. 49 and 30 of the study.

number of completed trials and criminal convictions. A number of factors contribute to the difficulty. The individual witness may perceive giving evidence against an accused person as a risk factor against which they have little protection. Victims of crime, like witnesses, may be at risk. No legislation provides for witness protection beyond the courtroom. A lack of resources makes it very difficult to monitor and protect witnesses after completion of trial. Workshop participants pointed to this difficulty especially in organized crime cases, including trafficking. A number of safe houses for victims and witnesses have reportedly been developed under the ASAZA programme and are now operating in Lusaka (no details were obtainable), but not in other parts of the country. Witness protection and management is also a serious issue in cases involving defilement by persons in a position of authority over minors. (See text on defilement in section on children and the criminal justice system.) The DPP was hopeful that a witness management unit (including protection where necessary) may be created under the proposed National Prosecutions Authority. [212]

Refunds and compensation for witnesses to give evidence in criminal matters are too few and too small. Transport refunds and witness allowances in the High Court are too low small and sometimes remain unpaid. They are currently not available for Subordinate Court trials. Therefore witnesses in most cases who are vulnerable cannot afford to attend court because they do not have money. Witnesses may not be informed of adjournments to court hearings and waste a day travelling to court in vain. After disappointments like this, it is easy for witnesses to become discouraged.

The **witness management fund** established by the 2010 NPA Act[213] is to be used for a number of purposes, including transport of witnesses and "any other matter relating to witness management". The NPA Act provides that the fund is to be administered by the Board. It is assumed that defence, as well as prosecution witnesses, will be eligible to have their costs covered by the fund. This is especially so in the light of the duties of prosecutors under sec. 10 (6) of the Act to act impartially, and to also pay attention to circumstances that are of advantage to the suspect (sec. 10. 6 (b)).

[212] Interview with the Director of Public Prosecutions, February 2010,
[213] Op cit. See Part III.

Table 10. 3. 16: Court hearing adjournments and their main causes							
Main categories of causes	Specific causes (court point of view)	Institution requesting / causing adjournment of hearing					
		Police	DSW	Prisons	Prosecution	Court	Defence
Defendant related	Non-appearance, defendant in police custody						
	Non-appearance, defendant remanded to a prison						
	Non-appearance defendant on court bail / surety						
	Non-appearance defendant on police bond / surety						
Witness related	Witness summons not respected						
	Witness summons not issued						
	Witness summons not transmitted to witness						
Evidence related	Physical evidence not obtained						
	Physical evidence mislaid						
Scheduling related	Information not transmitted to institution						

	Hearing clash						
	Illness						
	Transport						
	Court facilities not available						
	Court personnel not available						
	Scheduling error						
Preparation related	Documents not filed with court						
	Documents (case files, depositions etc) not disclosed / transmitted to other party in due time						

Table 10.3.16 a Delays: Table of causes and recommendations				
Known causes of adjournments		Institutions [214]	Documentation of needs	Solutions
Primary	Secondary			
Non-attendance of accused	Distance from place of detention to court	Police, prisons service,	Identify gaps in terms of greatest distances	Continuous trial and detention facilities close to court
	Lack of transport facilities / means.		Need for transport audit (NAPCIZ proposal)	Improve transport facilities and budgets Pilot: mentioning could sometimes take place in "camp courts" in prisons.
	Lack of administrative rules clearly allocating responsibility for transport to hearings.	Min. of Home Affairs	Need for a precise examination of rules and responsibility	Adopt administrative rules to make responsibility clear.
	Occasional cheating by staff in institutions as to attendance.	Prisons Service		Better internal "policing / watchdog" of police and prisons.
Non-attendance of witnesses, representatives	Dates and times not effectively set and communicated	(a) the courts and (b) internally within the other institutions	See "functional gaps" in 2008 case flow study	Court to assert authority in scheduling;
				Improve communication system using modern methods
	Ineffective witness management. No witness fees in Sub. Courts	Police, prosecution, defence	Disparate causes. More than one solution required.	Comprehensive witness management system, including witness fees in Sub. Courts.

[214] Note that this does not mean these institutions are necessarily "at fault".

10.3.17 Recommendation on mobile telephone based alert system

It is well-known among justice system actors that many adjournments take place due to problems of **communication** concerning hearing dates, especially where changes are made. The following recommendations address this problem.

1. A **court calendar posted on the internet**. This could possibly be piloted by the Lusaka High Court, as the judiciary already has a functioning website.

2. An alert system **for changes in hearing dates** could be devised and tested using mobile phone texting, perhaps over the internet.

Operational considerations: Today it is not difficult to send bulk text / sms messages to a large number of subscribers over the internet using ordinary text messages. Almost all justice system actors have mobile telephones. [215] It is beyond the scope of the present study to make a detailed proposal or examination of the feasibility of this suggestion. However, a few points are noted.

Because of the limited number of characters that a text message can contain, it would not be possible to provide detailed information regarding the hearing (full names of parties to case motions, presiding judge etc). This detailed information would be on the calendar, as necessary, and should be in the records of the particular justice institutions, based on a case number or agreed code. The text based alert system would identify:

i) The court sending the message;

ii) The case identifier (a case number?);

iii) The initially scheduled hearing date and time;

iv) The new hearing date and time;

v) The kind of hearing (committal, remand, motion, trial, sentencing etc).

The system could work along the following lines:

a) For each criminal case going to trial at the High Court, the initial calendar of hearing dates (or just the single next date) is set by the court. It is displayed at the court and / or, (if possible) on the High Court homepage;

b) A focal point person is identified from each justice agency (who needs to be kept informed of any changes).

c) The focal point person is responsible for giving the court clerk / registry a number of mobile phone no.s to be used for updates regarding the hearing.

[215] As far fewer have smartphones, other message media such as Twitter are not recommended at present.

d) The court clerk / registry maintains a list of institutions / persons to be informed, with a mobile phone no. for each one. There are two possibilities at this point: either the court passes the information to a central person within the other justice agencies (at provincial level), who is then responsible for transmitting A standard template for a list can be used. It will probably include the following:

    a. Focal point in prison / remand centre where accused / defendant is being detained (either this, or the court passes the information to a single focal point in the Zambia Prisons Service, at Provincial level, who is then responsible for re-transmitting the information within the Prisons Service);

    b. Focal point in DPP's office at provincial level or particular state advocate to whom the case is assigned by the DPP's office;

    c. Focal point in LAB office or particular lawyer to whom case is assigned;

    d. If defendant is represented by a privately practicing lawyer, the name and mobile no. of the lawyer, alternatively, a LAZ coordinator at provincial level could perhaps be nominated;

    e. If the defendant is represented by a lawyer from an NGO such as the Legal Resources Foundation, the name and mobile no. of the lawyer, or a focal point at the LRF office.

    f. Focal point at the police CIO responsible for the case.

As noted, a choice would have to be made between informing a central focal point at each institution, a focal point at one office of that institution (the particular prison / detention centre etc), or the individual person responsible. The most effective method in terms of getting the information out would be to send the text message directly to the person concerned (the particular state advocate, legal aid lawyer, etc), but this would demand more in terms of making a contact list for each case.

The court would only be responsible for sending a text message to the justice agencies. It would then be up to the justice agencies to pass the information on to others (i.e. defence counsel contacts defence witnesses, state advocate contacts prosecution witnesses etc). If a system for witness management is developed, it might be possible for this office to establish a list of witnesses and mobile telephone numbers for each case. If the system were to be extended to Subordinate Courts, the list of persons would vary slightly to include prosecutors at the police stations etc (until the police prosecutors are phased out).

It should emphasised that this is a service that the court will attempt to provide, but it is not an obligation of the court to do so. It remains the obligation of the various parties to obtain information concerning dates and adjournments. Likewise, in contrast to official documents such as summonses for example, information transmitted in this way would not in itself have any legal status.

Requirements for setup and pilot testing of text based alert system

The system would require reliable internet connectivity at the court implementing it. It would also require an investment of time to devise the operational system, briefly train some court

personnel in its operation, brief users / stakeholders (through devising a short information sheet and holding an orientation meeting. The "visible" costs of an initiative such as this would include paying for the work time of an internal or external person to develop the system, the work time involved in obtaining lists and contacts, and the costs of sending the bulk text messages. An evaluation of the pilot scheme would also be necessary.

Savings would be less direct and immediately visible. They would consist of savings in work time expended and unnecessary transport avoided. It is estimated that savings have the potential of being significantly larger than the costs. Once operational, the courts could consider charging users a fee for the service. This would provide some guarantee of effectiveness and a measure of whether users see it as worthwhile.

10.4 The sentencing stage

10.4.1 The death penalty

The issue of the death penalty was extensively discussed in an international framework during Zambia's UPR process as well as nationally by the National Constitutional Conference. The UPR recommendation to transform the *de facto* moratorium into a *de jure* one was not adopted in either forum. In these circumstances, efforts must be made to ensure that the moratorium is maintained, that people charged with offences for which the death penalty can be imposed fully enjoy all fair trial guarantees at all stages of the criminal justice process, including sentencing. CSOs have important roles to play in this regard.

Recommendation: The UPR recommendation that the death penalty should not be imposed for crimes which cannot be classified as "the most serious" (which is in line with Zambia's obligations under Art. 6 (2) of the ICCPR) is endorsed herewith. Thus, the crime of aggravated armed robbery with the use of firearms, while deserving serious punishment, should not attract the death penalty. Section 294 (2) of the CPC should be amended accordingly.

10.4.2 Detention "during the President's pleasure"

This is permitted by sections 160 – 167 of the CPC. No figures were available to the team on the frequency with which the courts use these provisions to order the detention of people in prisons and mental institutions. Section 160 does not as such require an independent psychiatric or medical assessment as the basis for a finding of unsoundness of mind. Such an assessment ought to be obligatory. There is no wording linking the length of detention to the seriousness of the offence committed, the length of treatment required or the threat posed to society by the mentally disordered person.

S. 163 (3) of the CPC requires that institutions detaining such persons make six-monthly reports to the President containing "the prescribed information" with respect to persons detained. While this provision creates the potential for a six-monthly review of whether detention continues to be justified, it provides no guarantee that such a substantive review will take place. The team does not have information on whether the requirement to provide such reports is (a) complied with in practice and if so (b) whether the reports have a pro forma or substantive character (particularly on the mental condition of each individual detainee), or (c) whether continued detention is necessary or justified in the light of the seriousness of the offence committed by the detainee, his or her mental condition, and the potential availability

of other care solutions. As discussed in the section dealing with the LAB, it is at present not possible to assess the priority accorded to such cases in the granting of legal aid.

A similar provision is found in Art. 25 (2) of the Penal Code in relation to children found guilty of a felony and permitting detention at the President's decision for indefinite period.

Recommendation: Proposals for amendment of the provisions of the CPC on detention at the president's pleasure should be drafted based on the advice of legal and psychiatric specialists having experience in criminal justice and mental disorder. A psychiatric examination should be mandatory prior to any order for detention as a sentence or measure of disposition of a case. Periods of detention should be based on factors such as the seriousness of the offence, the threat posed to the safety of the public by the offender and the possible care options. The functioning of the scheme for review of the need for continued detention should be reviewed and modified as necessary.

10.4.3 Sentencing and the use of community service

Legislative amendments providing for community service orders (to the Penal Code and the Prisons Act) were made in 2000. These amendments have been criticized as ineffective. Some of the main criticisms have been that it was a mistake to place community service orders under the authority of the Zambia Prisons Service. As one study points out, this approach is not supported by experiences in other jurisdictions.[216] Moreover, the Prisons Service was not allocated "additional resources to implement community service orders, nor were any staff assigned to the task".[217] The Zambian Law Reform Commission has drawn attention to this issue and cooperated with the National Community Service Committee to draft a legislative amendment to put a better scheme in place, but resources to do so have not been allocated for this work. The study concludes that the system of community service orders has not got off the ground because of "ill-informed legislative amendments" that were lacking in support, and for which there was "clearly no capacity to deliver". The ZLDC is reportedly nevertheless working on recommendations to improve the use of community service and with pilot schemes to improve the functioning of the existing system. Recommendations could include placing responsibility for supervision of community service orders in the hands of probation officers. As discussed in relation to diversion at other stages of the justice system, probation officers are likely to face the same problems of overburdening and a lack of resources as others in the justice system, so it is likely that here as elsewhere, there will be a need to be creative and flexible in the use of various kinds of community structures. Probation is discussed below.

Recommendation: The Zambian Law Development Commission's work in the area of piloting good practice models for the functioning of community service schemes and examining the need for legislative change should be supported financially, administratively and politically.

10.4.4 Probation

The DPP discussed probation practice as a pointer towards approaches to diversion. He cautioned against a tendency to look for a quick or cheap exit, and looking at juvenile

[216] See Lukas Muntingh, Alternative Sentencing in Africa, in "Human Rights in African Prisons", Jeremy Sarkin (ed.) HSRC Press, 2008.
[217] Ibid.

offenders only as victims that need to be kept out of the criminal justice system. He said that this is one-sided, as they are often offenders who pose a threat to society. The challenge is how to rehabilitate them and remove the threat of offending behaviour, not simply to release them.

The DPP observed that the DSW does not see itself as a part of the criminal justice system, and that "social workers practically always recommend probation", but they don't make home visits to follow up on probation conditions and progress with rehabilitation, perhaps due to lack of resources. His view was that currently, too many juveniles found guilty are put on probation and released without performing community service or similar as there is no community supervision. This has resulted in communities losing respect for the justice system and people taking the law into their own hands.

In this view, diversion is for the purpose of rehabilitation, and not primarily for decongestion of prisons. If decongestion is seen as an end in itself, things go wrong. The problem now is that no one is inclined to report non-compliance with probation. They will tell you that the juvenile offender is complying, when in fact he is not. Magistrates also mentioned the lack of effective supervision in most of the studies carried out on juvenile justice in the country (see e.g. CJF evaluation 2010). The DSW of course makes no secret of its infrastructure and resource problems. Nevertheless, they point out that protection of society is not one dimensional. Keeping juveniles in a dysfunctional prison system is unlikely to protect society in the long run if people become more criminal.

10.4.5 Sentencing powers and confirmation of sentences

Section 7 of the CPC places limits on the sentencing powers of Subordinate Courts, and section 9 lays down the mechanism of sentence confirmation by the High Court. These two mechanisms of the CPC – sentencing by a separate court and confirmation by a higher court, are dealt with together here. The provisions permit the High Court to monitor and ensure consistency in the administration of criminal justice in the lower levels of the Subordinate Courts. They also provide protection against poor sentencing practice by guaranteeing that the most serious sentences are only handed down by more experienced and qualified judges. In most jurisdictions around the world, these concerns are dealt with through providing legal aid and the possibility of appeal. As long as legal assistance is not available to most defendants in Zambia, appeal is of very limited use as a protection mechanism for them and it could be argued that there is a justification for the division of sentencing responsibility / confirmation mechanism.

Operation of the mechanism: In practice however, the mechanism does not seem to work well. There seems to be a basic inconsistency in allowing senior magistrates to pass sentences of up to nine years while demanding that sentences of over three years passed by lower magistrates be confirmed not by the senior magistrates, but by the High Court. The sentencing powers and the circumstances in which confirmation of Subordinate Court sentences is required are set out in Table 10.4.5 below.

Table 10.4.5: Criminal sentencing Powers of the Subordinate Courts[218]				
Subordinate Courts		Imprisonment	Confirmation requirement by High Court	Sentencing by High Court
Professional Magistrates	Chief Resident Magistrates Courts	9 years imprisonment	N/A	All offences where sentence is > 9 years, incl. offences under Chap. XV of the Penal Code.
	Principal Resident Magistrate Courts			
	Senior Resident Magistrate Courts			
	Resident Magistrate Courts	7 years imprisonment		
Lay Magistrates	Magistrate Class I	5 years imprisonment	All sentences > 2 years	
	Magistrate Class II	3 years imprisonment	All sentences > 1 year	
	Magistrate Class III		All sentences > 6 months	

Confirmation: In the four provinces without permanent High Courts, confirmation of sentences has to await the next session of the High Court and may only be cause listed six months or more after committal. In the study surveys, Subordinate Court officials were asked to provide some figures on the numbers of cases sent to the High Court for confirmation and received back from the High Court after confirmation and on their estimates of the numbers of cases in which the sentence was confirmed. They were also asked to give their opinions on the functioning of the confirmation system. Precise figures were not available, and only some of the Subordinate Courts visited were able to provide figures to the survey teams.[219] UNICEF estimated that it generally takes three months or more to obtain confirmation of sentences in juvenile cases, though the period varies considerably depending on geography. As juvenile cases often enjoy a higher priority than adult cases, there is reason to fear that the period is longer than this in cases not involving juveniles.[220] The bottlenecks in this traffic go both ways, as the Subordinate Courts have to clear these cases before they are sent to the High Court for

[218] As set out in sec. 9 of the CPC. The section also imposes confirmation requirements in respect of fines. These are not shown here.
[219] Out of some 26 Subordinate Courts visited, only ten or less responded on the questions on numbers of confirmation cases.
[220] Notes, Consultation workshop of December 2010.

confirmation of sentences and in some cases for sentencing. As mentioned in chapter 7, the lack of computer and typing equipment at the Subordinate Courts is an obstacle there.

While the lack of a full picture makes conclusions uncertain, two tentative findings can be drawn:

- The Subordinate Courts seemed to be consistently sending more cases for confirmation than they were receiving back from the High Court, meaning that there is an increasing backlog of confirmation cases pending at the High Court;

- The number of cases where the High Court changed the sentence was low in comparison to the number where it did not change the sentence, showing that in a great many cases, the confirmation procedure does not result in a change of sentence.

Attitudes of the judiciary: Subordinate Court officials were generally critical of how the confirmation procedure works in practice, even if they appreciated the intentions behind it. Most referred to delays and backlogs, and that sentences are sometimes completed before confirmation arrives. Some frankly called it a waste of time. If the High Court is not in practice changing many sentences in the confirmation procedure, this could be due to either overburdening at the High Court or satisfaction by the High Court that the Subordinate Courts are imposing sentences correctly and consistently. It was not possible to discuss this in more detail with High Court officials to arrive at an answer. Magistrates pointed to two possible solutions. The first was to call for more permanent High Courts, so that confirmation would not have to wait on infrequent High Court circuits. The second, more radical solution was to do away with confirmation by the High Court, tackling any problems at their source and trying to ensure that sentencing in the Subordinate Courts is fair and consistent. If this were to be adopted, confirmation could be done by more senior magistrates, or the capacity and resources of magistrates increased (through training or provision of clear sentencing guidelines that would be made publicly available). Where sentences are varied by the High Court, it is not clear if they are sometimes varied upwards, or only downwards.

High Court officials agreed that there were too many delays with confirmation and sentencing were inclined to see problems on the Subordinate Court side, and pointed at lack of resources (use of manual typewriters etc) to explain the delays. Some High Court officials agreed that a solution would be to delegate more authority to Principal Resident Magistrates.

Sentencing powers: While precise figures are unavailable, the 2005 amendments to the Penal Code[221] and the publicity surrounding them seems to have led to an increase in the number of cases of offences against morality under Chapter XV of the Penal Code (such as defilement, rape, carnal knowledge of a child under the age of 16 years and indecent assault – see Chapter 11). Most of these offences carry a minimum sentence of 14 years imprisonment. As the highest class of Magistrate can only impose a sentence of a maximum of 9 years, any guilty verdict for these offences must be transmitted to the High Court for sentencing, increasing the burden on the High Court and on the processes for transfer and management of case files.

Consequences of the division of responsibility for sentencing: Stakeholders report that the High Court has become clogged with criminal cases coming from the Subordinate Courts for

[221] Penal Code (Amendment Act), Act No. 15 of 2005.

sentencing and confirmation of sentence. With the lack of adequate resources for transmission of records from the Subordinate Courts to the High Court, convicted individuals awaiting sentencing or confirmation in the High Court are remanded in custody for long periods. Apart from keeping convicted individuals in remand awaiting appearance before the High Court, the convicts must be transported from all corners of the country to provincial centres where the High Court is present (either as a circuit court or resident court). For example, the High Court sits in Kasama, Mansa and Solwezi three times per year. During these sittings, cases for confirmation and sentencing are heard. This transfer of convicts to provincial centres incurs transport costs and increases the population in prisons whose accommodation facilities are inadequate.

Findings: The confirmation requirement and the limited sentencing power of some Magistrates emerges from the study as a significant bottleneck in the criminal justice system without providing a corresponding benefit. While Chapter XV of the Penal Code is not the only source of this problem, the 2005 amendments illustrate two things: (i) the importance of planning for the consequences of legislative amendments in the operation of the justice system and (ii) the weaknesses and costs inherent in the system of transferring dossiers to another court for sentencing in the context of an overburdened justice system.

The current strategy to tackle these problems – among others - is to expand the number of High Courts. Another way of reducing this case load would be to increase the sentencing power of the Principal Resident Magistrate and Resident Magistrate. In the long run, our view is that this is the more sustainable strategy, as the challenge to case records management that is posed by the bifurcated sentencing arrangements is very significant.

Below, we recommend the phasing out of divided sentencing responsibility and confirmation as a strategic goal. However, this is not easy to accomplish, as it is dependent on a number of factors. The major requirement is to systematically strengthen and improve the Subordinate Courts, as discussed earlier in this study. Building the capacity of magistrates on sentencing matters should be a part of this effort. One major difficulty, as discussed in chapter 7, is the challenge of getting law graduates to accept postings to rural areas. Please refer to the recommendations in that chapter on Subordinate Courts.

Recommendations: The strategic goal for the judiciary should be to eliminate the confirmation procedure and the requirement of sentencing by the High Court, so that the sentencing powers of Magistrates Courts should be the same as their trial jurisdiction and that appeal, rather than confirmation or referral for sentencing, should be the mechanism for control of sentencing. This goal probably cannot be achieved immediately and should be reached in stages over a number of years. As steps along the way to phasing confirmation out, the measures set out below could be adopted:

1. **High Court sentencing**: The High Court should study its own caseload systematically to see which crimes and courts refer most cases for sentencing.

2. **Parliament should consider reducing the maximum penalty** for some offences under **chapter XV of the Penal Code** to no more than nine years, so that they can be handled by the senior magistrates in Subordinate Courts.

3. **High Court confirmation**: The High Court should study its caseload on confirmation with a view to seeing which courts refer most cases for confirmation, for which

offences, and which courts and offences most frequently have sentences varied. This may help in identifying the courts and the offences for which errors are most likely to occur and allow the court concerned to take measures to address the source of the errors.

4. **The High Court should arrive at a set of sentencing guidelines** that could be promulgated within the judiciary. This would enable Subordinate Courts to police their own practice as recommended below. The High Court should also monitor the traffic of cases being sent to the High Court for confirmation and how fast they are being disposed in the High Court. Development of best practices in this area is long overdue. Special consideration must be given to the provinces without a permanent High Court.

5. **Confirmation by senior magistrates instead of the High Court**: Consultations should be held with the judiciary to examine amending section 9 of the CPC to allow sentences of between three and nine years to be confirmed by a senior magistrate, instead of by the High Court. This could be done as a matter to be dealt with internally within the courts between professional and lay magistrates, possibly prior to the pronouncement of the sentence, without the need for a specific legal procedure. It could be initially piloted as a priority in areas where waiting times for confirmation are longest. This could be done by allocating sufficient senior magistrates to these areas to pass sentences so as to avoid the need for confirmation under the existing rules.

6. **Courts inspectorate**: Reference is made to the recommendation in chapter 7 to introduce a courts inspectorate. Inspections could help to alert the senior judiciary to any problems at the lower courts, including those related to sentencing that would otherwise have been caught by the confirmation system.

7. **Legal aid**: Examine how to go about systematically extending legal aid provision to the most serious offences in Subordinate Courts as an alternative to confirmation and High Court sentencing. This should provide greater legal protection to defendants than the confirmation / divided sentencing mechanism. A start could be made by the judiciary making an agreement with the LAB that legal aid should be provided in all offences carrying a sentence of more than five years in prison, later to be reduced to three years, assuming that LAB capacity and resources increase.[222] Such a proposal should be costed and examined for staffing and logistical requirements by the LAB.

8. **NPA role**: The CPC (incl. sec. 321A) would seem to permit the DPP / NPA to appeal against sentences considered to be too lenient. (If this is not permitted, the section could be amended to allow it.)

10.4.6 Parole

Participants at the December 2010 workshop agreed that the current rules on parole were too restrictive, limiting the availability of parole to cases in which there was a sentence of more than two years of which less than six months remained.[223] Another issue with the parole

[222] Five years is high by international standards, which would normally call for legal aid in cases carrying a lower penalty, but it is perhaps unrealistic to demand more at this time. If absolutely necessary, even a higher figure can be used to begin with.

[223] See Prisons Amendment Act No. 16 of 2004, s.114.

system is its outreach. While there are parole officers in all prisons, decisions on parole are centralized with the Parole Board, which is only able to travel occasionally.

Recommendations: the availability of parole should be greatly widened. It should be available in respect of all sentence lengths. Completion of two thirds of a sentence could be a suitable marker after which applications for parole could be examined.

10.4.7 Appeal

The 2008 study on case flow management identified preparation of court transcripts as a problem area, causing bottlenecks in relation to appeal cases. Neither the 2008 study nor the present one was able to ascertain whether the main difficulty lies with insufficient personnel, lack of training (computer, typing and writing skills) or a lack of computers etc.

10.4.8. Presidential pardon

The power of the President to issue a pardon is laid down in Art. 44 (2) (c) and Art. 59 (a) of the 1996 Constitution. Reference is made to it in sec. 2 of the Penal Code, though no law lays down detailed conditions as to the substance or procedure of its exercise. This is an issue that is particularly relevant to the higher courts. While pardons seem to usually be officially announced (for example at the time of inauguration of the President), no rules specifically require this.

Recommendation: it would be advisable and consistent with the rule of law to ensure that certain steps are consistently followed when pardons or commutations are granted. Likewise, the Office of the President should communicate with the judiciary as to the exercise of the pardon prerogative so as to ensure against unnecessary work and embarrassment.[224] Provisions related to the exercise of the prerogative could be laid down in amendments to the CPC or adopted and promulgated by the Office of the President.

10.5 The protection of victims of crime

At present there is no legal framework that regulates the treatment of victims of crime. Apart from the initiatives being undertaken by the Victim Support Unit much of this work is relegated to civil society organizations. Any strategy to ensure protection of victims must recognize a diversity of challenges depending on the forum, the type of offence and the category of victim concerned. Thus organized crime, family violence and witchcraft allegations in customary settings require different responses to the protection of victims both within and beyond the formal remit of criminal justice agencies. This section deals mostly with gender based violence. In view of the recent report by the UN Special Rapporteur on Violence against Women, which covered most of the issues, this section is fairly brief.

10.5.1 Assessing legal protection against gender based violence

Chapter XV of the Penal Code, which deals with offences against morality, covering crimes such as rape, defilement, sexual harassment, incest and prostitution was extensively amended by Act No. 15 of 2005, imposing long prison sentences for convicted offenders. The

[224] For this recommendation we are indebted to the observations of Ms. Michelle Flynn. See: http://www.pamodzi.ie/documents/Zambia%20Observation.pdf

amendments were prompted by a perceived unprecedented increase in a number of sexual offences, especially defilement (having carnal knowledge of a child below the age of 16 years old). While public anger against crimes like defilement reflects social attitudes, many Zambians point out that the severe punishments are in contrast with the legal and social tolerance of customary marriage of girls under fifteen years of age. The Penal Code may not distinguish sufficiently between consensual relationships between teenagers and abuse of young girls by predatory adults, nor reflect the fact that such abuse can take place within the framework of marriage. The attitudes reflected in customary law, especially in the area of sexuality, the age of consent and marriage dissolution, reveal the mixed signals and attitudes that the law sends and reflects. The NAP GBV[225] refers to statistical estimates from the ZDHS[226] identifying currently or formerly married women as being more likely to experience abuse, and teenage wives as particularly vulnerable. The family is the context that measures, including justice related ones, need to address.

The FNDP contained a gender-related indicator relating to a *reduction in cases of gender violence.* The FNDP MTR noted that it proved difficult to measure this KPI in a meaningful manner, so that it was replaced by measurements of (a) the percentage of reported cases of GBV that lead to a conviction and (b) the percentage of reported cases of GBV that are withdrawn (police and court).

The 2008 – 2013 NAP GBV sets out similar indicators, [227] relating to all stages of the case handling cycle, from the no. of cases reported to those adjudicated and the numbers convicted and serving "appropriate" sentences.

The NAP GBV places a strategic focus on three areas:

- Protective laws and policies
- Advocacy, community mobilization and awareness raising for prevention
- Capacity building for service provision.

All three areas have justice dimensions, and the monitoring aspect is emphasized in the NAP GBV.

Protective laws and policies – monitoring effects: The need to assess the effectiveness of laws extends beyond the area of GBV. Nevertheless, GBV provides a useful illustration of the ways in which laws can be assessed. The existence of a national plan on GBV calling for improved monitoring and documentation makes it a suitable area to attempt this kind of measurement. The SADC Protocol on Gender and Development, to which Zambia is a signatory, requires (Article 20 (1) (a)) that legislation be enacted and enforced prohibiting all forms of GBV by 2015. The table below sets out a number of factors that should be examined in this regard.

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[225] National Action Plan on Gender Based Violence, GIDD, April 2008, sec. 3.1.

[226] Zambia Demographic and Health Survey, 2007, showing that a quarter of Zambian women surveyed reported having experienced physical abuse within the previous 12 months.

[227] The SNDP focuses generally on women's empowerment as a response and uses responses to the 2007 Zambia Demographic and Health Survey as a baseline. 47% of Zambian women reported having experience GBV and sets a target of 25%. The programming means identified focus on awareness, establishment of one-stop centres for victims and increasing women's access to justice.

Service delivery in GBV cases: The issue of service delivery concerns the police – particularly the VSUs – as well as other justice agencies. The GIDD prepared standard guidelines for handling GBV cases. The team did not see the guidelines, though the report of the UN Special Rapporteur on Violence against Women (VAW) notes the absence of guidelines on "coordinated, prompt and supportive services to victims". Implementation of new legislation (the Health Professions Act No. 24 of 2009) points the right way in removing restrictions that allowed only medical practitioners to complete medical reports in these cases, but the UN report points to a need for training and information to make sure that law enforcement agents are aware of the new rules and that forms should not be subject to a charge. NGOs generally found that the largest problems with protection of victims were with implementation rather than legal frameworks. Some of the main problems are resource related, including the availability of shelters (provided for in the Anti Gender Based Violence Act of 2011) and of legal aid for victims.

Within the ZPS, an investigations officer has no power to decide whether the case should proceed or not, this is left to the Chief Criminal Investigations Officer and OIC at a police station. No reason is required to be given to the complainant or the public if the police discontinue investigations. Unfortunately for the victim of the crime and accused person, there is no recourse under law available at this stage. The ZPS could nevertheless introduce measures to build public confidence by setting out administrative measures by which complainants could appeal the decision of an OIC to a superior officer.

Table 10.5.1: Elements to measure effectiveness of legal protection against particular offences using GBV as an example								
Individual or social harm	Offence in criminal law	Estimated prevalence	No. of complaints reported	No. of complaints Investigated	Number of prosecutions	Number of convictions	Sentencing patterns	Impact on prevalence (increase, decrease over time)
Rape, sexual violence	E.g. rape, sections 132 – 134 of the Penal Code Act.	From sociological studies etc	From police, supplemented by NGOs	From police, supplemented by NGOs	From NPA / police	From courts	From courts	Sociological studies, police statistics
Analytical questions:	Does the legal definition sufficiently cover the offence? Are there gaps or problems in this regard?	Do sociological studies reveal under-reporting and the reasons for it? Do they suggest measures that could be taken to encourage reporting?	Are there indications of a gap apparent between prevalence and reporting of the offence?	% of reported complaints where investigation is completed / dropped and reasons why.	% of investigated complaints where prosecution is completed / dropped and reasons why.	% of prosecutions leading to conviction (a) for rape and (b) for lesser or associated offences.	By year and geographical area.	Is criminal justice working as a deterrent?
Example: rape	Marital rape not explicitly covered, Penal Code interpreted so as not to cover it.	Aspects of social stigma and pessimism about outcomes may hinder reporting.	Profile of those reporting may reveal patterns.	Non-timely reporting? Lack of facilities for medical examinations? Reluctance of witnesses?	Lack of reliable forensic evidence and witness timidity may be among the important factors.		Minimum sentencing imposed as of 2011.	In a few years from now, it will be possible to analyse whether minimum sentencing has had an impact

As noted at the beginning of the chapter, the justice system in Zambia is currently not equipped to gather and analyse the above kinds of information. Gaps still remain in the legal framework to protect women against GBV, for instance in the area of marital rape.

The UN Special Rapporteur's report on Violence against Women (VAW) in Zambia acknowledges that the recently adopted Gender Based Violence Amendment Act contains several positive features, as does other recent legislation, such as the Matrimonial Causes Act (MCA). Most of the recommendations made in the UN report on VAW are endorsed herewith. In the following, we concentrate on areas where the Access to Justice Situation Analysis has something to add or where our conclusions or recommendations diverge. In the following, a number of thematic topics are covered.

10.5.2 Court protection - restraining orders / injunctions

Section 101 of the MCA would allow protective injunctions, though they would have to be sought in the High Court, making them difficult to avail of. Focus group participants pointed to the conservative attitude to the use of such remedies, where the courts were reflecting widely held social attitudes where family structures might make it difficult to gain acceptance of such measures. Thus participants were not aware that injunctions of this kind had been widely applied for or granted. The MCA applies to civil marriages only, not to customary ones. NGOs told of efforts to get Local Courts to take up GBV cases (though as civil matters), telling of an example of this in Lundazi. There are possibilities to extend the protection afforded by the Local Courts in this regard, though it is expected that they will take time and effort to implement, as the Local Courts are unlikely to step far beyond the views widely held in their areas. Training for Local Court justices has reportedly been helpful in this regard.

10.5.3 Difficulty in pursuing GBV cases

Domestic violence was the law enforcement issue most frequently cited by police in the survey conducted for this study. The statistics of the Victim Support Units (VSUs) indicate an increase in complaints of gender based violence offences. Reporting on the FNDP MTR indicators showed that the number of convictions compared to cases reported remained low at 10 percent between 2007 and 2008, while the number of cases withdrawn before going to court rose from 23 percent to 40 percent between 2007 and 2008.[228] As with other measurements, these figures can be interpreted in different ways, and caution should be exercised in drawing conclusions. Withdrawal of cases before going to court is positive from the point of view of prosecutors refraining from burdening the courts with cases that have no prospect of success. Nevertheless, where it shows an inability of the legal system to provide protection, it is worrying. (See the analytical questions in table 10.5.1 above). CSO representatives thought that domestic violence was among the crimes that the justice system afforded least protection against.

The tendency of complainants to drop complaints against GBV perpetrators – a well-known problem beyond Zambia - poses difficult ethical issues. Case workers report women dropping cases of GBV at the investigation or prosecution stage.[229] This reflects imbalances in socio-

[228] FNDP MTR, pp. 103 – 104.
[229] Human Rights Watch 2007, Hidden in the Mealie Meal, Gender-Based Abuses and Women's HIV Treatment in Zambia

economic power faced by Zambian women, as well as their assessment of the costs and benefits of pursuing the action.

What rules should justice systems lay down, and how should justice officials react to withdrawal of complaints? Should a third party – the prosecutor – respect or try to override the wishes of a complainant who has decided to attempt to reconcile with her husband after a violent incident?[230] Legal systems have adopted a variety of approaches. At the international level and in many countries, it is rightly seen as an important step forward that VAW is no longer seen as a private matter, but as a violent crime like any other. A policy where the decision of police and prosecutors is independent of the victim's views can take psychological pressure off the victim, but this cannot be done without taking her concrete situation and the possibility of protection into account. The victim may have been threatened with further violence or the cutting off of economic support to herself or her children. On the other hand, she may believe the undertakings by the perpetrator (and/or his extended family) to ensure that there will be no repetition of violence. The violence may have been severe or relatively minor. It may have occurred a single time or repeatedly. The victim may have immediate protection and a realistic option of economic survival away from the perpetrator or not. She may or may not have access to a network of support. She may feel supported and understood by law enforcement officials, or may be skeptical and fearful of the justice process. All of these factors are likely to influence her wishes, and may also play a part in the choice of response by justice officials.

Law enforcement officials and other service providers must meet victims with seriousness and understanding of the dilemmas facing victims of SGBV and to provide the most supportive environment possible in terms of the decision to investigate and prosecute. There must be effective cooperation with legal service providers who are willing and able to provide services to victims. In some countries, legislation or policy obliges police investigators to investigate the reasons why a complaint has been dropped,[231] or urges particular support to victims fearful of pursuing charges. Recommendations on these issues are made below.

Reference has been made in section 5.2.2 to the uncertainty surrounding the legality of gender discrimination in relation to the exercise of prosecutorial discretion. As discussed there, this needs to be cured by the adoption of the constitutional changes proposed by the NCC in 2010.

10.5.4 Use of the reconciliation provision in section 8 of the CPC

Section 8 of the CPC allows Magistrates to encourage and facilitate settlements in less serious criminal cases, including proceedings for assault, or for any other offence of a personal or private nature, not amounting to felony and not aggravated in degree, in terms of payment of compensation or other terms approved by such court and may, thereupon, order the proceedings to be stayed."

The section is not necessarily based on a requirement of a prior admission of guilt, and reconciliation would seem to be a possibility both before and after a judgment in the case. It would seem to permit both a procedure whereby the charge is dropped entirely (perhaps on

[230] Though in practice, it is difficult to proceed without her cooperation.

[231] E.G. National Gender Policy, Belize. State of Victoria, Australia: Code of Practice for the Investigation of Family Violence. Canada, MoJ Handbook on Criminal Harassment. Materials Seen on UN Women website, SG's database on VAW: http://webapps01.un.org/vawdatabase/home.action

condition of the fulfilment of a compensation settlement or other measures), or one where guilt is admitted. Moreover, the section applies to a fairly wide range of offences. Both common assault under section 247 of the Penal Code and assault occasioning actual bodily harm are currently considered misdemeanours and are thus eligible for reconciliation. Statistics on use of this procedure were not available from the Courts. Magistrates surveyed generally said that the section was underused.[232] The study did not permit an in-depth assessment of the use or non-use of the provision.

Lack of guidelines: The Best Practice Handbook points to the lack of guidelines on the application of the section. The Handbook says that current practice is for the Court to refer the case to prosecutors to try to mediate it. We are not aware of mediation training materials or continuing education in this field or studies on the application of the section. The Handbook points out that prosecutors are not trained to mediate or to deal with the particularly difficult and traumatic situation of domestic violence. Increased use of the provision would require procedures and skills that are different from those required of a judge for adjudication of guilt and sentencing or to prosecute a case.

The UN Special Rapporteur points to the danger of unequal power.[233] Her report calls for legislation prohibiting conciliation in all VAW cases, before and after the trial.[234] The Handbook takes a different view, taking its point of departure in the overburdening of the justice system and calls for more mediation, but also for training and certification of mediators.

A choice or course must be found between these two points of view. The UN Special Rapporteur is absolutely right in principle while the Handbook authors are anchored in the concrete reality of criminal justice in Zambia. We are not convinced that cutting off the possibility of judicial reconciliation under section 8 in all cases will leave victims better protected, but neither is reconciliation appropriate in any case of serious violence. We think there might be room for judges to use the reconciliation procedure for **minor** and **first time** incidents of family violence. This may especially be so where GBV victims can be empowered to make conscious choices with the help of qualified paralegals or lawyers. The choice does not have to be solely between reconciliation and prison. Guilty pleas and conditional suspension of sentence could be appropriate, given the right set of monitoring and support systems and with the right conditions imposed by Magistrates.

We fully acknowledge the need for clear instructions and guidelines to Magistrates on this issue, including on how reconciliation should never be used to condone serious violence. The authority of the Subordinate Court can underline the seriousness of what has happened and ensure that the reconciliation settlement includes promises and measures (for example by members of the extended family) to avoid a repetition. There may also be cases in which reconciliation can be a viable alternative to having a case dropped completely. If a prosecutor

[232] 28 officers responded. Responses to the question indicated that only limited use is made of the provision, with 40% of respondents saying that the provision was used in 25 – 50% of eligible cases and a further 35% saying that it was used in less than a quarter of all eligible cases.
[233] See para. 68 and recommendation in para. 102.
[234] Our view in this case applies only to reconciliation at court, not to dropping of charges by prosecutors or not proceeding with a police investigation. (Section 8 applies only to judicially approved reconciliation settlements in cases brought before the court, and not to non-prosecution.

feels that a victim is likely to withdraw as a witness, a reconciliation procedure involving serious measures of redress could potentially provide a better outcome.

Recommendations on reconciliation:

As long as the criminal justice system remains overburdened to the present degree, the following could be an alternative to outlawing use of reconciliation in all GBV cases:

- The Chief Justice should instruct Magistrates to distinguish between common assault under section 247 of the Penal Code (carrying a one year sentence) and the more serious offence of assault occasioning actual bodily harm under section 248, which carries a five year prison sentence. Subordinate Courts should generally not approve reconciliation in cases under sec. 248. This should only be contemplated where the prosecution propose a reconciliation settlement as the only alternative to the withdrawal of a key prosecution witness.

- Judicial orders under sec. 8 in GBV cases should only be issued where a Magistrate certifies that he / she is satisfied that the conditions of the reconciliation settlement are capable of protecting the victim from a repetition of violence.

- Prosecutors should be trained and guided on the various options available to them, including diversion, reconciliation, plea agreements and a recommendation of a suspended sentence.

- The recommendation in the chapter of this study dealing with the judiciary to pilot a penal mediation scheme under judicial supervision in the Subordinate Courts is retained. It could involve a stay of proceedings, rather than definitively dropping the case. The study should include close observations on the practice of the court and justice system as regards GBV cases. Legal services to victims should be made available as part of the package.

- Fair and effective use of this provision would require a set of procedures and guidelines dealing with issues such as the separation of the reconciliation procedure from adjudication of the offence as well as safeguards against situations where power imbalances might lead weaker parties to drop charges, denying them the protection of the law and effectively condoning violence.

10.5.5 Other legal avenues and instruments

Restraining orders: Subordinate Courts should be authorized by law to issue injunctions restraining access to the marital / family home for the protection of spouses, children and other family members as well as the other orders referred to in Sec. 101 of the MCA. Local Courts and Subordinate Courts should be explicitly authorized to make similar orders in respect of customary marriages.

Victims and plea agreements: GBV victims should be informed of their right to be present in court when a plea bargain agreement is being considered. As the legislation does not appear to make provision for a hearing of the victim by the court, prosecutors should be called on by the court to demonstrate that the victim has been heard when presenting a plea agreement. The judge's obligation to consider the interests of justice must systematically include consideration of the interest of the victim.

Legal services for victims: Non-state legal aid providers (including the NLACW, while it was functioning) provided some services of this kind to women victims of violence. Ideally, victims should be able to avail of public legal services in some cases. The need for the LAB to consider the needs of victims in its priority setting and strategies is discussed in chapter 4. Although the LAB does not have the resources to provide advice to victims of crime on a significant scale, it would make sense to consider granting representation in important cases of principle and to attempt to ensure some independent advice, even if full representation is not possible.

Training of police: As in some other countries, it is likely that attitudes of police officers towards domestic violence may stand in the way of effective investigation and prosecution. This must be addressed through training and institutional culture, with senior management showing the lead.

Policies in the police and prosecution should oblige police officers to investigate into the reasons for withdrawal of complaints of VAW, if complainants express a wish to do so. Likewise, police should work together with community based initiatives, including women's organizations, to empower women and combat SGBV.[235]

10.5.6 Rape cases: capacity, service delivery and strategies

Cases of sexual offences within families pose particular difficulties as the family may protect the offender from prosecution and discourages reporting the matter to the police. Concerned community members may bring cases to the police, who nevertheless encounter resistance from the family and even victims. The VSU encounters a general lack of knowledge of what is a crime and what is not among the public. This points to a need for sustained public information efforts in this area.

The VSU refers some cases to YWCA which has expertise in psycho-social counselling. Pilot one stop centres for rape victims have been established in cooperation with other institutions under a programme called ASAZA (A Safer Zambia), implemented by CARE Zambia and funded mainly by the EU and USAID. The aim is to limit the number of places a rape / violence victim has to go to a single centre. At these centres, survivors can thus find medical help (including the collection and preservation of criminal evidence), legal support (including reporting the crime to the police and legal advice where needed), psychological support (including counselling and linking to survivor support groups) and, if needed, safe houses or shelters. In each centre, besides a VSU officer there is 1 YWCA counsellor, 1 lawyer from WLSA, 1 Ministry of Health representative (representing hospitals for evidence gathering). There is a total of eight one stop centres in Zambia (Lusaka, Ndola / Kitwe, and Chipata). The centres are equipped with one vehicle each for follow-ups. The centres are currently completely dependent on external funding.

Where there are no such centres, a rape or defilement case typically starts with a report to the police VSU, which provides a medical form to be completed by a hospital doctor. The signed form is brought back to the VSU, which then proceeds with investigation and, if relevant, work towards prosecution. In many cases doctors / hospitals are not aware of what is required of them in rape cases. Whereas in principle the medical examination should be free, they may

[235] There are many interesting examples of such initiatives in different countries. See for example the "Gulabi Gang" from the Indian state of Uttar Pradesh: http://www.gulabigang.in/index.html

charge fees for the medical report, as is the case with access to medical services generally. Doctors reportedly often refuse to testify in court on the basis of their report. Section 150 of the CPC permitting compulsion of witnesses was said to be of limited usefulness in this regard as does not extend to an obligation to testify on material knowledge of the case if a person claims ignorance. No conclusion is adopted on this issue here due to a lack of opportunity to explore the question more deeply. This should be done by the VSU and organizations concerned.

Recommendations to strengthen the ASAZA programme include strengthening of referral networks, intensifying community awareness programmes on services offered by the one-stop centres as well as awareness on SGBV, as well as continuing to build capacity of service providers.

While establishing and maintaining more one-stop centres would be a service to Zambians in need, we have insufficient information to be able to recommend doing so. Sustainability must be a consideration.

11. Children and the criminal justice system

> "The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, re-integration into his or her family and social rehabilitation."
>
> Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others**.**
>
> **African Charter on the Rights and Welfare of the Child, Arts. 17.3 and 17.1.**

This section of the report deals with issues specifically affecting children that are not dealt with in other sections of the report. Some issues of general concern that also affect juveniles are dealt with in the central part of this chapter.

One qualified expert wrote in 2005 that it was "increasingly difficult to advance the rights of a relatively small group (child offenders) when the poverty and suffering is so vast and expansive". That author saw the need to transform the child justice system in Zambia, including by embarking on law reform as a priority, preferably in a comprehensive manner, and if not, then focusing on key areas including the definitions of child, the age of criminal capacity, custodial sentencing, remand period, diversion and particular offences. [236] There is thus an acknowledged need in Zambia for a broad and comprehensive reform of juvenile justice. The present chapter cannot aim to be a comprehensive guide to needs in this area or to provide an overall framework for reform.

There is a need for an overall state policy framework and plan for reform of child justice in Zambia. The UN Committee on the Rights of the Child recommended in 2003 that Zambia should pursue efforts towards a comprehensive children's code. In the absence of such an overarching state policy framework, the present chapter refers to the proposed ten point plan[237] and attempts to focus on the areas outlined in the above mentioned 2005 report.

Legal Frameworks

The principal law regulating the treatment of juvenile offenders in Zambia is the Juveniles Act.[238] The main text of the act dates from 1956, though there have been some amendments, most recently in 1994. Some leading standards on juvenile justice in Zambia are seen in the table below. There is a need for a review of current legislation and policy in a number of areas in the light of international instruments.

[236] L. Muntingh, Report on Child Justice in Zambia with reference to UNICEF supported projects", UNICEF, 2005.
[237] Ibid, see Overall conclusions and recommendations of the evaluation report.
[238] Cap 53 of the Laws of Zambia

Table 11	International	National
Legally binding law and instruments	The Convention on the Rights of the Child African Charter on the Rights and Welfare of the Child[239]	Juveniles Act (Cap. 53), Criminal Procedure Code, Criminal Procedure (Amendment) Act, Penal Code Customary Law
Policies: Politically binding instruments	United Nations Standard Minimum Rules pertaining to the Administration of Juvenile Justice (Beijing Rules), United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Rules), United Nations Rules for the Protection of Juveniles Deprived of their Liberty, Vienna Guidelines for Action on Children in the Criminal Justice System)	National Child Policy and National Plan of Action from 1994. Need for new frameworks. There is no national juvenile justice policy in Zambia. UN CRC proposed the drafting of a children's code in 2003.

11.1 Legal provisions concerning age and childhood

While Zambia is not alone in laying down different ages for various aspects of childhood and legal maturity, national statutory and customary law does present a rather confusing picture, as is seen in table 11.1 below.

[239] Ratified by Zambia on 2.12.2008.

Table 11.1 Legal definitions of childhood and majority in Zambia		
Legal Term	**Age / Definition**	**Legislative Source**
Juvenile	< 19	Juveniles Act, Cap. 53 section 2(1).
Young Person	16 – 19	Juveniles Act, Cap. 53 section 2(1).
	< 15	Constitution, Art. 24 (4)
	< 15	Employment of Children and Young Persons amendment Act of 2005
Child	> 16	Juveniles Act, Cap. 53 section 2(1). Penal Code, sec. 131A.
	< 18 (unless majority is attained earlier)	Convention on the Rights of the Child
	< 18 (unequivocal)	African Charter on the Rights and Welfare of the Child
Juvenile adult	> 19 < 21	Juveniles Act, Cap. 53 section 2(1).
Age of criminal responsibility	> 12 / > 8 subject to presumption against)	Penal Code, Section 14.1
Age of consent to marriage	16 - Civil marriage No minimum - customary marriage	Marriage Act, Sec. 33 (1) Customary law: at puberty / no definite age.
Voting age	18	Elections Act, Local Government Elections Act Sec. 14 (1) (b)

11.1.1 Age of criminal responsibility

Zambia uses the so-called "*doli incapax*" rule found in many common law jurisdictions according to which children below a certain age are considered incapable of forming a criminal intent. In Zambia the rule sets the age of criminal responsibility at 8, with a rebuttable presumption against responsibility for children between the ages of 8 and 12. Child offenders over the age of 12 are considered to be criminally responsible, though special provisions may apply in regard to sentencing for children up to a higher age (see below under defilement, for example). To be properly applied, this rule demands that courts are able to properly assess and appreciate the maturity of child offenders.

These age limits are low by international standards, especially if custodial measures / sentences are imposed. The UN Human Rights Committee criticized the current age limit in 2007 and recommended immediate action to raise it "to an [unspecified] acceptable level under international standards".[240] The UN Committee on the Rights of the Child recommends twelve as the absolute minimum lower age level.[241] England, Australia (federal), and New Zealand now set ten as the lower limit. Ireland raised it to twelve in most cases and ten for the most serious offences[242]. Africa too has seen a raising of the limit from the old common law standard: Uganda raised its limit from seven to twelve more than a decade ago[243] , whereas South Africa changed its limit to ten.[244]

An argument to retain the current limit would have to show at least that:

- The eight year standard is necessary in order to protect vital interests of public order and/or the rights of others (life, safety and property), i.e. that serious crimes are being committed by children in this age bracket that cannot be dealt with through other means than criminalization;

- In view of Zambia's obligations under the CRC, that the best interests of the child are a primary consideration in setting the age of criminal responsibility at age eight and:

- That the courts are in practice able to assess the maturity of offenders below the age of twelve in order to determine their criminal responsibility.

Failing this, they risk violating the guarantee of the right to a fair trial in the constitution of Zambia, the African Charter and the ICCPR.

Application of the age of criminal responsibility in practice

As in so many areas, proper analysis is hindered by a lack of accurate statistical information. In practice, getting accurate information on the ages of child offenders is also a problem for the courts. The team was not able to obtain up to date information on the numbers of cases in which the courts find a child under 12 to be criminally responsible. There are nevertheless some figures on incarceration rates. A 2008 study by HURID[245] found that of 216 children then in prison, 3 were aged 12 and a further 3 were aged 13, or 2.8% under the age of fourteen. No children below the age of 12 were encountered in prison apart from so-called "circumstantial children" (born to imprisoned mothers). The same study found 1 ten year old and one 13 year old in Nakambala approved school. It was not clear what the specific offences committed by these children were.[246] Furthermore there was inconsistency in that some children under 18 were in prisons, while other offenders above 18 were in the approved school. Neither was it possible to question court personnel in detail on the application of the *doli incapax* rule in

[240] Concluding observations of the Human Rights Committee. UN Document CCPR/C/ZMB/CO/3/CRP.1 23 July 2007, para. 26. International standards do not set a precise limit. International standards do not set a precise limit.
[241] See UN CRC General Comment no. 10 (2007).
[242] Though requiring consent of the DPP for proceedings against any child under fourteen.
[243] Children's Act of 1997, section 88.
[244] Child Justice Act, no. 7 of 2008, sec. 7(1).
[245] Summary Report on the National Study on Children in Remand Prisons and Other Correctional Institutions, HURID, April 2008.
[246] It is possible that the authors of that study are in possession of the information.

practice, though it is well-known that qualified social workers and psychologists are in short supply. The clear indication of the above figures is that the courts of Zambia have (commendably) shown great reticence in finding children under 12 to be criminally responsible for offences normally carrying prison sentences. In practice, other solutions would appear to have been found.

Measures providing for care as foreseen in section 10 of the Juveniles Act should be used to deal with children in conflict with the law that allow solutions tailored to the needs of the child. This could include social support and observation, removal from the home if necessary, either to a foster family or an open or secure institution. Like trial and imprisonment, these are measures that cost money and require suitable institutions and capacity. Although there seem to be few very serious cases, care in a secure institution would demand special provision for particularly young children at an existing centre, for example. The practical consequences for an individual offender might not appear to be radically different from at present, but. the orientation of the public response would be one of care and rehabilitation in the best interests of the child rather than criminal punishment.

Analysis and recommendations on the age of criminal responsibility

1. The various terms used to describe persons under the ages of 18 and 21 in Zambian law should be reviewed and rationalized among the different pieces of legislation.

2. Zambia should strongly consider following the UN CRC Guideline and raise the age of criminal responsibility to at least twelve. Raising the age of criminal responsibility does not mean discarding all means of dealing with child offenders.

3. For less serious offenders whose home environment is seriously problematic, the potential for developing fostering schemes should be considered and, when means are available, piloted.

4. “De-criminalizing” the process should not entail a lessening of the evidentiary requirement or standard of proof showing that the child committed the act(s) in question. The fact finding process must respect the child’s procedural rights to fairness (including a presumption of innocence) – being not less fair than in a criminal trial, except that the outcome is not one of criminal guilt.

11.2 Children and the Criminal Justice Process

11.2.1 Offences, juvenile offenders and institutions

Reference is made to the 2008 HURID report[247] on this subject. Recommendations and findings from that study will not be repeated exhaustively here. Article 40(3) of the CRC provides that parties shall seek to promote the establishment of laws, procedures, activities and institutions *specifically* applicable to children alleged as, accused of, or recognised as having infringed the

[247] Summary report on the National Study on Children in Remand Prisons and Other Correctional Institutions, HURID / UNICEF 2008.

penal law. Although efforts have been made with programmes such as the Child Friendly Court, Zambia does not have an overall policy.

Official national statistics on juvenile crime were not available. In the absence of figures, magistrates and court clerks were questioned on juvenile criminal cases. Theft and assault appeared to be the most frequent offences for which juveniles were tried, with defilement and burglary also appearing frequently.[248] In Copperbelt Province, drug offences were also mentioned. 31 police officials responded to a question about the numbers of suspects reported to the police in the three months prior to the interview. Their answers yielded a total of a total of 12,744 suspects, of which 579, or about 4.5% were juveniles. While no claim is made that this figure is representative nationally, the survey does represent a cross section of urban, peri-urban and rural districts. It may therefore to some extent reflect reported crime. A reliable figure on the average numbers of juvenile offenders arrested, charged, tried and convicted per year, broken down by categories of offence and province, would be of enormous help for planning purposes.

Offender profiles: HURID (2008) reported survey results showing that most child offenders in prison are first offenders.[249] It is not clear from the report if this information is from case files or simply interviews with juvenile inmates, which might be less reliable. There is some uncertainty about its correctness as this was contradicted by the Director of Social Welfare in an interview, who said that many juvenile offenders known to the system are repeat offenders, indicating a failure of reintegration efforts.[250]

Institutions: The justice providers most commonly resorted to in dealing with children's cases (minor theft for example) are the police, village head men and family elders.[251] These institutions are also the ones children list as closest to home. Adult users also pointed to the police as the justice institution most commonly resorted to in children's cases, followed by family and village headmen.

11.2.3 Juvenile justice and Pre-trial (police) diversion mechanisms

Official attempts to introduce diversion in Zambia have focused on court-based programmes, as discussed below. In practice there may be a thin line between community crime prevention (see section 10.3.1) and police diversion schemes. While diversion is not limited to juvenile offenders, it is most often used to deal with minor juvenile offences.

Diversion schemes are sometimes seen as an attempt by modern societies to recreate some of the community oriented justice mechanisms that are well-known to Zambians through family elders, ward chairpersons and village headmen and councils. Given the strength of such structures and ideas in Zambia and the limitations of state justice agencies, it would seem to make sense to attempt to utilise these methods, recognizing their role in diversion. There are pitfalls, and any attempt to make improvements must take account of these. It is often

[248] This more or less corresponds to the 2008 HURID findings, except that defilement ranked slightly higher there, and murder was also reported as accounting for 11.6% of charges against children.
[249] HURID, 2008, 16.22.
[250] Notes on interview conducted 11.2.2010.
[251] User survey results. As noted elsewhere in this study, the surveys operated with a very broad notion of "justice providers" in order to get an idea of what people actually do when confronted with a legal issue or problem.

precisely the children who fall outside of the traditional community structures – including street children - who fall into crime. Nevertheless, not everything can be fully planned in advance. The South African NICRO diversion (see below) scheme operated on the basis of internal instructions and local agreements for 10 – 12 years before legislation on diversion was adopted.

Pre-trial diversion models from other countries

In many common-law jurisdictions, including the UK, senior police officers have the discretion to use a variety of cautions and warnings to dispose of minor cases without prosecution, but with certain consequences for the offender. This is often to the benefit of the offender, the police and the criminal justice system. Certain checks and controls are necessary in order to ensure against abuse and corruption. These include (a) making the cautions subject to a set procedure, (b) limiting the number of police officers who can issue them, (c) limiting the offences for which cautions can be used, (d) putting the caution into a written record, and (e) making them subject to a number of legal requirements or rules. Depending on the seriousness of the charges, prosecutors are very often key to diversion decisions.

The UK example

In the UK, various kinds of caution are possible, including simple cautions, conditional cautions and, where young people are concerned, reprimands and warnings. Police can only issue a **simple caution** if certain conditions are fulfilled. There must be (i) evidence that an offender is guilty, (ii) an offender of 18 years of age or over who (iii) admits they committed the crime, and (iv) agrees to be given a caution. If the offender does not agree to receive a caution then they may be charged instead.

There are no rigid rules about the when cautions should be used – this is left to the discretion of senior police officers who are deemed experienced enough to exercise judgment. Simple cautions cannot be used for serious crimes like robbery or assault, which must always be referred to the prosecution. In practice, cautions are more likely to be used for first offenders, or those who may have offended a long time in the past. This is in line with the general purposes of the caution mechanism, which are to provide a way of deal quickly and simply with less serious offenders, diverting them from unnecessary appearance in the criminal courts; and reducing the chances of their re-offending. Being issued a caution is not the same as having a criminal record, but the police keep a record of the caution for a set period, and having received a caution makes it more likely that the person will be charged if they reoffend. The issuance of a caution may be used for the purpose of a civil action concerning the incident in question.

Conditional cautions go further than simple cautions. The same basic conditions apply to the issue of these as to simple cautions, except that they consult with lawyers at the prosecution before issuing them. They may also consult the victim of the crime. Here, the police agreement not to prosecute is based on a commitment by the offender to satisfy certain conditions imposed by the police. These could include conditions aimed at **rehabilitation** – changing the offender's behaviour to reduce the likelihood of them re-offending or helping to reintegrate the offender into society. Rehabilitative conditions could include ways of addressing drug or alcohol misuse, or other addictions or personal problems, such as gambling or anger. Other conditions might be aimed at **reparation** - repairing the damage done either directly or indirectly by the offender. This might involve apologising for the offending actions, doing

unpaid work to physically repair the damage caused or making it good financially, if this is acceptable to the victim.

Lastly, police can issue warnings, reprimands and penalty notices to young offenders. In addition to the conditions applying to adults, there are certain additional safeguards for minors, including involving social authorities and parents or guardians.

South African model

A model developed by the South African NGO NICRO is interesting for its joining of several distinct components that attempt to address the needs of the child offender, his or her family, the victim and the community. Offenders are addressed through a life skills programme. Depending on the age of the child, the seriousness of the offence and whether the child is a repeat offender, a more thoroughgoing version (known as The Journey) is also used. A Pre-trial Community Service programme involves the child accepting responsibility for the offence and being ordered to perform a specified number of hours of community service. A NGO worker, in consultation with the authorities (police or public prosecutor), determines the requisite number of hours to be worked and monitors the child's progress. In Victim Offender Mediation the victim and the child are brought together, under the facilitation of a specially trained NGO mediator. The victim and the child discuss the impact of crime on their respective lives and participate in a process of devising a mutually acceptable plan that will strive to repair the harm caused by the crime while holding the child accountable for his or her behaviour. The plan is drawn up into a contract submitted to the prosecutor. Compliance is monitored by an NGO worker. This mediation may be supplemented by Family Group Conferences, a mediated intervention where other individuals, such as the child's family, community members, teachers, etc. are also included in the decision making process. The results of the programme in South Africa are seen as very positive, with very high rates of compliance with the diversion demands and low rates of recidivism.[252] Diversion procedures and rules were written into South African legislation in 2008.[253] Responsibility for diversion decisions under the legislation lies with public prosecutors.

Police diversion in Zambia

The legal position: Zambia, like other common law countries, generally follows a so-called "opportunity principle" in relation to prosecution, meaning that a fairly wide discretion is allowed to the state in deciding which offences to prosecute. Prosecutorial discretion is explicitly recognized in the CPC.[254] There are no express provisions for dealing with police discretion in the Police Act, the Juveniles Act or the CPC, but neither is it forbidden by law to exercise discretion at the police investigation stage.[255]

Practice: Many sources confirm that informal diversion is widely practiced. The 2005 Zambian Juvenile Justice Role Players Training Manual mentions informal diversion by police. The Child

[252] The Effectiveness of Diversion Programmes - A Longitudinal Evaluation of Cases, Muntingh. NICRO, May 2001. Accessed at: http://www.unicef.org/tdad/nicroevaluation01(1).pdf
[253] See the Child Justice Act (no. 75 of 2008).
[254] See inter alia s. 81, s. 88.
[255] Police Act, Cap. 107, Sec. 14 (3) places a general duty on police officers to bring offenders to justice. Sec. 18 endows police officers with the power to lay an information before a magistrate. The latter section is not framed as an obligation.

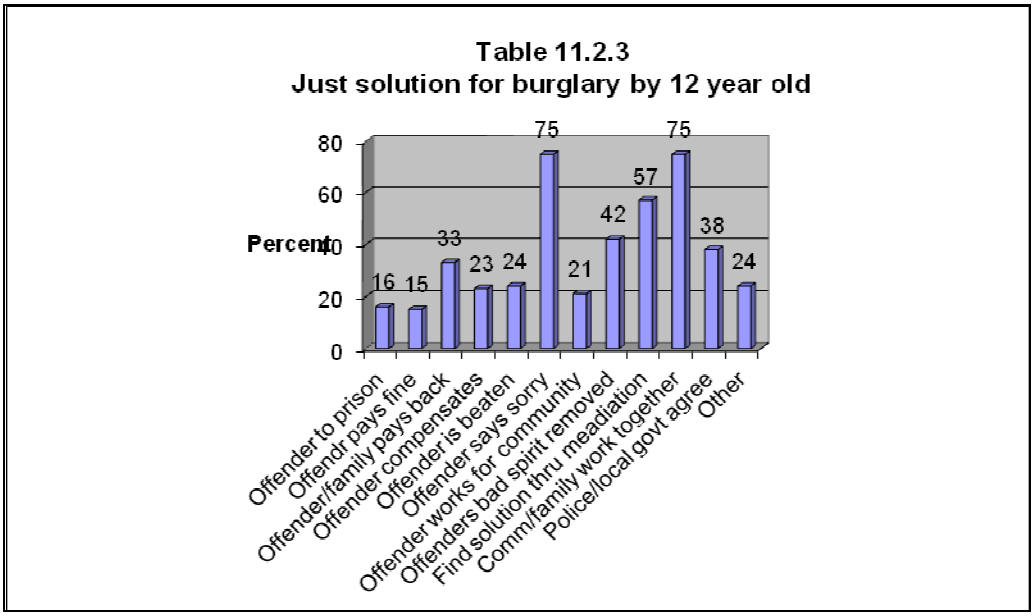
Justice Forum (CJF) evaluation report mentions diversion of cases in various ways, including substitution of criminal charges by warnings or counselling and withdrawal of the complaint. No information is given regarding discussions or negotiations or the conditions under which complainants agreed to take this step. [256] At the police investigation phase it is generally up to the OIC to choose between diverting the case by sending the juvenile offender for counselling or transferring the docket to the court for trial. Survey responses of members of the public interviewed indicate that informal means of disposing of cases are practiced widely by the police. Respondents mentioned mediation and negotiation, compelling offenders to compensate victims, imposing what the public understood as "fines", confining suspects in police cells as a punishment and sometimes beatings as ways in which police officers sometimes deal with cases. Chapter 10 discusses police - community linkages, and gives examples of how police tolerate or cooperate with other local actors that impose order or settle disputes.

Attitudes of police: Police were asked whether it is permissible under the CPC and Police Act for a police officer to exercise discretion by not pressing charges in relation to petty offences. Responses varied, and police were unsure how to answer this question. Most said that the police often drop charges in petty offences if a good solution can be found at family or community level. Some police officers seemed uncomfortable with a practice for which there was no clear legal authorisation.

Public attitudes: The CJF Evaluation Report echoes police worries and mentions the risk that communities will suspect corruption if charges are dropped at the police station or if the police are seen to be acting like a court. The truth would thus seem to be that police are as well aware as all other justice sector actors that it would be completely impossible to bring all cases before the courts. Both the public and the police recognize a need to deal with many incidents and issues locally, and this is informally being practiced, probably on a large scale. The lack of legal clarity meanwhile, creates uncertainty and opens the door to abuse or the perception of irregularity. The lack of legislation or workplace incentives is a hindrance to wider and more controlled use of police diversion. Without a legal mandate for authorities to enforce a local remedy, its character is informal rather than administrative. There is no motivation for justice officials to undertake an extra effort or to change habits.

Nevertheless, in surveys conducted for the present study, Zambians responded overwhelmingly in favour of restorative solutions to non-violent juvenile crime committed by minors, as table 11.2.3 shows:

[256] CJF Evaluation, 2010, p.12.



It is clear that a set of legal rules alone will not remove abuse. Outlawing pre-trial diversion because of fears of abuse would be both ineffective and counterproductive. Regularizing it through the adoption of rules and guidelines clearly seems to be the best way forward.

Recommendations on diversion by police:

1. Zambia should move towards the introduction of a pre-trial diversion scheme. This could involve the police, the NPA or both agencies. Formalizing pre-trial diversion will not alone eliminate the potential for abuse, but it will at least:

- Allow upright OICs and police officers to legally do what is already done in practice without feeling that they are either circumventing or breaking the law or being seen to do so;

- Provide a standardized procedure and rules to replace a set of diverse practices;

- Provide a set of standards against which victims, offenders and community members can measure police conduct and hold police and diverted offenders to account;

2. Steps towards the introduction of a police diversion scheme should include:

- Mapping practice and evaluating experience with informal diversion, including through the CJF project but also informal police practice as regards warnings / cautions and interaction with community structures to solve conflicts informally; (this should be carried out as part of the larger study on community linkages proposed in section 10.3.1. The mapping study should be carried out by a team including police and NGO representatives.

- Consulting with the NPA on the respective roles of the police and the NPA in a pre-trial diversion scheme. There are both foreseeable advantages and disadvantages to involving prosecutors in the scheme. Advantages would include the greater accountability that is provided when two different institutions are involved. This

should lower the risk of corruption. Disadvantages would be that the procedure would become more burdensome and bureaucratic and subject to the delays that are already known in the justice system. Our recommendation is to allow the police to divert some very simple matters, and to involve the prosecution for more serious ones.

- Piloting one or more models in some different settings (urban and rural, low crime and high crime areas). Piloting could take place based on internal instructions within the police and prosecution. Community information should be part of the pilot scheme. Provision should be made for the use of a variety of community level structures to assist in restorative justice solutions, and CSOs and CBOs should be invited to assist.

- Evaluating experience with the pilot projects. Consulting on results with all relevant stakeholders. Drafting suitable legislation based on good practice and lessons learnt.

11.2.4 Court based diversion

This subject is covered in a number of other studies referred to herein and is not explored exhaustively here. Court based diversion has been practiced under a scheme managed under the CJF inspired by the NICRO model. UNICEF and HURID developed a juvenile justice training manual for the scheme, which depends on external funding and capacity within civil society partners, as well as on good working relationships between NGOs and state agencies. Sustainability was hoped for through government financing via DSW, but it is not clear that this has happened.[257] The CJF evaluation (2010) found that the diversion component of the programme had not been effectively rolled out to the districts due to lack of funding[258], though Lusaka, Mongu and Kasama had diversion programmes with NGOs providing services. Like pre-trial diversion, court based diversion suffers from the lack of a specific legislative basis, though courts may apply section 8 of the CPC[259] on reconciliation in minor matters or suspend a sentence for up to three years under sec. 16 of the CPC for many offences.[260] NGOs have filled gaps caused by the lack of resources on the part of the DSW, but these solutions tend to be ad hoc in nature, as the NGOs are themselves dependent on external funding and do not always have the required expertise, authority and resources.

11.2.5 Other trial stage issues

Jurisdiction: Subordinate Courts sit as juvenile courts when hearing cases of juvenile offenders.[261] They have non-exclusive jurisdiction to hear juvenile criminal cases.[262] Local Courts also deal with juvenile offenders. The field survey data indicated that 10 local court justices heard cases where children stand as accused, whereas 35 said they didn't hear such cases. Four out of ten social welfare officers interviewed stated that they have collaboration with Local Courts.

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[257] See recommendations of the evaluation.
[258] Information obtained during interview with Mrs Sharon Newa, Principal Resident Magistrate, Chairperson of CJF Lusaka
[259] Cap 88 of the Laws of Zambia
[260] The fifth schedule to the CPC lays down a list of offences for which sentence may not be suspended.
[261] Section 63 of Cap 53 of the Laws of Zambia
[262] Juveniles Act, s. 63- 64

Magistrates were generally familiar with juveniles as accused. 6 of 24 responded that children above the age of 12 could occasionally represent themselves (i.e. appear without counsel). Two thirds (14 out of 21) responded that, in the absence of counsel, parents would choose who supported the child before the court, whereas one third (7) responded that the child would be involved in the selection. (In some cases, the parents might not be present.) Most courts (16 out of 23[263]) said that there were child and family courts in their provinces, and almost all said that special procedures applied to the handling of cases involving child parties.

Child Friendly Courts: These courts were established to provide an environment conducive to the trial of juvenile offenders, including infrastructure that is not intimidating in design as is the case is with most open courts. The sitting arrangement must naturally be friendly to the juvenile. Judicial officers must be trained in dealing with juveniles. The court normally sits in an informal way without strict adherence to the rules of the Criminal Procedure Code. The court is expected to have a magistrate specialised in juvenile law. Child Friendly Courts were active until 2004. Unfortunately things seem to have fallen apart due to a number of factors including the high turnover rate of magistrates trained in juvenile justice and a lack of appropriate court rooms. A lack of specialisation in this field by judicial officers and the transfer of trained officers to other departments within the judiciary hamper the operations of the Child Friendly Court. These inadequacies cause delays in finalising cases.

Until 2011, there was one Child Friendly Court in Lusaka, but no infrastructure improvements had been carried out on courts in other provinces. In 2011, UNICEF announced the construction of a child friendly court in Nakonde in Northern Province. Magistrates interviewed in the districts said that they improvise to create a child friendly environment.

At present there are no judicial rules on procedure and practice that regulate the administration of justice in Child Friendly Courts. A set of guidelines is needed that goes further than the Juveniles Act. This means that the sitting Magistrate uses his or her discretion in disposing of the cases.

Procedure: Unfortunately the Local Court, High Court and Supreme Court do not sit as Juvenile Courts, subjecting the juvenile offender to strict adherence to the law against offenders as practiced in these courts. The Local Courts Handbook (para. 123) instructs Local Courts not to try Juveniles for offences under the Penal Code. This is discussed in brief in chapter 12. In capital offence cases in the High Court, juveniles are prosecuted like other offenders. Sec. 119 (2) of the Juveniles Act provides for the exclusion of most members of the public from the courtroom even at the High Court, though not the media. In practice, the juvenile's identity is often not protected during trial as very few cases are held in camera. This negatively impacts on the juvenile's social standing and may result in child alienation. Section 67 of the Act allows transfer of the juvenile offender to the Juvenile Court for sentencing, but this does not apply to the trial itself, and is discretionary rather than obligatory. Zambian jurisprudence provides that either a parent, guardian or a social worker must be present during the trial of a juvenile.[264]

There is also some uncertainty as regards child witnesses, about whether a particular witness should be treated as a child for the purpose of deciding whether his evidence requires

[263] The numbers of court officials responding to particular questions varied from one question to another. This is why the number of respondents to the different questions is not uniform.
[264] The People v Dimeni (1979) ZR 234 (High Court). Cited in Best Practice Handbook, 2010.

corroboration. The Court said that courts would be guided by the statutory definition of a "child" means a person under the age of sixteen.[265] If those under sixteen are to be treated as children for the purposes of the evidentiary weight of their testimony, it should logically follow that they should benefit from measures of protection appropriate to their status.

DSW role at trial: HURID (2008) found that 37% (80 out of 216) of children in prisons and 70% (75 out of 107) of those in child correctional facilities reported that a social welfare officer was with them in court. Thus, the outreach of the social welfare officers is far better for the child correctional facilities than for children detained in other places, indicating an obvious need for improvement here. HURID also reports a disparity between child prison and correctional centre detainees in regard to *in camera* hearings: 88% of those in correctional centres reported that they had been tried *in camera*, whereas the figure for those in prison was only 68%. We assume that the lack of a social welfare officer to advise the court is a factor here.

Legal assistance: Chapter 6 points out the general lack of LAB legal assistance in Subordinate Courts. As this is where most juvenile defendants appear, juveniles rarely enjoy the benefit of legal assistance. The recommendations on beneficiaries in that chapter include making child defendants a priority for legal assistance. Clearly, this should particularly be the case where there is any possibility of a sentence of imprisonment.

Recommendations:

1. **DSW functions and cooperation with NGOS**: Government needs to increase the funding and capacity of the DSW, and donors should support these efforts. Donors should be cautious about creating parallel structures among NGOs to fulfil state (DSW) functions such as monitoring the implementation of diversion schemes or presence at trials. Any delegation of DSW functions should take place in the framework of an overall policy. DSW should, in the context of an institutional strategic plan, set out the terms of its cooperation with NGOs and establish working relationships with them based on more or less standard Memorandums of Understanding (MOUs).

2. The UN Committee on the Rights of the Child recommended that Zambia develop and adopt a comprehensive Children's Code. This recommendation is endorsed here. In this context or in a general reform of the Juveniles Act, provision should be made for reporting restrictions in trials concerning juveniles where appropriate. In the meantime, guidelines should be adopted by the Chief Justice setting out procedure in Child Friendly Courts.

3. The courts, the LAB other legal aid providers and relevant stakeholders should set a realistic time frame for the achievement of the goal of the provision of legal assistance in every case where a child is on remand detention or risks a sentence of imprisonment. These parties should agree on a time-frame and a plan of action for the realization of this goal.

[265] As noted by the Supreme Court in cases such as Chisha vs. The People – referred to in People v Ngulube case SCZ no. 7 of 2007.

11.2.6 Sentencing and penalties

As mentioned elsewhere in this study (section 10.3.12), there is a particular problem in regard to detention of juveniles pending sentencing. Sec. 64 (7) of the Juveniles Act refers to obtaining a (social welfare) report, "if practical". Courts reportedly tend to insist on the report, which should contain recommendations regarding sentencing in the event of a finding of guilty. Not all courts in the country receive social welfare reports due to a shortage of professional staff countrywide. Labour statistics at present indicate that there is at least one social welfare officer in each province. This is far from adequate in comparison to the number of cases involving juvenile offenders. Reports are not submitted on time or at all due to lack of resources. In Lusaka, in order to prevent delays the child friendly court lends its vehicle to the social welfare officer in order to ensure that the social officer can carry out home visits and is able to submit timely reports to the court, but ad hoc solutions like this are not sufficient to solve a general problem of a lack of resources at DSW.

Research for the study showed that delayed submission of reports is an important cause of backlogs in juvenile sentencing. Section 64 (7) of the Act provides for remand detention pending sentencing. Delays in submission of the social welfare officer's report, and in transporting the juvenile to the detention facility mean that juveniles are detained for long periods before serving their sentence. What is perhaps most disturbing about this are reports that time spent in remand detention is not deducted from the actual sentence.

> Juveniles await sentences at Lusaka Central Prison
> By Brian Malambo
>
> Legal Resource Foundation has discovered that there are some juveniles who have been put in custody at Lusaka Central Prison awaiting sentences in the magistrate courts.
>
> LRF Paralegal Mwaanga Malambo unearthed the odd development during his visit in August 2010. Mwaanga wondered how a magistrate who fully understands the law would want to meet a sentence on a juvenile.
>
> He noted that it was unfortunate that juveniles were made to mingle with adult convicts for longer periods of time while waiting to be sentenced.
>
> Under, the Zambian Law, Juveniles when found wanting are to be sent to reformatory centres for a stipulated period of time as opposed to sending them to jail as part of their punishment. Meanwhile one juvenile has spent three years at the same prison while awaiting to be sent to Mazabuka Approved School. The named juvenile is believed to have defiled a 12 year old girl in Luangwa district and has been ordered to Mazabuka Approved School but has been at Central Prison since 24th June 2007.

It is not clear whether the limitation rule in Sec 72 of the Juvenile Justice Act, stipulating that sentences of imprisonment for juveniles should be a last resort is uniformly applied in practice.[266]

[266] OMCT 2007, p.16, expresses doubt on this but lacks precise information.

11.2.7 Restorative justice solutions and requirements to implement them

The many possibilities of restorative justice (broadly including crime prevention pre-trial or court based diversion, non-custodial sentencing, probation arrangements etc) provided for by the law, as well as those that could be devised through progressive changes to the law, are all dependent upon the effectiveness of some measures of harnessing community responsibility for wayward youths. The immediate bottleneck in relation to all of these measures is the inadequate means at the disposal of the Department of Social Welfare to carry out a variety of functions, including writing social welfare reports, finding and arranging adequate and defensible community care and restorative justice arrangements, and supervising whatever schemes are put in place.

Realistically, carrying out the moves towards restorative justice recommended by this study, as well as many others, would require a large increase in the staffing and capacity of the DSW and/or of its cooperating partners in civil society. Existing civil society organizations can undoubtedly be mobilized more effectively for this purpose, but it must be recognized that there are limits in this regard. Many NGO staff who might be willing to engage in this work lack the professional qualifications and other resources necessary to supervise restorative justice and juvenile reintegration schemes.

While it is beyond the scope of this study to assess the numbers of social welfare officers or qualified NGO staff necessary. It would not be unduly difficult to make some calculations, based on police and court juvenile caseloads and the numbers of juveniles a social worker can assess and supervise. DSW could be asked to arrive at some figures in this regard. However, staffing is only one aspect. The necessity of transport facilities must also be accounted for.

If these kinds of budgetary increases are not realistic in the short or medium terms, the question is whether increased diversion can still go ahead. Can the justice system proceed with developing community based diversion schemes that it may not be able to train and supervise to the degree that actors would desire? Can it accept sending minors into such schemes? Would this be worse than the other available options?

These kinds of questions are difficult because they are choices between options, none of which are particularly attractive (They can be crudely summarized as (a) allowing juvenile crime to go relatively unpunished, (b) condemning juveniles to an unsuitable and harmful life in the criminal justice system and (c) entrusting juveniles to relatively unqualified and untested communal schemes. It is submitted that the further development of restorative options must go ahead, and it is the job of justice sector actors to make them as accountable, transparent and sustainable as possible in the current Zambian context.

In some areas, there were reports of NGOs informally taking on the role of the DSW where the latter was unable to perform.[267] These were generally the NGOs involved as service providers in the diversion programme. Such local initiatives are valuable in principle and ought to be encouraged by senior levels of the police and the courts. Nevertheless it is important that they take place under some form of official authority and agreement in order to avoid problems

[267] Ibid. The reference is to YWCA and Jesus Cares Ministry playing this role in Kasama.

and the potential for abuse that might jeopardize the success of the initiative.[268] Authority in respect of probation monitoring would have to take place under Section 15 of the Probation of Offenders Act (Cap. 93) and Section 6 of the Juveniles Act. These acts place no apparent obstacles to the Minister to grant appointment to qualified persons from outside the Public Service, though some restrictions in the places such non-public inspectors would be authorized to inspect would seem appropriate (perhaps not public institutions, if not appropriate). Agreement could be made in the form of an MOU among the NGO, the DSW and the Zambia Police Service at national level providing for the conditions under which the DSW and OICs are authorized to enter into this kind of cooperation with NGOs. A monitoring framework would have to be put in place whereby the Police and DSW are responsible for ensuring quality and professional standards by the CSO representatives carrying out these functions.

Recommendations on sentencing of juveniles

Corporal punishment: It has been pointed out in other reports and studies that sec 73 (1) of the Juveniles Act needs to be repealed following the Banda case[269] outlawing corporal punishment. Rule 58(4) of the Reformatory School Rules likewise needs to be repealed.

Government agencies, donors and NGOs should continue to work hard to develop restorative justice options for children at all stages of the criminal justice process. They should encourage innovative approaches to build sustainable community platforms for dealing with children in conflict with the law.

Court based diversion: Where possible, the Courts should encourage legal aid providers – including suitably qualified paralegals - to help in formulating the terms of diversion agreements. Where this is possible, Magistrates should consider limiting themselves to examining proposed settlements (as to the fairness of procedures and the substance of the settlement) for conformity with a set of guidelines to be adopted by the Chief Justice under s.71 of the Juveniles Act. The AtoJ programme and GIZ have supported development of mediation schemes towards this end.[270] These ought to be supported by government and donors.

11.3 Children as victims of crime - with special reference to sexual offences

The surveys were unable to gather statistical information on children as victims of crime. Neither could national statistics on this be obtained.

11.3.1 The issue of defilement

In the context of what appears to be a general increase in teenage pregnancy in Zambia[271], defilement is of concern to agencies of the justice system as well as to society. Of even greater concern is the phenomenon of sexual abuse of young children by adults. The first of these two

[268] The CJF evaluation report points out that Social Welfare Officers must be gazetted as probation officers and Juveniles Inspectors under the Juveniles Act (Cap 53) and the Probation of Offenders Act (Cap 93).
[269] John Banda v The People HPA/6/1998
[270] Best Practice Handbook, p.96.
[271] Press reports refer to Ministry of Education figures showing an increase from 9,111 reported pregnancies of school-going girls in 2005, compared to 12,370 in 2008. See: http://ipsnews.net/news.asp?idnews=50729

phenomena is closely related to issues arising from the legal age of marriage and consent discussed at the beginning of this chapter. As regards the second, the lack of statistics make it unclear whether the increased number of cases is a result of greater awareness or a change in criminal conduct.

S. 138 of the Penal Code provides that (1) Any person who unlawfully and carnally knows any child commits a felony and is liable, upon conviction, to a term of imprisonment of not less than fifteen years and may be liable to imprisonment for life. Subsection (2) provides that attempted defilement carries a penalty of 14 – 20 years.

In enacting these provisions, Zambia's legislators wished to protect minors against sexual abuse by predatory adults (including abuse by persons in positions of authority such as teachers or family elders). They might also have wanted to discourage teenage sex and pregnancy. These are two different problems, and most Zambians interviewed for the study thought that they should be dealt with in two different ways. That the Penal Code does not clearly differentiate between the means to deal with these two issues is highly problematic. [272] We attempt to deal with them separately in the present analysis.

Child sexual abuse committed by adults: The 2008 UNICEF / Government of Zambia situation analysis of children and women refers to research suggesting that most child sexual abuse is committed by persons known to the victim, and frequently by a person in authority. Figures were not available to the study on the numbers of charges, indictments, trials and convictions for defilement, incest and rape of children by adults, but the report refers to reluctance among children to report abuse. In cases where the defiler is a person in a position of authority over the defiled minor or is being protected by such a person, it is extremely difficult for the authorities to offer the lasting trust and protection that would be necessary to break through the fear and mistrust of the child.

Law and practice on "peer to peer" defilement: As many cases of defilement concern relationships between consenting teenagers, subsection (4) is important. It provides that a *child* (i.e. not a *juvenile*) above the age of twelve years who commits an offence under subsection (1) or (2) is liable, to such community service or counselling as the court may determine, in the best interests of both children.[273] This seems to protect teenagers against imprisonment for consenting sexual relationships. However, recalling that the law defines a child as a person under the age of 16, the protection of this section only extends to those under 16. Anyone over 16 would, strictly speaking, seem to be liable to the full penalty of at least fifteen years in prison.

11.3.2 Defilement cases in the Subordinate Courts

Section 131A of The Penal Code (Amendment) Act No. 15 2005 defines a child to mean a person below the age of sixteen years. In prosecution of defilement cases, it is a requirement

[272] It becomes more so when we recall that the law imposes no minimum age for capacity to enter into a customary marriage. Thus, a thirteen year old girl can be legally married (including through an arranged marriage) to a far older man[272], but if she has a consenting sexual relationship to a sixteen year old boy, she may render him liable in principle to fifteen years in prison. Thus, at present the law does not forbid all sexual activity by children under 16, only that part of it which takes place outside of customary marriage.

[273] As amended by Act No. 15 of 2005

as a matter of procedure and practice that the age of the victim (child) be ascertained before a complaint can be made before court. For instance the claimant must show that at the time of commissioning of the act, she was under the age of 16 years. However as a matter of practice, a complainant can still lodge a complaint before court as long as there are persons who can come and attest to the age of the child as age goes to the root of the offence. However, the trend is currently changing as the court will demand for documentation tending to prove age of the complainant.

The 15-year sentence in sec. 138 of the Penal Code brings the offence of defilement outside the sentencing powers of the Subordinate Courts.[274] In practice, it seems that many courts may however continue to apply sec. 73 of the Juveniles Act when dealing with juveniles found guilty of defilement and applying non-custodial measures. UNICEF pointed out that subsection (j) of this section allows the courts to use discretion in sentencing juveniles. In this regard, it is interesting to recall the Juveniles Act S. 1 (2) "In the application of this Act to juveniles, the provisions of African customary law shall be observed unless the observance of such customary law would not be in the interests of such juveniles"

The 2008 HURID study nevertheless found 38 juveniles[275] in detention or imprisonment on defilement charges and that the age difference between the parties was usually 2 – 3 years. 23 were in prison, the remainder in the reformatory institutions. The HURID report does not give the precise ages of these detainees.[276] Neither is it exactly clear how many had been convicted. 15 were in the two child institutions in Southern Province. It is assumed that these had been convicted. Thus, the police and the public may not be aware of the interpretation usually used by the courts, and, if some of those found by HURID to be detained were convicts, the courts may not be interpreting the law uniformly throughout Zambia.[277] From the number of Magistrates interviewed during field research work, it was found that the number of juveniles who go to court as complainants/claimants is almost the same as those accused of committing crimes.

While we do not have comprehensive figures on conviction rates for different kinds of offences, [278]workshop participants agreed that conviction rates in defilement cases are low because of the lack of enthusiasm for prosecution among the public. Nevertheless, while the rate may be low as compared to the number of cases reported, the rate of conviction for cases prosecuted is not strikingly lower than for criminal cases generally (See table 10.4.a in chapter 10 (71.5% in 2005, 94.6% in 2008).

Most representatives of the DPP's office interviewed responded that children between the ages of 12 and 18 generally could not represent themselves as victims / claimants. The CRC (Art. 12.2) obliges Zambia to hear and consider the views of children capable of forming their own views in all matters affecting the child. The obligation applies especially to legal and judicial proceedings. Domestication of the CRC would directly oblige Zambian law enforcement officials to hear and consider the views of children who are old enough to express their views.

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[274] CPC sec. 7. See also infra in the chapter on the judiciary.

[275] Here, we use the word "detention" to mean those not convicted and "imprisonment" for those who have been convicted.

[276] . The largest group of those in prison were in the 16 – 17 age group. Depending on the definitions used, they would qualify as juveniles or children.

[277] It is possible that they had been convicted prior to the changes to the law in 2005.

[278] See figures in chapter on the police.

	Processing of defilement cases, 2009[279]					
Cases reported	Completed prosecutions	Prosecution rate	Convictions	Acquittals	Conviction rate (reported cases)	Conviction rate (prosecuted cases)
1676	340	20.2%	277	63	16.5%	81.4%

Local Courts: Local Court Justices have applied customary law in criminal matters by ordering perpetrators to pay virginity damage to parents of the child instead of reporting the case to the police[280]. This finding is confirmed in the survey material for the present study in which local court justices confirmed that they hear cases of defilement "virginity damage" etc.[281] These cases are among those most frequently encountered in the Local Courts. A large number of these civil actions would appear to be successful from the point of view of plaintiffs. The finding des not differentiate between cases of peer to peer defilement and abuse by adults, so more work is necessary to determine practice. VSU officers find LCMs knowledge of state law, including criminal law, to be very limited as regards the requirements of the law in this regard. The VSUs have tried to sensitise local court magistrates and traditional leaders through partner organisations.

Under customary law, carnal knowledge of a girl below the age of 16 years, provided it is without the consent of the girl's parents or guardians, often merely gives rise to a civil claim on the part of the parents for compensation. A marriage bargain may also be concluded. Such a case, if taken to the chief's court, may not be heard because payment of some form of compensation to the parents is considered acceptable. During the field study, the research team found two families negotiating with a police officer at a police station in Mansa. A 16-year-old boy had defiled a 14-year-old girl and the boy's family offered the girl's family a canoe as compensation for the 'deflowering' of their daughter. The girl's family, being fishermen, gladly accepted the canoe. But when the matter came to the attention of the police, the two families were told that this is a criminal matter which needed to be prosecuted by the state and could not be settled through mere compensation. The two families were unhappy as they both preferred to settle the matter as would be done traditionally through compensation. This is the preferred, amicable and acceptable form of justice in many rural settings.

Social attitudes: Both practice and surveys reveal that very many people do not consider lengthy imprisonment appropriate in cases of relationships between consenting teenagers who are often close in age. These are reflected in the practice whereby defilement is often dealt with by families – and followed by Local Courts and traditional courts- as a question of civil law. HURID[282] states that the family of the girl accuses the boy's family in order to gain

[279] Source: US DOS report on Human Rights in Zambia, 2011
[280] 2008 Situation Analysis of Women and Children, UNICEF, Government of Zambia, p.52.
[281] (Ref. q11 + q 33 of local court questionnaire).
[282] 2008

money. The same approach may be taken in rape cases. This view was commonly repeated among Zambians encountered during the study.) In peer to peer cases, families are more likely to be interested in compensation for the damage to their daughter's educational and marriage prospects and the expense incurred in providing for an infant. They may see the state justice system as providing no benefit to them for the injury and inconvenience they have suffered. Families reportedly often intervene at the stage of the medical report and instead of handing it back to the VSU take it to the offender's family to use to negotiate compensation.

Legal information and legal knowledge: 68 % of children believed that parents/guardians are allowed to beat them in some instances. 63% of children say nothing is done if parents beat them and they seek help. Interestingly, 86 % of children interviewed stated it is not allowed for parents to marry off an underage person. Other users (adults) also seem to have little basic knowledge on child rights as well as knowledge about how to access legal aid services either from NGOs or LAB. Children's view on accessing legal justice providers and the main obstacles listed by children for difficulties in accessing a justice provider were examined through the study surveys. 82% of the children interviewed said legal aid services were not easy to access if needed.

Indecent assault: Sec. 137 of the Penal Code dealing with indecent assault – covering sexual acts not amounting to "carnal knowledge" - allows the defence of consent. It covers only acts committed against females. Generally, consent is not a defence if the girl is under the age of twelve, except where the perpetrator reasonably believed that the girl was over twelve. Thus, while the law provides for very serious penalties under sec. 138 for sexual intercourse, it is actually rather lenient regarding other sexual acts. Anyone, including adults, may seemingly engage in sexual acts not amounting to carnal knowledge (intercourse) with girls over twelve provided they have consented, and even where the girls are under twelve, they may try to show that they reasonably believed the girl to be over twelve. No information was available to the study on the frequency with which sec. 137 is used, the profiles of victims and offenders etc.

"Acts of gross indecency": Sec. 158 of the Penal Code deals with same sex sexual acts not amounting to intercourse. Legal protection of male children thus falls under this section. It covers acts with both children and adults, providing the same penalty for both.[283] In the framework of Zambia's examination under the Universal Periodic Review, the Government of Zambia chose not to accept suggestions that it decriminalize same sex activity between consenting adults. In recent years religious organizations, including the Holy See have opposed criminalization.

Analysis: It is understandable if members of the public at present do not understand how the law views defilement. They are likely to feel uncertain about approaching justice agencies about cases. The complications of the law make it difficult for the police and LCMs to clearly understand the legal position. The lack of a clear legal distinction between abuse by adults and consenting "peer to peer" defilement constitutes several legal problems with serious consequences for the rights of Zambian children, including (in practice) differential treatment of males and females and liability to lengthy terms of imprisonment for consenting acts which in other circumstances and for other persons (i.e. in a customary marriage) would be legal. The

[283] The Holy See made statements to this effect to the UN General Assembly in 2008 and 2009.

lack of documentation on these different kinds of case is an obstacle to qualified public debate and policymaking.

While there is criticism of Local Courts for handling defilement cases as civil claims rather than referring them to the police for investigation and prosecution, it is submitted that exactly this solution may be appropriate in many peer to peer defilement cases of where there is a consenting relationship and little age difference. This way of dealing with such cases seems to enjoy widespread popular acceptance and, if settlements properly include maintenance arrangements for the child, may be in the best interests of the infant, as well as the child perpetrators.

The result of the provisions on indecent assault, as far as the legal protection of children against sexual abuse by adults is concerned, is that they are protected against same sex abuse, but that consent is a defence against charges of abuse against girls over twelve. Sexual abuse of boy children by women that does not amount to intercourse is not made criminal.

Assistance: Prominent among the civil society organizations dealing with sexually abused children is the Young Women's Christian Association (YWCA). Due to the nature of the abuses suffered and the need to protect the children, much of the rehabilitation work is treated with confidentially. Good results have been noted and the likelihood of cases being reported has increased where local efforts and community support to victims have responded to instances of abuse of children. Challenges in this case have been limited community, parental and child awareness of their rights and mechanisms of protection, social pressure to withdraw cases and reconcile with abusers, poor capacity and an entrenched discriminatory attitude on the part of some police and judicial officials, and a lack of access to legal aid.

Programmatic interventions

Education: HURID produced a child justice training manual, and UNICEF has trained magistrates, police and prisons personnel in child justice issues. Information collected during the desk review shows that a number of NGOs (CARE, PLAN, Save the Children) have facilitated various trainings of social welfare officers, prosecutors, judges, and police from VSU with regards to child justice. However, the limited training on child justice was consistently cited as a problem by social welfare, magistrates and police officers. Further, as with other targeted programmes of this kind (including the VSUs), transfer or movement of personnel (i.e. those who have received special training and participated in networks) is a threat to their sustainability.

Aside from the training activities conducted through the Child Justice Forum, Local Court Justices seem to have received most training with regard to children and women's rights as part of a GTZ / Danida funded programmes. With regard to other justice providers there is no clear picture as to the extent and content of training they have received with regards to child rights.

Recommendations:

1. Pending more comprehensive law reform in the area of child justice (see previous recommendations and the CRC recommendation to develop a national policy), the lack of clarity in relation to peer to peer defilement should be removed by changing the word "child" in sec. 138 (4) of the Penal Code to "juvenile", so that the protection against a term of

imprisonment for fifteen years to life for consenting peer to peer sexual relationships would be extended to all persons under 19 years of age.

2. Pending law reform, the practice of applying sec. 73 of the Juveniles Act and non-custodial sentencing measures in peer to peer cases should be made uniform through instructions by the NPA and the courts. The NPA should apply the CRC by instructing prosecutors to systematically allow child victims of defilement (particularly those over 12) to express their views in such cases on the question of prosecution of the offender in a manner appropriate to their age and maturity. Decisions by prosecutors on whether to prosecute should take account of the interests of the victim, as laid down in the NPA Act.[284] This should go together with a practice note or instructions to Subordinate Courts on the handling of defilement cases, including civil aspects of maintenance and paternal responsibility.

3. Consideration should be given to legalizing the practice of allowing Local Courts to reach civil settlements in cases of **consenting** peer to peer relationships where the age difference between the parties is small. This will help justice agencies to avoid the use of criminal justice by families to extract payments for pregnancy resulting from teenage relationships and to focus on real abuse by adults. Teenage pregnancy from consenting relationships should be preventively through information campaigns and civil actions to ensure provision for children.

4. Sec. 137 of the Penal Code dealing with indecent assault should be modified to ensure better protection of children from sexual abuse. Indecent assault should apply regardless of the sex of the victim. Consent should not be a defence where girls under sixteen are concerned. The reasonable belief defence should not be available to adults where the victim is a girl under the age of twelve. Consenting acts between peers should be dealt with through non-custodial measures.

5. The implementation of (reformed) statutory law should be strengthened and support services for child victims of crime improved. This applies to the DSW, VSUs, NGO services and court personnel. DSW seems to be currently in greatest need of support. It was not possible in the framework of the current study to assess the institutional readiness of the DSW to absorb and properly channel support. Some level of participation by DSW in, for example, CCCI could be explored.

6. The problems of loss of capacity due to transfer and movement of personnel can be mitigated, if not eliminated, by planning within the institutions and units to ensure against personalization (where only one staff member is engaged in the CFJ or VSU mindset) so that an understudy or alternate to the main focal point is identified and a proper handover is carried out before the primary focal point is transferred. This issue is tied to the more general question of sustainability. The CJF found some evidence of institutional sustainability, in that the justice institutions were cooperating well and taking on responsibility. A general updating of the magistrates' handbook (from 1993) could benefit from inclusion of child justice issues.

7. The police, prosecution, DSW and courts should allow children who are sufficiently mature (particularly those over 12 years of age, without discrimination as to sex) to be heard and considered in the question of who should be allowed to represent their interests in cases concerning them.

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[284] Sec. 10 (6) (b).

12. THE LOCAL COURTS

This chapter should be read together with the text on customary law in chapter 2 on Sources of law. As discussed there, the solution adopted by Zambia to the challenge of finding a framework for the co-existence of customary and statutory law came in the guise of the Local Courts. Here, **state appointees rather than traditional leaders** are the adjudicators of custom, subject to (i) the legal framework of the Local Courts Act, (ii) the primacy of statutory law and (with important reservations) the constitution and (iii) a continuation of the so-called "repugnancy clause".

Balancing between state and community

The hybrid institution that was created contained within itself a number of inevitable tensions or paradoxes, where custom and community are balanced with the authority of state law and institutions. In relation to appointment as well as the application of law and procedure, the Local Courts must balance between customary and statutory law, between the spoken and the written word, between state authority and community legitimacy, and between dynamism and tradition in a changing and developing, yet still rather conservative society. This is a highly complex task that could call for skill, legal understanding and considerable tact.Far from being provided with great resources to tackle this challenge, the Local Courts have had to carry out this balancing act more or less alone and in isolation from the rest of the justice system. Customary law, the sets of rules that regulate the lives of most Zambians in a range of important fields, is hardly studied or taught at the country's universities.

Local Courts are the lowest officially recognised courts in Zambia. As far back as 1967, the then registrar of the High Court stated thatt[285]:"*By far the greater proportion of cases coming before the courts of Zambia are brought before the Local Courts of the country, and the importance of the functions performed by these courts in the administration of justice cannot be over emphasi[s]ed*. "

Zambia deserves credit for establishing and maintaining a system of courts that are relatively accessible to ordinary people, geographically, financially and culturally. When criticisms are made of the Local Courts or of any justice institution, this ought to take place within an overall recognition of the value of this system and of its still greater potential to bring justice to Zambians. Local Courts are popular. In the survey conducted for this study, they scored higher than any other instance (23%) among respondents as the preferred justice provider and the most impartial. 31% rated them as best at finding a lasting solution - again higher than any other provider. The reasons that people cited for this choice were very much associated with closeness, familiarity and a feeling that their voice will be heard.

Methodology

As shown in Table 12.1 below, 48 Local Courts were visited in 20 districts country-wide[286].

[285] Republic of Zambia, The Local Courts Handbook, 1996: iv
[286] See chapter 1 on methodology.

Copperbelt Province had the largest number of Local Courts (9) included in the study; followed by Eastern Province (8); Luapula and Lusaka Provinces (7 in each).

Table 12.1: Number of Local Courts visited by Province[287]

Province	No. of Local Courts	%
Central	4	8
Copperbelt	9	19
Eastern	8	17
Luapula	7	15
Lusaka	7	15
North-Western	3	6
Northern	1	2
Southern	5	10
Western	4	8
Total	48	100

12.1 Mandate, structure and functions

The Local Courts Act (LCA) states that the jurisdiction of Local Courts encompasses 'any civil charge or matter' and 'any criminal charge or matter', except criminal matters involving murder or manslaughter.[288] Section 5(1) (i) of the Act expressly states that matrimonial and inheritance claims, irrespective of their value, are matters over which Local Courts have original jurisdiction. Unlike other Courts, Local Courts are found in most parts of the country, including villages.[289] The majority of the 505 Local Courts are situated in rural areas. Local Courts are easily accessible, relatively cheap[290] and therefore often used by the Zambian population.[291]

[287] Field Survey data.
[288] CAP 29 as amended by Act No. 18 of 2003: sec 8, 9 & 11
[289] Coldham, .68
[290] See the filing fees listed below.
[291] WILSA, 2007: 57

12.1.2 Jurisdiction of the Local Courts

The **geographical jurisdiction** of the Local Courts is determined by the warrant recognizing the court issued by the Minister or the Director of Local Courts under sec. 4 of the Act.[292] It is usually very local in scope. Today, there are 505 Local Courts in Zambia.[293]

Table 12.1.2 : Written law provisions that Local Courts have jurisdiction to administer[294]

Name of Act ("The" omitted)	Sections Local Courts can apply		Name of Act ("The" omitted)	Sections Local Courts can apply
Brands Act (Chapter 244)	All		Markets Act (Chapter 290)	All
Zambia National Broadcasting Act (Chapter 154)	Section 14 (1)		Stock Diseases Act (Chapter 252)	All
Cattle Cleansing Act (Chapter 248).	All		Traditional Beer Act (Chapter 168)	All
Control of Dogs Act (Chapter 247)	All		Tsetse Control Act (Chapter 249)	All
Cotton Act (Chapter 277)	All		Witchcraft Act (Chapter 90)	All
Education Act (Chapter 134)	All		Registration and Development of Villages Act (Chapter 289)	All
Firearms Act (Chapter 110)	All		Personal Levy Act (Chapter 329)	All
Fisheries Act (Chapter 200)	All		Prevention of Cruelty to Animals Act (Chapter 245)	All
Forests Act (Chapter 199)	All		Public Pounds and Trespass Act (Chapter 253)	All
Local Courts Act (Chapter 29)	All		Public Order Act (Chapter 113)	Sections 6, 7, 10, 11 and 15 (2)
Penal Code (Chapter 87)	Sections 41, 88, 102-103, 118-121, 178-179, 180-182, 210-214, 227, 247-248, 250, 260, 272, 276-278, 281, 286, 293, 301-306, 311, 315, 318, 320, 330, 334-335(1), 378, 380-383, 389-390		Roads and Road Traffic Act (Chapter 464)	All provisions relating to offences other than - (a) those by persons responsible for motor vehicles and trailers and their servants or agents; (b) those relating to driving licenses.

[292] LCA sec. 8.
[293] Submission to the Committee on Policy – 2010: Local Court Section, 2010: 1 and 6
[294] Local Courts Act, Local Courts Jurisdiction Order (As amended by Act No. 95 of 1976)

Substantive/ material jurisdiction: The Local Courts apply[295]: (a) African customary law (provided it is not repugnant to natural justice or morality, and it is not inconsistent with any written law), (b) Local government by-laws in force in the area where the court is, and (c) statutes listed in the Local Courts (Jurisdiction) Order (see table below).

Powers of Local Courts: Local Courts are divided into two grades: A (senior courts) and B (junior courts). Of the 469 Local Courts: 144 are reported to be grade A and 325 grade B[296]. 'The power of a court to award compensation or to punish is limited by its grade, as shown below:

Table 7: Powers of Local Courts[297]	
G Grade A	Grade B
Hear a civil claim of not more than 16,667 fee units (K15,0000 at time of writing)	Hear a civil claim of not more than 13,889 fee units (K12,0000 at time of writing)
Award up to K15,000 in compensation	Award up to K12,000 in compensation
I Issue a fine not more than K2,000	I Issue a fine not more than K1,200
Order imprisonment of not more than 24 months	Order imprisonment of not more than 18 months

12.1.3 Criminal jurisdiction and caseload of the Local Courts

The Local Courts hear and determine criminal cases under written Law (statute) as empowered by jurisdiction orders and section 9 of the Local Courts Acts and the Penal Code (i.e. theft and assault cases). In practice, most Local Court personnel interviewed said that they rarely deal with criminal cases. While most stakeholders familiar with the Local Courts confirmed this, the Director of Local Courts said that criminal jurisdiction was still exercised in rural areas, though the judiciary discouraged it in urban areas. Local Courts did report that, in rare instances, they encounter serious criminal cases ranging from robbery to manslaughter (survey responses included robbery accounting for 7% of cases, and murder and manslaughter for 5% each). 45% of Local Court respondents said that they dealt with cases of less serious theft. While we assume that Local Courts report any such matter brought before them to the police, further work is required to confirm this. Nevertheless, the long term tendency seems to be clear: the Subordinate Courts have gradually taken over what used to be the criminal caseload of the Local Courts, especially in urban areas.

The offence of contempt of court under sec 47: There is one important exception to the general lack of criminal cases. This is the application of the power of Local Courts to convict for contempt of court in sec. 47 of the Local Courts Act, which carries a maximum penalty of one year in prison for the most serious contempt offence (threatening, intimidating or intentionally

[295] CAP 29, as amended by Act No. 18 of 2003: Sec 12(1) (a) & 13; Zambia, LC Handbook, 1996: 3 para15
[296] Submission to the Committee on Policy, 2010.
[297] Source: Local Courts Handbook, 1996, para 10.

insulting a member of the court), or a maximum of three months for all other contempt offences. The study revealed many anecdotal accounts of section 47 of the LCA being abused by LCMs through arbitrary and excessive convictions for contempt. Without more information, it is difficult to know the extent of this problem. Some LCOs said that imprisonment for contempt is subject to review by them, though this is not provided for in the LCA.

Offences under customary law: Section 12 (2) of the LCA permits Local Courts to deal with offences under customary law, provided that a higher punishment is not imposed than would be imposed under the Penal Code, and subject to the repugnancy clause. Nevertheless, the Local Courts Handbook, which is the practical guide issued by the High Court which Local Courts should follow, clearly says otherwise: (para.s 123 and 139: "Local Courts should not hear criminal cases under customary law)."[298] The general impression from the survey was that this rule is well-understood by LCMs and generally applied in practice, though there is no assurance that it does not take place in some areas.

The neat distinction between civil and criminal matters does not have an exact parallel in customary law. This is seen in how certain matters are dealt with, including those arising from teenage pregnancy ("virginity damage", defilement) and witchcraft). Some Local Courts have in the past allowed litigants to claim compensation because of an alleged bewitching by the defendant. Paragraph 17 of the Local Courts Handbook observes that this is inconsistent with the Witchcraft Act, which makes it an offence to accuse anyone of being a witch. This could also be the basis for a civil claim of defamation. What seems often to be the case is that Local Courts, being the only forum for adjudication for many people, tends to deal with criminal offences as civil matters. This will of course be seen as improper by justice system actors, but it may have the support of ordinary people for two main reasons: the dysfunctionality of the criminal justice system as outlined especially in chapter 10, and the lack of any visible benefit or compensation to the victim from the criminal justice system for the harm that they have suffered. Put bluntly, where fines are imposed by courts for crimes, ordinary people may simply see this as the state taking the compensation that is rightfully theirs. This is especially apparent in relation to the issue of defilement, which is often treated as a civil matter litigated by parents on behalf of daughters. This is discussed in chapter 11. This is consistent with widespread practices under customary law emphasising reconciliation. As discussed there, the view of the study team is that the appropriateness of this practice varies greatly depending on the nature of the offence and the parties.

The repeal of sec. 43 of the LCA which used to permit corporal punishment (amended in the light of the decision in the *John Banda* case[299]) was pointed out in the previous chapter. The Local Courts Handbook still contains guidance related to corporal punishment. It needs to be revised in this regard to avoid confusion.

12.1.4 Civil jurisdiction and substantive caseload of the Local Courts

The monetary jurisdiction of Local Courts is set out in S.I. 7/2001. The Local Courts Act does not impose any limit on the monetary jurisdiction of Local Courts (either Grade A or Grade B) in matrimonial and customary inheritance cases, but section 43 (2) of the Intestate Succession Act limits the monetary jurisdiction of Local Courts in succession disputes to 50,000 kwacha.

[298] Zambia (GRZ), LC Handbook, 1996: 29 para.s 123 and139.
[299] Op cit.

This unrealistically low figure is in need of revision. It is our understanding however that this does not have any bearing on the value of an estate that may be administered by an administrator appointed by the Local Court, so long as there is no question of a dispute.)[300] Local Courts have no jurisdiction to deal with testate succession (where there is a will or testament). Cases involving wills go to the High Court.

Thus, it is especially in divorce cases that Local Courts can have responsibility for adjudicating relatively high value property disputes. Since women's position in customary marriage is often unfavourable, this makes protection of women's rights and interests in divorce cases before Local Courts a key concern, all the more so considering that divorce in customary marriages seems to be the single biggest legal issue dealt with by Local Courts.

Local Courts reporting to the Directorate of Local Courts differentiates cases only as to whether they are criminal or civil cases. In the Local Courts visited, it was not possible to obtain disaggregated figures relating to case types / legal domains. Issues of time and access to records prevented the study team from carrying out its own systematic examination of case records to attempt to categorize cases according to legal domain.

Thus, all that is possible to do at present is to attempt to gain an impressionistic account of the cases most often brought to and dealt with by Local Courts. The following two tables set out the impressionistic data gathered by asking Local Court officials to respond to questions in this regard.

Asked to name the five kinds of case most frequently dealt with by their court, the responses of Local Court officials are shown in table12.1.4.

The classification by family, property and conduct related disputes should not be seen as representing sharp divisions. They are interrelated. The main issues in a customary divorce case will often be property related, and the granting of a divorce may be accompanied by a property settlement. Litigants and Local Court officials may also see domestic violence issues as family or divorce related. Types of cases most seldom heard by the Local Court include complaints over government institutions (4%); and road accidents (2%). This is interesting in that these are issues that are of frequent concern to people everywhere. It is interesting to observe that land issues are frequently encountered in Local Courts. Nevertheless, issues relating to customary land in rural areas are more frequently dealt with or referred to Traditional Courts.

[300] Attempts to obtain clarification on this point were unsuccessful during the study.

Table 12.1.4: Cases most frequently brought to the Local Courts			
	Case description	% of respondents ranking highest	Legal domain
1	Divorce (customary)	22%	Family
2	Defamation/compensation for insults	22%	Conduct
3	Virginity Damage /pregnancy of young girls	17%	Family
4	Unpaid debts /credit issues	19%	Property / business
5	Polygamous marriages	8%	Family
6	Disputes with investors	8%	Property / business
7	Will and inheritance issues	8%	Property / business
8	Accusation Witchcraft	8%	Conduct
9	Common assault	8%	Conduct
10	Dowry payments	6%	Family
11	Child Maintenance	6%	Family
12	Domestic Violence	6%	Conduct
13	Adultery	3%	Family

Understanding of the substantive caseload is vital when designing and conducting programmes of assistance to the Local Courts, including provision of written guidance, training materials and conduct of training courses.

12.1.5 Links to other mechanisms: family elders and the Traditional Courts

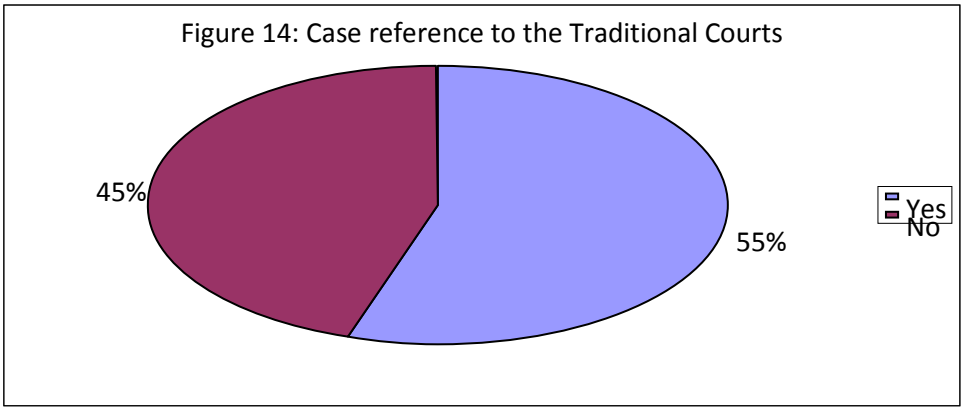
Section 50 of the LCA acknowledges the existence of African customary arbitration and settlement mechanisms. Broadly, these mechanisms operate primarily through family elders in cases to do with marriage and family relations, and through traditional leaders in matters to do with custom, ritual and use and property rights in relation to customary land. The acknowledgement in section 50 of the LCA does not give guidance as to how Local Courts should interact with these mechanisms, or set out any set of principles in relation to them.

Paragraph 31 of the Local Courts Handbook urges Local Court officials to ensure that "*Every effort should be made to keep the family and matrimonial quarrels out of the courts*". This can only mean that such cases will, and in the eyes of the judiciary, be brought before family elders or councils, and perhaps, failing a solution there, before traditional courts. Family issues are dealt with extensively in the chapter devoted to that area.

The 2006 ZLDC study examined issues relating to the interfaces between Local and Traditional Courts in greater detail than is possible in a more global study such as the present one. Some general observations found there are echoed here. One is that issues of customary land are not dealt with to any significant extent by the Local Courts. This area remains firmly within the domain of traditional leaders. For a number of reasons, there would seem to be little immediate prospect of customary land disputes coming within the *de facto* purview of Local Courts. Firstly, Local Courts very often lack the knowledge necessary to determine these cases, as this is a matter of oral tradition and oral agreement among traditional leaders, village headmen and family heads. Knowledge of the cases can only come if litigants – with the ultimate approval of traditional leaders – brought case histories before the court. Secondly, in the absence of acceptance of their role by traditional leaders, Local Courts lack the legitimacy and authority to ensure that decisions on these issues would be enforced. The *modus Vivendi* that exists between Local Courts and traditional leaders would be upset by any uninformed attempt to appropriate control over this area.

How relationships between Local Courts and traditional leaders actually function varies considerably from place to place. There are districts in which "forum shopping" exists, and others where it is rather a case of "litigant shopping" where Local Courts and traditional leaders feel that they are in a situation of competition with one another. In some areas, Local Courts depend on the traditional leader for legitimacy, and even for a place to conduct court hearings. Most Local Court officials indicated that they defer to the authority of traditional leaders and traditional courts in at least some instances. 55% of Local Court respondents indicated referring cases mainly involving witchcraft, land disputes and conflicts within and between families to the traditional courts. The references to the Traditional Courts were done for the purpose of either seeking reconciliation or to enable carrying out judgment which would provide traditional based compensation and fines.

Figure 14: Case reference to the Traditional Courts



Source: Field Survey

12.2 Personnel, including appointment, qualifications and training

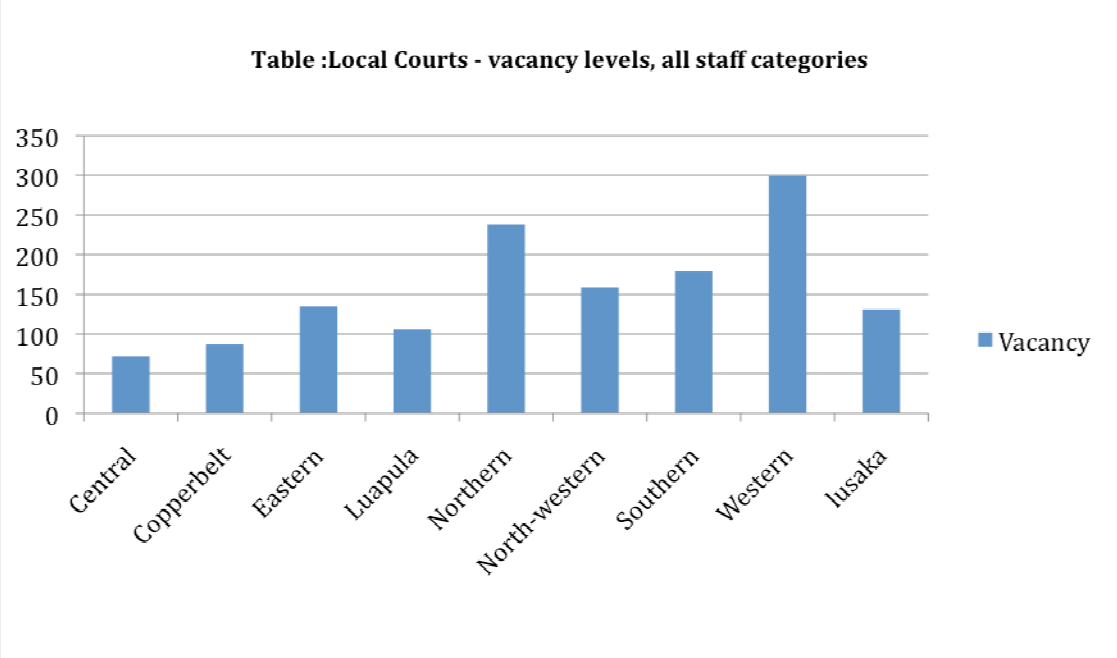
The Local Courts were among the few justice institutions that were able to provide relatively detailed figures on staffing, caseloads and revenue that permits a critical analysis to be made.

Table 12.2: Filled (F) and vacant (V) positions in the Local Court establishment as of 2010[301]

Position	Province												
	CO		LUA		CE		NW		W		N		Total
	F	V	F	V	F	V	F	V	F	V	F	V	F
LCM	75	31	77	41	40	27	60	33	34	67	162		448
Court Registrar	3	1	3	1	0		0		1	1	0		7
Court Clerk	31	2	26	12	67	0	6	2	15	4	6		151
Ass. Court Clerk	30	2	58	15	0		26	21	58		41		213
Court Messenger	105	4	104	6	63	10	66	36	97	79	50		485
Senior Court Messenger									0	19			
Office Personnel	1	1	0		0		0			1	0		2
Personnel Officer									0	1			
Typists	1	8	1	4	3	1	2	1	2	4	2		11
Drivers	0		1	1	0		0	1	0		1		2
Classified Daily Employee	40	38	0		0		0		0		0		40
Watchmen	0		5	9	2	7	0	12	0	22	4		11
Office Orderlies	0		6	8	0		0		0	6	2		8
Station Handymen	0		39	9	4	27	1	49	18	70	4		66
Clerical Officers	0		0		0		1	2	2	2	4		7
Registry Clerks	0		0		0		1	2	4	0	0		5

[301] Source: Submission Paper to the Committee on Policy - 2010 Local Court Section, Local Court Department. Information was not available for Eastern, Lusaka and Southern Provinces.

Out of a national establishment requirement of 1,061, only 680 LCMs are engaged country wide, leaving a shortfall of 381 in the national establishment[302] Vacancy levels are highest in Western Province, but there does not always seem to be a rational relationship between numbers of LCMs and other personnel categories. For example, while the establishment figure for LCMs is more or less similar for Western and Copperbelt Provinces, Western Province has a far higher establishment of court messengers.



12.2.1 Effects of vacancy levels

Justices sitting alone: Generally, the acknowledged practice is that at least two LCMs sit at any Local Court to hear cases. The purpose of involving more than one LCM is to ensure fairness in interpretation of the local customary laws and in arriving at decisions; and therefore in the delivery of justice. Statistics on the exact number and location of Local Courts affected by the shortfall were not made available during the study. There were, however, indications of areas where only one LCM was posted to preside over cases.

Clerks acting as LCMs, messengers acting as clerks: A second observable effect of staffing shortages is that court messengers are often filling in as Local Court clerks – often without having the necessary training or qualifications. It is also observable that clerks often play a very prominent role in dispensing justice in the Local Courts. As set out at the beginning of chapter two of the Local Courts Handbook, they function as a gateway to the court, exerting a strong influence on whether cases are filed or not (see reference above to the Local Courts Handbook and the instruction in paragraph 31 to try to avoid family quarrels being brought before the court). The role of clerks in regard to execution of judgments is also very significant, and there are likewise reports of clerks questioning parties and witnesses in court – effectively acting as an inquisitor or prosecutor. Where a messenger has taken over the job of a clerk, this can effectively mean that a person trained as a court messenger is playing an important role in dispensing justice.

[302] Submission Paper to the Committee on Policy - 2010 Local Court Section, 2010: 2 -5.

12.2.2 Qualifications and appointment of LCMs

Knowledge and skills required: The "balancing act" between loyalty to the central state and the local community comes resolutely into play in connection with the appointment of LCMs. If LCMs were to apply only statutory law, it would be relatively easy (setting resource challenges aside for a moment) to stipulate a set of qualifications required for the post of LCM and design a national curriculum and examinations for those recruited. If on the other hand, there was a purely non-state administration of customary justice, matters of appointment and qualifications could be left entirely up to traditional and communal structures.

It can hardly be overemphasised that Zambia's choice of a hybrid approach to state and custom promises benefits, but also involves challenges. As long as Zambia wishes to combine custom with state authority, paradoxes and contradictions are inevitable. A more rigorously applied set of qualifications for appointment, and competitive and transparent recruitment and appointment processes, as well as standardized training would go together with enhancing uniformity and knowledge of statutory law. Nevertheless, if local legitimacy is to be preserved, both knowledge of local custom and language, as well as acceptability to community and traditional structures is necessary.

There are two aspects to this challenge for LCMs. LCMs need knowledge of custom and language, but they also need "functionality". In addition to knowing customary and statutory law, LCMs must be able to navigate within the social or institutional setting in which they work. Working as an LCM (a public servant) requires compliance with many requirements of organizational hierarchy and accountability, usually in the form of administrative formalities. This issue is not always one of knowledge of custom as such, as much as the acceptability and legitimacy of the appointee as an adjudicator. Customary ways of adjudicating disputes and maintaining community harmony require social understandings and skills. A good working relationship with traditional leaders is often necessary for an LCM's rulings to be enforced. This is however a double-edged sword as a too-close relationship to local power structures can easily compromise the impartiality of the LCM or lead to the perception that it has been compromised. The LCM must in effect be a hybrid creature who is able to navigate in these two rather different settings. While a standardized recruitment system would be more transparent and fair, and give a greater chance of ensuring that knowledge of statutory law, it might not ensure local functionality.

Appointment: According to sec. 6 of the LCA, LCMs are appointed by the Judicial Service Commission (JSC). The LCA does not set out any set of qualifications for appointment as an LCM or other officer of a Local Court. In practice, though a number of requirements are generally applied by the JSC. To be appointed a LCM, one previously had to be 45 years of age or above,[303] knowledgeable in African customary law,[304] and at least a grade twelve school leaver.[305] The judiciary has now adjusted the age at which LCMs are generally recruited, setting it at around 40 years. Retirement is now obligatory at 65. This has helped in revitalizing the Local Courts.[306]

[303] ZLDC, Review of the Local Courts System - Eastern Province Research Findings, 2003: 11
[304] WLSA, Justice in Zambia – Myth or Reality: 69
[305] Magistrate Likokoto, Interview: 2009
[306] Interviews with the Deputy Registrar of the High Court, Lusaka March 2010.

Though not a requirement, the general practice for many years was for the Judicial Service Commission to write to the Chief in the area where a Magistrate is needed asking him to 'recommend people he considers suitable for the position. The Chief and his advisors then nominate candidates and submit their names to the Judicial Service Commission. [307] The consequences of this practice, as well as changes to it in recent years are discussed below.

While no authoritative figures were available on the basis of appointment (i.e. a recommendation from the Chief or an open recruitment process) from the judiciary, the findings from the study indicate that at least 48% of the LCMs interviewed were appointed upon the basis of a recommendation from a Chief. One would normally expect Chiefs to nominate persons from the area. This seems confirmed, as the survey also showed that 59% of LCMs who responded to the question (20 persons) came from the province where they were serving. The remaining 41% (14 persons) did not. These figures also correspond closely with the rural / urban balance of the courts visited for the present study.[308] Demonstration of outstanding performance and appreciation in their past occupation is another factor of qualification. Thus many former civil servants have been recommended and appointed to these positions.

Thus, although a generalization, it would not be too inaccurate to speak of urban Local Courts where LCMs do not necessarily come from the local area, and are more likely to have been appointed following an open recruitment process (perhaps from another job in the public service). These would be contrasted with rural Local Courts were LCMs come from the area and are appointees of the Chief.

Origin of LCMs and links to the communities served: Previous studies have shown conflicting results on the question of whether LCMs come from the area where they serve. WLSA found that most Magistrates are of local ethnicity[309], whereas Himonga found that Magistrates are moved around the country.[310] One respondent in the present survey said that "*we have been told that a Magistrate can serve anywhere in the country, not only the area where he or she comes from.*[311] He observed that the need for flexibility in this regard was due to the general shortage in qualified staff that affected the justice sector as well as other sectors, due to AIDS deaths and migration. According to this view, a prior requirement that one be from the area of assignment would mean that Local Courts would not function at all due to the lack of a presiding officer. The Director of Local Courts took the view that the origin of LCMs was not a particular problem, either in terms of the numbers of LCMs serving in areas other than their region of origin or in regard to knowledge of custom. As discussed below, local origin of LCMs is probably more important in rural than in urban areas. The use of **assessors** by Local Courts is also relevant in this regard.

[307] ZLDC, Eastern Province research: Finding No. 8

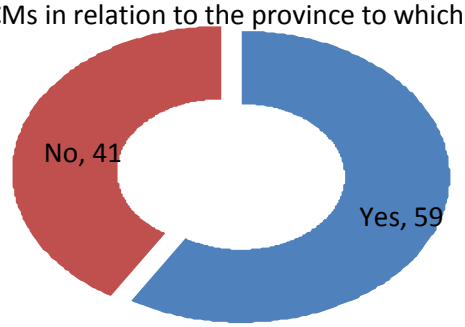
[308] 60% of the Local Courts visited for the study were classified as being in towns. While 38 rural Local Courts were visited, the research teams took every possible advantage of visits to provincial and district HQs to visit the Local Courts there. This inevitably resulted in more town Local Courts being visited.

[309] WLSA, 1999, 70.

[310] Himonga, 20.

[311] Magistrate Likokoto, Interview: 2010. Team study notes.

Figure: Origin of LCMs in relation to the province to which they are assigned.



12.2.2 Knowledge of customary law

The Local Courts rely predominantly on the application and interpretation of unwritten customary law in conducting their work. 56% of LCMs interviewed claimed to know "a lot" about the customary law applied in the areas they worked in, and a further 41% claimed "some knowledge" of it. Some authors and previous studies raised doubt as to whether LCMs were able to properly dispense justice in a plural legal system because of problems with their understanding of customary law in the areas to which they are assigned.[312] It was not within the scope of the present study to try to assess whether LCMs know the relevant customary law.

In fact, two separate, though possibly linked issues arise here. One is a lack of knowledge of relevant customary law, the other is change and development of customary law. LCMs (or even traditional leaders in traditional courts), may fill gaps in their own knowledge or in relevant custom by resorting to judicial creativity. While unbridled discretion in this regard would clearly be harmful, judges have always needed and enjoyed some leeway in the common law system, through distinguishing and overruling cases or by applying rules of equity.

Urban areas and mixed and developing customs: There is a particular challenge with respect to application of customary law in urban areas. One person may have to know the variety of customs pertaining to a mixed group of Zambians in an urban area. Secondly, custom is fluid and dynamic. It might not address some of the questions that arise in an urban setting and a cash economy. The question of how to respond to changing expectations of urban dwellers in settings where traditional ways of life are becoming a memory, where traditional authorities no longer hold sway in daily life, and where a variety of cultural influences are at work. In this context, Local Courts have developed customary law to respond to the new circumstances. This was observed by WLSA during research in Ndola, where Magistrates described how, in urban areas, 'the [L]ocal [C]ourts try to develop common rules applicable to all tribes given the fact that urban society consists of people from different tribes".[313]

A well-known example is seen in in legal actions for **marriage interference** under customary marriages. Polygamous marriages are permissible under the customs of many population groups in Zambia. (Attitudes on this were illustrated by the user survey, in which 47% of

[312] Studies by Professor Himonga, the ZLDC, Women and Law in Southern Africa (WLSA) and the Inter African Network for Human Rights and Development (AFRONET).
[313] WLSA, 1999: 5.

respondents said that it was permissible for a man to get a second wife and this did not constitute either adultery or marriage interference.) Traditionally, women were reluctant to bring adultery actions against philandering husbands. When more started doing so in urban settings, Local Courts developed a customary legal action of "marriage interference" that allowed wives to sue their husbands mistresses. How this was dealt with by the judiciary is discussed in the chapter on family law.

12.2.3 Gender (im)balance among LCMs

Gender equality has traditionally not received much attention in Local Court appointments. Unfortunately, the establishment or actual staffing statistics do not indicate how many LCMs (or any other officials) are male or female. In contrast to the presence of many female judges in Subordinate Courts, the judiciary is candid in admitting that most LCMs are male. The role of women has remained defined by tradition, which, especially in rural areas, has militated against their assuming any significant responsibility in the institution of Local Courts. demonstrated by the role of the Chief in the appointment of the LCMs and the application of customary law. The study observed a strong preponderance of males as LCMs and clerks in the Local Courts visited.

Since many parties in cases before the Local Courts are female, the dispensation of justice in these courts takes on a distinct gender aspect. Research shows that Chiefs are often biased towards recommending the appointment of male rather than female Magistrates.[314] According to the ZLDC, the Chiefs' nominees are "always male".[315] The ZLDC equally acknowledged "an acute shortage of female Local Court justices", and found this gender inequality to be reflected in the decisions and attitudes of the Local Courts.[316] In 1999, AFRONET found that most LC Magistrates are male and above the age of 50 years[317]. The ZLDC noted that elderly male officials often use their positions to foster their own beliefs.[318] More often than not, these beliefs are influenced by cultural attitudes that favour the subservience of women in most aspects of life. Magistrates in Southern Province explained this by observing that "*Chiefs feel that women [can] not handle cases effectively as they lack the confidence and are also used to being subservient to men*".[319] While this is undoubtedly true in many cases, keeping women away from the bench simply perpetuates the problem and hinders accessibility of justice by vulnerable members of society such as women and children.

The judiciary is aware of these issues, and the move by the judiciary towards more transparent recruitment processes in recent years has helped women to apply and be treated on a more equal basis. Qualified women candidates have been viewed and the judiciary expressed satisfaction with the work and commitment shown by female LCMs.[320]

Analysis: The judiciary has made significant efforts to renew the staffing of Local Courts in recent years. This has included greater transparency through open and competitive

[314] See Afronet, 1999, section 2.4.
[315] ZLDC 2006, Eastern Province Research, finding no. 8..
[316] ZLDC, 2006, at p. 82.
[317] AFRONET, 1999: 5
[318] ZLDC, Eastern Province research: Finding No. 11.
[319] WLSA, 1999: 69
[320] Interview with Director of Local Courts.

recruitment procedures and a set of qualifications for appointments.[321] The age for recruitment as an LCM and the retirement age for LCMs have been lowered. Among the more recently recruited LCMs, there are clear signs that more women are being appointed (though figures were not available). Nevertheless there are limits to how quickly things can move in this regard. The system of nominations by Chiefs still persists in the rural areas, where it is more difficult to use media and to find candidates willing to move. Renewal in terms of staffing will inevitably be linked to pay, and especially working conditions.

Recommendations on appointments of LCMs

In theory, there is no necessary link between nomination by Chiefs and elders and the importance of local knowledge and connections. Local origin is one factor among several, and knowledge of custom should perhaps be accorded greater weight than origins and connections. The JSC, when recruiting LCMs, could easily require knowledge of the customs of an area as a condition of appointment as an LCM in a particular province. Nomination by Chiefs and elders could be replaced by a more democratic, but still local process, where a committee or panel examines candidates according to a set of transparent criteria and forwards nominations to the JSC. The panel could include chiefs and elders, while also being open to others, such as civil society representatives and elected councillors. If it is necessary to recruit people from province or district concerned (for reasons of knowledge of custom and language), it would seem that Article 23 (4) and (6) of the Constitution might permit the judiciary to demand origin in a particular province for appointment as an LCM in that province. While this would be prima facie discriminatory, it would seem to be permitted by the exceptions to the clause.[322]

Recommendation: The judiciary and JSC should explore using a representative district or provincial nomination committee on a pilot basis and evaluate results with this. Based on the results, consideration should be given to expanding it to other areas.

Recommendation: Transparent recruitment processes should explicitly aim at securing representation of qualified female candidates among nominees and appointees to positions as LCMs. It would be better if this could be accomplished through representation of women on the bodies that nominate candidates rather than through the JSC imposing women candidates who have not been nominated by Chiefs. Thus, the judiciary and JSC should enter into a dialogue with elders on how to broaden the composition of bodies nominating LCMs and the field of candidates put forward.

Recommendation: In the longer term, a standardized entry level examination should be introduced for candidates seeking the position of LCM. The knowledge required to be an LCM could thus be divided into two or more sections. The written examination could be applied to some issues of the administration of statutory justice, while knowledge of custom could initially be examined orally. (This is not to suggest that an LCM needs to know everything before starting. What is required here is a basic level of knowledge that could at some point be supplemented by induction training - see below.)

[321] interview with DR HC, March 2010

[322] However, this is ultimately a judicial determination so this view cannot claim to be authoritative in the absence of jurisprudence on the point.

12.2.4 Training and legal knowledge of LCMs

There are no systematic accounts or documentary sources of the level of legal knowledge of LCMs. However, the impression gained by the study team is that there is very large variation among those serving as LCMs. In contrast to the training of Subordinate Court Magistrates, there is no defined formal training for LCMs, either in the form of pre-existing qualifications or training prior to commencement of functions.

17 Local Court officials interviewed for the study affirmed that they had been trained in the application and interpretation of the laws they ought to apply. LCMs have been exposed to short term training programmes through workshops on contemporary legal issues relating to the interpretation of the laws for the delivery of justice. These include human rights, gender issues, and the administration of justice.

The training workshops were initially carried out with donor (GTZ / GIZ) financing and in cooperation with by legal aid / paralegal and other civil society organisations. More recently, they were incorporated into the Access to Justice Programme funded by Denmark and run by the High Court (Directorate of Local Courts). Figures were not available on the numbers of workshops held and participants in the past two years, and the indications were that there had been some falling off in the rate at which these workshops were taking place.

The team did not evaluate these workshops as such, but examined their content and format and found them to be useful and relevant. More work could still be done however on tailoring the content to the precise issues most frequently dealt with by Local Courts. An innovative and worthwhile aspect of the initial training workshops is that LCMs and clerks were trained together with CSO paralegals. This enabled the two groups to learn of each others' perspectives, roles and skills. The project had success in breaking down barriers between Local Courts and paralegals in Southern and Eastern Provinces.

The judiciary indicated a wish to introduce such formal and standardised training, though the team did not see a plan and / or costing of this effort.

Recommendations on training:

Current programmes to train LCMs should be maintained and enhanced. Any larger scale plans to step up training of Local Court personnel – especially through the introduction of an induction training course for LCMs - would be a very worthwhile move, but need to be preceded by a needs assessment and an analysis of costing and logistical arrangements, as well as curriculum design and development of academic and training materials.

Longer term plans to formalize training of LCMs through an induction training should be coordinated with the diploma for Subordinate Court Magistrates in order to ensure a step-by – step approach. The level of training and qualification necessary to become an LCM should thus constitute a certain portion of the diploma for Subordinate Court Magistrates, to the extent that this is possible.

The training needs of other court personnel such as clerks and messengers should be assessed and documented more thoroughly by means of a needs assessment

The use of assessors

Local Courts may make use of the expert knowledge of customary law assessors (sec. 61 of the LCA and paragraph 305 of the Handbook). Official figures on the appointment and use of assessors are not available. 57% of LCMs said that they did not make use of customary law assessors, whereas 43% said that they did so occasionally. The use of assessors enables the LCMs to exercise jurisdiction over issues applicable to customs outside the area of the court's jurisdiction, and to enable those who do not come from the local areas to exercise the same. This is a common approach in localities, such as urban areas, where the populations comprise people of different customary backgrounds. But even then, the Local Courts Magistrates must demonstrate ability to understand and interpret the contributions from the Assessors.

There is no set procedure for appointment of assessors. Most often, it seems to take place in consultation with the traditional leaders. In Luapula Province, responses indicated that some Local Courts instead make use of court messengers, who are native to the locality, instead of assessors. Other responses indicated that informally, this is probably practiced a great deal, especially considering the very limited resources available to Local Courts to pay assessors. Some respondents reported that there may be scope for women to participate in the appointment and selection of assessors.

12.2.5 Knowledge resources / written materials

Local Courts Handbook: At least 80% of the Local Courts visited during the study had been provided with the Local Courts Handbook. This provided them with guidelines to conduct court proceedings. Many had been supplied with the Handbooks during donor supported workshops conducted by the judiciary or in cooperation with Civil Society Organisations (CSOs). The Local Courts Handbook, while useful on general legal principles and on procedural issues and rules, is rather formalistic in tone and potentially quite far removed from the daily feel of the work of LCMs in hearing and deciding cases. While there are occasional references in the Handbook to substantive issues, it is not and does not purport to be a guide on questions of substantive law. In this regard, there is quite a contrast to the **training manual for Local Courts**, which is written in more accessible and appropriate language. This is a tool developed for the training of LCMs discussed above, though it also contains useful information on issues ranging from human rights, to intestate succession and basic rules and principles of civil procedure.

18 officials further confirmed that they have been provided with written guidelines that govern their work. Local Court clerks were generally found to be familiar with the procedures that they are supposed to apply for court management, reporting and recording of information.

Legislation and other materials: Local Court judgments often do not refer to statutory law such as the Local Courts Act or other written legal reference materials. Very few Local Courts were found to be in possession of copies of legislation. Many do not have even the Local Courts Act or the the Local Court Rules, and few possess copies of other legislation that the Local Courts are supposed to apply, such as the Intestate Succession Act. 9 LCMS said they did not have copies of the legislation they ought to apply, while 8 of their colleagues did. The LCMs interviewed expressed a need of such materials to support their work in interpreting the law and making informed decisions.

Academic legal works, collections of cases or other reference sources are even rarer, though LCMs in urban areas often have some possibility of accessing these through other sources.

Recommendation: It is currently unrealistic to think that Local Courts can be provided with a full set of the materials they need. The most realistic and practical ambition might be to develop a revised and comprehensive Local Courts Handbook which, in addition to being a procedural and managerial guide, contained an additional volume or volumes dealing with the issues of substantive law that most commonly arise in Local Courts, as well as guidance on human rights (including women's and children's rights) and the application of the repugnancy clause.

Some of the areas of law in which they need legal materials are those related to the most common cases that come before their courts, which include family law, assault and intestate succession. Firm guidance on the use and limits of the power of contempt of court is also necessary.

In order to guard against the misuse of power by Local Court Magistrates and other personnel, materials to be used by the Local Courts should be made available to CSO legal service providers and members of the community. While we must be realistic about the lack of such legal services in most rural areas, the materials themselves could and should be made available for download on the judiciary's website (which at present does not provide much information on the Local Courts).

As LCMs knowledge of customary law is sometimes lacking, it might also be possible to produce a guide of some kind on some general principles of African customary law that are common to various ethnic groups. Within the different parts of Zambia, there might also be an interest in producing accessible works on aspects of custom in an area or among an ethnic group. This would preferably not be in the form of codified "customary law", but as a more discursive text that tried to impart familiarity with local culture, norms, conditions and dynamics. Works like this could, as well as promoting knowledge and discussion, begin to form the basis of debate on issues of custom.

12.3 Resources and the economy of the Local Courts

The Local Courts suffer from grossly inadequate funding to carry out their task (though they are hardly unique among justice agencies in this respect). There are two aspects to this. One is poor disbursement of budgeted funds, the other is a lack of clarity relating to the permitted retention of 40% of fees.

12.3.1 Allocations from the national budget

The total budgetary allocation for the Local Courts for the year 2009 (USD equivalent) was approximately 8.3 million USD. The figures for the amounts disbursed and spent were not made available to the study team. In the period 2006 – 2008, disbursements to the Governance Sector Generally (including justice) were 53% of budgeted amounts. Unfortunately, more specific figures on disbursements and expenditures for the Local Courts were not made available to the team.

12.3.2 Utilisation of collected court fees and fines

Money realised from the both fines and court fees are paid to the Local Courts. According to LC officials, receipts from criminal fines go straight to government accounts, whereas with court fees, the rule is that 40% may be retained by the court for its expenses whereas 60% should be paid to the judiciary at central level.[323] In practice though, it seems that **even the retained 40% is generally remitted to the Local Courts Officer at district level** by the Local Court clerks. While the need for proper bookkeeping and financial management is clear there often seem to be problems in practice with the operation of the retention system. Without having been able to examine bookkeeping in detail for this study, the clear impression from the field study is that the system works to the disadvantage of the individual Local Courts, which often seem to lack funds for basic needs such as stationery, transport (for instance to send a convicted person to prison at a district centre, to deliver a court summons, or to ensure enforcement of court orders) basic office furniture and even toilet supplies. Instead, the funds collected often seem to be pooled and allocated to priorities as seen by the LCO and PLCO.

12.3.3 Material Resources

Infrastructure: The majority of the Local Courts visited lacked basic suitable infrastructure. This echoes the findings of the large ZLDC study in 2006. The buildings were not only inadequate but of poor quality. Poor infrastructure was commonly mentioned as a major problem by the respondents in outlying rural districts (study visits to Lundazi in Eastern Province, Gwembe in Southern Province, and Mwinilunga in Northwestern Province). Many Local Courts lacked toilet facilities. The 2010 report by the Local Courts Director describes substantial government funded work to build and refurbish Local Court buildings in all provinces. Details and figures on this are to be found in the report and are not repeated here.

Equipment and transport facilities: The majority of the Local Courts visited lacked basic equipment, including suitable desks and chairs, as well as court uniforms for LCMs and messengers. The lack of such basic equipment does not provide a suitable environment for conducting court proceedings. Bicycles were not supplied to some of the Local Court messengers. As long as even better means of transport are not available, bicycles are usually necessary to facilitate mobility of court messengers. Where bicycles were found to have been supplied, many of them were in poor condition. LCOs and PLCOs also lack transport. This makes it difficult for them to monitor and advise the Local Courts and to serve as a link between them and the rest of the judiciary, as foreseen in the Local Courts Act.

Stationery and court forms: There are inadequate financial resources allocated to both District Local Court Officers (DLCOs) and Provincial Local Court Officers (PLCOs) for purposes of purchasing of stationery. Often, Local Courts lack stationery materials to enable them record their proceedings. Also, Court forms are rarely available at most Local Courts. This is a problem experienced and acknowledged by the majority of the Local Courts visited during the study.

Recommendations:

The poorer quality of justice available in Local Courts that is due to poorly trained personnel, poor infrastructure and poor facilities disproportionally impacts low income people. Without

[323] The team was not given a documentary source for this rule or practice, but everyone associated with the Local Courtswas familiar with it.

addressing these basic needs, it will be impossible to address more ambitious goals such as improving reporting and documentation of practice (decision making in cases) in the Local Courts. The Directorate of Local Courts should carry out an examination of the income sources and funding requirements of individual courts, the LCOs and PLCOs and make it clear exactly what proportion of court fees may be retained by the individual Local Court and for which purposes.

Retention of fees by the individual Local Courts is an important strategic and performance incentive. Without it, court officials confronted with a lack of funds for the most basic operational items may *in extremis,* even feel justified in resorting to corruption and dishonest reporting. It is important that the judiciary (Chief Administrator) resolve the issue of funding. This should go hand in hand with a accounting requirements for courts.

12.4 Local Court case loads

Local Courts are the Court of first instance for the vast majority of legal disputes in Zambia. As is often argued, they handle almost all of Zambia's civil matters. In the year 2009, the Local Courts dealt with 111,510 civil cases and 13076 criminal cases.[324] Reference is made in this regard to the discussion on prioritisation of legal aid services by the LAB, LAZ and even by NGOs in chapter 6. Depending on the population size of its jurisdiction, as well as the popularity of magistrates, the case load of a court tends to range from 5 – 105 cases per week; or 15 – 400 cases per month.

[324] Statistical Case Returns, Local Courts, 2009. It will be quickly seen that there is a discrepancy between this figure and those in Table 12.4 below. It was not possible to get clarification of this from the judiciary.

Table 12.4: Local Courts, reported case loads by province, 2009[325]	
Province	Caseload
Central	6,900
Copperbelt	19,418
Eastern	N/A
Luapula	6,900
Lusaka	32,629
Northern	8,822
North-western	5,115
Southern	13,409
Western	9,656
Total	102,849

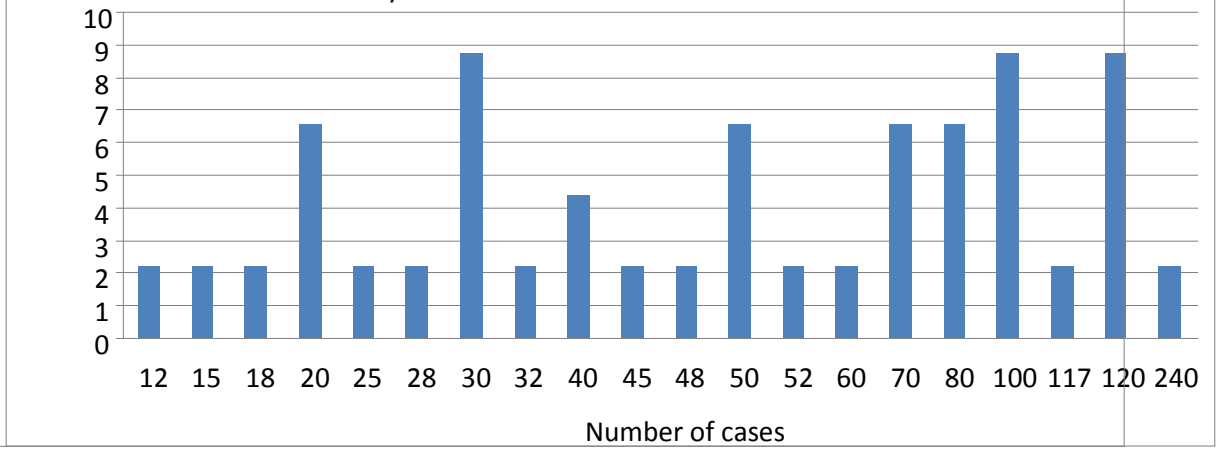
In order to manage this demanding responsibility, the majority of the Local Courts sit every day during the five working days of the week, except holidays. 73% of the Local Court Magistrates and Clerks who were interviewed said that the Local Court sits daily. The study findings indicated that at least 70% (32) of the Local Courts visited sat daily to discharge their responsibility. (***See Figure 2 below***) Only 12 Local Courts indicated sitting three times per week. Two LCMs indicated that they visit and conduct court sessions at least once and twice per week, at Local Courts which have no permanent LCMs. The average number of cases heard by the Local Courts per month, based on the study findings, is presented below.

The Local Courts generally attend to and discharge cases with a minimum of delay. The study revealed that on average, it takes seven (7) days for the Local Courts to attend and dispose of cases. Sometimes the court will set a time period for the parties to discuss the case with a view to reconciling or reaching an out of court settlement. Any delays are due to factors such as a failure by the parties involved to bring witnesses or to attend court, due to illness, or where there are technicalities that the court wishes to examine prior to trial. Usually, parties come to court on the appointed days with their witnesses. According to survey respondents, the Local Courts are on average able to hear and dispose of three to four cases per day, depending on the nature of the cases.

[325] Submission paper to the Committee on Policy- 2010 Local Court Section.

Figure 12.4 a: Average number of cases heard per month by Local Courts

Source: Field Survey



12.4.1 Analysis of the distribution of staff, courts and caseloads

Table 12.4. b: Overview of Local Court staffing, courts, revenue and caseloads nationwide[326]

Province	No. LCMs	Staffing filled	% of total staff	No. of Courts	% of courts	Courts revenue	Caseload	% of total caseload	Cases per LCM (av.)
Central	40	179	7,3	40	8,3	96105170	6900	6,7	173
Copperbelt	75	286	11,7	38	7,9	N/A	19418	18,9	259
Eastern	N/A	419	17,2	76	15,7	N/A	N/A	N/A	N/A
Luapula	77	319	13,1	45	9,3	130659760	6900	6,7	90
Lusaka	N/A	200	8,2	36	7,4	441324300	32629	31,7	N/A
Northern	162	268	11	67	13,8	29899650	8822	8,6	54
North-western	60	163	6,7	47	9,7	99421000	5115	5	85
Southern	N/A	279	11,4	52	10,7	269375700	13409	13	N/A
Western	34	328	13,4	83	17,1	297070650	9656	9,4	284
Total	448	2441	100	484			102849		

In Table 12.4 above, it is useful to note where there are significant divergences between resources (numbers of staff and courts) and caseloads. These are highlighted in the simplified table 12.4.c.

[326] Submission Paper to the Committee on Policy - 2010 Local Court Section (Local Court Department, Judiciary Headquarters, Lusaka)

Table 12.4. c Average caseloads and staffing by province					
Province	% of total staff	% of courts	% of total caseload	Cases per LCM (av.)	Cases per court (av)
Central	7.3	8.3	6.7	173	173
Copperbelt	11.7	7.9	18.9	259	511
Eastern	17.2	15.7			
Luapula	13.1	9.3	6.7	90	153
Lusaka	8.2	7.4	31.7		906
Northern	11	13.8	8.6	54	132
North-western	6.7	9.7	5	85	109
Southern	11.4	10.7	13		258
Western	13.4	17.1	9.4	284	116

The most urbanized provinces, Lusaka and Copperbelt, are dealing with slightly more than half of the total caseload of the Local Courts while having less than one fifth of the staff. In a general comment on this, the Director of Local Courts, Mr. Chibwe made the valid observation that more courts were necessary to effectively serve the population in Provinces where the population is dispersed. In significantly urbanised Provinces like the Copperbelt, a single court can serve a much larger population as it can be easily accessed by the majority.

As can be seen from the above however, the divergences are not only or even primarily between rural and urban Provinces. A comparison between Lusaka and Copperbelt Provinces shows that Lusaka is dealing with close to a third of all Local Court cases with less than 10% of the total staff. Copperbelt has 86 more staff and only two-thirds the number of cases. Western Province has 9.4% of the cases compared to Northern Province's 8.6%, and yet it has 328 staff compared to 268 in Northern Province. It is important to emphasise that these comparisons are not made for the purpose of generating contention or a campaign of criticism against the operation of the Local Courts. In fact, the Directorate of Local Courts deserves significant praise for painstakingly compiling these figures, making them available and being willing to discuss them – frankly in a more open manner than much of the rest of the justice system.

Nevertheless, attention needs to be paid to ensuring correspondence between the numbers of adjudicators and the caseload, if adjudication quality is not to suffer. From the above statistics, it is clear that workloads are far higher for some Local Court Magistrates (LCMs) and courts

than others. This information could be useful for a number of purposes, including training priorities, salaries and incentives, as well as the allocation of other resources.

12.4.2 Ways forward on caseloads and staffing

Low caseloads can suggest one of two possible responses: either the judiciary should (a) work to satisfy the need for justice by making it easier for people to file their cases and have them tried - boost caseloads - or (b) consider reducing staffing and costs in areas where courts are not used optimally. This is a matter of public policy where many factors should be considered. Since the areas where caseloads are low are the rural areas where levels of public service and infrastructure are low, cutting justice services further would be harsh and make urban – rural imbalances even greater. Thus, what can be done to make Local Courts more accessible, effective and attractive to litigants?

Would more potential litigants use the Local Court if it functioned more fairly and effectively? In the areas where Local Courts are underused, do people not use them because (a) they are too far away, and too expensive? Or is it because they are not perceived as being effective and fair enough? A policy response by the judiciary demands a better understanding of these factors. Realistically, we must acknowledge that some factors are economic and social, and outside of the control of the judiciary. People lack money for transport from outlying areas to villages and districts where Local Courts are located. Some may not even be aware of the Court's functions. They may be intimidated by the risk of failure or by social exclusion for challenging power structures in their locality. On the other hand, there are also factors that are within the control of the judiciary. The judiciary must assume that the better the Local Courts are able to do their job of fairly and effectively dispensing justice, the more people will avail of them.

Recommendations on caseloads and staffing

We do not necessarily conclude that staffing is excessive, but a finding that personnel are not always distributed optimally seems justified. This analysis is an illustration of the benefits that could be drawn by the Zambian justice system from producing more documentation and analysis of such matters. Such benefits include a more rational basis for planning and the possibility of designing programming and resource interventions to tackle observed problems, as well as evaluating the impacts of such interventions.

Rationalization: Some general indicators or guidelines should be adopted on the numbers of cases that can be handled by a Local Court to an adequate standard of quality. The caseloads of the urban courts show that a relatively well staffed and resourced Local Court can handle a larger number of cases than many rural courts are dealing with at present. Thus the judiciary should be asking itself whether money currently spent on high numbers of certain categories of staff could perhaps better be spent on improving infrastructure and facilities in the courts, or on outreach to make them better known and more effective. There might be a justification for Local Courts to sit only on some days of the week, (and perhaps for the judiciary to consider part-time contracts) if the caseloads are low. In some areas, there might be good reasons to emphasise a smaller number of well-functioning courts. On the other hand, it might be useful to know why Local Courts in particular Provinces are not being used to the same degree as they are in others and to ask whether there are ways of boosting caseloads, and hence court revenues.

12.5 Practice and Procedure in the Local Courts

The Local Court Rules are made by the Chief Justice under the authority given to him by section 68 of the Local Courts Act. Together with the Act, these rules regulate most matters concerning procedure in the Local Courts.

Court fees: Rule 9 of the Local Court Rules provides for a "loser pays" cost-shifting arrangement, so that the successful party in an action before the Local Court should be able to recover for court fees paid, unless the Court orders otherwise. Information received regarding court fees is set out in table 12.5 below.

Table 12.5: Local Court Fees

Service/ Document, civil cases	Cost, per info from judiciary [327]	Fees as set out in S.I. no. 70 of 2005 (where different / supplemental)
Issue of summons to defendant, civil case		5,100
Issue of summons to witness, civil case		5,100
Lodging of Appeal to Sub. Court	K50,100	
Notice of filing of grounds of appeal		10,000
Hearing Fee	K 15,000	
Divorce Certificate	K50,000	
Failure to Obey Summons	K10,000	
Marriage Certificate, customary marriage	K10,000	
Divorce Certificate, customary marriage	50,000	
Preparation of Records	K 50,000	1,100 per page
Swearing Affidavit	K 10,000	
Appointment of administrator of an estate	30,000	
Issue of warrant of distress		25,000
Execution of a warrant of distress		25,000

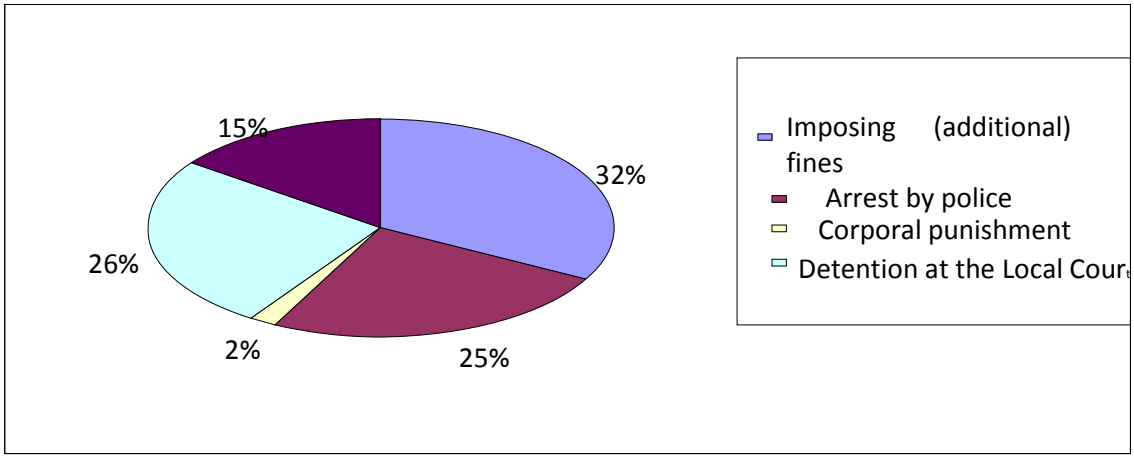
12.5.1 Orders and legal remedies

The Local Courts can issue a variety of orders for action to be taken in disposing of cases after judgment. Official figures are not available on orders emanating from the Local Courts, but the study included the impressionistic responses of Local Court officials on this question. According to these, Local Courts frequently order payment of compensation, or fines (32%), to custodial sentencing (26%) of those found at fault. Warrants of arrest using the Police (25%) are also issued by the Local Courts where there is a failure to to attend or appear before the court, or

[327] Information provided by the judiciary to the study team, Lusaka, 2011.

to comply with court decisions. The study findings indicating the most commonly applied court orders in disposing of cases at the Local Courts visited during the field survey are shown in the figure below.

Figure 12.5.1 Commonly applied orders in disposing of cases[328]



12.5.2 Cases involving children

Civil cases: 38% of respondents (38%) mentioned cases involving children appearing as interested parties before the Local Courts. Only respondents in Mongu and Lundazi mentioned matrimonial disputes resulting in assaults and divorce as the cases where issues affecting the children were likely to be involved. When divorce is at the centre of such cases, the issue of responsibility for children's welfare would always arise. As to whether children are seen by court officials as being able to represent themselves, only 11% responded positively. Some added that this depended on the age of the child, though usually without mentioning an age limit. In this connection, obligations under the CRC dealing with children's right to be heard – taking due account of their level of maturity - do not currently seem to be given prominence.

Criminal cases involving children: The Local Courts Handbook (para. 123) instructs Local Courts not to handle Penal Code offences involving juveniles (below the age of 19). This is in line with the provisions of the Juveniles Act (ss. 63 – 67) providing for juvenile offenders to be dealt with in Subordinate Courts constituted as Juvenile Courts. While the Juveniles Act does not confer exclusive jurisdiction on Juvenile Courts in relation to Juvenile Offences, the instruction of the Handbook is clear on this point. It does not seem that this rule is always respected in practice, as the responses of LC officials appeared to indicate that some of them deal with juvenile offenders. What may often happen in practice is (once again) that the Local Court deals with the civil aspect of the matter, ordering compensation. If the Local Court orders a fine, it has of course been dealt with as a criminal matter.

Where a child is accused of committing an offence is reported to the Local Court, LC officials said the child should be represented by the parent or guardian. Respondents mentioned the DSW in this regard, but referred to widespread inability on the part of the DSW to represent children in their courts. 68% of Local Court respondents responded positively to a question about whether cases involving children would be held in camera.

[328] Source: Field Survey data.

12.5.2 Legal services

Section 15 (1) of the LCA prohibits legal representation in a Local Court except in respect of criminal criminal charge under any of the provisions of: (a) by-laws and regulations made under the provisions of the Local Government Act; or (b) any written law which such Court is authorised to administer under section thirteen.

While the idea of the Local Court is that procedures should be simple and unencumbered by technical rules, the issues at stake may be important, and people may feel a need for advice and assistance. Any person who is charged before a Local Court with a criminal offence under a written law may in theory be defended by a trained lawyer. In practice however, this is almost entirely meaningless, as lawyers (whether privately practicing or working for the LAB or cooperating with NGOs such as the LRF) virtually never appear before Local Courts. Whatever chance there is of lawyers appearing before urban Local Courts, there is virtually none in regard to rural ones. No Local Court official interviewed referred to any case of a lawyer appearing before them, though 24% did mention parties occasionally receiving some kind of legal services

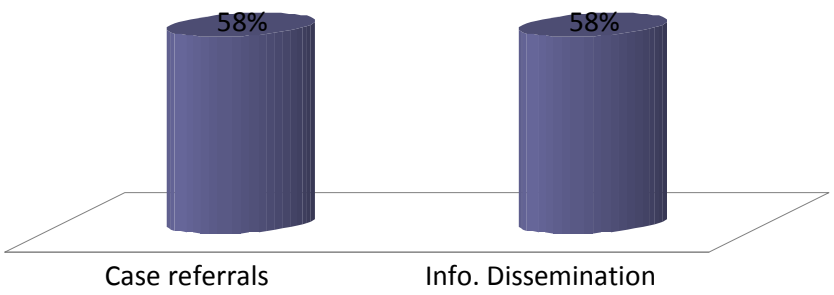
Local Court officials were positive about the potential of properly qualified paralegals to fill the gaps caused by the lack of lawyers. Almost all Local Court respondents (93%) agreed that paralegals should help in preparing parties prior to the case. 26% were in favour of paralegals representing parties in court.

58% of Local Court respondents thought Local Courts, should inform parties and communities of the existence of legal services and refer some cases to the LAB. 80% agreed that paralegals should provide support to the weak and vulnerable, whereas 74% though that paralegals should support the functioning of the justice system (see figure 12.5.2 below).

The vital issue here is assistance or representation in civil cases, as these constitute the great bulk of cases before the Local Courts. In this regard, the new Local Courts Act in neighbouring Malawi is interesting, opening as it does a door for paralegals to appear on behalf of parties before Local Courts there, provided that they do so free of charge (as so-called “next friend”).[329] Allowing paralegals some standing before Local Courts would require a regulatory framework for paralegals that deals with issues of qualifications, professional standards and discipline. These issues are discussed in chapter 6.

[329] Malawi Law Commission, Sept. 2007, p.31.

Figure 12.5.2: Role of Local Courts in facilitating legal aid services



12.5.3 Procedures for appeal and review

The course of appeal (see sec. 56 et seq of the LCA) is long and rather complex process for the poor, and attracts costs that are unaffordable for many. Although the Act (sec. 60) says that an appeal will normally be dealt with by way of a complete retrial unless the appeal court decides not to do this, the Registrar of the High Court instructs that a complete re-hearing should not normally be necessary[330]. The Local Court Rules[331] provide that notice of appeal should be made to the clerk of the Local Court, who should transmit the notice to the appellate court (Subordinate Court) together with the record of the case and the judgment or order. Thus, even if the Local Court is not a court of record, at it should prepare records allowing an appeal court to have a brief background of the case. All Local Court respondents said that records for all cases appealed are submitted to the Magistrates Court. Local Court respondents indicated that cases most often appealed include child maintenance, land disputes, divorce, adultery and defamation. Comments on record keeping are made below. Appeals to Subordinate Courts would appear to be practically nonexistent in rural areas, and rare in urban ones.

Confirmation and revision mechanism by LCOs: The relevant rules provide for both mechanisms of compulsory confirmation and of the possibility of applying for review of a judgment or order of a Local Court. In both cases, the review instance is the Local Court Officer (LCO). Rule (12(2) of the Local Court Rules provides that no-one may be imprisoned until the sentence has been confirmed by an authorised officer. While there was familiarity with this rule among both Local and Subordinate Court personnel, it was not possible to confirm to what extent the rule is complied with. Some Subordinate Court personnel mentioned violations of the rule.

Section 54 (3) of the LCA provides for the possibility of applying to a LCO to revise a judgment of a Local Court, and for hearings and the taking of evidence, or the power of the LCO to order the case to be reheard by a Local Court or a Subordinate Court. No judgment in a civil case should be revised to the detriment of a party without affording the party an opportunity of being heard. The same applies to any enhancement of penalties in criminal cases. According to Local Court officials, applications for review by an LCO are a rarity, with most Local Courts not having more than one or two cases per year being the object of a revision process.

[330] CAP 29, Local Court Rules, as amended by Act No. 13 of 1994: Rule 27; Zambia, LC Handbook, 1996: 71 para. 287).
[331] Local Court Rules, part VIII, sec. 25

Nevertheless, given the avenue of review by an LCO and appeal to a Subordinate Court, the former is clearly simpler and more accessible to parties.

A principal difficulty is that the LCA intended the possibility of revision to be not simply a *reactive* avenue of redress by parties to cases, but a *proactive* one that should arise from inspections to be carried out by LCOs. For reasons of resources, these inspections do not take place as often as they should. This is discussed below.

Recommendations on practice and procedure

Children: The rules (para.123 of the Handbook) concerning juvenile offenders should be made known and rigorously enforced concerning any offence that could carry the risk of detention or imprisonment. However, where very minor offences that would incur the payment of relatively small fines or other non-custodial sentencing (including performance of community service) are concerned, the Local Court could be an appropriate forum to deal with erring juveniles. The judiciary could briefly examine practice in this regard through consulting with LCMs, LCOs and PLCOs and introduce any necessary modifications to the rules.

Training of Local Court Magistrates should include some elements on the rights of the child to be heard on matters concerning the child, taking account of maturity and coupled with an awareness of other procedural rights, in camera proceedings etc. This could be of particular importance in so-called "virginity damage" cases.

Legal Services: The Chief Justice should consider introducing rules in the Local Court rules that would permit qualified and certified paralegals to have some standing as providers of assistance to parties before Local Courts on a non-remunerated basis. This rule should take effect when a qualification and monitoring system has been developed, perhaps in the framework of the national legal aid policy and with the participation of the LAB, the PAN network and LAZ.

12.6 Accountability and monitoring mechanisms

Generally, accountability of Local Courts could be enhanced by means of upward, downward and horizontal measures. Upward accountability is present in the system in two ways: the mechanisms of appeal and revision as discussed above, and the inspection mechanism discussed in this section. Downward accountability, towards users, should be present in terms of the degree to which people use the court and in feedback mechanisms indicating satisfaction or dissatisfaction. These are discussed below. A third form of accountability, towards a community of peers that seek to uphold professional standards, would be very desirable but hardly exists at present.

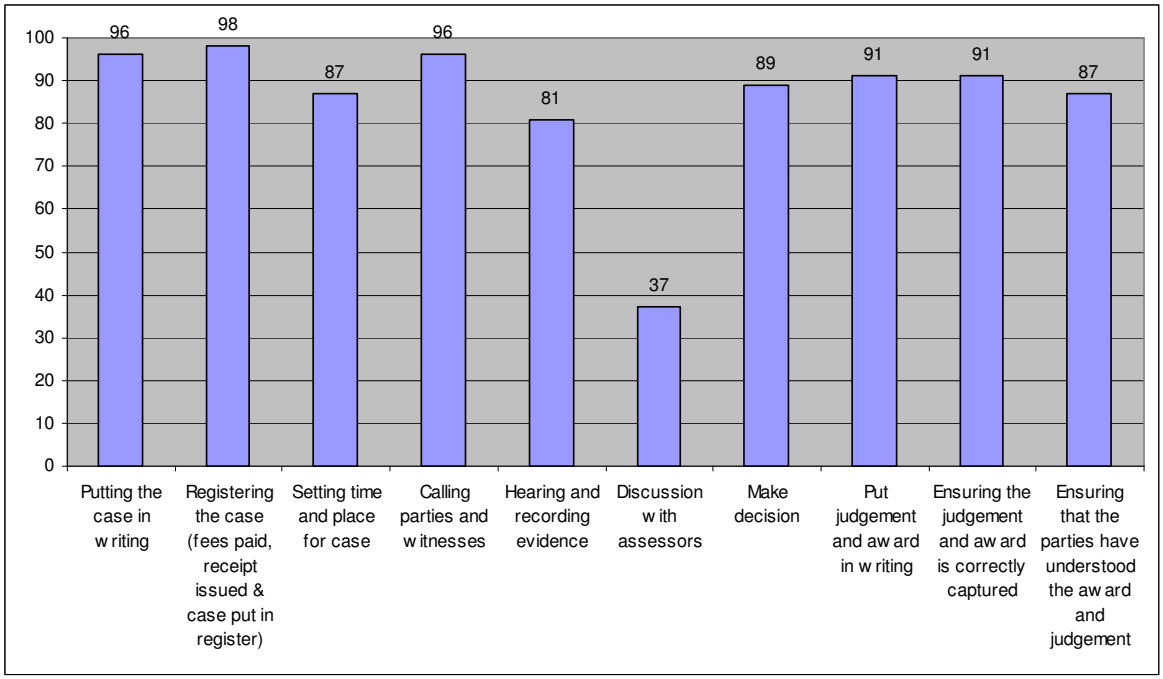
Inspection: Provincial and district local court officers are supposed to provide support and supervision to LCMs by visiting Local Courts, inspecting records and discussing cases and issues, as well as dealing with financial and administrative issues. The relationship between LCMs and the LCO should be two-way, involving obligations and reasonable expectations on either side. They are hindered from doing this primarily by a lack of transport facilities. Most Local Courts visited were not regularly visited by LCOs. Moreover, in districts and courts where the main problem is one of facilities, funds and infrastructure, inspection is of limited value if nothing is done to address the causes of the problems.

A further problem is that LCMs may not have the funds to travel to the district HQ to remit returns and reports. The net result is that LCOs are not getting many cases to read and discuss. It seems that they only see the small minority of cases that are the subject of a revision process. Local Court provide reports to LCOs on a yearly basis, but these do not contain discussion of issues of procedure or substantive law. The judiciary's first aim is to make their reporting quarterly rather than yearly.

Nonetheless, the inspection mechanism, and the support that LCOs should provide is a vital component of a good Local Courts system.

Record keeping: Rule 7 of the Local Rules makes clerks responsible for 'the safe keeping of all court records, which include case records, financial records and administrative records. 'Case records' refers to documents, dockets and files relating to a particular case. It was not possible for the study team to carry out its own detailed verification as to record keeping in the courts visited, but enquiries were made by the study on the type of records kept by the Local Courts. Most of the records indicated were concerned with Court orders and decisions, as shown in the table below.

Table12. 5.1 a: Responses on records kept by the Local Courts



Case records are necessary for a number of purposes, including appeal to Subordinate Courts, revision by LCOs, as well as for inspection by LCOs and any other judicial officer designated by the Director of Local Courts (LCA sec. 54 – 55). Moreover, paragraph 268 of the Handbook provides that records containing interesting points of customary law should be sent to the Registrar of the High Court by the authorised officer (LCO or PLCO) who inspects the case record. This is intended to enhance the system of documentation and reporting of outcome of cases handled by the Local Courts, but it does not happen in practice to any significant extent.

During the field visits, research teams had some opportunity to view judgments and orders issued by Local Courts. Few judgments clearly differentiate between the facts of the case and the law applied to them. It is rare to find explicit references to statutory law, or even to explicit rules of customary law in judgments.

Retention of records: According to the Local Courts Handbook case records should be kept at the Local Court for at least one year. If there is a lack of storage facilities at the court, they may then be stored for a further year at the office of the PLCO or in some other safe place (Handbook para. 267). Following this, the all court records more than two years old should be sent to the National Archives of Zambia at the beginning of each year (para. 266). This does not happen in practice. Another question concerns access to records. By virtue of sec. 16 (2) of the LCA, members of the public, including researchers, are generally not allowed to consult case records. Parties to a case are entitled to copies upon payment of a fee, but copying machines are not available at the court.

In practice, record keeping does not seem to be complete or reliable. Judgments and orders are often not written according to any standard format. Even if case records are well-written up, clerks are hindered in their record keeping function by a lack of storage facilities and filing systems. The poor state of court buildings (lack of security, leaking roofs and walls) may mean that the clerk is left with a choice between keeping records at his or her own house or running the risk of damage to them.

Downward accountability: perceptions of the Local Court: The geographical spread of Local Courts, including in rural areas, and the absence of formal and bureaucratic procedures, including affordable costs, provide an environment of easy access to these communities. That the Local Courts mainly base their procedures on customary laws that reflect the traditional social rights, reinforces their acceptance as the preferred paths to justice by the poor. These factors combined, provide confidence and inspire trust among the poor. The Local Courts, as indicated by the study findings, remain the most preferred and used Justice institution by the majority of the poorest segments of the Zambian population seeking justice in areas that incorporate social and economic disputes. Nevertheless, people are acutely aware of the shortcomings of Local Courts in terms of resources and quality of adjudication. Local Courts are thus valued for their relatively high **accessibility** but criticised for their lack of **compliance** with legal, constitutional and ethical standards.

The danger of "elite capture" when judges are nominated by local power holders (most often traditional leaders and their councillors, members of leading families) does not need much explanation. Will LCMs be willing to go against local power elites? That the absence of written legal norms makes it more difficult to compare case outcomes to objective legal standards, and thus to uncover judicial errors. Chiefs and their councils of senior headmen may consider that their power consists not only in representing and "remembering" what customary law is (i.e. as its "custodians") but actually in "legislating" on issues that they consider to be within the purview of custom.[332] There is very little documentation of practice in this respect.

[332] See for example Norad Report 8/2007 Discussion Study on drivers of change in three chiefdoms of Southern Province in Zambia, pp, 5, 19.

On the other hand, where traditional leaders are trusted and respected by communities, Chiefs and their councillors can play a valuable role in intervening with the judiciary and other state agencies to advocate for a well-serviced, effective and fair Local Court.

Combating elite capture and corruption: More work is needed to understand the phenomenon of corruption in the Local Courts. More systemic attention to the Local Courts by agencies such as the ACC could perhaps contribute, but this analysis should probably be systemic in nature to start with rather than focusing only on catching individual wrongdoers. Corruption in the sense of receiving payments for orders or judgments undoubtedly occurs, but more subtle threats to judicial impartiality may be equally or more important. In survey responses, about 30% of Local Court officials considered corruption to be a problem within the Local Courts. LCMs attribute corruption among the justice agencies to such causes as poor pay and conditions of service, including lack of housing / poor housing allowances. The lack of clarity consistently applied policy concerning retention of 40% of the fees, leaving courts without funds for basic needs may also lead to a sense of unfair treatment. Consequently, the respondents suggested that the vice could be curtailed by improving conditions of service (91%). Intra organisational monitoring was indicated by at least 76% of respondents as important in tackling corruption, and reference is made to the recommendation in 12.3 above on transparency and education and awareness raising, including accountability measures towards the immediate community of users of the Local Court also ranked highly at 70%. Periodic transfer of officials from one court to another to cut down on familiarity with the local communities is a possibility, but this would have to be measured against the costs in terms of lack of familiarity with custom, as well as the costs of transferring officers. Some also suggested greater use of ACC officers working "undercover" to reveal corruption.

12.6.1 Recommendations on accountability

Reference is made to recommendations above on the financial resources and material conditions for basic court functions are a primary concern. Without tackling this issue, other measures are of limited value.

The Directorate of Local Courts should **promote good practices of local transparency and accountability** right down to the level of the individual Local Court. This could include simple measures such as a noticeboard where court fees are clearly displayed, and a publicly displayed board (whiteboard or blackboard for example) showing, for example on a monthly basis, the numbers of cases heard, judgments issued, case backlog, fees paid, receipts remitted to the LCO etc. Such measures of community ownership are the very purpose for which Local Courts were established. The judiciary could take measures to encourage these practices by a number of means, including honouring or rewarding the courts that best fulfil them, at district, provincial and national level. The retention of fees rule, if properly implemented, could go a long way in encouraging good practice among Local Courts, as Courts that win the trust of their communities of users should attract more cases and thus gain more resources.

Upward accountability: The second step would be to improve formats for judgments and reporting and a process for sharing of cases and experiences among LCMs. This should then lead to increased prominence of customary law issues among other levels of the judiciary, including the Subordinate Courts, PLCOs and the Directorate of Local Courts.

Reference is also made to the following chapter on Traditional Courts and to the section on customary law in chapter 2 on sources of law.

13. Traditional Leaders and Traditional Courts

Methodology

The field team visited 20 traditional courts, interviewing 40 traditional leaders. A questionnaire consisting mostly of open, qualitative questions was used for the interviews. The chapter also draws on an extensive desk study (see bibliography) and team members' practical knowledge of conditions both in Zambia and the region.

Introduction

Chiefs and headmen in Zambia have authority by virtue of laws and customs based in tradition that encompass a range of inherited cultural and metaphysical ideas, ways of life and moral and social values. To many Zambians, chieftaincy embodies the identity of their ethnic group and belonging. The traditional institutions serve and protect those values and represent historical continuity.[333] Custom regulates and controls relationships and social behaviour within a traditional community. Traditional leaders and systems of governance are oriented towards people and land or territory, rather than towards provision of services. As relationships were traditionally bound up with rights and duties in relation to land use and ownership, traditional leaders' or Chiefs' main sources of power and authority remain (a) their authority over the allocation of land and (b) their authority as "custodians" of custom, including "customary law".

A traditional leader is eligible for leadership by birth[334] and exercises influence over a geographically defined area through authority over instruments of administration including traditional or customary courts. Traditionally, leaders would have been held to varying degrees of accountability (depending on balances of power within the community) by councillors (called *ndunas* in some communities) and the community as a whole. Generally, chiefs did not exercise power alone, but in conjunction with the *ndunas* and having regard to the need to maintain consensus in the community. The importance of favourable relationships with Chiefs and headmen in order to access land[335] meant that the position of chief provided great power. This made it of interest to British administrators in colonial times as well as to politicians up to the present day for the purposes of gaining and exercising political power. In some cases it is said that colonialism upset this delicate balance by removing these links of (downward) accountability to community members and replacing them with dependence on the favour of the district commissioner or other colonial officials. The relationship between Chiefs and state officials, like other aspects of governance, was inherited by the newly independent state in the 1960s. As discussed in Chapter 12, this was modified by the loss of formal adjudicative authority through the Local Courts Act.

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[333] Adeuwmi & Egwrube, 1985:20

[334] See Ray and Reddy, 2003: Grassroots Governance? Chiefs in Africa and the Afro-Caribbean. Pp. 90

[335] Bastian van Loenen, Land Tenure in Zambia 1999, http://www.spatial.maine.edu/~onsrud/Landtenure/CountryReport/Zambia.pdf citing Chanock, Martin, 1985, "Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia". Cambridge University Press, Cambridge, 1985 and Bates, Robert H., 1976, "Rural Responses to Industrialization: a study of village Zambia". Yale University Press, New Haven and London, 1976.

In Zambia, as in many African countries, chiefs and headmen settle a large number of disputes. The resilience of the traditional governance and justice systems has been attested to in a number of studies. The Zambian Law Development Commission (ZLDC) found that "there is a viable traditional court system in existence in the country",[336] and confirmed this to be the case even in the Southern Province, where the system was not traditionally strong. In matters concerning customary land, chiefs remain the natural source of authority, exercising executive and adjudicative functions.

Even in non-land related matters, the justice systems that operate under traditional leaders tend to fill the gaps left by the lack of outreach and familiarity of the "modern" or state justice system. These courts were created in order to deal with disputes locally and tend to be more active in communities where the police are not present or accessible or are present and accessible, but have failed to address crime over a long period of time. Thus, Dr. Chikwanha remarks that many citizens are forced to turn to customary justice because of the inaccessibility of the state system.[337] Headmen, Chiefs and the traditional courts that operate under their auspices remain "tribunals of preference" or "tribunals of default" for many rural citizens and an option for the indigent who cannot afford travel costs and litigation fees in distant statutory courts.

It is not the mandate of the present study to undertake a historical analysis. Nevertheless, it is worthwhile to recall the historical background to the current situation of traditional courts. As pointed out in other studies, traditional leaders in Zambia headed so-called "Native Courts" prior to independence. The enactment of the Local Courts Act in 1966 meant that Chiefs lost the recognition that they had previously enjoyed as part of the state-recognized customary justice system. By taking this step, Zambia affirmed the principle of the independence of the judiciary. It avoided the problems encountered in neighbouring Malawi where Traditional Courts under the Ministry of Justice (rather than the judiciary) were abused as a political instrument against opponents of the Banda government. The disadvantage or "downside" of the Zambian solution was that legislation did not mean the disappearance of Traditional Courts, but simply that they were effectively ignored. The continued existence of traditional courts took place in the shadows of the justice system as such. This has consequences for access to justice for Zambians today and for any attempt to streamline the justice system.

13.1 The Legal and Institutional Framework

13.1.1 Mandate and functions of the House of Chiefs

In common with a number of countries in Africa, the Constitution of Zambia provides for the establishment of the National House of Chiefs.[338] Such houses exist in *inter alia*, Ghana, Botswana and South Africa.[339] This state body is comprised of three chiefs from each of the

[336] Zambia Law Development Commission, *Review of the Local Courts System, 2006,* p.12.
[337] Chikwanha, Annie Barbara. "Zambia - Crime and Criminal Justice." Nairobi: Africa Human Security Initiative, 2007.
[338] Article 130 of the 1996 Constitution.
[339] In South Africa, the Constitution permits national legislation establishing a council (in legislation, called "House") of traditional leaders, but it does not require it. See RSA Constitution, Article 212.

nine Provinces thus twenty-seven in total[340]) of the Republic elected by and among the Chiefs of each province. [341]

Article 130 provides that the House of Chiefs shall be "*an advisory body to the Government on traditional, customary and any other matters referred to it by the President*". Article 131 elaborates on its functions, setting out situations where the House of Chiefs does not have to wait for a presidential referral to take a matter up. Thus, the House of Chiefs may under this Article: (a) "*consider and discuss any Bill dealing with, or touching on, custom or tradition before it is introduced into the National Assembly*".

There is no requirement for the government to submit any such Bill to the House of Chiefs prior to its introduction in the National Assembly. Nor does the House of Chiefs have any authority to block the passage of legislation. The House of Chiefs may also: *(b) initiate, discuss and decide on matters that relate to customary law and practice.* What is the status of a "decision" of the House of Chiefs under the sub-article? This remains unclear. There is little practice in the implementation of the provision available from the House of Chiefs to ascertain how this body itself interprets the provision. Nor does there appear to be any authoritative judicial or scholarly interpretation. Given the clear words of Article 130 describing the House of Chiefs as an advisory body, it seems unlikely that the intention of the drafters of the Constitution was to make this akin to a power to legislate in matters of customary law. The intention might rather have been linked to the necessity of arriving at a single position in relation to its advisory function. This would appear to be confirmed by the report of the preparatory commission on the 1996 Constitution.[342]

In other instances, referral by the President is an explicit requirement for consideration by the House of Chiefs. Thus, subsections (b) and (c) of Article 131 provide that the House of Chiefs may: (c) *consider and discuss any other matter referred to it for its consideration by the President or approved by the President for consideration by the House*; and (d) *submit resolutions on any Bill or other matter referred to it to the President, and the President shall cause such resolutions to be laid before the National Assembly*.

Thus, where a matter has been referred to the House of Chiefs by the President, it is mandatory that any resolution adopted by the House of Chiefs be laid before the National Assembly.

Although established by the 1996 Constitution, the House of Chiefs first began functioning after it was revived by President Mwanawasa in 2003. Until recently, It was administered by and located in the Chiefs Affairs Unit,[343]a department of the Ministry of Housing and Local Government[344], underlining the link to the executive. After the change of power in 2011, these

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[340] The NCC draft constitutional bill produced in August – September 2010 would increase this to five per province, for a total of 45.

[341] Article 132 of the 1996 Constitution.

[342] The Mwanakatwe Commission, which was responsible for producing the 1996 constitutional text, confirms on p. 548 that the "functions of the House of Chiefs are advisory in matters of customs and traditions".

[343] According to a 2010 newspaper article, this amount is currently set at 1M kwacha per month. Members of the House of Chiefs also receive a monthly allowance of 330,000 kwacha. Source: http://www.daily-mail.co.zm/media/news/viewnews.cgi?category=8&id=1276756664

[344] Department of House of Chiefs.

functions were handed over to the new Ministry of Chiefs and Traditional Affairs. Chiefs are paid a monthly subsidy by the district council, answering to civil servants in Lusaka.

Analysis: The House of Chiefs is thus an advisory body rather than one with real power. It does not control any resources. Despite its advisory character, the cited constitutional provisions could potentially give the House of Chiefs a certain importance in the legislative process, though this depends partly on the willingness of the Presidency to refer matters to it and the National Assembly to take its resolutions seriously. There do not seem to be many examples as yet of this institution living up to its potential as a forum for debate and legislative initiative in relation to the application and development of customary law. While individual Chiefs have played positive roles in social development and the elimination of harmful practices, the team did not find examples of the House of Chiefs as such having played a role in relation to the development or revision of customary law.

The institution of Chief is not enumerated under the parts of the Constitution dealing with the executive, legislative or judicial branches of government, nor under Part VIII, dealing with the system of local government. Instead, Chiefs are dealt with under a separate part (Part XIII), in their own right. This signals the intention of the makers of the Constitution not to confuse the institution of Chief with the basic structures of republican governance. In practice however, Chiefs are linked to the executive branch of government through the powers of the Presidency in relation to appointment and dismissal of traditional leaders, as well as through the payment of subsidies and the executive functions of Chiefs. While this link is not as explicit as in previous times[345], it continues a practice that has been consistent since colonial times. The executive functions of Chiefs are discussed below.

Article 127 of the Constitution[346] deals with the institution of Chief, providing that (1):"Subject to the provisions of this Constitution, the Institution of Chief shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the people to who it applies".

The Constitution recognizes that it is up to the communities and peoples of Zambia whether they wish to recognize and accept Chieftaincy as an institution. People and communities are entitled to maintain the institution of chieftaincy in accordance with their wishes and aspirations. How this institution is formed and structured is a matter to be determined either by culture, custom and tradition, or by wishes and aspirations. The wording inherently recognizes that culture and custom are not static. A democratic element is introduced whereby ethnic communities may develop the chieftaincy institution according to their wishes and aspirations, and not only or necessarily by inherited tradition. These fundamental constitutional principles are important to keep in mind when dealing with issues of Chiefs and traditional courts, especially because the daily reality power and the attitudes of both ordinary people and traditional leaders may contrast rather starkly with them.

[345] See for example, The 1972 Chona Report on the Establishment of a One-Party State. (Report of The National Commission on the Establishment of a One-Party Participatory Democracy in Zambia) paragraph 96 of the report states that: "chiefs were an extension of the administrative branch of Government and [as] their functions included implementing Government policies and the enforcement of law". Accessed at: http://www.unza.zm/zamlii/downloads/chona-report.pdf

[346] Part XIII of the Constitution.

13.1.2 Appointment of Chiefs

When a Chief dies or is unable to continue carrying out his or her functions, the choosing and appointment of a successor is a matter that is discussed and negotiated among the elders of the Chiefdom - members of the Royal Establishment who are entitled to vote. In principle, and generally in practice, Chieftaincy is often seen or understood as "belonging" to a particular clan. The Constitutional article provides further, that (2) in any community, where the issue of a Chief has not been resolved, the issue shall be resolved by the community concerned using a method prescribed by an Act of Parliament. Thus, Article 127 lays down the first essential conditions for recognition as a Chief: acceptance by the community, if necessary according to a method recognized by legislation.

As mentioned previously, succession disputes occur that sometimes require outside intervention to be solved. The Chiefs affairs unit also give assistance with negotiations to solve disputes over succession to chieftaincy. Sometimes the process can be a lengthy one and take a year or more, during which functions may be carried on by an *ngambela* or "Prime Minister".

Article 139 of the 1996 Constitution defines a "Chief", (unless the context otherwise requires) as "a person who is recognised by the President under the provisions of the Chiefs Act or any law amending or replacing that Act as the Litunga of Western Province, a Paramount Chief, Senior Chief, Chief or Sub-Chief or a person who is appointed as Deputy Chief". Thus, the second essential condition for recognition of legal status as a Chief is presidential recognition.

Unlike in some neighbouring countries[347], the Chiefs Act in Zambia does not deal with the appointment or recognition of village headmen. As noted above, the Registration of Villages Act defines a Headman as "a villager who is recognised as the Headman of a village in a rural area by all or a majority of the other villagers under their customary law to be their Headman and who is also recognised as such by their Chief". Thus, recognition by the Chief is required. Recognition by a majority of the other villages is also a requirement, but "recognition" in this regard does not necessarily mean the same as "chosen" or "elected". Recognition takes place according to customary law. There are thus no set procedures for the appointment of village headmen. Levels of participation in the appointment are likely to vary from one ethnic group and community to another. As far as the authors are aware, nowhere does the process take place on the basis of a democratic popular vote. Both local village elders and Chiefs play a role in the choice and appointment.[348]

Appointment procedures and gender (im)balance: it is clear that the institution of traditional leadership that is based in patrimonial relationships and obligations sits uneasily with democratic, rule of law and human rights principles. A system of chiefs, royal families and their allies among councillors and headmen tends to be a self-reinforcing elite power group that jealously guards its members' status and privileges. Outsiders such as women (except where particular functions are reserved to women) and those from outside the power elite may have difficulty penetrating this circle, and the attempt to do so may result in social and economic sanctions. Nevertheless, this does not mean that the power of traditional leaders is not used in the interests of their communities.

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[347] Botswana and Zimbabwe, for example. See sec. 8 of the Traditional Leaders Act in Zimbabwe.

[348] This is reflected in the definition of a village headman in section 2 of the Registration of Villages Act, requiring . Op cit at footnote 30

13.2 Legal status and recognized functions of Chiefs[349]

Article 128 of The Constitution lays down concepts and principles relating to the institution of Chief, providing that "the Institution of Chief shall be a corporation sole with perpetual succession and with capacity to sue and be sued and to hold assets or properties in trust for itself and the peoples concerned". Nothing in this provision is to prohibit a Chief from holding any asset or property acquired in a personal capacity. This provision is of potential relevance in relation to property rights in respect of customary land.

The legal construction of corporation sole enables a distinction to be made between property owned by the corporation and the personal property of the office holder. A feature of the corporation sole is that the holder of the office, in contrast to other forms of corporation, is not subject to corporation by-laws or control by a board of directors. One question is whether the legal construction of "corporation sole" responds to the tradition in many Zambian ethnic communities whereby a chief is not seen as an unrestricted monarch, but one subject to control by a council (*ndunas*) and obliged to obey custom / customary law.

Section (c) of Article 128 provides that a traditional leader or cultural leader shall enjoy such privileges and benefits as may be conferred by the Government and the local government or as that leader may be entitled to under culture, custom and tradition.

A further reference to Chiefs is found in Article 16 (y) of the Constitution, dealing with property rights and referring to "*any other interests or right enjoyed by Chiefs and persons claiming through and under them*". There is no specific reference to the adjudication of property claims in this provision. Chapter 15 of this study deals with property and customary tenure systems and makes it clear that the powers of Chiefs in relation to community property are not ones of "ownership".

Article 129 prohibits Chiefs from engaging in partisan politics. In the same vein, Article 65 provides that a Chief shall not be qualified for election as a member of the National Assembly and, (if intending to seek such electoral office) must abdicate his functions before lodging his nomination.

The Constitution recognizes the existence of the Chiefs and provides a legal basis for their existence, making them presidential appointees. The constitutional provisions necessarily imply that the office of Chief, and any exercise of public authority by Chiefs, is subject to the provisions of the Constitution. It goes without saying that Chiefs, and their exercise of public authority, is, at a minimum, subject to the Bill of Rights and constitutional provisions relating to governmental functions and the separation of governmental powers.

The Chiefs Act was adopted in 1965 and last amended in 1994. Sections 2 and 3 of the Chiefs Act enumerate the same categories of traditional leader as the Constitution, but also mention *kapasus.* Village Headmen are not mentioned in the Constitution or in the Chiefs Act.

The Constitution provides very little guidance on the functions of Chiefs, and particularly, on any exercise of public authority. The relevant articles of the Constitution do not in themselves

[349] http://www.saflii.org/zm/legis/consol_act/ca65/

provide any basis for, or guidance on, the exercise of an adjudicative function by Chiefs. Nor would it appear to prohibit such a function. Part VI of the Constitution, dealing with the Judicature, makes no mention of the Chiefs as enjoying a judicial function or having any formal jurisdiction. As discussed in Chapter 15, the Lands Act does not confer adjudicative authority on Chiefs in land matters either. It is thus clear that Chiefs are in no sense part of the Judicature. [350] The specific functions of traditional leaders in relation to land and tenure are discussed in chapter 15.

While the Chiefs Act is the main legislative source on the functions of Chiefs, other legislation also sets out some roles and functions. As this study is concerned with justice and its administration, it is beyond its scope to enter into a detailed discussion of these. Nevertheless, it should be mentioned that the Local Government Act (1995), provides for representation of chiefs at the level of the (district) council. The Act provides that the composition of local council shall include, "*two representatives of the Chiefs, appointed by all the Chiefs in the district*". Here again, chiefs are forbidden to hold electoral office, including that of mayor. Cap 289, the Registration and Development of Villages Act of 1971, likewise provides for some administrative functions.

This legislation provides a legislative basis for the exercise of some functions by Chiefs (though not explicitly an adjudicative one, as discussed below). Section 10.1 (a) of the Chiefs Act provides that: "*Subject to the provisions of this section, a Chief shall discharge- **(a)** The traditional functions of his office under African customary law in so far as the discharge of such functions is not contrary to the Constitution* or *any written law* and *is not repugnant to natural justice* or *morality;* and *Cap. 1*

Section 10.1 (a) thus leaves it to a large degree up to customary law to determine the functions of Chiefs.

13.3 Law Enforcement Functions under the Chiefs Act

All three arms of government give recognition to the law enforcement function of Chiefs. The legislature, in section 11 of the Chiefs Act explicitly provides for the exercise of law enforcement functions by Chiefs. Thus, while the Constitution does not place Chiefs under one arm of government, the Chiefs Act gives them executive functions, and confirms the tendency of the Constitution to place them under executive authority. This is seen in firstly sections 3 – 6 on recognition and appointment. Section 7 even gives the President the power to ban / exclude a dismissed Chief from a specified area[351]) Provisions on remuneration (sec. 8) and revocation of authority (sec. 7) in the Chiefs Act (clearly under the authority of the President)

[350] Nevertheless, the list of courts enumerated in Article 91 of the Constitution is not exclusive, as Article 91 (f) allows Parliament to establish other courts by legislation). Thus, it is in principle, open to Parliament to recognize other courts, including traditional or community courts. The separation of powers principle, as seen in the requirement of Article 91 (2) of the Constitution, would however require that Chiefs exercising executive authority should not also exercise judicial authority.

[351] This executive power raises questions in relation to the freedom of movement under Article 11 (b) of the Constitution. Article 11 would seem at the very least to require that the power be made subject to judicial control to check whether a particular order made under section 7 falls within the limitations clause in the final part of Article 11.

make it clear that the exercise of Chiefs functions is primarily of the nature of executive authority.

Section 11 of the Chiefs Act gives the Chiefs responsibility for preservation of the public peace. To this end, they are required to "*take reasonable measures to quell any riot, affray or similar disorder*". In one case, overnight detention in a cell at the Chiefs Palace was found to be within such "reasonable measures".[352]

Section 9 (1) of the Act provides that it is the President who determines the number of *kapasus* (retainers of the Chief, having the functions of court messenger and "traditional policeman", directed by the Chief and wearing a uniform or badge of office) attached to a Chief. The team was not able to obtain official information on the numbers of *kapasus* currently allocated to Chiefs in the country or on the extent to which *kapasus*, Chiefs and other traditional leaders are in fact exercising law enforcement functions. According to anecdotal information, Chiefs generally have only two or so *kapasus.* It is only Chiefs who have *kapasus.* They do not exist at the level of village headmen. Thus, while the following text raises issues of principle in relation to *kapasus*, they are relatively small in scale compared to many of the other issues raised in the present study.

13.3.1 Ensuring respect for legality by traditional leaders and institutions

It should be acknowledged that there are no reports or documentation indicating that abuse of law enforcement powers by Chiefs is a regular source of major or serious human rights violations in Zambia today. There are nevertheless two reasons why we devote significant space to this subject here. One is that it is a neglected area. The other is that these powers, when coupled with the multidimensional nature of the power of Chiefs in rural areas (cultural, ritual, political and economic) have a serious impact on the rights of a very powerless and marginalized group of Zambians: the rural poor. If these Zambians are to feel that they are truly citizens with rights rather than "subjects" of arbitrary power, it is necessary to look closely for possible abuse of power and to combat it where it occurs.

Detention: Anecdotal information suggests that detention by traditional authorities still happens in some rural areas. Occasionally there are reports of places of detention being maintained at Chiefs palaces and by headmen.[353] The Zambian Human Rights Commission has investigated such reports, but there is no systematic attempt at documentation of this.[354] In the absence of information, one can only speculate as to its extent, as well as to the existence

[352] Court reports reveal a case from 1982 (thus predating the current constitution), *The Attorney-General (1982) Z.R. 75 (H.C.)*, dealing with the exercise of these powers of Chiefs. The plaintiff complained of unlawful detention because he had been held overnight in a cell at the Chief's Palace after being arrested by the Chiefs *kapasus* subsequent to an altercation between the plaintiff and some Chiefs at a beer hall. The court found that overnight detention in the cell was a "reasonable measure" within the meaning of the Chiefs Act. It is hard to assess from this case what the attitude of the courts would be to a longer period of detention before, or in the absence of a transfer of the detainee to the police.

[353] See the case cited above in note 12. Other examples can be found in the media. See for example: http://www.lusakatimes.com/2007/08/21/seven-chewas-detained-over-nyau-tradition/. The ZHRC has investigated claims of illegal detention cells at Chiefs Palaces: see "Chitimukulu denies having secret detention cells at palace" http://www.postzambia.com/post-read_article.php?articleId=11892

[354] None was found in the context of the present study.

and prevalence of other abuses in this regard. The lack of information is in itself problematic in relation to the enjoyment of constitutional rights.[355]

By virtue of section 11 subsection (2) *Kapasus may arrest persons reasonably suspected of committing an offence in connection with the riot, affray or disorder*. Subsection (b) provides that the *kapasus*, directed by a Chief, may detain such persons until they can be delivered into the custody of a police officer or brought before a court of competent jurisdiction to be dealt with according to law. The website of the Ministry of Housing and Local Government confirms that one of the functions of the Chiefs Affairs Unit is to undertake "*timely procurement of Chief Retainer's uniforms and handcuffs to enhance smooth operations and his identification*". This is an indication that arrest by *kapasus* is a real and continuing phenomenon.

By virtue of subsection (a) *kapasus* may direct any male person in the vicinity to assist them. Failure to do so is a punishable offence under Section 11 (3). Thus, any persons deputized in this way are also exercising public authority and are obliged to comply with the law in the same way as the *kapasus* themselves.

Supervision / accountability for law enforcement functions: Section 11 of the Act makes no reference to coordination or supervision by the police or the judiciary in the exercise of these functions beyond providing for transfer of arrested persons to the police.[356] Neither does the section set out any time limit or procedural requirement for the arrest or transfer of suspects to the police and courts. These powers need to be seen within the framework of the **24 hour rule** within which a suspect should be brought before a judge. Thus, one must assume that the *kapasu* is obliged to turn the arrested person over to the police in time so that the latter are able to comply with the 24-hour rule. Any unreasonable delay could render the *kapasu* and the Chief liable to charges of illegal detention. The police, as the receiver of anyone arrested in this way by *kapasus*, have an interest and a duty to ensure that this power is not abused and does not result in illegal detention. The Chiefs, under whose direct authority *kapasus* are acting, have an obvious duty and interest in ensuring that misuse of this authority does not render them liable to actions for illegal arrest and detention.

Section 9 (2) of the Chiefs Act provides that disciplinary control over *kapasus* vests in the President. In practice, Presidential functions in respect of Chiefs appear to have been delegated to the Department of the House of Chiefs under the Ministry of Housing and Local Government (as of late 2011 these functions have presumably been transferred to the new Ministry of Chiefs and Traditional Affairs), as mentioned above, but it is not clear if this extends to disciplinary control over *kapasus*. Among the functions of the Chiefs Affairs unit[357] is the conduct of workshops and seminars to enhance the performance of chiefs and their retainers (*kapasus*).[358] Thus, the unit is of importance in addressing a number of questions, including the law enforcement function of chiefs and *kapasus* (see below). The authors are not aware of any regulations relating to law enforcement functions having been adopted by this unit. It would

[355] Nevertheless, this should not be seen as a problem only among traditional structures. Elsewhere in the current study there is discussion of failure to comply with legal requirements by the police and state justice institutions also.

[356] Neither does the Police Act contain any reference at all to Chiefs, Traditional Leaders or *kapasus.*

[357] See above, note 7.

[358] http://www.mlgh.gov.zm/index.php?option=com_content&task=view&id=25&Itemid=34&limit=1&limitstart=1

also seem to be open to the House of Chiefs to discuss this matter and to adopt recommendations on it pursuant to Article 131 (b) of the Constitution.

Confessions: Some judgments of the Supreme Court deal with the admissibility of confessions made to village headmen.[359] *Moola v People*, a 2000 case, confirms the position that village headmen are not considered public authorities for the purpose of the investigation of crime, so that the requirement under the Judges Rules to issue a caution does not apply to any statement given to village headmen. As a result of this position, the judges of the Supreme Court did not see any reason to exclude a confession made before the Village Headman (as well as other members of a village committee), stating that Headmen are not under an obligation to issue a caution. The implication of the finding that village headmen do not have public authority in relation to criminal investigations would seem to be that headmen do not have power to arrest and detain persons beyond the power of citizen's arrest that all people have.

Secondly, it seems clear that the above reasoning does not apply to arrest, detention and questioning by *kapasus* (or indeed other persons designated by them), as the latter are specifically authorized to exercise public authority in criminal justice by virtue of section 11 of the Chiefs Act. Section 10.1 (a) clearly requires that this be carried out in accordance with the constitution, written law, natural justice and morality. They should be specifically instructed regarding the prohibition of torture and cruel, inhuman and degrading treatment. One possible inference could be that *kapasus*, and anyone working under their authority, should generally issue a warning to suspects prior to any questioning. Otherwise, their reports of statements allegedly made by arrested persons should not be accorded significant weight by the courts.

Mistreatment: A worrying aspect of the *Moola* judgment is that despite evidence that violence (beating) had been used to obtain the confession (not controverted in the judgment), the Supreme Court found the same reasoning to be applicable: since the person who had seemingly administered the beating was not a public official, there were no grounds to exclude the confession that resulted from it. The Court did not seem to make any statement condemning such treatment or calling for investigation and prosecution of those responsible. Depending on the gravity of the beating, this attitude on the part of the Supreme Court could amount to tolerance of, or acquiescence in torture within the meaning the UN Convention against Torture, to which Zambia is a party. Article 15 of the Convention lays down a clear requirement not to admit evidence obtained as a result of torture as proof of guilt of an accused. While this may not have been the intention of the court (which was perhaps mostly concerned with defeating what it saw as weak grounds for a successful appeal against conviction for murder), the tolerant attitude seemingly apparent from the judgment could lead to tolerance of violence against suspects, as long as it is committed by persons in a shadowy zone of law enforcement. This would be very unfortunate. It is to be hoped that the higher courts will make it clear that torture and mistreatment of suspects is entirely unacceptable, no matter who commits it. Any abuse or physical mistreatment of detainees should be punished, and persons engaging in it suspended or dismissed from their positions. Judges should not admit any evidence obtained as a result of torture or mistreatment, no matter who is responsible. The Courts and all criminal justice agencies must devise appropriate ways of

[359] See, importantly, the case of *Banda* v *The People* (1986) Z.R 105, and Moola v People (SCZ Judgment No. 35 of 2000) [2000] ZMSC 47 (17 October 2000)

ensuring that law enforcement, no matter who is responsible for it, takes place with respect for fundamental guarantees of the constitution and human rights. While this is challenging, it must be clearly established as the prevailing norm of the criminal justice system.

These cases, as well as the research conducted for the study in general, make it clear that the exercise of law enforcement functions by a range of persons whom the state has limited opportunities to control and monitor will continue to be a feature of the administration of justice in Zambia for some time. There would seem to be a clear need for a tightening of regulation and supervisory mechanisms in this area, though this obviously depends on the extent to which people are in practice being arrested and detained by traditional leaders and *kapasus*. Any persons who carry out arrests must be made aware of the rights of suspects. The Chiefs Affairs Unit in the MHLG is far removed from the daily functions of *kapasus* and Chiefs, and any supervision of functions and effective discipline cases related to law enforcement would require coordination with others closer to the scene.

Recommendations on the law enforcement functions of Chiefs

A set of regulations should exist to govern the taking into custody of persons by traditional authorities, as well as relations between police and traditional authorities taking persons into custody. The police should be made responsible, at district level, for the supervision of the law enforcement powers of Chiefs and their *kapasus.* The House of Chiefs should be involved in the drafting of recommendations in this regard.

Serious or repeated failure to respect these rules without good excuse should lead to dismissal or the loss of law enforcement powers, as well as to other appropriate legal action.

In addition to the possibility of a court action for unlawful arrest and / or detention and mistreatment, there should be an avenue of complaint regarding the abuse of such powers for citizens, both to the OIC of the police station and to the PPCA.

13.4 Recognition of an Adjudicative Function?

While the law enforcement functions of Chiefs are recognized by all three arms of government as seen above, silence prevails in relation to an adjudication function. The Zambia Law Development Commission, in its *Review of the Local Courts System,*[360] writes of the "*silent agenda of ignoring the traditional system to its death through the introduction of local courts*", though observing that this agenda has not succeeded.[361] Dr. Matibini likewise argues that:*"Despite the important role played by traditional leaders in conflict prevention, and management, their role is largely marginalized.*

The Chiefs Act does not explicitly mention an adjudication function or any authority to adopt legally binding decisions in disputes. This is in contrast to the position in some of Zambia's neighbours (as well as other countries in Africa), where such a function is explicitly recognized in legislation.[362] It is nevertheless uncontroversial and accepted that the "*traditional functions*"

[360] Transmitted to the Minister of Justice in February 2006.
[361] At page 12, summary of findings, para. 2. The Commission's recommendations are discussed below.
[362] An example is the Traditional Authorities Act (2000) in Namibia. See Section 3 (1) a) and b). The recognition of customary justice structures in Namibia is carried further in the Community Courts Act of 2003. Zimbabwe's Local Courts are presided over by traditional leaders.

of the office of chief under African customary law included an adjudicative function. As such it can be argued that Section 10.1 (a) constitutes a legislative basis for a dispute resolution by the traditional leaders. An acknowledgement of traditional courts can also be found in state court jurisprudence. The Supreme Court of Appeal in 1999 mentioned them in the case of *Mukelabai v Widmaier*.[363] Likewise, section 50 (1) of the LCA recognizes African customary arbitration.

13.4.1 Legal recognition of African forums and settlements

Previous studies of the LCA by the ZLDC study and by Dr. Matibini.[364] These studies point to section 50 (1) of the Local Courts Act, which criminalizes persons who "*purport to exercise judicial functions as [a] local court justice*". The second part of the section makes an exception:

"*Provided that nothing in this subsection shall be deemed to prohibit any African Customary arbitration or settlement of any matter with the consent of the parties thereto if such arbitration or settlement of any matter with the consent of the parties thereto is conducted in a manner recognized by the appropriate African customary law*".

Thus, traditional modes of dispute settlement are legal and acknowledged. While the subsection speaks of "*any matter*" the indirect recognition only applies to disputes of a civil character, as no criminal jurisdiction is given to traditional justice systems.

Forums implicitly recognized by Section 50 (1): While neither the Constitution nor the Chiefs Act mentions the role of village headmen[365], these play a vital role for ordinary people in villages, especially in the rural areas, where they are close at hand and constitute the most accessible part of the traditional justice system. (Indeed traditional courts at the level of chiefs are just as far or even further away from the people as Local Courts are, usually being located in the district town, very often close to the Local Court.)

Moreover, Section 50 (1) is not limited to chief's courts, but includes settlements "*recognized by the appropriate African customary law*". This would seem at the least to include settlements reached with the help of family councils and village headmen, as well as chiefs. Dispute resolution by village headmen and family councils is so-well established in history and custom that the courts could hardly fail to recognize dispute resolution at these levels as "*African Customary arbitration or settlement"* within the meaning of the Act. Thus, as far as the Local Courts Act is concerned, a settlement by a village headman or woman or a family council could seemingly be considered on the same basis as one reached in a chief's court.

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[363] [1999] ZMSC 41. This is a case involving customary acquisition of land. In this case, the Supreme Court acknowledged that 'the plaintiff lost [his case] in the Traditional Court'. The facts of this case are available on the SAFLII Database of Cases, http://www.saflii.org/zm/cases/ZMSC/1999/41.html (last accessed January 2011).

[364] ZLDC, 2006, Review of the Local Courts System, pp. 53 - 54.

[365] Headmen are mentioned and defined in Cap 289, the Registration and Development of Villages Act of 1971. This legislation makes no reference to adjudicative functions. Here, a headman is defined as "*a villager who is recognised as the Headman of a village in a rural area by all or a majority of the other villagers under their customary law to be their Headman and who is also recognised as such by their Chief*. The definition of a "village" includes the requirement that there be a headman. Headmen are required by the Act to fulfil functions of registration concerning the population. Thus, headmen do exercise public authority in Zambia in some fields.

Indeed, the section could potentially go even further than this. As long as they are sanctioned by customary law, section 50 (1) could give recognition to dynamic, modernized forums whereby customary law develops to recognize new and more democratic and participatory forms of dispute resolution. When customary law is praised for its responsiveness, dynamism and flexibility, it would seem wrong for the courts to stand in its way if it adopts forms that come closer to Zambian constitutional values.

Status of settlements reached by customary means: If dispute settlement according to customary law is legal, what is the nature and status of such settlements? There are two aspects to this question: (i) does the legal system see them as binding decisions or as non-binding agreements? and, (ii) could they be enforceable by the courts?

Subsection 50 (1) of the Local Courts Act appears to permit both outcomes that are binding on the parties and those that are not, mentioning both "*arbitration*" and "*settlement of any matter with the consent of the parties thereto*".[366] If a party to such a settlement were to contest it before a state court, it would appear to be open to the parties to argue that the traditional court outcome or settlement had been agreed to as binding between the parties, either as a prior condition to the arbitration or after the settlement had been reached. It would be up to the state court to arrive at a finding.

Subsection 50 (1) of the Local Courts Act is also silent on the second question, enforcement of settlements reached according to customary law. Thus no express provisions exist in Zambian law for the legal enforcement of customary settlements or prohibiting such enforcement. It could thus be argued that as long as enforcement of customary settlements complies with other norms and rules of law, that it is open to the courts to give recognition to them. This issue is discussed in the following section and in the discussion on policy options and recommendations at the end of this chapter.

To sum up this section, the current legal position takes little heed of the reality in Zambia, especially in rural areas, that the systems of family councils and of traditional leaders, from village headmen to Chiefs exercises an important function in the resolution of disputes. Nevertheless, the flexibility offered by section 50 (1) of the Local Courts Act opens up interesting and little used possibilities for the recognition of customary settlements.

13.5 The Normative Framework of Traditional Justice under the Chiefs Act

Insofar as the Chiefs Act does (indirectly) recognize the adjudicative function of Chiefs, it subjects this to a limitation. What is still often called the "repugnancy clause"[367] is contained in

[366] Arbitration is usually understood as a process where both parties commit themselves to a resolution of a case by a third party, accepting in principle that the outcome will be binding upon them. It is thus distinguished from settlement by mutual consent. For present purposes, we understand mediation as a process where any external facilitator assists the parties in the process of communicating with one another in order to find a solution, but does not actively intervene to suggest a solution or decide upon the outcome. Conciliation is here understood as a process where a third party proposes a compromise of some sort that may be mutually acceptable.

h[367] In some countries in Africa, the phrase "repugnancy clause" is no longer used because of its overtones of colonial era bigotry and prejudice. As the phrase is still in common use in Zambia and because it is close to the wording of the relevant laws, we use it here.

section 10 of the Chief's Act, allowing Chiefs to exercise these functions "in so far as the discharge of such functions is *not contrary to the Constitution* or *any written law* and *is not repugnant to natural justice* or *morality;* and *Cap. 1"* (ie. the Constitution). If the Government of Zambia incorporates the provisions of the CEDAW Convention into Zambian law, these would apply to Chiefs as well as other state officials.

The "repugnancy clause" as contained in other legislation (the Subordinate Courts Act and the Local Courts Act) is discussed elsewhere in the present study. Insofar as the Chiefs Act does permit Chiefs to exercise a (non-binding) adjudicative function, they should be guided by the practice of Subordinate Courts and the Local Courts as to what is contrary to the Constitution and to written law, and what is deemed to be repugnant to natural justice or morality.[368] Thus, a traditional leader or traditional court should not promote any settlement of a case that conflicts with the Constitution or any written law, or which is repugnant to natural justice or morality. It is important to point out however, that the clause is formulated broadly. It does not apply only to the *outcomes* that result from traditional dispute settlement, but more generally to the exercise of Chiefs functions. It thus requires that they be exercised in a way that is consistent with: (i) the Constitution (ii) written law (iii) natural justice and (iv) morality; as these concepts are interpreted by the Courts.

The requirement of conformity with natural justice as laid down in the Section 10 (1) (a) has procedural aspects as well as substantive ones (i.e. outcomes of cases). Procedurally, it demands fairness of process, including impartiality of the adjudicator(s), an absence of bias based on any discriminatory factors, a substantially equal hearing of both parties, and a decision based only on relevant facts and law. Justice should be seen to be done.

The provisions of Article 18 of the Constitution on fairness of hearings are also relevant in this regard. While traditional courts should probably not be considered as "courts or adjudicating authorities" within the meaning of Article 18, the intention of the Constitution that Zambian citizens should be enjoy fair and impartial decision making is clear. This should be taken heed of by the courts at all levels.

13.5.1 Normative frameworks applied by traditional courts and the repugnancy clause

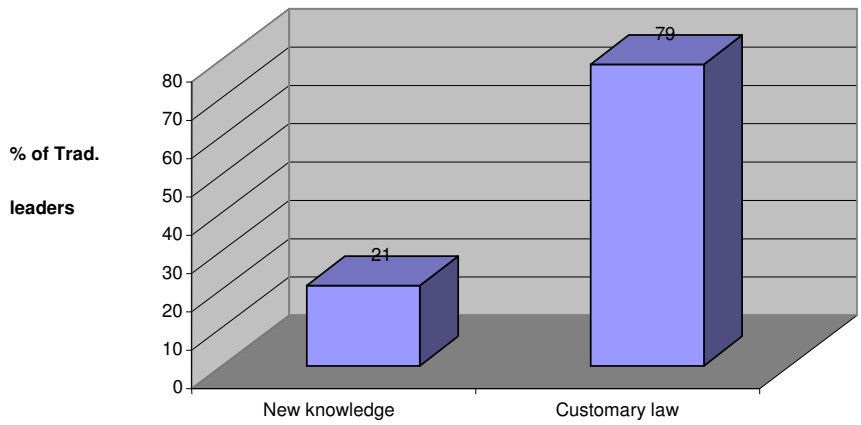
Chapter 2 deals with the Zambian dual legal system and the development of customary law. Traditional leaders assert that they apply customary law in settling disputes. As has been pointed out in many studies, the rural population gives primacy to customary law in most parts of the country.[369] Each of the 73 ethnic groups in Zambia has its particular customs, ways of settling disputes and maintaining social order. [370]

Survey responses from the 40 traditional leaders interviewed are relevant here. Some had attended training or workshops on state law. Few traditional leaders gave very specific answers about conflicts between statutory and customary law, seemingly showing that

[368] An exploration of how the latter concepts could be applied by Zambian courts applying African concepts of morality is inspired by Lungowe Matakala's work on this theme.
[369] African Human Security Initiative Zambia - Crime and Criminal Justice Issue Paper 2007 by Dr. Annie Barbara Chikwanha
[370] African initiative Zambia- THE CRIMINAL JUSTICE SYSTEM IN ZAMBIA Enhancing the Delivery of Security in Africa African Human Security Initiative Monograph No 159, April 2009

knowledge of statutory law was not very high. 36% were aware of conflicts between customary and statutory law. In the event of a direct conflict between statutory and customary law, nearly four out of five traditional leaders said that they would continue to apply customary law rather than the "newly learnt" statutory law. On the face of things, this does not give much reason for optimism regarding the application of the "repugnancy clause" by traditional courts.

Table 13.5.1 Application of learned Statutory Knowledge vs customary law



In response to other questions however, nuanced replies were given, showing that traditional leaders had a general awareness of the requirements of statutory law, and that there are conflicts in respect of women's rights to property, in inheritance cases, and with regard to polygamous marriage. It is also important to understand the reasons for the hesitations of Chiefs and to recall the nature of the process of customary dispute resolution. Thus that the Chief's role is generally to lend his (or her) authority to a consensus or settlement that has been reached in what – despite some flaws – is a rather participatory process. The Chief does not act as a "sole arbiter" the way a Magistrate does. Thus, these responses should not necessarily be interpreted as showing only chiefs upholding conservative norms. Case outcomes might be reflecting what the chief and counsellors perceived to be the consensus of values among those who intervened during the hearing of the case.[371] If this is so, other means might be required to induce change.

13.5.2 Procedural requirements of the repugnancy clause

Procedural aspects of fairness also arise from the repugnancy clause. As pointed out above, traditional leaders are obliged to comply with "natural justice". In common-law doctrine, the requirements of natural justice are well-established to require at the very least that:

(i) both sides must be given an adequate and equal opportunity to be heard, and

(ii) the adjudicator must not be not biased.

[371] We fully acknowledge that there might be inherent biases in this, where women are reluctant to speak etc. Nevertheless, it reflects the complexity of processes of change.

A third basic rule, that decisions must be based only on evidence, would almost always be required. Depending on the resources and sophistication of the system, additional rules of fairness may also be required to secure that decisions be based on law that is known to all parties and consistently applied and that the possibility of appeal is present. Zambian jurisprudence might, in view of the requirement to comply with the constitution, choose to add other aspects of elementary fairness or to extend the reach of the above principles. For example, the requirement of a fair hearing might demand processes or mechanisms to ensure that vulnerable people, including children, are not unfairly treated. A prohibition on the use of any form of coercion would also stem from the constitution. Moreover at least to the extent that they are known to the adjudicator, people should be made aware of their rights (including knowing that the traditional court is not a binding judicial instance).

Broadly speaking two sets of issues are of relevance when considering the merits of adjudication processes in traditional courts. On one hand there is the question of the accessibility of these mechanisms, and on the other, their compliance with basic standards of fairness (including equality) and effectiveness.

Accessibility issues include:

- Distance, time, cost (fees and opportunity cost) language, familiarity;
- Equality of access, and gender discrimination in regard to being heard, and whether psychological barriers are placed in the way of women litigants, reinforcing and gender role expectations

Compliance issues:

- Coercion and mistreatment
- Impartiality of adjudicators;
- Fairness of process;
- Certainty and consistency in decision making (perhaps including keeping of records and access to information concerning practice)
- Procedural effectiveness, including time taken and enforcement of decisions.
- Effectiveness of appeal systems

To the extent that traditional leaders are still resolving a significant number of disputes, and this is actively or tacitly accepted by the state, consideration should be given to how to ensure that this takes place in conformity with the law. While most substantive issues are dealt with in other chapters, the present chapter will try to deal with these procedural issues. We will examine aspects of the existing procedures in traditional courts from the point of view of fairness. Later in the chapter, recommendations are made in respect of how these issues can be addressed.

13.5.3 Procedure applied in practice

Observer accounts from research assistants highlighted a number of factors that make traditional courts stand out from the "modern justice system.[372] The advantages of the traditional courts are seen most strongly in terms of their accessibility.

Non-recording of decisions: In practice, proceedings and decisions are generally not recorded, making it difficult to standardise the decision making and quality of justice dispensed or to monitor the substance of decisions made or observe inconsistencies. The non-codified and flexible nature of customary law means that it can be very pragmatic in the solutions that it reaches. While pragmatism has advantages, it may also mean treating powerful people differently to poorer and less influential ones.

The ZLDC, found that "In the traditional courts …, researchers found that there is no record-keeping as such, but rather the traditional courts keep a register of complaints and their hearing dates (like diaries). The traditional rulers interviewed said that they use oral traditions and as such, written records are not necessary. The Chiefs further informed researchers that traditional courts apply precedent through the use of proverbs. They argue that this is the most efficient way of dealing with cases as they are based on events of the past. They said this also saved time."[373]

Gender discrimination: The 2006 ZLDC study found that while "Most traditional officials said that they treated men and women equally in court, by giving them an equal opportunity to state their case, a statement to be taken with a pinch of salt. Female litigants spoken to in the research recounted stories of the ridicule that they are subjected to in traditional courts, and that proceedings are steeped in culture, which makes it difficult for them to take their grievances to court, especially where men were involved."[374]

Language: Proceedings in traditional courts are conducted in a language that both parties are comfortable with. They almost always take place in the vernacular of the particular village or community. The terms used in court are simple and familiar. Technical language is not used in the proceedings.

Speed: Traditional courts and dispute resolution mechanisms – particularly at the lower levels - are "fast track courts" cases are quickly disposed of, and unlike the local courts which are usually congested, the traditional courts are easily accessible to the people. Nevertheless, this does not necessarily always hold true. There are also reports of cases pending in traditional courts for long periods.

Expense: The system is said to be inexpensive: most members of the community can afford to have their case heard before the court. However, traditional courts have adapted to social change and do charge fees. It is reported that at the level of Chiefs' Courts at least, these fees are kept at the same level as Local Court fees. Figures like K5, 000 for a summons, or K7, 000, a

[372] A2J situation analysis field study ; Research assistants' notes from the field
[373] ZLDC 2006, review of the Local Courts System, 2006, p. 87
[374] ZLDC 2006.

chicken or goat as hearing fees was also mentioned. Village headmen feel they have to be paid or at least fed while sitting at a traditional court.[375]

Procedure: Research has noted that "Traditional courts procedure is inquisitorial and thus more akin to the civil systems than the common law adversarial model."[376] As in the Local Courts[377], there is no legal representation.

Lack of impartiality: There were reports in one area that in cases where the traditional leaders had an interest in the case, they refused and threatened that one would be expelled from the village if they do not respect the judgment passed.

Illegal coercion and "contempt of court": The use of coercion to obtain confessions or use of trial by ordeal is occasionally encountered, sometimes amounting to severe mistreatment or torture. It should be viewed together with the imposition of illegal penalties, discussed below.

There are also a number of times when community members especially women, the poor and children have been cited for contempt of court and punishment for failure to pay, including treatment that would amount to cruel, inhuman and degrading treatment including tying someone to a tree, forcing them to sit in the sun for a number of hours. The survey assistants heard one account of a woman had her hands tied up and was made to hang from a mango tree. Thus in some areas the traditional reconciliatory nature of the traditional court may have changed significantly. Civil and criminal cases stemming from the same event are often heard simultaneously. An offender used to be sentenced to some punishment such as banishment from the chiefdom, corporal punishment, or ordered to the pay compensation. The accused person must prove his/her innocence.

Ill-treatment also surfaces in relation to punishments meted out by traditional courts. Eye witness accounts from the A2J field teams mirror the conclusions that drawn by the African Human Security initiative. [378] They may be swayed by mob influence to arrive at decisions. One relatively well-documented and fairly recent case concerns allegations the use of so-called "water "in Mazabuka, in Chieftainess Mwenda's area. "Water dipping" is a euphemism – the practice was similar to the much criticised torture of terror suspects through waterboarding. From newspaper reports it appears as though large numbers of people looked on and a number of headmen and traditional chiefs were involved, as well as a "neighbourhood watch" association. Reports seem to show that it was documentation and intervention by the ZHRC, rather than the police, which brought these practices to a stop.[379]

There may be support of harmful and discriminatory practices, as discussed in chapter 11 (discussion on reconciling defilement cases) and in chapters 14 and 15 (discrimination in family

[375] Charles Dinda , Traditional courts , LADA.
[376] ZLDC 2006.88, para. 5.12
[377] In theory, legal representation is permitted in the Local Courts in criminal cases. In practice, it is almost unheard of.
[378] See p. 12
[379] http://www.postzambia.com/post-print_article.php?articleId=7734

and property law matters). Nevertheless, there are also examples of Chiefs who have worked to eliminate early marriage and to combat other harmful practices.[380]

Treatment of children by traditional courts: Little information or documentation is available on the treatment of children by traditional courts. Chapter 11 discusses the evaluation of the Child Justice Forum (CJF), and how the Barotse Royal Establishment was represented in the Mongu CJF, and how this might help in ensuring that traditional courts in Western Province are "kept abreast of developments in the field of child justice".

In the survey responses, Zambians overwhelmingly (83%) responded that children old enough to speak out and have an opinion should be allowed to speak in disputes that concerned them. Thus, in this instance, popular opinion would seem to be entirely in conformity with instruments such as the convention on the rights of the child.

Enforcement of settlements: Law users and civil society organizations have cited the inability of the traditional courts to enforce judgments' as one of the main weaknesses of the traditional court system. This finding is confirmed in the ZLDC report cited herein, as did the survey interviews carried out for the present study. Traditional leaders frequently bemoaned the lack of support from state agencies for enforcement of their decisions and thus a weakening of their ability to provide this service to the community.

13.6 Structure and composition of traditional leadership and traditional courts

While there are many variations from tribe to tribe and area to area, traditional authority is generally divided into a number of levels or categories, from Paramount Chiefs to Senior Chiefs, Chiefs, Sub-Chiefs and Headmen. There are also deputy chiefs, and among some ethnic groups, such as the Lozi, there may also be institutions such as a chief minister (known as the *Ngambela*). While there may not necessarily be courts corresponding to all of these levels, there are generally traditional courts operating at least at the level of Village Headman, Sub-Chief and Chief[381], called by different names but often popularly known as *katengo*[382] courts in Zambia.

Very commonly, the lowest is a "court" or adjudication function at a village headman's home, where the Village Headman is assisted in his functions by a group of village elders. An unsatisfied party can appeal up to the Court at the Chief's Palace, the highest court in the

[380] See: http://allafrica.com/stories/200510100697.html (Some Chiefs resolving to ban sexual cleansing Central Province, 2005):
http://www.times.co.zm/news/viewnews.cgi?category=6&id=1291796364

[381] See ZLDC, review of the Local Courts System, 2006, para. 4.7. See also section 4.5.3 of the report, describing the system in Western Province "dispute settlement starts with the village headman. The village headman forms a council comprising elders in the village, which he presides over. Where parties are dissatisfied all matters from the village level go to the *Silalo Kuta*, sub-district traditional court."

[382] Katengo means tree. Since these courts are not legally recognised, sessions are usually held under trees except in a few communities where through the initiative of the traditional leaders, simple shelters have been built. In western province the shelter for this court is erected at the entrance to the palace and adjacent to a local court.

tribe. In recent times, communities and traditional leaders have been innovative, creating zonal courts where a number of village headmen, headed by a senior headman, meet to look at a particular case. However, community members are not forced to appeal to zonal courts from a village headman's court, and may take their appeal directly to the chief's court. It is not uncommon for this system to have family tribunals especially with members of the royal family and a council of elders making up the settlement structure. The Chief may be the only person authorized to formally pass judgment at the level of the Chief's court, but senior headmen in the tribe play a central role in assisting the chief in his adjudicative duties.[383]

Table 13.6 Traditional Courts Structure

Paramount Chiefs (5)								
Senior Chiefs (54)[384]								
Chiefs 286[385]								
Sub-Chiefs								
Zonal Courts (Groups of Headmen) N/A								
ZC		ZC		ZC		ZC		
Village Headman (VH) N/A								
VH	VH	VH	VH	VH	VH	VH	VH	VH

[383] ZLDC PG:13-18:-25-28

[384] No governmental or academic source was found for the numbers of chiefs. The numbers are taken from a 2006 newspaper article found on the Times of Zambia website.

[385] Source: Ministry of Local Government and Housing website: http://www.mlgh.gov.zm/index.php?option=com_content&task=view&id=25&Itemid=34&limit=1&limitstart=1

13.6.1 A requirement of structural equity and accountability?

Section 10 of the Chiefs Act refers to the exercise of functions. Does the obligation to respect the Constitution include a requirement to "*recognize the equal worth of men and women in their rights to participate*"?[386] On the face of things, such an obligation would seem to apply to Chiefs when they appoint village heads and other officials. It is increasingly recognized that an adjudicative body, in order to be fair, should be balanced so as to ensure representation of society, not representing only one set of interests and points of view. Thus gender balance is now generally acknowledged to be necessary in all bodies exercising public authority, as reflected in international instruments ratified by Zambia, including the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[387]. By ratifying this instrument, Zambia committed itself to ensuring "increased and effective representation and participation of women *at all levels of decision-making*".

Likewise, by ratifying the CEDAW, Zambia committed itself to: "Take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, … *ensure to women, on equal terms with men, the right:... (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government*;

There can be no doubt that traditional leadership and the public authority exercised by traditional leaders are public offices and public functions in Zambia within the meaning of these international treaties. Thus the state is required by international law to take measures to ensuring representation of women in these offices and bodies. As a matter of national law on the other hand, the provisions of Article 23 (4) (d) of the Constitution may still operate as a bar to fully addressing discrimination in this regard.

Gender balance in practice: Efforts are being made by some Chiefs to improve gender representation in traditional leadership. The 2006 ZLDC study mentions how Chiefs in some areas have a deliberate policy of appointing female headpersons, demonstrating the influence of Chiefs in the process.[388] It was not possible to obtain figures on the number of female chiefs in Zambia, though it is estimated that among the 286 Chiefs, the number of women is less than 20%. The figure for village heads is not known either. In some areas, female *ndunas* are appointed, or certain traditional functions are exercised by a female traditional leader, as is the case in the Southern Province.[389]

In other countries in Africa, government policy has systematically worked to improve gender equality in local representative institutions, Uganda's Local Councils, including Local Council Courts, operate with a requirement of at least 33% female representation. South Africa imposes a similar requirement in relation to traditional councils. [390] Legislated quotas of this kind can be one ingredient in a strategy of increasing equality, but they are unlikely to succeed on their own and they may produce a backlash.

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[386] 1996 Constitution, third preambular paragraph.
[387] Zambia deposited its instrument of ratification of this international treaty with the African Union on 7 July 2006.
[388] ZLDC, 2006, p.81.
[389] Ibid.
[390] See Local Council Courts Act, 2006, Uganda and Traditional Governance and Leadership Framework Act, 2003, South Africa, p.3

More broadly though, the lack of control of chieftaincy and traditional courts that stems from the undefined legal status of these courts can lead to abuse going unchecked.[391] This is not necessarily an argument for recognition as courts as such, but rather for oversight of the exercise of traditional leaders' functions in general. It would be possible to institute a control mechanism based on the exercise of traditional functions, or to impose conditions on some form of recognition of settlements reached in these forums.

Structural accountability issues: It is useful to distinguish among various ways of securing accountability, which can be based in either in customary or state structures. That traditional systems use different ways of trying to ensure accountability does not necessarily mean that they perform more poorly than state structures in this respect.

Accountability systems in respect of traditional adjudicators could in principle be *downward*, towards members of the community, *horizontal*, towards other power holders, or *upward*, towards hierarchically superior or more powerful authorities (either traditional or not). Accountability is closely linked to transparency. Judges in formal courts are held accountable by the possibility of checking their judgments for conformity to accessible statutes and judicial precedent, by the possibility of appeal and by systems of professional discipline and inspection. All of these mechanisms can, depending on circumstance, work more or less well.

Where chiefs become more distant from their communities (living in the capital rather than at the palace), community control may be weakened. On the other hand, factors such as the availability of alternatives, (including the Local Courts) may exert demand-side pressure on traditional courts to measure up to people's expectations of justice. Higher levels of education on justice and governance issues and a more educated populace may strengthen these effects.

Accountability and legitimacy: It is clear that forms of accountability of traditional leaders are generally not those of the modern republic. They are neither based on democratic elections as with politicians nor on law and rule-based public office like state officials. No qualification is demanded to sit as a judge at a traditional court apart from the fact that one has to be a village headman who often acquires the position through birth.

Doubtless, levels of accountability in traditional justice also varied and continue to vary greatly in their effectiveness, depending on a number of factors, including the individual personality of the chief, the strength of the counsellors surrounding him (or her) and the wealth, power and education of members of the community. Some may argue that the tightly knit nature of traditional rural communities with known values and precepts put limits on leaders from becoming excessively arbitrary in their exercise of power. Likewise, the collective elements of leadership, where a chief is surrounded by a council of elders may ensure a measure of consensus and broader access. In discussing accountability, is also necessary to deal with legitimacy.

Legitimacy generally: The 2008 Afrobarometer study[392] showed reasonable levels of trust in traditional leaders: 62% of Zambians interviewed thought that traditional leaders were interested in their problems, 48% thought that they could be trusted to do the right thing, and

[391] Charles Dinda Paper On Traditional courts prepared for Traditional Leaders in Southern Province 2002.

[392] Afrobarometer / Carolyn Logan Working Paper No. 93, TRADITIONAL LEADERS IN MODERN AFRICA: CAN DEMOCRACY AND THE CHIEF CO-EXIST? February 2008

45% thought that they were relatively free of corruption. While these figures do not indicate a very high level of overall trust in traditional leaders (the survey noted an overall mean figure of 3.4 out of a possible high score of five), it is relevant to compare them with the perception of other figures of authority: overall, there was a higher level of trust in traditional leaders even than in the presidency (which came in second) and local authorities and MPs. Traditional leaders enjoyed a higher level of trust (52%) than the courts (49%) or the police (42%). There was some evidence that more highly educated urban dwellers showed less support for traditional leaders than less educated rural ones, but this tendency was not overwhelming and its importance should not be exaggerated.

Importantly, though, this survey found higher levels of support for traditional leaders where there was also a general approval of local elected and governmental officials. This would seem to indicate that traditional and governmental leaders and officials are not so much in *competition* with one another for the approval of the public as they are in a situation of complementarity. Put simply (and in very general terms), what the public seems to want is good government services from those in leadership positions, and a good performance by one part of government raises the approval ratings of all. Phenomena such as illegal taxation by traditional leaders are discussed in chapter 15 on property rights.

13.7 Substantive issues and case loads

Since there is no explicit recognition of traditional courts, they have no recognized jurisdiction. The Local Courts Act section 50 makes it at offense for anyone to sit and adjudicate over any case without authority. Traditional leaders therefore do not have jurisdiction to adjudicate in criminal matters. In practice, there continue to be reports of traditional courts deciding even over serious criminal matters, including defilement (both so-called “peer to peer” and more obviously abusive defilement). Reportedly, traditional courts often attempt to reconcile the victim and offender. With the family playing an important role in the settlement.

In fact, traditional courts are dealing with a wide range of issues, civil and criminal, including witchcraft, offences against the person, family law issues, and property, especially real property cases.

Many actors within the formal justice system have a negative view of traditional justice, being quick to cite examples of abuse.

13.8 Perceptions of traditional courts and linkages

Many justice sector actors have strong views on traditional courts, and cite examples of abuse and injustice. While many of these stories undoubtedly have a basis in truth, there is also exaggeration, and perhaps a failure to recognize that this does not represent the whole truth. Like Local Courts, traditional courts are trying to fill a gap without much in the way of capacity or resources. Many are doing their sincere best to respond to a need that is not otherwise being met.

Linkages between Local Courts and Traditional Leaders can be both positive and negative, and it would be misleading to generalize. At worst, there are instances of Traditional Leaders interfering with the action of Local Courts to prevent their operation and using various means

to discourage litigants from approaching them. In practice, a Local Court Magistrate will often need to maintain good relations with a traditional leader. Opposition or misunderstandings can mean that a traditional leader can hinder the effectiveness of a Local Court in various ways, by discouraging people from cooperating with it or from enforcing its judgments.

From Post Report:

"an officer at the judiciary's Malabo local court said the Mwenda court had paralysed the operations of the local court in the area as the headmen forced the people to appear before their court.

The officer who preferred to remain anonymous said the traditional court went as far as squashing judgments passed by the local court and made their own new judgments.

"We are just loafing here because most of the cases are dealt with by the traditional court. People prefer that court because cases are disposed off within a day and punishments are highly enforced compared to our local court that follows the procedures and does not want to infringe people's human rights," he disclosed.[393]

The cited ZLDC study also notes however that traditional courts are sometimes assisting Local Courts by lending them a room or building to hold sessions in.

Thus, it is possible to find examples of both obstruction and positive facilitation. Beyond both of these viewpoints, the undeniable strength of the traditional system is its outreach through the system of village headmen and zonal leaders. This allows disputes to be settled at a very local level in a way that the Local Courts are not capable of. There is a potential for constructive interaction between Local Courts and Traditional Leaders.

The same goes for interaction between police and traditional leaders. The issue is not whether police and traditional leaders should cooperate, but how. This is discussed in chapter 10 on police – community links.

13.8 Programmatic interventions

The introduction of paralegals at community level in Southern, Eastern and Luapula Provinces by NGOs[394] is one alternative to ensure the indigent in rural areas have access to justice. The concept has been well received by traditional leaders and in certain instances traditional leaders consult the paralegals.

Traditional leaders, especially those who actually sit at traditional courts, have over the years opened up to training and these could be trained in paralegal skills as well. Training could help set standards among these courts, and a code of conduct and a monitoring system could be used as a supervisory tool.

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[393] http://www.postzambia.com/post-print_article.php?articleId=7734

[394] LADA in Southern Province, Eastern Province Women Development Association and Mansa Women Development Association Work with paralegals at community level. LADA has provided consultancy to the last two

13.9 Summary of policy options and recommendations

A number of options are open to the Government of Zambia and the judiciary in regard to traditional courts. These can be roughly summarized as follows:

1. Keep things as they are at present;
2. Regularize current practice – i.e. full recognition of traditional courts with power to make binding decisions in civil and even some criminal matters;
3. Recognition as civil courts;
4. Moves to further marginalize the traditional system;
5. Develop the potential of conditional recognition of traditional courts as non-binding arbitration / mediation forums.

The option of maintaining the status quo: It must be recognized however that none of the available options is easy or cost-free, including the option of doing nothing and leaving things as they are. In this option, the cost is borne by the ordinary people of Zambia. Thus, we do not recommend the option of doing nothing. Likewise, while chapter 12 fully endorses support to the Local Courts to enhance justice there, we also recognize the importance of the traditional system to Zambians. As a result, we do not endorse moves to marginalize the traditional courts.

The option of recognition as courts: Roughly speaking, option 2 and 3 above to some extent reflects what was previously been done in neighbouring Malawi (2) and what is currently done in Zimbabwe (3). The ZLDC in their 2006 review of the Local Courts found the traditional court system to be viable and recommended that it be officially recognized.

There would seem to be no bar to the Parliament of Zambia under the existing Constitution (1996) adopting legislation recognizing traditional or community courts in a more explicit way or providing an express mechanism for enforcement of settlements reached in traditional courts. Nevertheless, the Constitution requires[395] that any such courts be independent and impartial[396] and comply with a judicial Code of Conduct. The links of Chiefs to the executive, discussed above, would either need to be changed or provision would have to be made for a clear separation of the functions of law enforcement and adjudication by traditional leaders and the persons exercising them.[397] It would require changes in the traditional and current functions of the Chiefs (i.e. different persons would have to exercise the executive (law

[395] See Article 92 (2).
[396] *Independence* of the judiciary usually refers to ensuring that there can be no undue influence by the other arms of government, especially the executive. *Impartiality* usually refers to ensuring that there can be no bias in relation to the parties to a case or dispute.
[397] The 1972 Chona report, paragraph 96, decided that Chiefs could not preside over Local Courts because of their executive functions.

enforcement) and adjudicative functions[398] and new institutional arrangements to ensure independence of the adjudicative function from the executive.

Moreover, the demand of impartiality would require rules on disqualification in cases where there is any suggestion of a personal interest in the case on the part of the adjudicator as well as procedural rules to ensure impartiality and fairness in practice. Thus, compliance with Constitutional requirements would be rather onerous and would require a level of regulation, training and supervision that would be expensive and perhaps unrealistic. For this reason, we do not adopt option 2 or 3 above.

Proposal:

In the following, we propose a pragmatic acceptance of the unavoidability of traditional courts, and thus a means for **limited and conditional recognition** of them – not as courts that adopt binding decisions, but as forums of mediation, negotiation and arbitration.

We recommend that outcomes reached by traditional courts could be endorsed by formal courts (mostly Local Courts, but also Subordinate Courts) if the parties to the outcome or settlement can show that the settlement is, in terms of procedure and outcome, in conformity with natural justice, written law and the Bill of Rights. If the state court is satisfied of this, it should be possible to endorse the settlement so that it becomes binding.

In our view, this solution would:

Build on the strengths and comparative advantages of each of these forums, supporting synergies within an overall aim of enhancing access to justice for ordinary Zambians;

Avoid the constitutional difficulties that would be caused by recognition of traditional courts as judicial organs; and

Be a "win-win" solution that aims at strengthening, not weakening the power and outreach of Local Courts.

It is obvious that this option does not provide easy solutions any more than any other. It requires that both the traditional courts - where settlements are reached - and the Local Courts that would have power to endorse them, have sufficient capacity, knowledge and integrity to comply with the requirements of their roles. This will not come without programmes of capacity building, training and monitoring. We nevertheless think that this solution presents the best way forward because it is a framework in which the contributions of all parties is taken account of.

This model would be based on a full acceptance by traditional leaders of the roles of all other justice providers, from NGO / CSO paralegals to Local Courts and police. On the side of the judiciary, it is based on a recognition that the traditional courts, particularly in rural areas,

[398] Among some of Zambia's ethnic groups, there is some separation of functions among different officials, though it does not necessarily correspond to a republican separation of powers doctrine. See ZLDC, 2006 (review) in section 4.5.3, describing the *Kuta* court system among the Lozi, where it is the office of *Ngambela,* (sometimes translated as the prime minister) that presides over the highest level of the court system.

often have an outreach and a legitimacy that rivals or exceeds their own. Thus, in any place or context where a traditional leader is willing to work constructively to enhance access to justice according to the principles of the constitution and written law, every effort should be made to provide support and constructive engagement.

1. Recommendations

Using sec. 50 (1) of the Local Courts Act, the Chief Justice should invoke his rule making power under S. 68 of the LCA and how it could be used in relation to a number of issues, including the recognition of arbitration or mediation settlements reached in African customary mechanisms.

The House of Chiefs should be engaged in a cooperation project with the judiciary to develop a set of standards of basic procedural fairness in traditional courts that would be promulgated among traditional leaders.

Pilot projects should be developed and implemented to explore models of constructive engagement among traditional courts at all levels, Local Courts and paralegals that would aim at training in written law, the Bill of Rights and other relevant human rights instruments, and at transparency of traditional justice processes and constructive cooperation through engagement with NGOs and representatives of the judiciary.

At the level of each chiefdom, projects as processes such as participatory “self-statement” of customary law that facilitate involvement of the entire community should be encouraged.

14. Family law

Introduction

Family Law is 'that part of private law which regulates the legal relationship between spouses (i.e. husband and wife), as well as the legal relationship between parents (or guardians) and children'.[399] Zambian law does not define the term 'family'[400] but various forms of it are recognised and respected. For example, the nuclear family is recognised in legislation;[401] and the extended family[402] as well as the single-parent family[403] are protected in case law. While rural Zambia follows customary law which regards one's lineage as the family, the nuclear unit (sometimes with, and other times without, dependants) is what constitutes the family in urban Zambia. Thus, the concept of family is fluid and has links to time, residence, kinship, ideological preferences and economics.[404] In this study, Family Law covers the following areas: marriage, divorce, adoption, custody of children, paternity, maintenance of children and spouses and registration of civil status. Because Zambia is a plural legal society, the section will consider both statutory and customary law.

14.1 Family law institutions and their main functions

14.1.1 Institutions dealing with statutory family law

- *The Minister of Home Affairs:* He issues and authorises specific public officers to issue special marriage licences, i.e. one that dispenses with the requirements to obtain the Registrar's certificate and give notice to the public of an intended marriage.

- *The High Court*: It has the power to dissolve statutory marriages. The Subordinate Court does not have such powers.[405]

- *The Subordinate Court*: It hears maintenance and custody matters. It is also empowered to entertain actions in relation to hear customary law marriages.

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[399] PJ Visser & JM Potgieter, *Introduction to Family Law*, 2nd edition, (Juta & Co. Ltd, 1998) p1.

[400] Not even the main Family Law textbook that is used in universities across Zambia (i.e. L. Mushota *Family Law in Zambia: Cases and Materials*. (Lusaka: University of Zambia Press, 2005)) ventures to explore the meaning of this term in the Zambian context.

[401] See for example The Intestate Succession Act 5 of 1989, as Amended by Act 13 of 1994, Chapter 59 of the Laws of Zambia, Volume 5. Section 5 of this Act provides for spouses' and children's inheritance rights.

[402] See Siwale case of (S.C.Z JUDGMENT NO. 24 OF 1999). This case dealt with the extended family members' right to customary land.

[403] *Edith Zewelani Nawakwi v The Attorney General* (1991) S.J. (H.C.). In this case, Justice Musumali ruled that 'a single parent family headed by a male or female is a recognised family unit in the Zambian society'.

[404] K.N. Ouma, The Familial Entitlement Theory: A Grounded Theory Based Approach to Understanding Widows' Property Inheritance Rights in Zambia. (Lund University, 2008) p28.

[405] MCA, Section 4 (1), Act No. 20 of 2007. See also t*he High Court Act 41 of 1960*, as Amended by Act 13 of 1994,Chapter 27 of the laws of Zambia.

- *The Church*: Section 5 of the Marriage Act recognises the 'church' as an entity. This includes all legally registered churches in Zambia. The same section states that the Minister of Home Affairs has the power to authorise any church and church minister to solemnise civil marriages. They however cannot divorce or separate parties to a civil marriage. As already stated, only the High Court can. The church in Zambia also solemnises religious marriages. During a family law workshop with experts, it was established that in practice, should the parties to a religious marriage wish to divorce, some churches issue a document acknowledging that the parties have failed to reconcile and can therefore separate. The couple takes that certificate to the Local Court which then dissolves the religious marriage, and issues a divorce certificate.[406]

14.1.2 Institutions dealing with customary family law

- *The Subordinate Court*: Also empowered to entertain actions in relation to hear customary law marriages.

- *The Local Court*: Section 12 of the Local Courts Act outlines the laws to be administered by the Local Court, one of which is African customary law. As such, the Local Court has the power to dissolve customary marriages and orders distribution of property in accordance with the customary law of the parties involved.

- *The Family Council*: This is a special group of one's relatives, which can be from one's maternal, paternal or both lineages. In each lineage, there is a recognised ancestor or ancestress from whom all the members descend. Normally, the group that constitutes the family council has a genealogical depth of about three to four generations.[407] The family council plays a big role in African customary family law. To begin with, the woman's family council determines the amount of *lobola*, and the man's family council often negotiates to reduce it. Traditionally, the man's family council also played a big role in raising the required *lobola.* In marriage, whenever the couple fails to resolve a problem, they ought to seek audience with some members of either the man's or woman's family council. Customarily, the council has the power to dissolve a customary marriage and decide the sub sequent matters of custody of children and distribution of property.

- *The village headman*: In the traditional system of dispute resolution one can either appeal from the family council to the village headman or go directly to him. Thus, the village headman has powers to resolve family matters.

- *The Chief*: When dissatisfied with the decision with the village headman one can appeal to the Chief.

- *The Traditional Court*: Though not formally recognised in law as it was outlawed by the Local Courts Act, the traditional court still sits and adjudicates customary law matters.

It was established during the survey that many respondents were of the view that disputes involving husband and wife, including dissolution of marriage and wife battery, did not warrant

[406] Family Law Workshop, ZHRC, 2010.
[407] See for example L. Holy *Strategies and Norms in a Changing Matrilineal Society* ed. J. Goody vol 58 *Cambridge Studies in Social Anthropology* (Cambridge: Cambridge University Press 1986) p21.

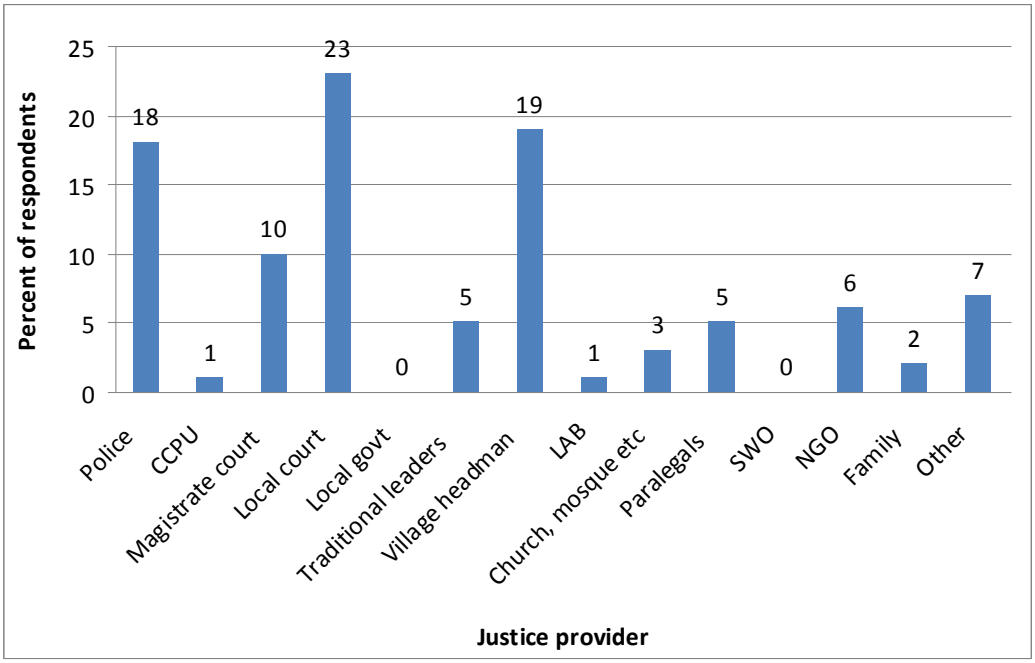
seeking justice from or reporting to the formal justice providers. The findings indicate that the majority of the respondents preferred resolving their disputes relating to marriage dissolution within the family, the traditional courts or the local courts. This position does not only reflect the traditional norms and practices, but also the absence of awareness about the statutory family law provisions.

14.1.3 The user's access to family law institutions

The survey findings show the there is low usage of the statutory family law provisions. Many of the surveyed users have poor knowledge and awareness of the law, as well as availability of justice providers and the services they offer. They do not know their basic legal rights, including what actions to take, which legal procedures to follow and where to go (i.e. which justice provider for which dispute or conflict). Lack of information is therefore a serious obstacle for the poor and marginalised to access statutory justice services in Zambia.

Predominantly, the justice providers and services that are readily accessible to the surveyed users are limited to the customary traditional justice structures, including the chief, the village headman and the family. In the survey, when asked who to approach to best deal with their disputes, 49% indicated the traditional justice structures, representing the chief (5%), the village headman (19%), the local court (23%) and the family (2%).

Table 14.1.3 Preferred Justice Providers



Distance and cost are unsurprisingly, very important in determining people's choices of justice provider. While the cost of accessing the formal justice system is a universal problem affecting all people, its impact on the poor and marginalised is particularly severe. The key cost barriers for the poor include:

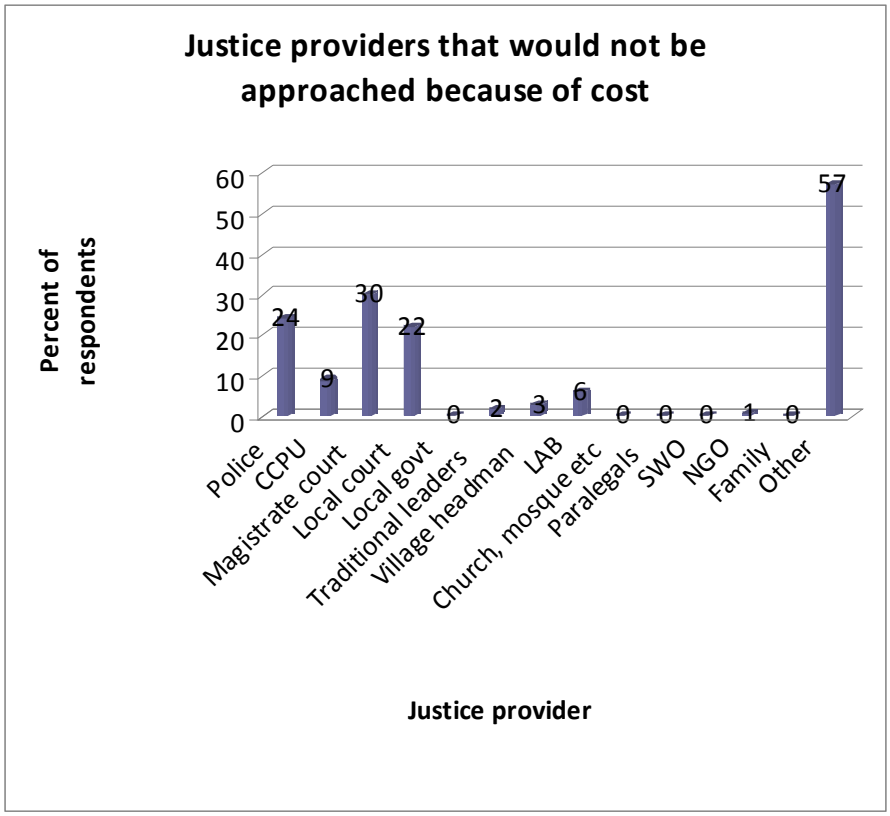
- Transport costs to cover the distances to and from the location of a justice provider; and

- Court fees, no matter how minimal.

Consequently, some of the formal justice providers may be perceived strictly as institutions exclusive to those who have the capacity to afford the costs. In this respect, the Magistrate Courts (30%), the Police (24%) and the Local Courts (22%) were considered as the most costly justice providers.

Distance is of course linked to time as a cost. The location of the formal justice providers has serious ramifications in relation to access and utilisation of their services. Most of them are located at the district or Provincial headquarters. This is the case with LAB, Magistrates and High Courts, and (paralegal) legal service providers. Citizens near these agencies are more likely to access and utilise their services than those in remote areas and far off villages.

Table 14.1.3 a Choice of justice providers and cost



Familiarity, custom and tradition have always taken precedence in the dispensation of justice among the majority of the poor in Zambia; and this compensates for their lack of access to the formal justice providers and statutory law provisions. Often, the choice of provider is determined by custom and tradition. This may in practice be difficult to separate from issues of familiarity of procedure and the language in which the proceedings are conducted. Thus it is not surprising that the rural poor are more inclined towards the use of the traditional justice providers.

The informal justice providers also use procedures which are easy to follow and swift in delivering justice. At least 32% of the respondents in the survey considered collectively, the informal justice system as providing the fastest delivery of justice.

Overall, the survey results among the sample of users in the nine provinces show that a considerable number of respondents (47%) use the informal justice systems because of :

- More familiarity and awareness of these justice structures and systems;
- Easier accessibility of them within the localities; and
- Greater effectiveness in providing justice in the fastest manner as they pass judgment or conclude the matter in a short period of time.

While acknowledging that traditional justice structures may not be a substitute for statutory or formal justice systems, they remain a lifeline for the majority of the rural poor.

14.2 The legislative and human rights framework

14.2.1 The Constitution

The **Constitution of Zambia**[408] lacks an enumeration of the right to marry and to found a family, though this is considered a fundamental right by all major human rights systems, including instruments ratified by Zambia such as the ICCPR and the African Charter. The 2010 NCC draft constitution would cure this defect (Art. 52). The Constitution of Zambia as the supreme law of the land prohibits discriminatory provisions embodied in law either of itself or in its effect. However, the constitution of Zambia permits for an exception especially, discrimination in family as can be seen in the language of Article 23(4).[409]

14.2.2 International Human Rights Law

The International Covenant on Civil and Political Rights (ICCPR, 1966): The ICCPR recognises the family as the innate and elementary entity of society that must be protected by the public and the state *[Art 23(1)].* For this reason, ICCPR allows men and women that have attained the right age to marry and establish a family as desired. *[Art 23 (2)].* However, it warns that in no circumstance should the intending spouses be forced to do so *[Art 23 (3)].* Furthermore, the ICCPR demands that member states enforce strategies that will guarantee equal rights and role-playing of spouses concerning the marriage, throughout marriage and at its termination *[Art 23 (4]*. In addition, the ICCPR stipulates that children must be protected should the marriage dissolve *[Art 23 (4]*.

The International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966: The ICESCR views the family as the innate and essential entity of social order; and one that must be widely protected and assisted with its organisation; as well as care and education of dependent children *[Art 10(1)].*

The United Nations Convention on the Rights of the Child (CRC), 1989: The CRC defines a child as a person below the age of 18 years, unless otherwise considered as having attained majority under a valid law. Important obligations in the area of family life include the right of each child

[408] Act 1 of 1991, as amended by Act 18 of 1996.
[409] CAP 1 as amended by Act No. 18, 1996

to be registered at birth and to be given a name *[Art 7]*; and the protection of the child's privacy, family, home and correspondence *[Art 16]*. To achieve this, the CRC urges states to instigate measures that will shield a child from physical or mental violence, neglect or negligent treatment, maltreatment and exploitation including sexual abuse *[Art 19]*. Under Article 34, the CRC emphasises the need for states to protect a child from sexual abuse *[Art 34]*; as well as put in place tactics to prevent child trafficking *[Art 35]*. The CRC also urges states to endeavour to protect the child against all other forms of abuse detrimental to any aspects of the child's welfare *[Art 32]*.

The African Charter on Human and People's Rights (ACHPR), 1981: The ACHPR regards the family as the natural unit that forms the basis of social order taking care of physical health and morals of the human race *[Art 18(1)].* Because the family is the custodian of morals and traditional principles standardised by society, the ACHPR urges the state to fully support the family to execute its tasks *[Art 18(2)]*. Support from the state is needed because each individual has a role to play in the family itself, society, the state and both local and international communities *[Art 17(1)].*

With regard to women and children, the ACHPR instructs states to put measures in place that will not condone any form of discrimination against women; and that they stand for rights (of women and children) as provided in international declarations and conventions*[Art 18(3)].* The ACHPR also directs the state to ensure that the physical and moral needs of aged and differently-abled persons are met *[Art 18(4)]*.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979: CEDAW prohibits discrimination against women in all its forms;[410] and it mandates every state party to take measures (including legislation) to ensure full development and advancement of women.[411] CEDAW prohibits stereotyping and prejudices against women based on their sex, and directs states to modify the social and cultural patterns of conduct of men and women so as to eliminate practices which are based on the idea of women's inferiority to men.[412] Art 14 of CEDAW obliges state parties to eliminate discrimination against rural women and recognise the vital role they place as well as the challenges they face. Thus, CEDAW instructs state parties to accord all men and women equality before the law.[413] In particular, Art 16 provides that men and women shall have the same rights and responsibilities: (i) when entering into marriage; (ii) during their marriage and at its dissolution, (iii) as parents and (iv) in owning and disposing of property. These provisions are of enormous significance for family law justice in Zambia.

While most international human rights treaties have not been domesticated in Zambia, the country is nevertheless bound by its ratification of many human rights treaties that directly apply to family law disputes in Zambia.

[410] Art 2.
[411] Art 3.
[412] Art 5.
[413] Art 15.

14.3.3 Zambian Legislation

The Marriage Act (CAP 50 as amended by 72, 1964): This legislation governs statutory marriages only, while recognising marriages contracted in accordance with African customary law *(CAP 50 as amended by 72, 1964: sec 34)*. Currently, no legislation deals specifically with the registration or regulation of customary marriages. Nonetheless, the ZLDC is working on drafting such a law and tabling it before Parliament through the Ministry of Justice. It is hoped that this will be a step in the right direction.

The Marriage Act sets out the requirement that needs to be met in order for a marriage to be legally valid. These include the giving notice of an intended marriage at least 21 days before the wedding failure to which the proceedings are deemed void *(CAP 50 as amended by 72, 1964: sec 6)*; and the issuance of a certificate by the registrar to the parties to be married upon payment of a prescribed fee *(CAP 50 as amended by 72, 1964: sec 10)*. It is worth noting here that the Act authorises the Minister to issue a special licence, which dispenses of the notice requirement *(CAP 50 as amended by 72, 1964: sec 12)*. Additionally, a marriage between persons either of whom is under the age of 16 is void, unless the judge of a High Court has given consent to such a marriage *(CAP 50 as amended by 72, 1964: sec 33).* In terms of where and who to solemnise a marriage, the Act only allows licensed churches and church ministers to do *(CAP 50 as amended by 72, 1964: sec 30)*. The Act prohibits polygamous marriage; and to this effect it creates an offence of bigamy *(CAP 50 as amended by 72, 1964: sec 34)*. Thus, it is a crime to marry under African customary law while already married under the Act.

The Matrimonial Causes Act (Act 20 of 2007): This legislation deals with divorce in relation to civil or statutory marriages only. In this section, the references to "the Court" mean the High Court, which currently the only court is having authority to deal with proceedings under this legislation *(MCA No. 20 of 2007).* The Act permits divorce *(MCA No. 20 of 2007; sec 8)*; and lays out in detail the five 'facts' for divorce *(MCA No. 20 of 2007: sec 9).* The Act allows for one ground only for divorce: the petitioner has to prove that the marriage has 'irretrievably broken down.' The five facts for divorce are: adultery *[MCA No. 20 of 2007: sec 9(1) (a)];* unreasonable behaviour *[MCA No. 20 of 2007; sec 9(1) (b)]*; desertion for a continuous period of at least two years immediately preceding the presentation of the petition *[MCA No. 20 of 2007; sec 9(1)(c)]*; two years separation with consent *[MCA No. 20 of 2007; sec 9 (1) (d)]*; and five years separation *[MCA No. 20 of 2007; sec 9 (1)(e)]*. Any one or a combination of these facts may be relied upon to prove the irretrievable break down of a marriage. It is also possible for one to get a decree of presumption of death, and subsequently, dissolution of marriage *(MCA No. 20 of 2007; sec 24)*. It is important to state that unless the High Court provides otherwise, the decree of divorce will only be made absolute after six months from when it is granted*(MCA No. 20 of 2007; sec 41)*.

The Act also provides for property adjustment orders in connection with divorce proceedings *(MCA No. 20 of 2007; sec 55)*; powers of the court in maintenance matters *(MCA No. 20 of 2007; sec 52 & 56)*; and regulation on cases where one neglects to maintain the family or a spouse *(MCA No. 20 of 2007; sec 58)*. Additionally, the Act provides for periodical payment orders for the children of a family *(MCA No. 20 of 2007; sec 60)*; and it sets out the orders for (i) custody and education of children in cases of divorce; and (ii) custody and maintenance in cases of neglect *(MCA No. 20 of 2007; sec 72)*; Lastly, the Act lays down the court's powers in custody matters *(MCA No. 20 of 2007; sec 75)*.

The Subordinate Courts Act (CAP 28 as amended by Act No. 25 of 1998): This Act extends the jurisdiction of a Subordinate Court in matrimonial matters so it can make any order, which may be made by a court of summary jurisdiction, for instance, a court that has the power to make decisions without assistance from another body such as a jury. Section 20 of the Act regulates claims for damages and the amounts that can be heard by different classes of Subordinate Courts; and orders that may be made by a court of summary jurisdiction *(CAP 28 as amended by Act No. 25 of 1998: sect 20)*. The Subordinate Court does not have jurisdiction in matters to do with *inter alia*: legitimacy of a child, dissolution of marriage, and actions relating to the validity of a will *(CAP 28 as amended by Act No. 25 of 1998: sec 20).*

The Adoption Act (CAP 54 as amended by Act No. 53, 1965): The Adoption Act deals with formal adoptions. It is common under the customary system for one to adopt children of a deceased relative simply by taking them in and providing for them, without going through the formal procedures of adoption. However, this kind of 'inform adoption' is not provided for under any legislation in Zambia, but it is recognised under customary practices. In fact, under customary law there is no distinction between one's own child and those of one's brothers or sisters; hence the concept of adoption is not even contemplated.

The Act grants both the High Court and the Subordinate Court the power to make orders authorising adoptions *(CAP 54 as amended by Act No. 53, 1965: sec 3)*. It also provides for the qualifications and restrictions of persons who can make an adoption order *(CAP 54 as amended by Act No. 53, 1965: sec 4)*. Further, it lays down conditions under which an adoption can be made *(CAP 54 as amended by Act No. 53, 1965: sec 5).* In addition, the Act authorises adoption of an infant who has already been adopted before, noting that if the adopters under the last adoption order are still alive, they are deemed the parents of the infant *(CAP 54 as amended by Act No. 53, 1965: sec 9)*. The Act also places a duty on the court to strictly fulfill its functions as regards a child's welfare as provide under section 7. With regard to future custody, maintenance and consent to marriage of the adopted child, the Act stipulates the rights and obligations of guardians *(CAP 54 as amended by Act No. 53, 1965: sec 14).* In cases where the guardian of an adopted child dies intestate, the Act states that the deceased's property shall devolve as if the adopted person were the child of the adopter born in lawful wedlock *(CAP 54 as amended by Act No. 53, 1965: sec 15)*. The Act also regulates adoption of illegitimate children *(CAP 54 as amended by Act No. 53, 1965: sec 17)*.

The Affiliation and Maintenance of Children Act (CAP 64 as amended by Act 55, 1995): This Act permits both the Subordinate Court and the High Court to make an affiliation order on the application of a single woman in any of the following instances *(CAP 64 as amended by Act 55, 1995: sec 3):*

a) at any time within twelve months after giving birth to a non-marital child;
b) at any time, upon proof that the putative father of the non-marital child has within the period of twelve months after the birth of the non-marital child paid money for its maintenance; or
c) at any time within the period of twelve months after the return to Zambia of the putative father of the non-marital child, upon proof that he ceased to reside in Zambia within the period of twelve months after the birth of the non-marital child.

In addition, the court may make an affiliation order on the application of a non-marital child made through the child's next friend, subject to the limitations contained in section three *(CAP 64 as amended by Act 55, 1995: sec 3)*. Paralegals working for CSOs make use of these provisions to assist mothers to seek support for children.

14.3 Marriage

Two types of marriage are recognised in law in Zambia –statutory and customary. A statutory marriage is the one provided for in the Marriage Act; while 'a customary marriage is a marriage that is conducted according to the relevant Zambian customary law of the two parties'.[414] A third type of marriage not officially recognised in law is religious marriage. A religious marriage occurs when a couple is married in a church and by a church minister (whether or not they sign a civil marriage certificate).It is permissible to marry under more than one type of marriage – e.g. a couple can be married by the church and receive a form of certificate from it, and also fulfil the statutory law requirements and register their marriage accordingly. A religious marriage occurs when a couple is married in a church and by a church minister (whether or not they sign a civil marriage certificate). What follows is a critical analysis of the requirements, advantages and disadvantages of each of the three types of marriage.

14.3.1 Statutory / civil marriage

Zambian legislation contains no definition of statutory marriage. The definition applied by Zambian Courts still relies on the definition given in an English court judgment[415] delivered in 1866. The judgment defines marriage as '*the voluntary union for life of one man and one woman, to the exclusion of all others'*. In the case of *Lillian Mushota and Doreen Mwila (Mushota)*[416] the High Court affirmed that a statutory marriage is between one man and one woman; and that where a person contracts a statutory marriage, any purported second marriage is a criminal offence under the Zambian Penal Code. A number of points can be made in regard to the *Hyde* definition of marriage.

Firstly, the effect of Zambian legislation modifies the definition somewhat. While, a *union for life*, 'means literally that once married, always married until death parts the parties',[417] the Matrimonial Causes Act permits divorce.[418] Secondly, as a union of *one man and one woman*, this definition excludes same sex marriage.[419] Of greater significance in the Zambian context is that it also excludes customary marriage (which is potentially polygamous). Though the former is not permitted at all in Zambia, the latter is. This implies that Zambia applies two different definitions of marriage: one for statutory and another for customary marriage. A consequence of this is that while Zambia, through its recognition of customary law, allows and recognizes polygamous marriages, it denies the benefits of statutory law to parties to these unions in most areas.[420]

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[414] WLSA, *Marriage Rights* (Lusaka, 2001) 148. Section 34 of the Marriage Act does not define but recognises customary law marriage.
[415] Hyde v Hyde and Woodmansee (1866)LR1 P & D 130, judgment of Lord Penzance.
[416] (2000/HP/0078).
[417] L. Mushota, Family Law in Zambia: Cases and Materials. (LUSAKA: UNZA press 2005), p. 56.
[418] See Matrimonial Causes Act, No. 20 of 2007, Part II.
[419] Art. 52 (5) of the 2010 draft constitutional bill would insert a prohibition on same sex marriages into the constitution.
[420] An exception is the Intestate Succession Act, which also applies to polygamous marriages.

14.3.2 Accessibility and use of the institution of civil marriage

Out of the 694 users interviewed in 20 districts, only 40 were married under the Marriage Act. Thus not only statutory dispute resolution forums, but statutory legal mechanisms themselves remain little used by Zambians, particularly rural ones. To try to explain this, it is worthwhile to examine not only issues of cultural familiarity, but also those of accessibility.

Looked at from the point of view of the user, there are many requirements that must be met before entering into a statutory marriage: e.g. one of the parties gives notice on a prescribed form at least 21 days before the marriage; plus the parties must marry within 3 months of such notice.

Research shows that many people – if they are at all familiar with these notice requirements - find them 'time consuming', 'cumbersome' and even 'expensive', especially if the gazetted place or person is far from their home; or if they fail to marry within 3 months after giving notice and have to follow the notice procedure all over again.

Civil or statutory marriages are solemnised at the civic centre i.e. the municipal council.[421] This can of course be at quite some distance for rural Zambians. Other than the 'civic centre', a statutory marriage can only be solemnised (i) in a place of worship that is licensed by the Minister of Home Affairs; and (ii) by a licensed minister of the church.[422] These requirements as to location can be restrictive in that not everyone has access to the civic centre; and not everyone is a member of a denomination with a church that is licensed to solemnise marriage.

Another area where justice is not readily accessible in relation to civil marriage is in relation to dissolution of marriage. Section 4 of the Marital Causes Act[423]vests jurisdiction in such cases in the High Court. This alone may constitute a disincentive to it.

Setting cultural factors aside for a moment, these accessibility factors are a deterrent from marrying under statute law, and an incentive to choose customary marriage instead, raising the question of whether a more simplified and accessible procedure would succeed in encouraging more civil marriages.

A recommendation is made below to make statutory marriage more accessible and popular, the Minister could authorise more places and officials to solemnise marriage. This would require some training and perhaps the development and issuance of a set of guidelines.

14.3.3 Level of legal protection offered

Despite its shortcomings in relation to accessibility, statutory marriage may be the type of marriage that – at least on paper - offers the greatest protection for Zambia's vulnerable and marginalised groups in today's circumstances – particularly women, children, widows and orphans. The stronger legal protection is seen in the following three aspects:

- In general, men and women are treated equally in the Marriage Act.
- No one can be forced to marry as both parties must consent to the marriage.

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[421] Sec 22 of the Marriage Act 10 of 1918, as Amended by Act 72 of 1964, Chapter 50 of the Laws of Zambia.
[422] Sec 20 of the Marriage Act 10 of 1918, as Amended by Act 72 of 1964, Chapter 50 of the Laws of Zambia.
[423] Op cit.

- There is no possibility of early marriage as the Act demands that a party to a marriage must be at least 16 years old;

Entering into a civil marriage would render a person liable to a conviction for bigamy if they enter into a second marriage (see above under the Marriage Act).

14.3.4 Customary marriage

Most marriages among the poor are contracted through the customary arrangements between the two extended families. As mentioned, the survey found that out of the 461 married users interviewed, 421 were married under customary law. Zambia has 73 ethnic groups, with widely varying customs and laws. That notwithstanding, there are three vital requirements that must be met in order for a valid customary marriage to be created. These are consent of the parents of the two parties, payment of *lobola* and the marital status of the girl must be single, widowed or divorced.[424]

Consent of the parties themselves may be considered to be implicit, or to be a matter to be resolved within each family. As there is no outside official conducting the marriage as such, there is no obligation on any one person to satisfy himself or herself that consent is present. This may not be an issue in relation to adults, but it is a matter of serious concern where children are involved.

The preliminary requirements of a customary marriage are less stringent than those of a statutory marriage – e.g. the person marrying the parties does not have to be gazetted, and the ceremony can be held at any place, including one's house, under a tree or in the common grounds of a village. It also does not matter whether the marriage occurs a month or a year after the preliminary talks, provided the two families agree. What is important is that a man follows the customary law applicable to the girl's ethnic group, which involves his family approaching the girl's family, asking for the girl's hand in marriage and paying at least part of the *lobola* prior to the marriage. In many cases, people already know these requirements, and those who do not can easily ascertain them as they are in line with the majority's culture and ordinary way of life.

14.3.5 Legal protection offered by customary marriage

To the question of whether or not customary marriage provides legal protection, the obvious answer is "*it depends who you ask*"'. During the Family Law Workshop on the Situation Analysis of Access to Justice *participants were* asked: If you had children, under which law would you prefer them to marry and why? The responses received are a true reflection of the nation's divided sentiments on this matter. One participants responded as follows:

"*I would prefer statutory marriage because of the HIV prevalence situation in this country, customary marriages are potential polygamous and they run the risk of getting HIV/AIDS.* "

Another participant said:

"*It depends if it is a male or female child. For a male, I would rather he marries under customary law. But for my daughter, I prefer statutory marriage. Ultimately, it is men who*

[424] L. Mushota *Family Law in Zambia: Cases and Materials*. (Lusaka: University of Zambia Press, 2005) 80.

decide because they are the ones paying lobola. There is a lot of demand for customary marriages because civil marriages remove a lot of our privileges as men. "

Thus men may prefer customary marriage because it accords them 'privileges' which statutory marriage does not. By marrying under customary law, a man can avoid the offence of bigamy and its punishment of up to 5 years imprisonment because customary law permits polygamy.[425] Unlike in a statutory marriage, all subsequent customary marriages are valid provided the customary requirements are met.[426]

Especially for women, there are several disadvantages to a customary marriage. Gender-based discrimination occurs because the system is based on traditional practices and norms which do not generally favour women. This can be seen in regard to:

- The lack of a clear consent requirement means both women and men can be coerced into marriage, but it is women who are more clearly disadvantaged,
- Toieration of early marriage (see below);
- Disadvantageous provisions of customary law as it is currently practiced in the event of divorce / (differential grounds for divorce between the two parties) or death of a spouse;
- The absence of human rights principles of equality and the best interests of the child in customary law as now practiced;[427]
- Customary institutions including customary justice institutions and the marriage process are controlled by men.

14.3.6 Early marriage and arranged marriages

WLSA studies found that forced early marriages are considered normal and the rights of individuals like women and children are ignored in favour of tradition. A 12-year-old girl may be forced into an early marriage to a polygamist as the fifth wife, a situation that will be accepted by the customary justice system. Participants in the family law workshop pointed to statistics concerning the death of young girls in childbirth because their bodies are not yet ready for motherhood.[428]

The 2007 Demographics and Health Survey indicated that 46 percent of women between the ages of 20 and 49 were married by age 18, including 11.6 percent who were married by age 15. The 2001–2002 survey (ZDHS 2001–02) said that 42% of 18 year old girls are married, with a higher proportion in rural areas than in urban ones. A comparison of the Demographic and Health Surveys conducted respectively in 2001- 2002 and 2006 – 2007 seem to show a clear downward trend in the number of women married by age fifteen (3.1% of 15 – 19 year olds in the latter survey, compared with 4.9% in the former one).

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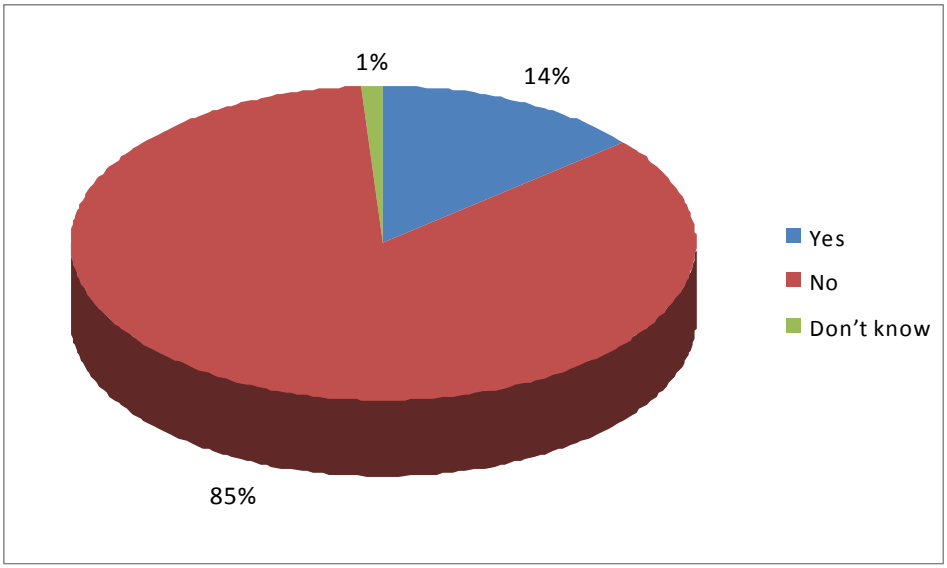
[425] Sec 38(b) of the Marriage Act 10 of 1918, as Amended by Act 72 of 1964, Chapter 50 of the Laws of Zambia.
[426] L. Mushota *Family Law in Zambia: Cases and Materials*. (Lusaka: University of Zambia Press, 2005) 57.
[427] Family Law Workshop,18th March 2010: ZHRC
[428] Ibid.

These findings were confirmed by the surveys conducted for the present study. 85% of the respondents said that they are against the idea of arranged early marriages.

Table 14.3.6 Acceptability of parents arranging marriage of Children under 18



The problem of early marriage is acknowledged in the 3rd & 4th CEDAW Report.[429] In the 5th & 6th CEDAW Report of 2010, paragraph 59 mentions that the government has put measures in place to provide civic education "on the importance of involving girls and women in decision making and enforcing laws which promote girl child education. This has resulted in many Chiefs banning early marriages, a practice which encourages more girl children to freely pursue their education''.

Legality of Early Marriage: Early marriage is not permitted under statutory law in Zambia. Although the minimum age at which one can enter into a customary marriage[430] is not clearly defined in the Marriage Act, the Penal Code criminalises carnal knowledge of a girl under the age of 16 years. This would seem to imply a view in the law that only girls aged 16 years and above are eligible for marriage. According to the Penal Code, carnal knowledge of a girl below the age of 16 years is defilement – a criminal offence punishable by imprisonment. (See section 11.3 of this study.) Customary law however permits marriage of a girl who has reached puberty, which at times happens as early as at the age of nine.

A further question is whether the courts of record (i.e. Subordinate and High Courts) would or should give recognition to early marriages validly conducted according to customary law if a marital dispute involving such a marriage came before them. In an interview, a senior member of the judiciary expressed the view that the High Court would and should not recognize such a marriage, but treat it as a case of defilement. Nevertheless, if this is the correct legal view, there is no reason why a case should be treated differently simply because it comes before the High Court, and there should be prosecution of all early marriages. The Penal Code does not

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430 Sec. 33 (1) of the Act is clear in setting a legal limit of 16 years for civil marriage.

seem to provide a clear legal basis for this position. If those conducting early marriages are to be held liable to penal sanctions, this should be made clear in the Penal Code.

Customary law, however, requires the consent of the parents or guardians of the girl to be married and that of the boy's parents or guardians. Without their consent, no valid marriage can be created. Because the girl's consent is not a requirement for a valid customary marriage to come into existence, many girls are married against their will provided their parents are in favour of the marriage. This can be contrasted with civil marriages, where the Marriage Act demands that the parties intending to marry consent to the proposed marriage. Only if one of them is below the age of 21 years does section 17 of the Act require his/her father's, mother's or guardian's consent.

This is clearly a violation of the girl's own right to marry, as well as her right under the CRC to be heard on any matter concerning her, and of the ICCPR and CEDAW guarantees of equality in relation to marriage. The Zambian state is obliged as a matter of international law to protect these rights. It fails in this duty if state officials (including chiefs or Local Court officials) directly or indirectly support coercion in regard to marriage.

A General Recommendation[431] of the UN CEDAW Committee outlines that States parties should require the registration of all marriages whether civil or according to custom or religious law. This measure can help to ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy[432] and the protection of the rights of children. Customary marriages should be regulated by statute law in order to ensure that women's rights and children's rights are not violated. Nevertheless, care should be taken in introducing a registration scheme that it does not result in high costs for ordinary people that are in practice impossible for them to comply with.

14.3.7 Religious marriage

A religious marriage is one that is solemnised by a religious leader in a religious building such as a church. There are no available statistics to show how many people are in religious marriages. What is important from the point of view of legal protection is whether the religious marriage is also a customary or statutory marriage, as religious marriage in itself does not give rise to legal consequences. It is common practice for those who marry under civil law in a church to also be in a religious marriage as the church always issues its own marriage certificate to such couples.

Unfortunately religious marriages and their certificates are not recognised by the courts. The former National Legal Aid Clinic for Women (NALCW) therefore highlighted that these certificates have given them a number of challenges.[433] When asked who then dissolved religious marriages, the NALCW said that the church writes a letter stating that it has failed to reconcile the two parties and the parties take that letter to the local court. It is not known whether the Local Court grants divorce based on the letter from the church. If not, it means that parties married under religious marriage only (i.e. there not also party to a statutory or customary marriage) cannot divorce one another.

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[431] Ibid. para. 39.
[432] The CEDAW Committee has also taken a clear position against polygamy. This is discussed below.
[433] Family Law Workshop, ZHRC, 18 March 2010.

Reference is made to the earlier recommendation of a mechanism for the recognition of religious marriage or the completion of civil marriage formalities by religious communities. Religious bodies and officials that are already gazetted and therefore authorised to solemnised statutory marriages should also be empowered to solemnise religious marriages and issue religious certificates recognised by the law and courts.

14.4 Dissolution of marriage

A customary marriage comes to an end after families of both parties have made several attempts to counsel and reconcile them. The families are fully involved in the processes of marriage as well as of divorce *(L. Mushota, 2007: 58)*. If the parties wish, they may proceed to a Traditional Court or to a local court for the dissolution. In both courts, parents of the parties, particularly of the woman, are required to confirm that the parties were actually married by explaining matters of consent, and marriage payments.

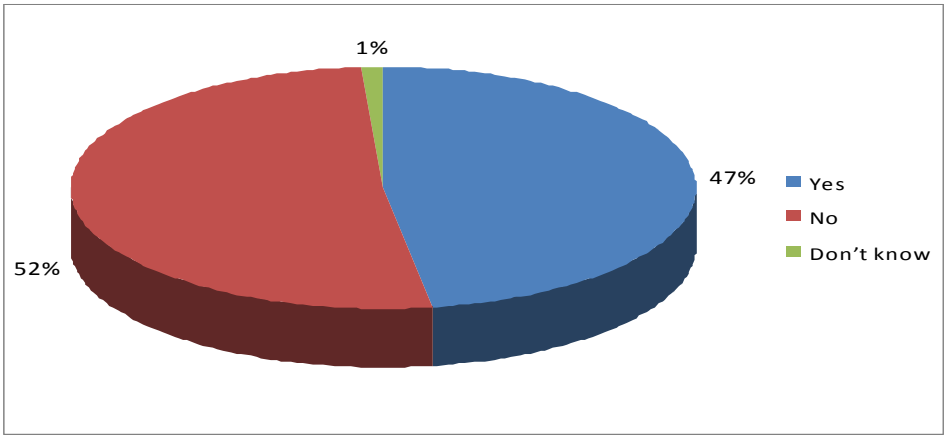
According to Mushota, allegations by a man concerning grounds for divorce do not need to be proved in the Local Court, and the marriage is usually dissolved as long as the man no longer wants his wife. Allegations by a woman require proof, and the marriage will usually not be dissolved if the man contests the dissolution. The marriage will also be dissolved if the woman commences the action for reconciliation, with no intention of divorcing, as long as the man tells court he no longer wants her *(L. Mushota, 2007: 58)*.

14.4.1 Grounds for dissolution of a customary marriage

Mushota *(L. Mushota, 2007: 57 et seq)* lists a number of grounds on which divorce is usually granted in customary law. They are listed briefly below.

Adultery: A husband may divorce an adulterous wife. A Traditional Court does not generally entertain a divorce petition by a wife on the adultery of her spouse. A husband is allowed to have extra-marital relationships because the marriage is potentially polygamous. The man has a right to marry additional wives. A wife would not call upon a local court to grant her a divorce on account of her husband's adultery. A wife may however divorce the husband for persistent adultery which brings shame on her or otherwise prejudice her interests. (See also marriage interference below).
Quite often, the customary justice systems would be more inclined to use reconciliatory approach and/or compensation. It is common knowledge that in the event of adultery involving the man, women would not take independent decisions to seek justice on the violation of their rights to marriage. Polygamous marriages are permissible under the customs of many population groups in Zambia. 47% of survey respondents indicated acceptance of polygyny as a matter of customary law.

Survey responses: acceptability of polygynous marriage



Behaviour: Conduct that amounts to unbecoming behaviour includes violence against the wife or children of the family or both, refusal or neglect to provide adequate food, shelter, clothes, use of abusive language in the presence of children, in-laws or outsiders, denial of conjugal rights, nagging, quarrelsome, greed, dislike of the other spouse's relatives. Customary law allows men to chastise wives for wrong doing, and they may not petition except in cases of severe beatings occasioning actual bodily harm that may result in loss of pregnancy.

Desertion: means abandoning one's family and wilfully neglecting to provide for them. A woman may petition and she will get support from her family. Desertion is a relatively new phenomenon that came about by virtue of colonial policy which took men away from their villages to urban areas where they provide cheap labour.

Separation: This takes the form of a wife being sent back to her family for a 'refresher' course in marriage while she is with her family. Marriage counsellors (*bana chimbusa)* teach her afresh about married life, after which, if the complainant was genuine, the man arranges to have his wife back. If it was just an excuse, the formalities for divorce are done, which include packing her belongings and delivering them to her uncle's (or other relative) house.

Childlessness: In customary law, procreation is the basis for marriage. In the past a typical Zambian family took pride in a large number of children, of ten or more. In some ethnic groups men became polygynous in order to have a large investment in the children: an important source of labour.If the party unable to procreate discovers that it is the other spouse who is impotent or unable to produce children, he or she can petition for divorce. A woman may then petition. In the case of a man, he is secretly given by his in-laws a young sister or niece (or other near relative) to produce children. The assumption is usually that it is the woman who is infertile.

Illness: Generally a husband has an obligation to care for the wife and family during her illness. In cases of serious or prolonged illness, however, her family will remove her from the matrimonial home and look after her. If the illness persists her family will usually give the husband her young sister or near relative as an additional wife. If the husband neglects to look after a sick wife, she is entitled to divorce him.

Laziness: A spouse who neglects, fails or refuses to adequately perform marital duties can be divorced. This includes providing food for the family e.g. by going out to hunt or fish, thatching a leaking roof, providing adequate shelter and security to the persons and property, tilling land and growing food crops, cooking properly and doing other household chores timely and efficiently. A wife who falls ill and fails to perform household chores may be divorced. In any case, most ethnic groups take all ill wife to her parents to be nursed, and may be divorced if the illness is prolonged. In particular, a person may be divorced for illness such as insanity, epilepsy and leprosy.

14.4.3 Consequences of dissolution of customary marriage

Property rights and distribution of property: As most land in Zambia is owned by men, only a tiny percentage is owned jointly by married couples. Most rural women do not own any property until they get married. In a civil marriage, women are entitled to enter into contracts and have access to property other than land, either individually or jointly with their husbands *(M. Shezongo,* Strategic Litigation Workshop, *2005: Johannesburg).* Customary law would not traditionally have authorized women in customary marriages to acquire possessions beyond immediate household items; thus while the subsistence of a marriage under customary law, a woman is deemed not have separate property rights as the acquisition of such rights only ensues if the husband consents that his wife do acquire some form of property rights in her own name. Without permission from her husband, the wife cannot have separate property rights *(M. Shezongo,* Strategic Litigation Workshop, *2005: Johannesburg)*. The *Chibwe v Chibwe*[434] case represents a progressive development in terms of customary marriage and division of property on divorce. However, it appears not all Local Court Justices are aware of this judgment. Thus in most Local Courts where disputes on division of property has arisen, the judgment in the *Chibwe* case (supra) has in many instances not been strictly followed.

Maintenance of spouse and children: Both customary law and statutory law favour maintenance of a spouse during the subsistence of a marriage *(MCA No. 20 of 2007: sec 50).* Under **statutory** law a court of competent jurisdiction has power to order a husband in the case where the marriage subsists or where they are on a judicial separation, to pay money to the wife or any person named in the order for either the wife's maintenance or for the children's maintenance alone. In the case of a divorce the ex-husband may be ordered to pay the ex-wife a lump sum or a weekly or monthly sum of money for her upkeep, the children's upkeep or for both her and the children's upkeep *[CAP 64 as amended by Act 55, 1995: sec 9(1)].* Hence a spouse to be maintained may make an application to court for maintenance and the court will consider his means, usually upon production of a salary statement or bank statement and proof of income from other sources such as shares and other businesses as well as the woman's means, if any.

Customary law does not generally support maintenance of a divorced wife; the kinship system determines the party who will maintain the children, usually being the party with custody.

Maintenance of children upon dissolution of a statutory marriage: The High Court can make provision which appears just in divorce proceedings either before or after the final decree for the custody, maintenance and education of the children of the couple divorced or to be divorced. This power is entrenched in Section 52 of the *MCA No. 20 of 200).* There is no fixed

[434] SCZ Judgment No. 38 of 2000 (Kas Legal, electronic version)

amount of money which the court should limit itself to. It has discretion to make an order in any amount as it thinks just. The current socio-economic changes and the poverty levels have destroyed the social safety net of the past.

Customary: Some Local Courts today apply the principle of "the best interests of the child" in making maintenance orders. It is not necessarily the party who has the child or children in their custody who maintains her him or them. Similarly, there are some reports that kinship systems are adapting to change whereby customary practices are also following "the best interest of the child" principle as illustrated in the few examples given hereunder. The *Lunda* of *Kazembe* and the *Shila* of *Nchelenge* and *Ushi* of *Manza* in *Luapula* Province have shifted their custom and follow a patrilineal type even if they are matrilineal. This is the pattern throughout the Province. The *Lunda* of *Mwinilunga* who are also matrilineal, still practice their kinship system of custody of children upon divorce of their parents. They however consider the ages of the children and the father may be granted the custody of the older children. In the case of death, children similarly go either way; to the mother's side or the father's, while the *Luchazi* of *Kabompo* practice a custom similar to the *Lunda.*

14.5 Lobola

The custom of *lobola* is practised by all but one or two of the 73 ethnic groups[435]. Very few Zambian women ever get married without *lobola* being transferred *(Himonga, 67). Lobola* is something of value that a prospective bridegroom or his family transfers to the family of the bride as some form of appreciation *(Banda, 72).* It is one of key requirements under customary marriage but also applies in civil marriage in practice, though not provided for under the Act, due to the fact that the parties could conduct a civil marriage and at the same time pay *lobola.* For instance, out of the 694 users interviewed during the situation analysis on access to justice, in 20 districts, only 40 were found to have contracted under civil marriages and *lobolo* was paid in all these cases.

Traditionally, *lobola* was rendered in the form of cattle, farming implements, livestock or even labour. Among some ethnic groups in Zambia, only beads or very small amounts of money were asked for. The worth of *lobola* in traditional society lay not in its monetary value but its significance. The rendering of *lobola* is the most vital requirement for the creation of a valid customary marriage (Himonga, 35). Its importance can be likened to that of signing a marriage certificate in the creation of statutory marriage: without it, no valid marriage can be concluded. Hence *lobola* is said to be what 'bring[s] into existence the marriage relationship' under African customary law.[436]

Today African customary law is subject to the cash economy. People are more dependent on money than cattle and thus some tend to render or demand *lobola* in the form of cash. Because of the high cost of living, the woman's family often negotiates for much higher *lobola* than used to be the norm in traditional society. In some areas, ethnic groups whose custom previously did not demand payment of cattle or large amounts of money have begun to do so. Thus, it is apparent that a change in custom has taken place, one which may be for the worse, is that there is a price to be paid by a bride whose *lobola* is high. In general the Local Courts seem to have accepted and enforced this changed norm of customary law whereby the level of

[435] ZLDC, Report on the Restatement of Customary Law Project: 236
[436] Ibid.

lobola has increased. Nevertheless, some Local Courts have also been willing to interpret culture dynamically, giving expression to notions of the dignity of Zambian men and women in the context of life as it is lived and understood today. Some relevant decisions and good practices gathered from real practice by representatives of the Local Courts themselves are discussed in the following text.

Wife Battering and *Lobola:* Wife battering can also is a ground for divorce under customary law. In a certain case brought before the local court, a man was cruel to his wife and would beat her each time he came back from drinking beer. One day he hit her with a pounding stick but nursed her in the house for three months. The woman decided to sue for divorce in a Local Court on the grounds that her husband was too cruel. The court granted divorce, on the ground that since cruelty or wife battering is now treated as a criminal matter which puts the other spouse's life at danger, and therefore the marriage should be dissolved. The court also encouraged the plaintiff to report the case to the police.

***Lobola* and Divorce:** Among some ethnic groups, if a woman seeks divorce, her husband and his family will only allow her to leave the matrimonial home if she or her family returns the *lobola* that was paid.[437] Traditionally, a bride does not personally benefit from *lobola*. It goes to her family, who feel entitled to it as compensation for what they spent on her upbringing, education and so forth. Some families did keep a bride's *lobola* in trust for her in case she wishes to divorce and return it to him and his family. Poverty, the ever-increasing cost of living and the payment of *lobola* in cash make this completely unrealistic. This text can be supplemented with content from Charles' contribution on the practice of the Local Courts

***Lobola* and Inheritance:** Due to the negative impact and domino consequences of property grabbing, the link between lobola and disinheritance of widows and orphans is a matter of serious concern. In relation to the Tonga people in the Southern Province, Malungo, a Zambian social scientist, records that *(J.R.S. Malungo 2001: 380):*

> The family members of a man marrying give animals and other materials to the family of the woman to be married. This pays off this woman to be married. Therefore, to pay the woman again at the death of her husband is *nkubba* (stealing on her part). And where are the benefits of the family members who assisted in this man's marriage? The answer is nothing.

It is further contend that *lobola* comprises of two parts viz: *iciko* and *malya nshima. Iciko* was said to be the 'main part of *lobola*' which is 'for all the fa*mily* members *(J.R.S. Malungo 2001: 380).* In case of divorce or death, *iciko* is retrievable but *malya nshima* is irretrievable, it is 'cattle for the woman which compensate [her] for all the activities she is going to perform in her husband's home including child bearing' *(J.R.S. Malungo 2001: 380).* Accordingly, it is felt that 'they have already paid for her inheritance when the husband dies.' "*Wakona kale* (this woman has already got her share!). She and the children she is going to bear have taken their share" *(J.R.S. Malungo 2001: 380).* Malungo's findings reveal what *lobola* means to many people today: it is not seen as a token of appreciation or symbolic of bringing the two families together but rather a price that 'pays off the woman to be married' and a justification for disinheriting her.

[437] Sampa et al, 1994: WILDAF

There is clearly a misunderstanding as to what *lobola* represents in modern Zambia, and to whom it belongs. Whereas the bride's family feels entitled to it, the groom's family (for instance, among the Tonga people) is of the opinion that part of it is the bride's inheritance. Viewed from a man's extended family members' perspective, it is understandable that they should see it as such, especially in these economic times. The many millions of kwacha demanded by the girl's family are too taxing to be merely a 'token of appreciation'. So it is no surprise that at the time of their son's death, these people look forward to getting their wealth back.

Pegging *lobola* so high cheapens the custom of *lobola*. Even worse, a high *lobola* works against the interests of the bride when her husband dies. A widow whose *lobola* was high is often in a serious predicament. She does not receive the *lobola* so there is no question of her being 'paid again' – she was not 'paid' in the first place. Assuming a family manages to hold on to a bride's *lobola* and gives it to her at the time of her husband's death, no matter how much *lobola* was paid, a part of it would never suffice as an inheritance for both the widow and her children. In most cases, the value of the deceased's estate and the household property amount to much more than that. Bitterness regarding high *lobola* causes the man's extended family to seek restitution at time of inheritance, hence they find it difficult to share a deceased's estate with the widow and her children.

14.6 Registration of Civil Status

Registration of civil status in Zambia is governed by the Births and Deaths Registration Act *(CAP 51 as amended by S.I. 21 of 1973 and 13 of 1994).* In its preamble, it is stated thus: *this is an Act to provide for a uniform law for the registration of all births and deaths in Zambia, without distinction of origin or descent; and to provide for matters incidental thereto."*

It is by law required that every person should have his/her civil status registered. Pursuant to section 5 of the Births and Deaths Registration Act, Chapter 51, *"the birth of every child born and the death of every person dying in Zambia ….shall be registered in accordance with the provisions of this Act*." In this Act, a "child" includes an illegitimate child. Practice in Zambia has shown that no registration of, for instance, birth does not have any negative consequences. For example, a child who is without a birth certificate would still be able to access the under five clinic. With regard to intestate succession and inheritance, as long as it is not disputed by anyone that the deceased was a parent of the child, such a child will inherit even without a birth certificate.

A person who does not have a birth certificate can acquire a Police affidavit in which he/she declares that he/she does not have a birth certificate; but has been told that he/she is a Zambian citizen and the villages where his/her parents originate from. With that affidavit, and a guardian who can testify to the correctness of the information in it, one can acquire a National Registration Card (NRC), which is the official national identity document that one needs in order to register as a voter, acquire a driver's license or apply for a job.

In relation to marriage, registration is governed by the Marriage Act, Cap 50. Under this Act, nothing in principle changes as regards civil status except that once a woman marries, she becomes part of her husband's family, hence she is entitled to a share of her husband's estate upon divorce or her husband's death. To this extent, one would say a woman's civil status changes upon marriage.

In general, it would appear that under Zambian law, non-registration of civil status does not have significant consequences especially in relation to birth as the law is silent on that aspect.

14.7 Conclusion and recommendations

Most marriages among the poor are contracted through customary arrangements between families. Consequently, the vast majority of matters concerning family law are regulated by customary law; and disputes are considered for resolution within the family or/and by the traditional justice system. Many respondents were of the view that disputes involving husband and wife, including dissolution of marriage and wife battery, did not warrant seeking justice from or reporting to the state justice agencies. The findings indicate that the majority of the respondents preferred resolving their disputes relating to marriage dissolution within the family, the Traditional Courts or the local courts. This position does not only reflect the traditional norms and practices, but also the absence of awareness about the statutory Family Law provisions.

The Government of Zambia must determine whether promotion of civil marriage is a goal of state policy. If it is, then targets could be set and progress measured. If the survey figures are correct at national level in indicating that approximately 10% of marriages are currently civil marriages, what target would the government set for 2025? What policy means could be used to achieve this? Making the institution of civil marriage more accessible and more attractive to users would definitely be one such measure.

Recommendations for Reform

In the view of the authors, the way forward for Zambia must be to make far greater efforts to reduce the gap between the statutory and customary justice. This effort must take its outset in both sides of the equation. Many measures must be adopted to make statutory legal options (including civil marriage) as well as institutions and processes accessible, available and understood by the people. Likewise, there must be an effort to develop customary law institutions, norms and procedures so that they correspond progressively more to the values adopted by Zambians through legislation and constitutional principles.

Some of the most difficult issues to address are those related to the challenge posed by inequality between men and women in the social sphere, and in customary law. On this, we have no doubt that the principled goal is the achievement of equality and the elimination of the unequal status of women. A radically principled approach on this basis would be for the immediate abolition of the recognition of polygynous marriages by state organs. It is clear however that this is a political step which cannot be implemented without sufficient backing among the population of Zambia. It is thus an aim that should be pursued through the political process by Zambian activists rather than one to be demanded by lawyers on the basis of legal principle alone. It is also clear that any such step would have to safeguard the legal rights of women and children currently in polygynous families. Nevertheless, the government should adopt a programme of actions with this clear aim.

Making statutory legal protection and institutions more accessible

1. To make statutory marriage more accessible and popular, the Minister could authorise more places and officials to solemnise civil marriage, e.g. Local Courts, Local Court

officers, Pentecostal churches, and their pastors and priests. He could also empower churches not only to host and conduct civil marriage ceremonies as well as their own religious ones, but, subject to compliance with conditions and tests of knowledge, also to issue the officially recognised marriage certificate, which currently is only issued by the registrar at civic centre.[438] Churches would be obliged to transmit records in due form to government agencies on a periodic basis. Failure to do so would result in a loss of the licence (and surrender of an authorised seal, for example) to conduct civil marriages.

2. Consideration should also be given to making actions for dissolution of civil marriage a matter for Subordinate Courts so as to remove a disincentive regarding accessibility of this legal procedure.

3. Both Parliament and Courts need to bring Zambian legislation and case law respectively, to set out a clear new definition of (civil) marriage that reconciles the old definition with current legislation and jurisprudence.

Making customary marriage and law more compliant with legal and constitutional values

4. The General Recommendation[439] of the UN CEDAW Committee that States parties should require the registration of all marriages whether civil or according to custom or religious law should be adopted as a goal of official policy by Zambia. This measure can help to ensure compliance with the Convention and establish:

- equality between partners,
- a minimum age for marriage (a minimum of 16 is suggested),
- gradual elimination and abolition of polygyny,[440]
- the protection of the rights of children regarding the principle of free consent to marriage.
- Customary marriages should be regulated by statute law in order to ensure that women's rights and children's rights are not violated.

A study should be carried out on costing and financing of this step. Care should be taken to ensure that it does not lead to the de facto invalidation of marriages for large numbers of people because of inability to comply with costs or travel requirements.

5. In actions for dissolution of customary marriages, the courts (particularly the Local and Subordinate Courts) should not entertain actions that make dissolution of marriage conditional on repayment of lobola).

6. Legal reforms must go hand in hand with programmes of reform and empowerment in other sectors (the key five sectors through her national gender machinery which include: agriculture and land; education; governance; health; and social protection).

[438] Family Law Workshop, ZHRC, 18 March 2010.
[439] Ibid. para. 39.
[440] The CEDAW Committee has also taken a clear position against polygamy. This is discussed below.

Government must protect women's property rights and address issues of domestic and gender based violence, including through enforcement of the 2011 Gender Based Violence Act.

7. There is need to encourage the government of Zambia to strengthen its ties with civil society, researchers and academia, as these entities are often the repositories of the most practical background information.

8. Civil society organizations should work vigorously to develop, articulate and advocate a common agenda for the empowerment of women in Zambia. This should be linked to various programmatic activities including education, information dissemination, sensitisation, and legal empowerment. Networks or coalitions working for this purpose should also lobby government and political parties for a combined effort of both administrative and educational policies at the national level to ensure elimination of discrimination against women.

15. Land and Property Law

This chapter does not attempt to provide a complete explanation of property rights in Zambia, but rather an overview of the strengths and weaknesses of legal protection of these rights. As with the overall approach of this study, the key questions here concern the legal protection that is in fact available to Zambians, its adequacy in law and in practice, and in relation to both substance as well as procedure.

As in other areas of law and justice in Zambia, the largest single challenge is how to successfully harmonize the norms, structures and mechanisms of law and society, or of statutory and customary law. In the areas of family and property law, the role of customary norms, structures and processes remains primordial. The lack of outreach of the state, and the historical lack of familiarity and legitimacy of state law and justice is in contrast to the persistence of social and customary mechanisms and patterns of order, justice and fairness. Nevertheless, in a changing society, both have their weaknesses and their strengths. The two worlds represented by state and society operate according to different philosophies, norms and rules. The challenge is not to treat this opposition as a question of "choosing" one or the other, but of finding and developing models for how these two can work in harmony with one another. This will require creativity flexibility, pragmatism and perhaps a need to experiment on a small scale to find workable models.

15.1 The right to property in the law of Zambia

The Constitution

Article 11 (d) of the Constitution of Zambia (1996) provides a guarantee against deprivation of property without compensation. Article 16 addresses the same right in more detail, beginning in its first section by providing a guarantee against compulsory deprivation of property through state action without adequate compensation and as provided by an Act of Parliament. The following section (2) of the article then goes on to list no fewer than thirty three exceptions to this constitutional right. Thus, nothing done under the authority of a law that provides for acquisition of any property or property interest will be considered to be inconsistent with the guarantee in section (1) if the law is shown to be for one of the thirty three listed purposes. Some of these are natural and reasonable, but others seem overly widely formulated.

Excluded from the protection of Article 16 (1) are (*inter alia)* laws:

(j) relating to abandoned, unoccupied, unutilised or undeveloped land, as defined in such law;

(o) for the purpose of or in connection with the prospecting for or exploitation of, minerals belonging to the Republic on terms which provide for the respective interests of the persons affected;

(y) for the purpose of the administration or disposition of such property or interest or right by the President in implementation of a comprehensive land policy or of a policy designed to ensure that the statute law, the Common Law and the doctrines of equity relating to or affecting the interest in or rights over land, or any other interests or right enjoyed by Chiefs

and persons claiming through and under them, shall apply with substantial uniformity throughout Zambia;

(z) in terms of any law providing for the conversion of titles to land from freehold to leasehold and the imposition of any restriction on subdivision, assignment or sub-letting.

Surprisingly, these restrictions were not revised during the lengthy deliberations of the NCC in 2009 and 2010 and are repeated almost verbatim in the 2010 draft constitutional bill.

These and the other very wide ranging exceptions severely restrict the usefulness of the constitution as an instrument of protection of property rights in Zambia. In this regard it is worth comparing the provisions of recent Constitutional documents from the region on the issue of property rights.

Article 28 of the Constitution of Malawi simply states the right to acquire property, alone or in association with and forbids arbitrary deprivation of property. Article 25 of the Constitution of South Africa and Article 75 of the new Constitution of Kenya are somewhat longer than this, but still brief by comparison with the Zambian provisions. Protection against forced evictions is also present, but lacking in the 1996 Constitution of Zambia and the 2010 NCC draft.

Further restrictions on property rights that particularly affect women are to be found in Article 23 (4) (c) and (d) of the Constitution, which, as discussed elsewhere in this study, shields discrimination in the fields of personal law (including devolution of property on death) and generally in relation to customary law (encompassing a wider range of matters concerned with property rights), from constitutional scrutiny. This can be contrasted with constitutional and legislative developments elsewhere on the continent, where customary law is subjected to higher constitutional norms defending women's equality. An example is seen in section 27 of Uganda's 1998 Land Act, which provides that customary law that contradicts the relevant provisions of the Constitution is null and void.

Recommendation:

The renewed constitutional drafting process in 2012 should re-examine the issue of the right to property and attempt to simplify the restrictions on the right, drawing inspiration from some of the newer constitutions in Eastern and Southern Africa.

Statutory and customary law: The Zambian dualism between statutory and customary law is very evident in relation to real and personal property, as seen in three key areas of tenure rights, succession rights and marital property rights. Rights in relation to real property are protected partly by statutory law such as the 1995 Lands Act or where succession is concerned, by the Intestate Succession Act in the case of State Land and leasehold property. Likewise, the Marriage Act deals with property rights on dissolution of civil marriage.

Under statutory law, title is held as leasehold title since the abolition of freehold title in the Land (Conversion of Title) Act[441]. Most of the outset for this section is the Lands Act of 1995

[441] Chapter 289 of the Laws of Zambia, 1972 Edition.

which repealed much of the previous legislation in the area[442]. Previous legislation, including the Land (Conversion of Titles) Act of 1975, and the Land (Conversion of Titles) Amendment Act 1985 are mentioned only insofar as provisions of this legislation are relevant to rights and legal procedures still applied today. The Lands Act No. 27 of 1995 was motivated by a declared need for land tenure reform to increase private sector development and domestic and foreign investment. Nevertheless, the adoption of this Act did not change the land tenure system significantly. All land in Zambia is still vested in the President[443] and land in a customary area, held under customary tenure before the commencement of the Lands Act 1995, continues to be so held and recognized[444]. Though all land is vested in the President, the actual power of control is delegated to the Commissioner of Lands.

The real property regimes set down by this legislation leave those whose lives are primarily governed by customary law untouched. As is well-known, this is actually the majority of the population.
Several sources affirm that minerals in the ground are vested in the President on behalf of the state. No precise formulation of this principle is to be found in the Constitution or the 1995 Mines and Minerals Act. Article 293 of the 2010 NCC draft Constitution would cure this defect.

15.2 Real property: Land tenure in Zambia

It is impossible to do justice to the depth and variety of customary land ownership in Zambia here. The following summary inevitably contains simplifications and generalizations that may not apply everywhere, and is intended as a general introduction. For a deeper understanding, reference is made to the numerous Zambian authors who have written on this subject, as well as to earlier research. A number of authors have elucidated the theme of land tenure in Zambia, including the development of the current scheme of State Land from colonial era Crown Land, and law relating to land in customary areas from the categories of reserve land and trust land.

Both customary and statutory law regulate the use, as well as the disposition of real property. Independence did not radically change the administration of land in relation to either of these categories. Crown Land became State Land vested in the President instead of the colonial governor so that all land, including land under customary tenure, is now vested absolutely in the President who holds it in perpetuity for and on behalf of the people of Zambia.[445] Chiefs continued, at least *de facto,* to exercise their functions of allocating land and adjudicating on most disputes.

Land in a customary area, held under customary tenure before the commencement of the Lands Act 1995, continues to be so held and recognized.[446] Official figures estimate that

[442] This law repealed the Land (Conversion of Titles) Act of 1975, the Zambia (State lands and Reserves) Orders, 1928 to 1964, the Zambia (Trust Land) Orders, 1947 to 1964 and other previous land laws.
[443] Lands Act, 1995 Part II section 3.1
[444] Ibid, Part II section 7.
[445] Section 3(1) of the Lands Act, Chapter 184 of the Laws of Zambia.
[446] Lands Act, 1995, Part II section 7

customary land covers about 94 % of Zambia and the remaining 6 % is leasehold tenure.[447] These figures from the 1970s are not updated. The Ministry of Lands has not maintained adequate records of the number of title conversions it has approved. Other sources estimate that customary land today covers much less and only amounts to 50 % of land in Zambia.[448] Some sources say that since 1991, when the pace of conversion reached something of a plateau, it has remained steady at about two to four thousand per year, the number being determined by the capacity of the Ministry of Lands to deal with the cases.[449]

Chiefs play roles in relation to three functions concerning customary land: allocation, adjudication and consultation / approval of conversion or alienation. The first two of these are purely customary, while the third is purely statutory. These functions are not dealt with by the Chiefs Act (see chapter 13).

The Lands Act does not recognize the authority of Chiefs to administer land or adjudicate cases concerning it. The 2006 Draft Land Policy discusses the role that Chiefs and Chieftainesses traditionally had in the allocation of land, but it does not foresee any role for them in relation to adjudication of disputes or in relation to registration. The Lands Act does require the consultation and, in practice, the approval of Chiefs in relation to the alienation and conversion of customary land. The 2010 NCC draft constitution foresees confirming the requirement of the approval of Chiefs for conversion to leasehold, but provides that such approval should not be "unreasonably" withheld.[450]

Besides their powers in statutory and customary law, there are occasional reports of Chiefs demanding the payment of "taxes" by citizens within their chiefdoms. Traditional leaders are sometimes accused of wanting to survive and meet their daily needs by imposing illegal taxes on their community members in the form of maize, money and sometimes goats and chickens against the will of the already poor men and women in their communities. While this may be done in the name of collecting a reserve for the community, the money or goods are not accounted for and no community member is allowed to ask how the collections were used. It is false to call this homage or a communal reserve if community members are forced to pay against their will, despite the hardships and shortages that they themselves are facing. Practices like this can make the institution very unpopular among their "subjects". At the same time, their authority is a simple reality in Zambia, especially in rural areas.

This is entirely without legal basis and effectively amounts to extortion. It needs to be tackled politically as well as through legal mechanisms. Another issue is the expulsion of villagers accused or suspected of practicing witchcraft. This may involve deprivation of acquired land rights, thus becoming a property rights issue.

15.2.1 Civil society views on current land tenure issues in Zambia

Civil society organizations, headed by the Zambia Land Alliance, pointed to a number of key issues with Zambia's current land administration and management: [451]

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[447] Government of the Republic of Zambia, Draft Land Policy, Ministry Of Lands, 2006
[448] Meeting with Zambian Land Alliance, 20 May 2010
[449] See Land Tenure Policy and Practice, 2003, p.12.
[450] Article 290, clauses (3) and (4).
[451] See Land Policy Options Paper, 2008, ZLA, p. 8.

- Centralised state control over land matters, patronage and corruption within Government, local authorities and customary authorities in land delivery, breakdown in land administration and land delivery procedures, and generally inadequate participation by communities in the governance of land and natural resources
- Multiplicity of laws and practices related to land administration and land management, inadequate environmental management, lack of viable land market regulation and disregard for land use planning
- Centralised, costly, discriminatory and inefficient land conflict resolution mechanisms
- Discrimination against women, youth, the disabled and the poor in accessing and holding land, as well as gender and trans-generational discrimination in succession or transfer of land
- Disparity in entitlement to defined, enforceable and transferable property rights, increased conflict over land, abandonment of agricultural land and increased urbanisation

The finalization of the Land Policy has been put on hold by the Government pending the finalization of the Constitutional review by the National Constitutional Committee (NCC). ZLA has submitted its recommendations to the Land and Environment Committee under the NCC and has advocated for a Land Chapter in the Constitution which takes into consideration the concerns of the poor.

15.2.2 Customary ownership

Allocation and acquisition: Land in pre-colonial Zambian society was traditionally held under customary tenure according to which ultimate ownership of land belonged to the ethnic or tribal community. Access to land was conditioned on a person's membership of the community and thus intrinsically linked to family, lineage / clan and tribal membership. Every member of the ethnic community was entitled to land for the purposes of sustenance. Land was relatively plentiful and used primarily for subsistence farming, as well as gathering of food and other necessities. Often, land could be had by a member of the community simply through the work of clearing and farming it, with community leaders such as headmen and chiefs giving their approval.

While it is customary to bring gifts to Chiefs when visiting them or asking a service of them, this should be seen as an expression of a patrimonial culture rather than indicating ownership by Chiefs of land. Most authors agree Chiefs did not "own" tribal land in any sense.[452] Rather, the office of chief involved a responsibility to allocate and exercise regulatory functions in respect of land on behalf of the tribal community[453], subject to custom and to checks on authority through a council of *ndunas*.

Gender (in)equality: Divided and clearly defined gender roles in customary society meant that rights of ownership were exercised primarily by males. While the criticism that these gender roles discriminate against women seems unavoidable,[454] it is important to understand this in the context of the complex social system in which it arose. A simplistic rejection of culture and

[452] Land Tenure and Rural Livelihoods In Zambia: Case Studies of Kamena and St. Joseph, Roy Alexander Chileshe, Ph.D Thesis, 2005, pp. 88 – 90.
[453] Ibid, citing Mvunga and other authors.
[454] Government of Zambia, Ministry of Lands, Draft Land Policy, 2006, p.10.

tradition as being purely discriminatory fails to understand the complexity of traditional social relationships. Females' rights to sustenance were exercised through claims on male relatives: fathers and husbands, or sometimes brothers, uncles and sons. This could include food from farming or cultivation by women of plots of land for subsistence crops. A failure to recognize these nuances can result in misunderstandings, whereby practices like abandonment of widows and property grabbing are falsely seen as being customary, rather than being violations of custom. Recognition of such nuances does not mean accepting them as a model for society today.

Customary ownership - disposition: As with use, ownership did not involve unlimited rights of disposition. Effective ownership through cultivation rights could be passed on to an heir within the family. Customary owners could enter into agreements with other members of the community in relation to cultivation of land in return for certain benefits or other periodic payments. Thus land could be temporarily pledged by one family to another, subject to return upon request of the family to whom the land had originally been allocated. This practice, which was confined to members of the same community, enabled more land to be cultivated in places where the original owner was unable to cultivate it.

Most researchers and authors agree that "sale" of land in terms of absolute alienation did not exist traditionally, and especially not to persons from outside the community.[455] If an owner died without heirs there was a reversion to the lineage and tribal structures – as represented by the headman and Chief. It was only in later time and with urbanization that land became a valuable commercial commodity that could be transferred for money. Mvunga (1982) describes acquisition of land through sale of improvements on the land, transfer of land in exchange for goods or services or on marriage.[456]

Rights of use: As in most other countries, ownership rights of beneficial use were not absolute. In most places, the cultivation rights of the effective owner could be subject to the concurrent rights of others to a number of benefits from the land, including for example, the right to gather wild food or firewood, the right to graze animals after harvest time and to avail of water supplies, as well as rights of way. A relevant question in this regard is what happens to these property rights when customary land is converted to leasehold. This is discussed below.

Not all community land was the subject of individual ownership rights. Some land, including forests and uncultivated land were available to all members of the community for grazing of animals, gathering of food and firewood or medicinal plants and herbs, hunting and fishing, drawing water, washing and other purposes. Common resources such as these were of particular importance for poorer or more vulnerable members of the community. No sources in literature have been found dealing with minerals or mining activity in customary law.

15.3 Security of tenure and recognition of title by statutory law

This section briefly discusses conversion to leasehold and the possibility of other legal mechanisms that could complement it. Conversion to leasehold under the Lands Act is

[455] See also Draft Land Policy, p.3.
[456] Mvunga, Land Law and Policy in Zambia, Mambo Press, Zimbabwe,1982, pp. 33 – 41.

discussed below, but first it is useful to generally put conversion titling in context. This mechanism or process was initially promoted by institutions such as the World Bank as a way of promoting economic development by allowing agricultural producers to use formal title as a guarantee when applying for loans and thus to improve agricultural production. Other arguments in favour of titling mechanisms are that by making land a saleable commodity, productivity is increased when the market mechanism allows more efficient producers to purchase it.

Critics of many of these titling schemes, including the UN Special Rapporteur on the Right to Food Olivier De Schutter[457] make several points that are relevant in the Zambian context. As the Special Rapporteur points out, the real question, "is not whether security of tenure should be improved, but how". The following general criticisms are made:

- Unless it is transparent and carefully monitored, the titling process itself may be appropriated by local elites or foreign investors, with the complicity of corrupt officials;
- If it is based on the recognition of formal ownership, rather than on land users' rights, the titling process may confirm the unequal distribution of land;
- There is a risk that titling will favour men;
- Land sales tend to favour not the most efficient users of land, but those whose access to capital is greatest;
- Individual titling can cause remove land from production and held as a speculative investment, resulting both in decreased productivity and in increased landlessness among the rural poor;
- The poorest farmers may be induced to sell land and then be "priced out", particularly if they have fallen into debt.

Also in Zambia, critics point out[458] that formal titling is expensive and thus usually inaccessible to the poor. Thus the cost of titling may exceed the value of the asset or right to be protected, even if the latter is very important to the poor people in question. The poor are also discouraged from converting to leasehold because of the requirement to pay ground rents on leasehold land. Van Lonen argues that titling does not give better protection, but it has advantages for new buyers who do not want to be encumbered by customary obligations. It is geared to middle-class owners. While customary tenure is recognized in law, including by the 1995 Lands Act, it is not possible to register customary tenure as such. Thus, attaining the security of registered tenure is conditioned on converting to leasehold tenure, and thus to state land, with the expense and resources that this process requires.

The ZLA echoes these views in its criticisms of the draft land policy. ZLA's Land Policy Options Paper was published in January 2008. It argues that A basic premise of both the 2002 and the

[457] See for example, Interim Report of the UN Special Rapporteur on the Right to Food, August 2010, UN Document A/65/281.
[458] Bastian van Loenen, Land Tenure in Zambia 1999, http://www.spatial.maine.edu/~onsrud/Landtenure/CountryReport/Zambia.pdf

2006 draft Land Policy is that more customary land should be converted to leasehold in order to generate economic growth. ZLA has argued that there is no evidence to show that rural poverty will diminish once rural populations obtain title for their land. ZLA further argues that conversion of land will not take place in an equitable manner and that access to land for the poor to sustain their livelihoods will thereby be further limited.[459] ZLA argues that a priority for a new Land Policy is to ensure equal status before the law for holders of customary and statutory land, so as to protect tenure rights and prevent one form of tenure taking precedence over the other.

According to the draft Land Policy, powers would remain vested with the President and delegated to the Land Commissioner but the Land Policy proposes the decentralization of Land Commissioner to district level. Civil society organizations argue that this in itself does not ensure transparency at local level and that full participation of the local community must be ensured throughout all land allocation processes. Moreover, ZLA found that the draft Land Policy did not provide any guidelines in terms of strengthening customary land administration. ZLA therefore proposes to strengthen a democratic customary land administration by developing basic guidelines to be applied nationwide, which will spell out the minimum standards for administration of customary land. ZLA suggests provisions for representation of stakeholders in land management and allocation decisions in both customary and statutory land tenure systems.

Lastly, the Land Policy has proposed affirmative action for women in terms of allocation of 30 % of state land for women. Civil society organizations headed by ZLA have expressed concern about the apparent lack of actual implementation mechanisms to effectuate the affirmative action provisions.

There are no countrywide statistics disaggregating title acquisition by income. However, studies report the economically skewed character of titling in Zambia and that the land conversion has primarily benefitted large scale farmers, foreign investors as well the local elite (retired civil servants, district-level officials, and the chiefs' family members).[460]

Few rural villagers are aware of the Land Act and the possibility of conversion. Even if villagers were fully informed of government procedures and wished to gain title to their lands, most could not afford to do so. The transaction costs of converting customary to leasehold title are often too high for most villagers. To acquire an initial fourteen-year lease, applicants must not only secure the permission of the chief and district council, they must also hire a surveyor to draw a sketch map of the land and pay a lease charge. In addition there are significant travel costs involved in securing a lease: A claimant must travel repeatedly to the district headquarters and the Ministry of Lands offices in Lusaka or Ndola. These costs are even greater if the landowner wants to convert his or her fourteen-year provisional lease to a full ninety-nine-year lease. Lastly, once the land is converted, a lessee must pay an annual ground rent to the Ministry of Lands. While urban businessmen, civil servants, politicians, and foreign investors can afford these costs, they are far too high for most rural Zambians.

[459] See Land Policy Options Paper, ZLA, 2008, p. 14

[460] See Market Based Land Reforms in Zambia, Taylor Brown p. 89., Land Tenure Policy and Practice, 2003,p.12,#54 and p 19.

Although an intention of the 1995 Act may have been to recognise and protect customary land rights, one of its main effects is to permanently diminish the amount of land held under communal tenure and to open up more land for investment. Once a villager or investor was granted a leasehold title for a piece of land, it ceased to be customary land and became state, essentially private, land. Customary rights are extinguished and the land cannot be reconverted back to customary tenure.[461] This would also be the position under the land chapter of the 2010 NCC draft constitution.

This points to a number of legal strategies for pro-poor land policies: (i) those aiming at ensuring that title conversion does not disadvantage the poor and (ii) those aiming at enabling the poor to secure their rights, including, but not limited to title.

15.4 Recognition of customary tenure

For the purposes of the present study, the question is whether more accessible legal protection could be provided to poor Zambians by allowing registration of customary tenure. Some other countries in Africa such as Mozambique, Tanzania and Uganda[462] have introduced law and administrative schemes by which customary tenure and a certificate of customary tenure can be issued. Legal registration and recognition of customary tenure is a question that is separate and distinct from that of whether ownership is collective or individual. Thus, titling can be on the basis of a community as a whole. This can be followed by subsequent processes in relation to rights of disposition and use at an individual or family level. Under the Ugandan model, a Communal Land Association may be registered.

Under Uganda's 1998 Land Act, the certificate of customary title is issued by public authorities. As discussed above, the important issue from the user's point of view is not so much which body or authority is responsible for issuing the certificate as much as the transparency, fairness and effectiveness of the system. Thus, certificates could be issued in some form of cooperation between a Chief's Office and a District Council, as long as they are correctly issued and legally valid.

Disputes and difficulties in relation to allocation decisions sometimes arise when the decision to allocate land made by one chief is contradicted by his or her successor. This can arise either through gaps in memory, the lack of records, or sometimes a deliberate attempt to countermand the allocation decisions of a former Chief. The problems of "double allocation" discussed above could in principle be cured by a gradual professionalization of the function of land allocation and registry, whereby records are standardized and stored. Whether this should take place at the office of the Chief or at another body, such as the District Council is a policy question, but it is also a practical one, having an important impact on the accessibility and effectiveness of justice for ordinary Zambians. In fact it would seem currently impossible to carry out this function without cooperation with the Chiefs as the repository of knowledge and legitimacy concerning land allocation. There is no doubt that

[461] See Market based Land Reforms in Zambia, Taylor Brown, p. 87.

[462] Community delimitation in Mozambique is enabled by the Lei de Terras of 1997, and Communal Land Associations in Uganda are facilitated by the Land Act of 1998 (Chapter 227, Laws of Uganda). In Tanzania, village registration is possible under the Village Land Act (No 5 of 1999).

Gift giving: The practice of gift giving in relation to land allocation presents several challenges. One is an obvious risk of corruption. At the same time, this would not necessarily be cured simply by transferring this authority to an administrative official, who might also be offered and accept gifts or bribes. It would also be a mistake to see gift giving only as an expression of corruption. In the setting of a patrimonial culture, it may just as well be an expression of respect for tradition and of personal esteem. The gift may in some cases be used for communal purposes. Recommendations are made below.

Recommendations:

Recommendations by other authors to **introduce legislation allowing for the registration and recognition of customary tenure** are fully endorsed. The legislation should facilitate registration of both individual and collective forms of ownership. Any titling schemes that facilitate disposition of land (see also below under leasehold conversion) should include specific mechanisms for protection of women's rights.

Programmatic measures: Government (through facilitation and cooperation) and development partner (through financing and where necessary and appropriate, technical assistance) should be given to innovative programmatic approaches in relation to land tenure and property rights. CSOs including the Zambia Land Alliance, YWCA, Young Women in Action and Action Aid Zambia have developed and pioneered a number of innovative approaches that tend in the general direction of increasing tenure security in relation to customary tenure. These include:

- participatory community sensitisation techniques and the work of paralegals,
- the establishment of CBOs, including women's organizations.
- processes to create village lands registry books;
    - This work requires a great deal of care and sensitivity in order to avoid mistakes, and models should be carefully tested and evaluated before being scaled up.[463]

15.5 State land

The need for subsidiary legislation: According to the Land Act Sec. 31 (2) the Minister may by statutory instrument make regulations with regards to a range of other procedures governing the administration of land, such as -

a) the terms, conditions and covenants of leases;
b) the procedure for applying for the President's consent to any transaction relating to or affecting land;
c) the procedure for applying for the renewal of a lease;
d) the ground rent for land;
e) fees for transactions in land; and
f) any other matter which is to be or may be prescribed under this Act.

[463] A very useful source in this regard is the 2011 "Tool Kit of Innovative Participatory Models for Promoting Women's Land Rights in Customary Areas" produced by the organizations named above.

The Land Act reportedly still suffers from a lack of statutory instruments, rules and procedures intended to govern the administration of land. This lack of regulations has created confusion over due process among both local and central government officials. Although, Circular No. 1 of 1985 remains in place it only regulates a small part of the Act in regard to the application procedures for converting customary tenure to leasehold tenure.

15.5.1 Leasehold and conversion

Administrative Circular No. 1 of 1985 describes the procedure for conversion of land from customary to leasehold tenure and the system for land alienation in which District Councils would participate in processing applications, selection of suitable candidates and making recommendations for alienation to the Commissioner of Lands. The procedures laid down in Circular No. 1, 1985 remain in force today. The consent of the chief must be obtained before an application in respect of leasehold on Customary Land is approved. Chiefs and District Councils should certify that they had physically inspected the land in question and that no person's rights or interests were affected prior to conversion. Neither the 1985 Circular nor the 1995 Act give Chiefs or Councils the authority to extinguish existing rights.

Thus, holders of property rights of the kinds described here are dependent on the quality of this process and the trustworthiness of both Chiefs and Council officials for the protection of their rights. Chileshe (2005) points out the non- bureaucratic and relatively inexpensive nature of this procedure.

Some authors point out that Chiefs may not be reliable as protectors of the interests of the poor and vulnerable, especially of women and young people. [464] They may abuse the power given to them by the requirement of consent to conversion to leasehold. Government officials acknowledge that the role of district councils may also be open to abuse and political favouritism.[465] The conversion process has been strongly criticized for being corrupt and only geared towards foreign investors, the elite and other influential Zambians to the detriments of women, the poor and landless. [466]

Chiefs / traditional leaders argue that they are not well informed about the law and that widespread incidents of 'land grabbing' by officials are common.[467]

As a matter of law, those responsible for the administration of such rights – traditional leaders and state authorities - would normally be responsible to the holders of such rights to ensure that they are either preserved or adequately compensated when conversion takes place. In reality though, the legal system is not accessible to the poor for actions of this kind, which are difficult to prove, especially for the rural poor, who tend to be poorly educated.

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[464] Making Land Administration Pro Poor: Paul van Asperen and Augustine Mulolwa Improvement of Customary Tenure Security as Pro-poor Tool for Land Development – A Zambian Case Study, Conference Paper for "Promoting Land Administration and Good Governance 5th FIG Regional Conference" Accra, Ghana, 2006

[465] Paper presented to the Expert group meeting on secure Land Tenure "New Legal Frameworks and Tools" By F.S. Kachamba, Chief Registrar, Lands and Deeds Registry Department Ministry of Lands Lusaka Zambia

[466] See ZLA, Policy Option Document, Jan. 2008

[467] See Land Tenure Policy and Practice, 2003, p.12 #50.

There are also problems from the point of view of would be purchasers or converters to leasehold tenure. If applications made according to the formal procedures result in several years delay, applicants are tempted to find ways of jumping the queue. The process then becomes overtaken by graft and corruption and the integrity of the system is undermined. The result is that statutory title may be no more secure than unrecorded customary tenure. Nevertheless, there has been a growing demand for titles as Zambians realize the market value of the leasehold system. The Ministry of Lands is reported to have a backlog of several years in the handling of applications for all types of leases and under current conditions it is generally believed that many applications may never result in a title. A further problem is that leaseholders may find after taking possession of "their" plots that there are outstanding claims relating to use or disposition of the land that were not properly resolved prior to the conversion. Possession of valid legal title may not be sufficient to resolve these problems in practice.

15.5.2 Alienation of land by the authority of the President

By virtue of sec. 3 (2) of the Lands Act, the President may alienate land vested in him to any Zambian and, under sec. 2 (3), to non-Zambians. Sec. 3 (4) (a) and (b) of the Lands Act place some (limited) restrictions on this power in areas where land is held under customary tenure. First, the President must not alienate the land without (a) "taking into consideration" the local customary law on land tenure (unless the said customary law is in conflict with the Act). Secondly, the President must not alienate such land without (b) consulting the Chief and the local authority in the area in which the land to be alienated is situated.[468] (c) without consulting any other person or body whose interest might be affected by the grant.

In order to foster cooperation from traditional leaders in matters concerning the conversion of customary rights into leasehold rights, the Lands Act states that the President '*shall not alienate any land situated in a district or an area where land is held under customary tenure without taking into consideration the local customary law on land tenure ...[and] without consulting the chief and the local authority in the area in which the land to be alienated is situated* ...' .[469]

It is submitted that this section does not, in law or in practice, adequately protect the property rights of existing customary rights holders in respect of the land to be alienated. First, the duty to merely "consult" the Chief and the Council would not appear to be adequate, as these bodies have no prima facie power to deprive ordinary Zambians of their vested property rights. Likewise, the duty to "take into consideration" local customary law does not seem to properly account for the binding nature of legal rights and obligations under that customary law.

In relation to alienation of State Land, problems have surfaced where Town and City Councils have enjoyed the power to allocate plots of State Land. Issues such as this are questions of administrative law, where Zambia currently lacks sufficiently strong public institutions (cf. Chapter 3).

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[468] In the case of a game management area, the person to be "consulted" is the Director of National Parks and Wildlife Service, who shall identify the piece of land to be alienated.

[469] Lands Act, No. 27 of 1995, section 3 (4) (a) and (b). See also Land Tenure Policy and Practice, 2003, #36.

A growing problem in very recent years is that of evictions of customary title holders when mineral deposits are found. There are numerous reports connected to manganese mining in Luapula Province, as well as in the more traditional mining area in the Copperbelt, of evictions of farmers. Most often, there is very little clarity on whether any procedure as foreseen under the Land Act has taken place. Farmers are most often by their own account entirely unaware of whether permits have been issued to miners or prospectors. In some cases, they report having simply been chased away at gunpoint, with no suggestion of compensation or alternative land. In some cases, traditional leaders claim to have no knowledge of mining permits having been given.[470] In other cases, the mining activities seem to be clearly illegal, though there may at times be connivance on the part of officials at local or even central level. Added to this are the health and environmental issues that arise in connection with mining activities, particularly if proper procedures are not followed.

15.5.3 Recommendations on leasehold conversion and alienation

As land administration is a specialized field, the authors of the present study do not intend these recommendations to be exhaustive. Some promising steps could include:

- Empowering of communities through outreach and legal assistance schemes by providers with specific knowledge of land related issues and gender equality.
- Capacity building, including training of Chiefs and District Council officials – preferably together, on the requirements of the Land Act and of other legal requirements of statutory and customary law and good practice, as well as gender equality;
- Pending legislative amendments, an updated version of the 1985 Circular could require the following:
- Standard forms for Chiefs to complete when certifying consent to conversion. These could include sections or boxes relating to:
  - The ownership history of the plot of land in question, individual or group;
  - Rights of way;
  - Water rights;
  - Other rights of use, including gathering, harvesting, tree planting, mining etc
  - A specific declaration that the property rights of women as well as men have been taken into account before giving consent.

Provision should be made either for these rights of use to continue and be carried over into the new leasehold framework or for compensation to be agreed upon with the holders of those beneficial rights in the land.

- The holding of a publicly announced hearing in the villages or hamlets closest to the location of the plot should also be required in order to give stakeholders a chance to

[470] http://www.irinnews.org/Report/90338/ZAMBIA-Land-and-mineral-rights-in-conflict

voice outstanding claims. The form should require certification that such hearings have been held (giving places, dates and times).

- A declaration **by the person seeking to convert** that to his or her knowledge there are no encumbrances on the property.
- Any fees demanded by Chiefs for services in this regard should only be permitted if authorized by a statutory instrument and should be standardized and made subject to requirements of recording and receipting.
- In the longer term, the exclusive authority of Chiefs in regard to consent should be reconsidered in favour of including more representative local structures.

15.5.4 Women's access to land

The National Gender Policy (2000) states that, "The acquisition and ownership of land in Zambia continues to be a major hindrance to women's effective participation in national development." Women's access to, control over and ownership of land are above all constrained by customary law and by attitudes and practices which may reflect the subordinate position of women under customary law, or which may be violations of principles of customary law that were formerly respected. The draft Land policy of 2006 blames discriminatory customs for the weak position of women where land ownership is concerned and recommends setting 33% of land aside "for women and other vulnerable groups".

Reference has been made above to the problems caused by Article 23 (4) of the 1996 Constitution, shielding areas of personal law and customary law from scrutiny under the principle of equality. Although there are ethnic differences in bodies of customary law and these have changed through time, an over-riding commonality is that women are treated as minors who are subordinate to men – fathers, uncles, brothers and husbands. While in the past, customary law provided some safeguards to protect women's access to (though not control over) land these safeguards no longer operate satisfactorily today.

The FNDP MTR in third indicator on Gender and Development dealt with the *Percent of Women with Titled Land.* At the time of the MTR, no disaggregated data existed on this and the land Policy remained a draft. The goal of allocating 30 percent of converted land to women is mentioned, and it is emphasised that this does not exclude women from applying or competing for the remaining 70 percent. The Ministry of Land reported that women received only 18.8 percent of the titles issued in 2008.

As regards protection of women's property rights in the immediate nuclear family, a legal rule introduced in Uganda is noteworthy. This provides that a husband is not entitled to dispose of family land without the explicit consent of his wife. Although the practical enforcement of this rule may leave a lot to be desired, it sends both a useful signal and provides an avenue of empowerment to those who are able to exercise it.

15.5.5 Women's real property rights in succession matters

Besides allocation of land according to customary law and through purchase, land is also acquired through inheritance. n areas under customary tenure, particularly where the custom is of virilocal marriage, a wife may be prevented from inheriting land or other property from a

deceased husband. Section 2 (2) (a) of the Intestate Succession Act (ISA) excludes land acquired and held under customary law from the application of the act. Inheritance of rights of access to land and control of other property is the prerogative of the deceased's kin, usually males. While we understand that the legislature may have wished not to divide and alienate customary land holdings according to percentage values, it would nevertheless have been possible to insert other provisions into the legislation that guaranteeing some form of livelihood protection to women, including life interests in marital property or guarantees of compensation.

Recommendation:

The Intestate Succession Act should be amended to secure legal protection of the real property rights of widows and orphans. Widows should in all circumstances be entitled to, at the very least, a life interest in marital land and real property. Children should be entitled to inherit rights in respect of real property that allows beneficial use.

15.6 Adjudication institutions

Lands Tribunal: The 1995 Lands Act established the Lands Tribunal at the level of the High Court. The Lands Tribunal has jurisdiction over any dispute relating to land under the Act. "Land under the Act" has been interpreted by the Supreme Court to mean leasehold or state land, thus excluding customary land from its jurisdiction.[471] According to a committee of the National Assembly, the effect of this interpretation is to render the Lands Tribunal "almost non-existent". As a result, the Lands Tribunal Bill[472] would, *inter alia,* extend the jurisdiction of the Tribunal to cover customary land.

The Lands Tribunal has not proved effective in protection of tenure. The 1995 Land Act established the Lands Tribunal to protect leaseholders and customary rights holders from abuse and to ease congestion within the High Court. The Tribunal was intended to be informal, low-cost and mobile so as to be accessible to rural and low income Zambians. One of the Tribunal's primary purposes was to provide poorer, non-titled individuals with a fair and accessible venue in which they could protect their customary rights to land. In practice, however, the Tribunal has been ineffective, inaccessible and costly. Few Zambians know that the Tribunal exists or what it does. Despite its ambitions to be mobile, the Tribunal has seldom travelled beyond Lusaka. Those pursuing claims must therefore incur the costs of travelling to the capital city and supporting themselves while there. Moreover, the Tribunal is over-burdened and under-funded: It has a backlog of cases of more than two years and is chronically understaffed.[473]

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[471] See National Assembly, Report of the Committee on Delegated Legislation on the Lands Tribunal Bill, N.A.B. No. 42 of 2010, 5th session of the 10th Nat. Assembly.
[472] No. 42 of 2010, sec. 4 (1) (b).
[473] See Market Based Land Reforms in Zambia, Taylor Brown p. 89., Land Tenure Policy and Practice, 2003, p 91.

Extension of the jurisdiction of the Lands Tribunal may be well-intentioned, but it could also have effects that are inimical to the interests of the poor if the tribunal continues to be inaccessible to them.

In practice, most disputes concerning customary land are dealt with through traditional institutions. This brings the discussion back to the question of documenting and registering customary title, as well as the adjudication (mediation, arbitration or negotiation) settlements reached in traditional forums, as discussed above.

15.7 Personal property issues

15.7.1 Property-grabbing

According to the ISA, women, together with the children, are entitled to inherit 20 % of their husband's property, including real property held under leasehold. However, it is widely reported that the law is not enforced and that property grabbing by the deceased husband's relatives is common.[474]

The problem of property grabbing that deprives especially widows and orphans of their property and may leave them destitute is well known and does not need to be extensively described here.[475] Customary rules that once provided protection against this have broken down in many places. While this is illegal according to the Penal Code and the Intestate Sucession Act, the biggest problems for vulnerable women and orphans are simply the lack of access to effective justice and law enforcement institutions such as the police (especially the VSUs) and the Local Courts.

15.7.2 Use of wills

Any dispute involving a will goes to the High Court. The lack of jurisdiction of lower courts in regard to wills could further strengthen traditional suspicion of written wills among poor and even middle-class people. There is very little use of wills in Zambia. Succession involving wills up to a certain monetary value should be within the jurisdiction of Subordinate Courts. NGOs could encourage the writing of simple wills based on standard formats approved by lawyers (with suitable disclaimers), as happens all over the world.

15.7.3 Intestate Succession

Section 43 (2) and (3) of the Intestate Succession Act sets very low limits on the monetary jurisdiction of Local and Subordinate Courts. Thus, Local Courts are limited to a ceiling of 50,000 kwacha, whereas the ceiling for Subordinate Courts is 100,000 kwacha. To the knowledge of the study team, these amounts have not been revised since the adoption of the Act in 1989. It is unclear if these amounts apply only to disputes before these courts, or if they also place limits on the monetary values that can be dealt with by administrators of estates

[474] See Women's Access to Land, Bonnie Keller, 2000.
[475] See for example: Centre on Housing Rights and Evictions (COHRE), Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa, ISBN: 92-95004-28-0

appointed by these courts. In either case, it is obvious that these amounts are unrealistically low.

The appointment and conduct of administrators of estates is a problem that is frequently cited by NGOs dealing with the poor in both rural and urban areas. Administrators are reportedly often partial and even corrupt. Local Court justices and clerks need to be more aware of the responsibilities of administrators and of their own responsibility to ensure that the authority conferred upon administrators by their courts is not abused. Likewise, Local Court Magistrates and clerks need to be reminded and monitored on their legal duty to respect the provisions of the ISA.

15.7.4 Recommendations on personal property issues

Property grabbing should be addressed through support to programming to strengthen resources and capacity designed to combat these practices using the institutions that are closest to the victims and are willing to combat them. These may include civil society organizations, either CBOs or NGOs, police VSUs, Local Courts, and traditional leaders who take a stance against such practices.

Subordinate Courts should be given jurisdiction in respect of **wills** where the value of the estate is below a certain threshold. Support should be given to legal aid providers that attempt to encourage the use of wills in Zambia.

The Intestate Succession Act should be amended to **increase the monetary jurisdiction** of the Local and Subordinate Courts, using the system of fee units to set the amount and making it possible to adjust these through rules of court to be issued by the Chief Justice.

16. Labour and Employment Law

For the present study, it was not possible to conduct an in-depth analysis of labour and employment justice in Zambia. The following brief note is intended merely to provide an overview of substantive law, the principal institutions and some of the main issues.

Basic principles of labour and employment law are set down in written law in the Constitution[476] which guarantees protection on labour and employment related matters in Article 23 and 24. In addition to the Constitution, there are at least 13 statutes that regulate labour and employment law. The Employment Act[477] and the Industrial and Labour Relations Acts[478] are the principal laws that regulate the conduct of players in this field of law.

16.1 Main issues and groups of concern

There are many categories of employees in Zambia, including those on income tax and National Pension Scheme Authority, including casual employees, temporary employees, permanent salaried employees, permanent employees paid hourly wages, employees on fixed contracts, employees paid for work done and not for time of work (i.e., pieceworkers, consultants, etc.), government employees, unionised employees and informal sector employees. The law is not always clear in defining these various categories of employees and setting out their rights and obligations.

Private sector employees: Except in regard to unemployment compensation, Zambia has ratified the key ILO Conventions relating to the protection of employment, notably those covering rights such as freedom from forced labour and equality of treatment in employment. Industrial relations matters are regulated by the Industrial and Labour Relations Act[479] and the Employment Act[480]. The Act provides for the establishment of the Tripartite Consultative Labour Council as the primary instrument for social dialogue and consultation among the social partners (that is, the unions and the Zambia Federation of Employers representing the employers and the Ministry of Labour and Social Security representing the Government).

Zambia's labour legislation also provides for protection of wages against unlawful deductions; minimum wage requirements; proper notification of wage conditions; the payment of wages in legal tender; the freedom of a worker to dispose of his wages; regularity in wage payments and the treatment of wages as a privileged debt.[481] The labour movement in the country has been weakened due to a proliferation of trade unions, and most employees affected by unfair employment practices rarely have access to justice. The backbone of non-discrimination in

[476] 1991 as amended in 1996
[477] Cap 268 of the Laws of Zambia
[478] Cap 269 of the Laws of Zambia
[479] Cap 269 of the Laws of Zambia
[480] Cap 268 of the Laws of Zambia
[481] Legal Empowerment of the poor – Labour Rights in Zambia, By Silane K Mwenechanya (Dr), An Issue Paper prepared for the UNDP – Commission on Legal Empowerment of the Poor August, 2007

employment in Zambia is Article 23 (1) of the Constitution which prohibits any form of discrimination.

Implementation and monitoring: The large numbers of job seekers on the country's labour market make some employers take advantage by not providing employees with the conditions of service that are stipulated by the law apart from discriminating between employees in selective offers as to conditions of service. Unfortunately due to the high number of people working in the informal sector, the Ministry of Labour and Social Security has serious challenges to monitor non-discrimination and equal treatment policies in the work place. This is seen in the non-observance by the informal sector of laws protecting workers' rights, occupational health and safety rules and other core labour rights resulting in denial to large numbers of workers their rights. This leads to a high incidence of poor health and safety conditions at places of work. Even in the formal sector, a large number of workers remain unaware of their rights and unprotected from potential injustices or victimization at work.[482]

Public employees: Government is still the largest employer in Zambia. Employees working for Government are normally referred to as public employees. This includes civil servants, and senior categories such as contract employees and those employed by parastatals, as well as constitutional office bearers, and employees of public service commissions.[483] Increased trade union membership among public servants has contributed to greater protection of employee rights and freedoms at the work place. Under the public service commissions most of the employees are engaged under permanent and pensionable conditions of service usually regulated by collective agreements. In most parastatals, employees are employed on fixed term contracts of service. Public service commissions play roles in relation to employment conditions of public employees, and the Commission for Investigations, discussed in chapter 3 provides an avenue of redress to public service employees.

Casual workers: The Employment Act[484] was amended in 1997 in response to the emergence of a private sector driven economy in the 1990s. The realisation that certain jobs were short term in nature and the search for financial savings led companies to avail of casual labour. A casual worker is any employee whose terms of employment provide for payment at the end of each day and who is engaged for a period of not more than six months.[485] As the law stands today, there is no obligation on the employer to pay terminal benefits to a casual worker. It is thus far cheaper to hire casual employees than permanent and pensionable ones. Thus the past twenty years have seen an increase in the number of casual workers.

Abuse of this type of worker is now referred to negatively as the "casualisation" of labour.[486] There is very little job protection for casual workers, as contracts are terminable on a daily

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[482] Draft Decent Work Country Programme (DWCP) for Zambia (developed with technical assistance from ILO). It focuses on four major priorities: *Rights at Work*; *Employment*- facilitation of creation of productive and sustainable jobs that comply with internationally acceptable standards of decency. The programme attaches high priority to enhancing the access of women, persons with disabilities and the youth to job markets by increasing opportunities for them to acquire marketable skills and competences; *Social Protection*; and *Social Dialogue*

[483] A parastatal is a corporate body where the Government has controlling interest in its management

[484] Cap 268 of the Laws of Zambia

[485] Cap 268 of the Laws of Zambia

[486] Chris Petrauskis, 26 September 2005- *"Promoting Faith and Justice"* -Social Conditions Research Project- Jesuit Centre for Theological Reflection Lusaka Zambia

basis and a casual worker may not easily find recourse at law for breach of contract. These kinds of workers are virtually without legal protection of any kind.

Low wage earners: The Minimum Wages and Conditions of Employment Act[487], while provides minimum wages protection and means of legal redress to four categories of workers. But the fines for violations of the law, as well as the minimum wage set by the Act are rather low.[488] Certain categories of workers are included under the protection of the Act, but a wide discretion as to which groups are included is left to the Minister of Labour. Initially, domestic workers which are considered by some to be among the most vulnerable,[489] were not included among those protected by the Act. CSOs including Caritas conducted advocacy on behalf of these workers, resulting in the adoption of a Statutory Instrument in 2011 giving them coverage for the first time.[490] At the same time, the minimum wage was increased.

Child workers: The Constitution stipulates that a child is one under the age of fifteen years. Child labour is defined in the Employment of Young people and Children Order of 2006 under the Employment of Young Persons and Children Act,[491] as 'work carried out by children under conditions which stifle and are detrimental and dangerous to the child and affects their proper physical, emotional and intellectual development, in violation of international and national legislation.'

In Zambia, statistics of child labour have been growing steadily in the last twenty years due to the general decline in the formal employment sector and job opportunities for the adult population. This has been compounded by the HIV/AIDS scourge that has left many homes without breadwinners, forcing children to engage in gainful employment. The extent of child labour in the country is seen for example in the number of children on the roadsides involved in quarry works (breaking stones) to earn a living. The farming community accounts for an average 75% of child labour. It is estimated that 47% of the child population in the age group between 7-14 years of whom is actively engaged in child labour. [492]

Of particular concern is an increase in child abuse through sexual exploitation as revealed by a survey conducted by the Central Statistical Office in 2006. The survey shows that of the sample of 2,019 sexually-exploited children aged 5-17 years old from 15 districts country wide, two-thirds were involved in commercial sexual exploitation.[493]

Recently Government amended the Employment of Young Persons and Children Act[494] replacing it with a new Act.[495] The amendment provides for the implementation of the

[487] Cap. 276, Laws of Zambia.
[488] Ibid. 225,000 Kwacha is the maximum fine at time of writing.
[489] See Caritas Zambia, Minimum wages and conditions of employment in Zambia, undated booklet, available from Caritas Zambia.
[490] Ministry of Labour, Statutory Instruments (SI) numbers 1 and 2 of 2011.
[491] Cap 274 of the laws of Zambia
[492] Understanding children's work in Zambia, Country Report May 2009- Understanding Children's Work (UCW) Program, University of Rome "Tor Vergata" Faculty of Economics, V. Columbia 2, 00133 Rome Tor Vergata
[493] Commercial Sexual Exploitation of Children Survey Report. Labour Statistics Branch, Central Statistical Office, Lusaka, Zambia, April, 2007.
[494] Act Cap 274
[495] 2004

International Labour Organisation (ILO) conventions on minimum age[496] and on the worst forms of child labour.[497] The new law protects children from employment in industrial sites and any person convicted for employing a child in such industry is liable to imprisonment for between five and twenty five years. As in other areas of the justice system, the challenge the country faces is implementation of the regulations contained therein through provision of sufficient resources and effective methods of work.

HIV / AIDS: Employees may be discriminated against on the basis of their HIV/AIDS status. A lot of advocacy has been undertaken in this area and discrimination on the basis of his or her HIV/AIDS status is a breach of the employment contract. Section 28 of the Employment Act[498] requires that every employee shall be medically examined by a Medical Officer before he or she enters into a contract of service of at least six months duration. The purpose of the examination is to ascertain the fitness of the employee to undertake the work, which he or she is required to do. The Act does not require that prospective employees be tested for HIV/AIDS. In addition to the provisions in the Law, the policy of the Zambia Federation of Employers is that employers should not require prospective job applicants to undergo an HIV test. Thus the only relevant criteria for recruitment are whether or not the applicant has the requisite qualifications and is medically fit to do the job. In Zambian Law, the medical examination is carried out for the purpose of deciding whether a person is fit enough to do a particular job at the time they are employed. The HIV status of the person is not relevant.[499]

Where an employee is discriminated on any ground permissible under the law, recourse lay to the High Court[500] and Industrial Relations Court[501] for the aggrieved party.

16.2 Institutions

16.2.1 The Industrial Relations Court

The Court is created under Article 91 of the Constitution.[502] The Court administers labour and employment legislation, the principal Acts being the Industrial and Labour Relations Act[503] provides for continuation of the existence of the Industrial Relations Court.[504] The Court is mandated under section 85(1) to hear and determine any industrial relation matters and any proceedings under the Act. In exercise of this function the Court has original and exclusive jurisdiction. The IRC is currently only present in Lusaka and Ndola.

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[496] ILO Convention:C138, Convention concerning Minimum Age for Admission to Employment,
[497] ILO Convention C 182: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour
[498] Cap 268 of the Laws of Zambia
[499] Guidelines on employment- HIV/AIDS and Human Rights in Zambia- *Building Solidarity Against Injustice* by Matrine Bbuku Chuulu, Priscilla M Chileshe, Chesya B. Mtamira and Joyce S Macmillan- Policy Project II, August 2001.
[500] Under Article 28 of the 1991 Constitution as amended in 1996
[501] Section 108 of Cap 269 of the Laws of Zambia
[502] Of 1991 as amended in 1996
[503] Cap 269 of the Laws of Zambia
[504] Section 84 of Cap 269

Due to the nature and complexity of labour and employment law a specialized tribunal, the Industrial Relations Court (IRC), is established[505] and has jurisdiction to hear and determine any industrial relations matters and any proceedings under the Act. Of importance to vulnerable persons is the extended jurisdiction of the Court to hear and determine any dispute between any employer and an employee notwithstanding that such dispute is not connected with a collective agreement or other trade union matter.

Procedure: The main purpose of the Court is to do substantial justice between the parties before it. Accessibility is intended to be enhanced by the rule that the Court is not be bound by the rules of evidence that apply in civil or criminal proceedings. This allows aggrieved persons who cannot afford to pay legal fees for representation by private lawyers to represent themselves before the Court.

Practice and procedure in the Court is governed by the Industrial Relations Court Rules. These provide for the method of commencement of an action in the Court by use of the complaint form. Response is by completing an answer form. The rules also deal with collective disputes.

A time limit of thirty days from the occurrence of the event complained of applies for lodging a complaint. Failure to comply may lead to refusal of the application unless leave of court is obtained to file the complaint out of time. The Court may extend the thirty day period for three months after the date on which the complainant or applicant has arisen if the aggrieved party is still exhausting the administrative remedies available in the organisation prior to filing the complaint. As knowledge of the rules and procedures of the IRC may not be known to many workers who are not members of trade unions, many potential claimants may fall foul of these time limits. Statistics were not available on the frequency with which complaints are timed out or dispensations are given.

Appeal from a decision of the IRC lies to the Supreme Court on any point of law or any point of mixed law and fact. This means one cannot appeal on a point of fact alone.

Caseloads: The team was unable to avail of statistics from the IRC for the purpose of the study. The 2009 AHSI report[506] noted that complaints in the Industrial Relations Court are most likely to arise from loss of employment as opposed to other breaches of the labour and employment laws. Because of the general weakening of the trade union movement, unless it is a class action, most employees who are unfairly or unlawfully dismissed lack trade union solidarity as they pursue their claims in the Industrial Relations Court. This entails that only those individuals with capacity can pursue their cases in the Industrial Relations Court.[507]

The statistics in the table below from the FNDP MTR show that the IRC has a substantial backlog of cases.

[505] Section 84 of Cap 269.
[506] Op cit.
[507] The whole country is served by two Industrial Relations Courts, one in Lusaka and the other in Ndola. This arrangement disadvantages a lot of employees or former employees who cannot afford to travel to Lusaka or Ndola and commence action against their employers or former employers. Thus access to justice in this realm is a great challenge to the disadvantaged

Table 16.2.1 : IRC performance on FNDP KPIs [508]								
		Baseline	2006		2007		2008	
		(2005)	Target	Real	Target	Real	Target	Real
1. Av. case disposal time (days)	IRC	100	95	N/A	85	N/A	75	1439
2. Case Backlog	IRC	100	90	78	70	64	75	75

Fees:

Table 16.2.1.a Industrial Relations Court Fees[509]	
Service/ Document	Cost
Order	K11,000
Affidavit of Service	If commissioned 20,000 and if not 31,000
Notice of Appointment	11,000
Notice of Adjournment	11,000
Copy of Documents	K6000 per page
Copy of Court Judgement	Free of charge (if you can find your own ways of photocopying)
Notice of complaint out of time	60,000 if commissioned 71,000 if not commissioned
Affidavit and Adjournment	31,000

16.2.2 Public service commissions

Regulation of public employees is done the through Service Commissions[510] created for the purpose of managing staff on behalf of the Government. In the event that a public employee

[508] Source: FNDP MTR, Oct. 2009
[509] Source: Obtained from court registry, May 2011.
[510] Cap 259 of the Laws of Zambia

has a grievance against the Government, he or she may resort to the grievance and appeals procedure provided for in the conditions of service. Information on case handling and case loads was not available from these bodies for the purpose of the study.

In certain situations recourse for grievances for public servants lies with the Commission for Investigations. This is dealt with in chapter 3 of the present study.

16.2.3 Labour Offices

Labour Officers exist by virtue of section 4 of the Employment Act. They include the Deputy Labour Commissioner, an Assistant Labour Commissioner and a Labour Inspector. The principal functions of the labour officer include visiting and inspection of any workplace; examining and interviewing employers and employees of the workplace to establish compliance with the law; and inspecting and demanding production of documents required by law to be kept at a workplace.[511] They also provide reconciliatory services between employers and employees in the event of disputes. Labour Offices are in principle situated in all districts of the country, normally located at Government district administrative offices and manned by Labour Officers. There is however a critical shortage of professional staff to run the offices. This has resulted in many institutions disregarding the observance of the minimum basic requirements for a safe workplace and compliance on conditions of service.

The powers of Labour offices / inspectors are inadequate. If the employer opts to disregard the order of the labour officer for example to reinstate an employee who was dismissed from employment, there are no enforcement mechanisms that the labour officer can resort to.

It was not possible to obtain statistics on personnel, numbers of inspection visits carried out, orders issued or institutional resources for the purpose of the present study.

16.2.4 The Workers Compensation Tribunal

Victims of industrial accidents or diseases may be entitled to awards of compensation by the Workers Compensation Commissioner under the Workers Compensation Act.[512] The Tribunal is an instance of appeal established under PART IV of the Act. The main functions of the Tribunal are listed in Section 28 providing for an appeal mechanism for complaints under the Act.

Certain categories of public employees are excluded from coverage under the Act, including police officers and members of the armed forces. A significant gap is that casual workers are also excluded from its protection (see also above), though domestic servants are in theory covered by section 109 of the Act. In practice, few domestic service contracts are formal.

Procedure: Decisions of the Tribunal are by a majority (section 29). An aggrieved party may appear in person or be represented or assisted by *inter alia,* a legal practitioner, a member of his family or (in the case of workers) by a trade union officer or an organisation approved of by the Minister.[513] The Tribunal has power to summon any person as a witness and failure to appear before the Tribunal may result in fining the potential witness. It also exercises power of contempt of court.

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[511] Section 6 of Cap 268 of the Laws of Zambia
[512] Workers Compensation Act, Act No. 10 of 1999
[513] Section 31 of Act No. 10 of 1999

The tribunal may confirm, vary or reverse the decision appealed against, or remit matters to the Commissioner with instructions in regard to the taking of further evidence or the setting out of further information. The decisions of the Tribunal are in principle final.[514] Appeal from the decisions of the Tribunal lies to the High Court within thirty days of such determination.[515] The High Court has limited jurisdiction as the Act provides the remedies that the High Court may grant under section 40.

16.3 Gaps analysis and recommendations

The Government must **harmonise definitions of "employee**" and "casual employee" within all labour laws, and clarify which legal provisions are guaranteed to the various categories of employees,

There is a need to **close the loophole in The Employment Act[516] that allows the re-hiring of a casual worker** or multiple casual workers on short-term contracts to fill a position that is continuous in nature.

The 2011 Statutory Instrument revising the categories of persons protected under the Minimum Wages and Conditions of Employment Act[517] is a positive step in setting out the minimum acceptable standards for the treatment of *any employee* in Zambia, including employees in previously excluded groups such as casual employees, domestic workers, government employees and unionised workers.

The Government must **strengthen the capacity of the Ministry of Labour and Social Security to monitor employment** across all districts of Zambia and ensure compliance with all provisions of the labour laws.

The **Subordinate Court should be given limited jurisdiction to deal with labour and employment cases** relating to unlawful and wrongful dismissals from employment of certain class of employees who are most vulnerable such as casual workers, domestic servants, shop attendants and guards, (as well as for other categories in provinces where the IRC is not present). This category of workers may not have sufficient resources to commence actions in the Industrial Relations Court or the High Court.

The **powers conferred on the labour officers should be increased** to allow for the imposition of appropriate penalties to enforce its decisions against offenders who breach or violate the rights of employees.

[514] Section 32 of Act No. 10 of 1999
[515] Section 40 of Act No. 10 of 1999
[516] Cap 268 of the Laws of Zambia
[517] Cap 276 of the Laws of Zambia

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Annex 2: Tables of Recommendations