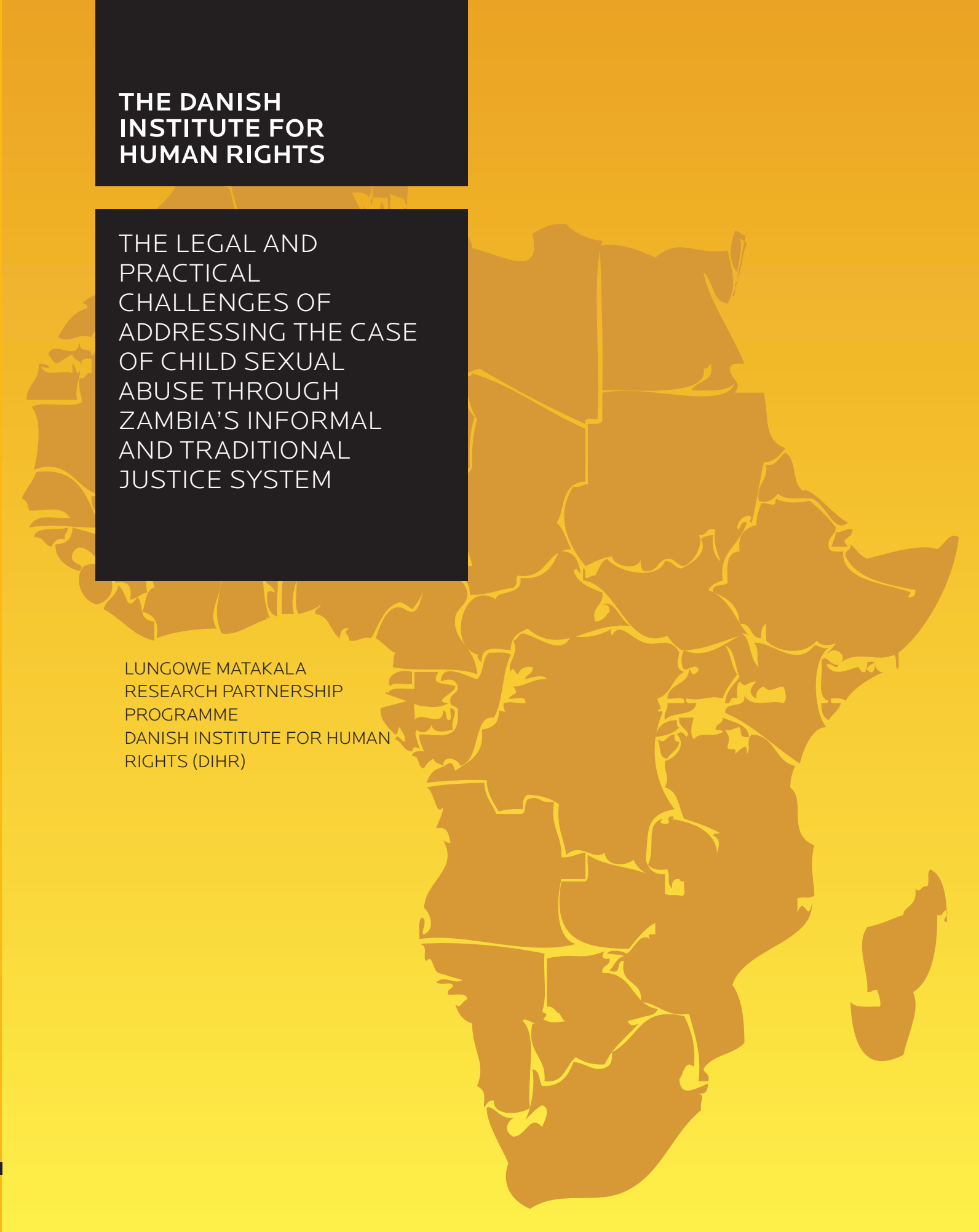


**THE DANISH
INSTITUTE FOR
HUMAN RIGHTS**

THE LEGAL AND
PRACTICAL
CHALLENGES OF
ADDRESSING THE CASE
OF CHILD SEXUAL
ABUSE THROUGH
ZAMBIA'S INFORMAL
AND TRADITIONAL
JUSTICE SYSTEM

LUNGOWE MATAKALA
RESEARCH PARTNERSHIP
PROGRAMME
DANISH INSTITUTE FOR HUMAN
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of compliance with human rights standards concerning participation and accountability, fairness of procedures (including the protection of the vulnerable) and substantive outcomes.

During her stay at DIHR, Lungowe Matakala's research work was supervised by Senior Researcher Eva Ersbøll.

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights, Adopted by the Assembly of Heads of State and Government of the Organisation of African Unity on 27 June 1981
ACL	African Customary Law
CRC	Convention on the Rights of the Child, Adopted by the General Assembly of the United Nations on 20 November 1989
DIHR	Danish Institute for Human Rights
DRM	Dispute Resolution Mechanism
FGC	Family Group Conferencing
IAPGHR	Institute of African Philosophy, Governance and Human Rights
ICCPR	International Convention on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 16 December 1966
ISA	Intestate Succession Act
ITJS	Informal and Traditional Justice System
LCMs	Local Court Magistrates
NGO	Non-Governmental Organisation
UNDP	United Nations Development Programme
UTH	University Teaching Hospital
VSU	Victim Support Unit
YWCA	Young Women's Christian Association
ZLDC	Zambia Law Development Commission

ABSTRACT

At least once every week, one of the main headlines in Zambian news is a 'defilement' case. Defilement is the term used in the Laws of Zambia to denote carnal knowledge of a child below the age of 16. In two separate interviews, the Police and the University Teaching Hospital (UTH), i.e. the main hospital in Zambia, said that they see a minimum of three victims of defilement every day. Although 1,339 cases were reported to the Police in 2011 alone, the majority of defilement cases are not brought to the attention of the Police. Rather they are dealt with either informally by the family, or customarily through the Traditional Court or the Local Court. In this article, I refer to these three key players in the dispensation of justice as Zambia's informal and traditional justice systems (ITJS). Much as the case of child sexual abuse is a pertinent one and requires greater analysis, in this article, I use it mainly as a lens through which I look at Zambia's ITJS. I explore two major questions: (i) to what extent are the human rights of the child protected in the ITJS? And (ii) what else could Zambia do to enhance access to justice for sexually abused children who seek redress by using the ITJS?

To begin the exploration of these two questions, I will consider the nature of Zambia's legal pluralism and the striking differences in how the formal justice system and the ITJS regard child sexual abuse. It is inevitable for certain theoretical turfs to be navigated through. Thus very briefly, I will define 'ITJS'. Ultimately, using the case of child sexual abuse, my goal is to demonstrate that the three ITJS are playing an enormous role in delivering justice (in one form or another) to ordinary Zambian citizens. Instead of ignoring or neglecting them, I strongly propose that the state and all players, in enhancing access to justice, should acknowledge them, understand their role, work with and through them.

CHAPTER 1

INTRODUCTION AND BACKGROUND TO THE STUDY

The term 'defilement' is not unique to Zambian law – Uganda and Ireland are some of the countries that also have it in their statute books.¹ In this article, wherever possible, I will use the term 'child sexual abuse' as opposed to 'defilement' because I am concerned about the annotation and connotation of the term 'defilement'. These concerns are aired in section 3.1.1 below.

1.1 BRIEF INTRODUCTION ON DEFILEMENT IN ZAMBIA

It is documented by the Global Press Institute that:

“ As many as 70 per cent of Zambian children are abused. Local police report daily cases of violence physical and sexual abuse against children. Advocates are struggling to break the culture of silence surrounding abuse and are providing increased training and awareness. But for some, help didn't come soon enough.”²

The most alarming form of child abuse in Zambia today is defilement. Section 138 of the Penal Code of Zambia stipulates that defilement is the carnal knowledge of a child below the age of 16.³ Below are some of the many headlines that have appeared in the news recently:

“ A 24 year old man of Kakote village in Kaputa has defiled a two year old girl of the same village. Police in Kaputa confirmed the development today.”

“ A 14 year old girl and a 15 year girl have been repeatedly defiled in Sinazongwe District. Both incidents occurred at Nangombe Basic School in Buleya Malima and the defilers have not been arrested despite the head teacher reporting the matter to the Police.”

“ Police in Mongu have launched a manhunt for a man who allegedly defiled a seven year old girl.”

” A 40 year old man has defiled and infected a 14 year old girl with a Sexually Transmitted Disease (STD) in Sinazeze in Sinazongwe District.”

” In Western Province, Joe Kanyanga aged 29 years of Mongu was picked up by the Police for defiling his 7 year old daughter. This occurred between 13th November 2011, around 22:00 hours and 14th November 2011, around 05:00 hours.”

” In Luanshya, the Police have arrested a man aged 19 years of Ngili Farms identified as Twambo Makulu for defiling a girl of the same area aged two (02) years around 12:00 hours. In a related development, Police in Mufulira have picked a man identified as Duncan Chilongo of section F Kankoyo Township for defiling a girl aged 10 years yesterday around 19:30 hours.”⁴

There are no statistics that show exactly how many children are abused sexually in a month or a day in Zambia. In the UPR Submission prepared by 32 organisations working on children’s rights in Zambia, it is recorded that “in 2007, 2008 and 2009, between 1,500 and 2,000 cases of child sexual abuse were reported annually by the Zambia Police Service.”⁵ According to Northern Province Police Commissioner Mary Chikwanda, 99 cases of defilement were recorded in Northern

Province alone between January and March 2012. Also, the Lusaka Times states that the “UTH reported recently that the number of defilement cases being recorded has been on the increase and that now it’s an everyday situation especially among girls between the ages of 12 and 14 years.”⁶ This report is in line with my finding during interviews with the UTH and the Police who both said that they see at least three victims of defilement every day,⁷ which would bring the total to 1,095 cases in a year. In short, child sexual abuse is rampant and widespread in Zambia.

1.2 RESEARCH QUESTIONS AND METHODS OF DATA COLLECTION

The research questions that I investigate in this article are twofold: First, to what extent are the human rights of the child actually protected in the ITJS? Second, what else could Zambia do to encourage access to justice for sexually abused children whose matters are brought before the ITJS?

I mainly conducted desk intensive research, meaning there was very little field data that I personally collected for this study. I relied heavily on three specific sources:

The first is a report entitled **Access to Justice in the Republic of Zambia: A Situation Analysis Carried Out on Behalf of the Governance Secretariat**⁸ (here after referred to as the Access to Justice study). This was a nationwide study that took place from 2009 to 2012,

on which I was the lead national consultant. I played a significant role in designing the research tools and training the data collection team of 36 people. I also interviewed key officials and conducted workshops with various stakeholders. Further, I wrote four major sections of the final report. For this article, I have also analysed information that was collected for the Access to Justice study but was not used in the final report, and has therefore not been released to the public before.

The second source that I depend greatly on is **The Local Courts Initial Mission Scoping Report of 2011**, published by the Danish Institute for Human Rights (DIHR). This report contains the latest information on the state of the Local Courts in Zambia.

The third is my PhD thesis of 2009, in which I looked at the inheritance rights of orphans and widows in Zambia.⁹ The proposal made in this article – i.e. setting up an institute to spearhead the development of African Customary Laws (ACL) and practices and ensure their harmonious existence with human rights law – is one that I first recommended in my PhD thesis. It has here been modified and now includes a focus on governance issues and structures under ACL and justice systems.

To supplement the information collected through the desk study, I conducted four key interviews: one with the Coordinator of the

Victim Support Unit (VSU) under the Police Service; one with the medical doctor in charge of the unit that attends to sexually abused children at Zambia's main hospital – the UTH; one with the senior researcher at the Zambia Law Development Commission (ZLDC); and one with the head of research at the Young Women's Christian Association (YWCA), a Non-Governmental Organisation (NGO) that receives complaints from victims and families of sexually abused children.

I faced two major challenges during the data collection stage: First, there is hardly any empirical data on child sexual abuse in Zambia. Relevant NGOs that deal with these cases were quite reluctant to share information as it was treated as sensitive and confidential. Second, very little is written about Traditional Courts in Zambia today. For instance, no one has recently and comprehensively documented the procedure they follow or the types of cases they handle.

1.3 DEFINITION OF ITJS AND DIFFERENCES IN HOW THE FORMAL AND ITJS HANDLE CHILD SEXUAL ABUSE CASES

When a concept is complex, it is often easier to define it in relation to another. Such is the case with 'traditional justice systems' and 'informal justice systems': they are often defined in relation to the formal justice system. For example, the United Nations Development Programme (UNDP) says:

” The term informal justice system is used ... to draw a distinction between state-administered formal justice systems and non-state administered informal justice systems.”¹⁰

The United Nations Women, United Nations Children’s Fund and UNDP study on Informal Justice Systems says it is:

” ... (i) the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that (ii) is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.”¹¹

The Penal Reform International, in their study entitled *The Role of Traditional and Informal Justice Systems*, distinguish between traditional justice systems and informal justice systems:

” The term ‘traditional justice systems’ is used to refer to non-state justice systems, which have existed, although not without change, since pre-colonial times and are generally found in rural areas. The term ‘informal justice systems’ refers to any non-state justice system. The phrase ‘traditional and informal justice systems’ is, therefore, used to denote traditional and other informal justice systems.”¹²

However, defining ‘informal justice systems’ or ‘traditional justice systems’ in relation to the formal system comes with its own insinuations, which are not necessarily true. As correctly noted by the UNDP:

” ... a disclaimer is necessary here, as the term informal justice system may in some cases not capture the extent to which the state is involved in a particular justice system as this line may often be blurred. In many countries, communities that apply African customary law are recognised and regulated by the state either by law, regulations or by jurisprudence, and are therefore ‘semi-formal’. Finally, describing a traditional or indigenous system as ‘informal’ may imply that it is simplistic or inferior when in fact it may apply a highly developed system of rules and be quite formal in procedure.”¹³

While one cannot come up with a universally accepted definition of traditional or informal justice systems, in this article, I refer to the family as a ‘traditional justice system’ because it does sit as adjudicator and dispense justice, yet there is no visible role played by the state in its work. I also classify the Traditional Court as a ‘traditional justice system’ because it does operate as a court in traditional society, even though it is not part of the judicature established by the Constitution. Lastly, I call

the Local Court an ‘informal justice system’ because, though it is part of the judicature, it is very different from the rest of the state courts. For instance, it is not presided over by an officer of the law; no legal representation is permitted there; it mainly applies ACL; and its procedures are semi-formal. Thus in this article, the term ITJS refers to the family, the Traditional Court and the Local Court altogether.

There is a marked difference in how the formal justice system and the ITJS handle the case of child sexual abuse. To begin with, such a case is called ‘defilement’ in legislation, while it is called ‘deflowering’ under the ITJS. To deflower is to ‘pick the flower’ off its tree or bush, thereby taking away something valuable. It is not as vile as defiling, which is ‘to make unclean’.¹⁴ Thus child sexual abuse is less of a wrong under the ITJS, while the formal justice system considers it to be a crime for which the perpetrator could receive a minimum of 15 years imprisonment if found guilty.

In the Local Court, a perpetrator who has ‘deflowered’ a child would not be sent to prison because deflowering is not a crime, it is a civil wrong. The maximum penalty that the Local Court can award is 60 penalty units, which translates to 15 Zambian Kwacha rebased, or three United States Dollars (USD 3.00).¹⁵ This compensation order is awarded to the family of the sexually abused child, and it is called ‘virginity damages’. In traditional societies that follow ACL and practices, it is the family and

not the child that is regarded as the victim of an offence such as child sexual abuse. Hinz has this to say about the value and meaning of compensation in traditional societies:

” Differently from the perception under common law, customary law compensation was seen to be the principle remedy for most cases, cases that common law would not treat as cases that could finally be settled between private parties, but had to be attended to by the state under its monopoly to prosecute and punish on behalf of the society as a whole. The findings from the fieldwork assisted this position. With respect to the most controversial crime for which compensation was considered to be the last word: murder, evidence could be produced that compensation paid by the murderer or his family to the aggrieved family was a powerful tool to resolve the issue and to restore peace in the community. Paying compensation was defined as wiping the tears.”¹⁶

In the formal justice system, when one is fined, the proceeds go the state not the family of the sexually abused child. This is because the principles of criminal law dictate that a crime is a wrong committed against the state.¹⁷ Hence it is the state, and not the victim, that prosecutes the accused and punishes him, if found guilty. The actual victim of the offence (e.g. the

sexually abused child) is a witness for the prosecution. While it is possible for the child to lodge a claim for pain and suffering and be awarded compensation for that, such an award is separate from the fine, which constitutes a punishment.

Additionally, when the formal justice system addresses child sexual abuse as a criminal matter, the child is considered as a witness and not a party to the case. During the Access to Justice study however, 55 per cent of the traditional leaders interviewed said that a child can be a party to a suit in the Traditional Court, either as a victim or as an accused. What is not known is whether the girl child does come before the Traditional Court and other ITJS as a party in cases of child sexual abuse. If she does, is she permitted to claim compensation individually as a victim who has been wronged? Unfortunately, no study that was consulted for this research touched on these questions.

Finally, an important point to note is that when any of the three ITJS sit to hear a matter of child sexual abuse, it is the family that is wronged and seen as the victim. This is because it is the family's name that is tarnished by the wrong; and the family may lose out on **lobola** or bride wealth should the child not be married due to the abuse. In many traditional societies (e.g. in India, Swaziland and Egypt), virginity is so highly valued that virginity tests are even conducted before or during the marriage proceedings. Therefore by compensating the

family, the wrongdoer appeases them, and in a way replaces that which they have lost. So while the focus is on punishment in the formal justice system, in the ITJS the focus is on compensation, restoration and reconciliation of parties, i.e. the perpetrator and the child's family. Kane and others put it thus:

” In general, customary tribunals tend to encourage mediation and to reach decisions that are restorative. Fines or compensation tend to go to the aggrieved party, even in criminal cases. ... This type of restorative justice is very appropriate to the needs of poor people and tends to rebuild community relations, as opposed to the formal judiciary which is largely adversarial.”¹⁸

1.4 ZAMBIA'S LEGAL PLURALISM AND COURT STRUCTURE

Before 1898, ACL was the only source of law in Zambia. The traditional methods of resolving disputes – e.g. the Traditional Court and the family – were the only ones that resolved disputes. It was during colonialism that the English common law and court structures were introduced. After independence in 1964, legal pluralism continued. Today, it is entrenched in the Constitution in Article 23(4), which recognises ACL and keeps it separate from constitutional scrutiny. In case of conflict between a norm of ACL and written law, Zambia has conflict of law rules in section 12(2) of the Local Courts Act¹⁹ and section 16 of the

Subordinate Court Act²⁰ (i.e. the repugnancy clause). According to this clause, ACL is allowed to operate provided it does not go against written law and principles of morality, natural justice and good conscience.²¹

Zambia is a dualist state. International human rights treaties, though ratified, are not enforceable in Zambian courts of law unless and until Parliament passes an enabling Act that domesticates a particular international law provision. Section 3 below analyses several rights of the child, which are guaranteed in international treaties that Zambia has ratified. Unfortunately, none of the analysed provisions have been domesticated. That notwithstanding, Zambia is, by virtue of ratification, obliged to ensure the realisation and enjoyment of these rights.

Article 91 of the Constitution lays out the court structure in Zambia. The four courts recognised in the Constitution of Zambia are the Supreme Court, High Court, Magistrate's Court and Local Court. The long title of the Local Courts Act says that the Local Court was created to replace the native courts, i.e. Traditional Courts. The Local Courts are the lowest courts in the hierarchy of courts and they primarily apply ACL. It is important to note that the Traditional Court is not recognised in law in Zambia.

CHAPTER 2

THE THREE ITJS IN ZAMBIA AND HOW THEY HANDLE THE CASE OF CHILD SEXUAL ABUSE

2.1 THE FAMILY

2.1.1. OVERVIEW

In ACL, a family is extended and not nuclear. Although the laws of Zambia do not define the term 'family', it is apparent from legislation that both the nuclear and extended units are recognised as a family unit in Zambia.²² In this article, the term family refers to the group of people with whom the child resides; and or those who are authorised by law or custom to make decisions for and over the child. This group could be nuclear or extended.

It is common cause that the family is a holder of rights and responsibilities. Article 18(2) of the African Charter on Human and Peoples' Rights (ACHPR) goes further and states that the family is 'the custodian of morals and traditional values'. The family strongly asserts its custodian role when it resolves disputes. The concept of the family resolving disputes is not a new phenomenon in Zambia, Africa and even other parts of the world. Since time immemorial, under ACL and systems, certain members of the family (e.g. the head of the

household in the nuclear family and the elders in the extended family) had, and still have, the power to hear and settle disputes. Thus, they are a recognised and respected dispute resolution mechanism (DRM) among the people.

Apart from resolving disputes, under ACL and systems, the family is also instrumental in distributing property in times of inheritance of a deceased's estate.²³ For instance, among the Tonga people, during a funeral, a family council called the **mukowa** is constituted.²⁴ Members of the **mukowa** are called the **basimukowa**. Among the Tonga, it is the **basimukowa** who determine the successor and inheritor(s) of an intestate estate.²⁵ The decision of the **basimukowa** is respected by even the Local Court, as the Court respects ACL. Should the court find that the decision of the **basimukowa** violates ACL, it can rule otherwise.

Another interesting point to note about the family in African customary legal systems relates to marriage: marriage does not create a separate legal institution binding on the two

parties only. Rather, it is said that one marries the family as a whole.²⁶ Thus marriage is a family affair and not only a matter that concerns the two individuals that want to get married.

From the three examples cited above, it is evident that the family in traditional society plays a key role in the areas of dispute resolution, inheritance and marriage. Similarly, in the case of child sexual abuse, the family is highly influential in that the decision whether to take the matter before the formal or ITJS lies in their hands. One of the major challenges that the formal justice system is facing regarding prosecution of perpetrators of child sexual abuse concerns the family of the abused child: many do not report the incidents to the Police. Because the perpetrator is often a close relative or family friend, the family prefers to sit, hear, and settle cases of child sexual abuse, as opposed to reporting them to the Police. The Zambia Police Service has expressed disappointment over this and the spokesperson, Ndandula Siamana, has said, that: “this trend is affecting operations of the service in its quest to arrest culprits.”²⁷

Another major challenge is that under ACL, early marriage is permissible, meaning that carnal knowledge of a child is allowed. Early marriage only becomes a wrong in ACL when it occurs without the consent of the parents or guardians of such a child. The parents' or guardians' consent is received when they accept payment of **lobola**. The Penal Code on

the other hand prohibits carnal knowledge of a child below the age of 16, even if the parents or guardians of such a child were to consent.

2.1.2 FIELD FINDINGS

In 2009 during the nationwide Access to Justice study, one of our research teams observed the following at the Mansa Police Station in Luapula Province: a boy below the age of 16 had had carnal knowledge of a girl aged 14. The two, together with their parents, went to the Police station. The intention of the girl's family was to report the matter to the Police. But before doing so, the boy's family apologised and offered to compensate the girl's family for the 'loss suffered'. They particularly offered a canoe, which the girl's family found very attractive, as people in Mansa are mainly fishermen. The latter accepted the offer and the two families were at peace with each other. Soon after that, a Police officer took a statement from the two families and upon being told of the offer and acceptance of the canoe, he explained to them that that was not permissible in law as child sexual abuse is a criminal matter that violates section 138(1) of the Penal Code, and is punishable minimum by imprisonment of no less than 15 years and a maximum of life imprisonment.²⁸ A quarrel erupted between the Police officer on one hand and the two families on another, as the former relied on written law and the latter asserted ACL. 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 traditionally, which included the giving and receiving of compensation. This is the preferred, harmonious and accepted form of justice in many rural settings. Unfortunately, I do not know what happened subsequently because our research team was at the police station on that day only. Both the victim and the accused were under 16 years of age. Predominantly evident in this case scenario is the importance of compensation in ITJS.

Unsurprisingly, it is noted in the Access to Justice study that the rate of conviction in child sexual abuse cases is low “because of lack of enthusiasm for prosecution among the public.”²⁹ In an interview with the YWCA,³⁰ I asked why that is so. I was told that some of the reasons why the rate of conviction in these cases is low are:

1. To protect the family set-up: When one reports these matters, much tension comes in to the home and it is highly likely that family members will be drawn apart.
2. Economic dependence: In instances where the victim is a dependent of the perpetrator, it is feared that reporting the matter could result in loss of economic support.
3. Embarrassment or shame: When the community becomes aware of a case of child sexual abuse, the family of the victim feels embarrassed. To avoid the shame, many families opt to keep the abuse a secret

within the confines of the home or family.

4. Adjournment of cases: It is normal for a child sexual abuse case (like all other cases) to go on for about four years. This is too costly for the poor who have to travel long distances to court and spend their limited income on a cause whose end is neither in sight nor overtly beneficial. It is also time consuming, and thus many give up midway.³¹
5. Compensation is more lucrative: When dealt with customarily or informally, the family of the victim is able to receive compensation for the harm caused to the abused child. For this reason, many poor people prefer not to report the case to the Police but rather deal with it in a manner that has a rewarding end.
6. Acquittals: There are a lot of accused persons who get acquitted, and this discourages members of the community.

The six reasons given above are based on the files at YWCA, which contain complaints made by victims, their parents or guardians. These complaints are sensible, thus one cannot argue against them. However, it is worth noting that contrary to the last reason above, the statistics obtained from the Police show that in 2011, the number of acquittals in child sexual abuse cases was far lower than that of convictions. Out of the 1,339 cases that were reported, 936 accused were arrested; 511 were convicted; 239 cases are still pending; and only 23 were acquitted.³² Most likely, the victims and families discouraged by the number of acquittals look at acquittals in general and not only child abuse

cases. If they were aware of these statistics, perhaps they would be encouraged to report child sexual abuse cases to the Police.

During the Access to Justice study, we interviewed 690 users of both the formal system and the ITJS. We asked two questions that are vital for this study. The first was “who solves cases or problems in the area where you live?” We gave the respondents a list of 14 possible justice providers from which to choose;³³ and they had the option of choosing more than one justice provider. There were 390 users who selected the family as one of the bodies that solves problems within their area. This means that for every two users interviewed, one has either had a dispute resolved by the family or knows of someone else living nearby, whose dispute has been attended to by the family. This is evidence of how alive, widespread and active the family is as a DRM in Zambia.

It is easy to see why the family is used by so many as a DRM: To begin with, as established in the Access to Justice study, the family resolves disputes speedily: 96% of the users interviewed said that it takes the family under one week to resolve a dispute. Also, the family is the only DRM in which one does not have to pay anything at all to have the matter heard. In rural areas where family members live within close proximity to each other, there is no or very little transport cost attached to appearing before the DRM. “Distance and cost are unsurprisingly, very important in determining people’s choices of justice provider.”³⁴

The second vital question that the users were asked was “which service provider best deals with your disputes?” Here, 49% of those who responded to the question selected the ITJS structures as the DRMs that best deal with their disputes. These included the chief (5%), the village headman (19%) and the local court (23%). Out of the 49%, only 2% considered the family as the best DRM for their disputes.³⁵ So although one in every two users uses the family, it is considered to be the least best (i. e. the worst) DRM for dealing with the disputes that most people face.

2.1.3 PROBLEMS

Although the family has its place and advantages as a DRM, I have two reservations regarding its role in child sexual abuse cases. First, child sexual abuse is a criminal matter that falls squarely outside the jurisdiction of the family. The family does not have the power and means to impose the penalty stipulated in the Penal Code. So when they preside over child sexual abuse cases, they give a different punishment for the offence. Much as compensation to the child’s family is necessary and positive, it is not a sufficient remedy for child sexual abuse.³⁶ To allow the family to address such matters would be to assign judicial and executive functions to a structure that is not equipped to perform those functions; and whose work is not controlled through any checks and balances.

What is not clear, and would need to be established through field work, is whether, when the family sits as a DRM, they consider the child a victim, or whether they view themselves as a victim (as is the case when they take the matter to the Local Court and the Traditional Court). And when they sit, do they ask the perpetrator to compensate them? Or do they demand that compensation be made to the child? If they ask for the latter, it means that they acknowledge that the child is a holder of rights. But if they ask for the former, it means they do not see the child as a holder of rights.

In 1989, New Zealand introduced legislation that would regulate the ‘family group conferencing (FGC)’, a strategy designed to divert juveniles from the criminal justice system and empower communities to discipline their children.³⁷ Similar schemes have been tried in Australia, Canada and the United Kingdom. Research shows that while such schemes have the advantage of building upon and working with traditional DRMs, they are not devoid of problems. The challenge with such a scheme is that the FGC does not form part of the hierarchy of courts. Thus it becomes difficult to refer cases there, due to their lack of knowledge of law and suitable procedures. The use of FGC requires general research and monitoring in relation to existing traditional and informal systems and awareness training for the adjudicators. Paying members of the community to deal with problems, which may be successfully resolved by traditional judges

who are not paid, may cause resentment.³⁸ The question that begs an answer (particularly with regard to child sexual abuse cases) is whether or not it would be in the best interest of the Zambian child to introduce the FGC scheme and legislation in Zambia, which would enable the family to handle child sexual abuse cases.

My second reservation is that the victim of the offence – the child – is almost oblivious when the family sits to decide what will happen after the child has been abused. As seen in the case scenario at the Mansa Police station, the understanding under ACL and practice is that the family and not the child has suffered a loss or harm. Viewed from a human rights perspective, it is almost as though the child is some kind of property and not a human being who is a holder of rights.³⁹ This understanding needs to change.⁴⁰ Zambia is a state party to the Convention on the Rights of the Child (CRC),⁴¹ which respects the child as a holder of human rights. Article 34 of the CRC calls upon all states parties “to protect the child from all forms of sexual exploitation and sexual abuse.”⁴² Much as Zambia is a dualist state and the CRC has not been domesticated, by virtue of ratifying this instrument, Zambia is obliged to take measures to protect the child from sexual abuse. These measures include reform of traditional norms and practices that violate the rights of the child.

2.2 THE LOCAL COURT

2.2.1 OVERVIEW

The Local Court is the lowest court in the hierarchy of Zambia's Courts. In 2009, there were 950 Local Courts in Zambia: 505 were functional and 450 were under construction.⁴³ The Local Court is the Court of first instance for the vast majority of legal disputes in Zambia. Unlike other State Courts, it is found in most parts of the country, including villages.⁴⁴ The majority of Local Courts are situated in rural areas. Local Courts are easily accessible (in terms of location and language) and they are cheap. Consequently they are used often by the Zambian population.⁴⁵

The matters that fall within the jurisdiction of the Local Court are clearly enumerated in sections 5, 8 and 9 of the Local Courts Act.⁴⁶ The Local Court has both civil and criminal jurisdiction but its criminal jurisdiction is highly limited by law. In practice, both rural and urban Local Courts hear almost all types of civil matters. However, in the urban areas, Local Courts hear only minor criminal matters such as contempt of Court. The Magistrate's Court addresses most criminal matters.⁴⁷ In the rural areas, Local Courts hear all sorts of criminal matters, including those that fall outside their criminal jurisdiction.

Section 56 of the Local Courts Act permits appeals from the Local Court to the Magistrates Court (class II and above). Also, sections 53

to 56 of the Local Courts Act provides for referral of cases from the Local Courts to the Magistrates Court, whereby the latter is empowered to hear the referred matters afresh.

2.2.2 FIELD FINDINGS

The data analysed in this section is mainly that which was collected in connection with the Access to Justice study and data reported in the **Pilot Scheme for Enhancement of Justice in the Local Courts in Zambia: Initial Scoping Missions 2011**.⁴⁸ During the Access to Justice Study, it was established that in 2009 alone, the Local Court heard 13,076 criminal matters and 111,510 civil matters. Among these civil matters, 3,967 were child sexual abuse cases.⁴⁹

As noted above, the Local Court has a limited criminal jurisdiction; and child sexual abuse is not one of the cases that the Court is permitted to hear. During the Access to Justice study, we visited 48 Local Courts and found that one of the types of cases that they hear is a claim called 'virginity damages'. This is a claim lodged in instances where a person has carnal knowledge of a child and takes away that child's virginity in cases where the child's parents or guardians did not consent to that person marrying the child, and therefore having carnal knowledge of that child. I emphasise the latter because traditionally, parents do allow early marriage and therefore permit carnal knowledge of their minor daughters. In actual effect, this is child sexual abuse, permitted by parents. So while they lack the criminal

jurisdiction to hear child sexual abuse cases, Local Courts hear these matters under the name 'virginity damages' claims. Section 4(1) of the Local Courts Act permits the Court to make any order that it deems best, provided it falls within the jurisdiction of the Court. The name 'virginity damages' does not originate in an Act, but is found in the Court records. In short, it is a term used by the Court. Virginity damages claims are among the top five cases heard by the Local Court.⁵⁰ Research reviews that 22% of the cases heard by the Local Courts are virginity damages cases.

One may argue that it is good that a state court gets to hear and decide so many child sexual abuse cases despite many other families not reporting the matter to the Police. However, when the Local Court hears child sexual abuse cases, it treats them as civil matters (i. e. virginity damages cases) and not criminal matters. It is not common practice for LCMs to report to the Police the virginity damages cases that come before them as 'defilement' cases. A few months ago one LCM referred the matter to the Police and it was hailed in the newspapers. Perhaps some LCMs are of the opinion that if they reported these kinds of cases to the Police, they would be giving up their powers to adjudicate over such matters. The permission given to the Local Court to deal with defilement cases as virginity damage cases undermines the severity of the offence and violates the Penal Code.

Undoubtedly, there is a conflict between ACL and written law. The Local Court is instructed in section 12(1) of the Local Courts Act to follow written law in cases of conflict. But it is clear that many Courts follow ACL instead. A party that is dissatisfied with the Court's ruling has the right to appeal, and is likely to get a ruling in a higher Court which is in line with written law instead.

Additionally, the Local Court has many shortcomings and faces several challenges all of which hinder children's access to justice. Most of these have been documented in the **Pilot Scheme for Enhancement of Justice in the Local Courts in Zambia: Initial Scoping Missions 2011**.⁵¹ For example, it is recorded there that:

” One third of the Local Court is not using any kind of cause list. ... This keeps community members guessing as to the specific time that their cases are heard on each hearing day forcing even those whose cases will not be on the cause list to sit at court the whole day until the last case is called and heard. [Yet some litigants have to] cover 40-70 kilometres to reach the court.”⁵²

” ... [A]part from their general level of education (Grade 12 completed at secondary school), the only meaningful training provided to [Local Court Magistrates (LCMs)] and clerks was conducted by GTZ and DANIDA five years ago. A significant number of the [LCMs] trained have now been retired, and all new [LCMs] and clerks that joined the [Local Courts] after 2006 did not receive any similar training.”⁵³

” 25% of the [Local Courts] visited do not even have the most important statute required in their daily work, the Local Courts Act. ... In terms of other legal materials, very few [Local Courts] had copies of newly passed legislation such as the Intestate Succession Act (ISA) ... [N]one of the [Local Courts] visited had copies available from the specific sections of the Penal Code nor any extracts from about 23 other statutes which [Local Courts] are mandated to administer.”⁵⁴

” In civil matters, none of the judgments reviewed contained references to the law being applied, be it statutory or customary law, except for one [Local Court] mentioning the ISA....”⁵⁵

” In most [Local Courts], all court documents including case records are kept by the clerk at his/her private home....”⁵⁶

” Several clerks insisted that family matters and cases which have not been heard by elders or traditional leaders must be sent back and possibly be decided by the latter before the clerk allows a party to sue in their court. Some clerks admitted during the survey that they actually reconcile parties in their office without the involvement or knowledge of the [LCM].”⁵⁷

Further, much as the Local Court keeps court records, it is illegal to inspect them. Section 16(1) of the Local Courts Act reads in part:

” ... [S]ave as may be expressly prescribed, no person shall be entitled as of right, at any time or for any purpose, to inspection of originals or copies of ...any summons, warrant, charge, pleadings, record of evidence, notes by the [C]ourt, case record, ground of appeal, receipt or other document forming part of the papers in any case before a local Court, or of any other record kept by any [L]ocal [C]ourt.”⁵⁸

Yet, as stated by the DIHR, “case records are of value not only to the [Local Courts] themselves,

parties to cases heard in court and to [Local Court] supervisors, but also to the general public, including researchers and historians.”⁵⁹

In the face of all these legal questions, shortcomings and challenges, what form of justice is there—if any—for a child who is a victim of child sexual abuse, when the child’s case is heard by the LCM, or perhaps the clerk?

2.2.3 PROBLEMS

The legal questions, shortcomings and challenges addressed above are all problems that hinder sexually abused children’s access to justice in the Local Court. I wish to highlight two other issues that compound these problems: firstly, legal representation is prohibited in the Local Court;⁶⁰ and secondly, the Local Court is not a court of record.

As noted in the overview above, Local Courts are the lowest in the hierarchy of Courts. Thus it makes sense that they are not a court of record, i. e. they do not reveal their decisions to the public through law reports. However, this ought to change, bearing in mind that an entire body of law is adjudicated almost entirely by them and that ACL transgresses legal and human rights as in the case of child sexual abuse. Further, as there is no legally trained person to guide the Court as it applies written law, the Local Court must be turned into a court of record so that perhaps when LCMs read one another’s judgments, concerns about decisions and procedures that hinder access to

justice would be raised. Ultimately, this would encourage LCMs to engage in a process of critical thinking about their role in shaping and reshaping ACL in light of legislation and human rights law.

Similarly, if cases were reported, academics would easily access Local Court decisions and from their analyses, LCMs would learn more about the law they ought to apply and about how they ought to do so. Further, as Lord Denning said in emphasis of the importance of law reports, “[n]ot only do lawyers profit from them. But many laymen do.”⁶¹ In a Court where legal representation is prohibited, the least the state could do is permit publication of the Courts’ decisions so laymen could have access to precedent, which they could use to support their arguments.

Lastly, law reporting creates an open and accessible judicial system. Thus law reports on ACL decisions would enlighten Zambia on her judicial ACL. Prior knowledge and accurate information on judicial ACL is essential for government to make any attempt to direct the development both of the Courts and ACL. By prohibiting access to Local Court decisions, the legislature and judiciary have created an environment in which human rights violations and transgression of written law are perpetuated.

2.3 THE TRADITIONAL COURT

2.3.1 OVERVIEW

As already pointed out in section 1.4 above, the long title of the Local Courts Act says that the Local Court was created to 'replace the Native Courts', i.e. the Traditional Court. But as evidenced by the discussion in section 2.3, that aim was achieved on paper but certainly not in practice. The Traditional Court is very much alive and functioning in Zambia.

Before colonisation, the Court system and structure that was used in Zambia was different from that which is in operation today, i.e. that of State Courts. Indeed, one cannot claim that there was one particular system applicable throughout Zambia – there were 'Headmen's Courts', 'Chief's Courts', 'Village Courts', etc. and each of these had its own special characteristics.⁶² Nonetheless, there is evidence to show that these Courts were more similar to one another than to State Courts. In this article, I use the name 'Traditional Court' to refer to all these various types of Courts.

The Traditional Court has some distinct features: To begin with, it is presided over by a traditional leader. The law that the presiding officer relies on and applies is unwritten. The procedure is organised and yet laid back in comparison to that in a State Court. For instance, among the Lozi people of Western Province:

” The litigants, supported by their witnesses and kinsmen, sit before the judges ... The plaintiff, without interruption, states his case with full and seemingly irrelevant detail. The defendant replies similarly. Their witnesses, who have heard their statements, then speak. There are no lawyers to represent the parties.”⁶³

Furthermore, apart from the parties, the people who are present when the Lozi Traditional Court sits also play a key participatory role in the Court proceedings. Therefore, it is normal for the Traditional Court to be “assisted by anyone present” when it cross-examines the parties, deliberates, and reaches its conclusion.⁶⁴

Among some ethnic groups, however, the ordinary members of society do not participate in the process. This is the case with the Ngoni people of Eastern Province. Their Traditional Court is constituted of the Chief, his advisors and a few select headmen;⁶⁵ plus anyone whom the Chief nominates for his reputation of wisdom.⁶⁶ Together they form a council, which deliberates and passes judgment.⁶⁷

Additionally, in some Traditional Courts, the Village Head plays the role of 'court of first instance', and only when the matter remains unresolved does it go before the Chief – e.g. among the Ngoni people, the Chief does not preside when a matter is first heard. He leaves his advisors and the Village Headmen to

conduct the proceedings and ask the parties questions. He is only called in when the Court fails to mediate successfully between the parties to the dispute.⁶⁸

Whichever type of Traditional Court it is, generally speaking it gets a lot of insight and contributions from other people apart from the presiding officer. One can safely say therefore that in a Traditional Court, the presiding officer does not make the ruling unilaterally. In fact, as Professors Bennett and Vermeulen found in their research on the Traditional Court of the Shona people of Zimbabwe:

” The Chief as overall judge plays an essentially passive role in these proceedings; indeed his judgement should conform to the opinion expressed by the community, as far as possible, otherwise he will gain the reputation of arbitrariness.”⁶⁹

Presently, the Traditional Court is not recognised as a court of law in Zambia. That notwithstanding, it does exist and hears all sorts of matters.

2.3.2 FIELD FINDINGS

There are two important sources of information considered here: the Access to Justice study; and a key interview that I held with the Senior Researcher at the ZLDC, the institution mandated to develop Zambia’s written and unwritten laws.

During the Access to Justice study we interviewed 59 traditional leaders, of whom 44 were Village Headmen and 15 were Chiefs. There are three questions that they were asked during the Access to Justice study, which shed a lot of light on the nature of the Traditional Court and its role in Zambia today:

- **Which law do you apply when there is a conflict between ACL and other laws?** 76 per cent of the leaders replied, that they apply ACL. This means that there is hardly any written law that is relied upon when the Traditional Court passes its decisions.
- **How often does the Traditional Court sit in hearing?** 30 leaders said once a week; 13 said several times a week; four said every two weeks; and three said once a month. The frequency of sitting shows that the Traditional Court is very active. This is evidence that the Traditional Court enjoys legitimacy among the people, hence they take their matters there.
- **What is the time span from when a matter is reported to when judgement is given?** ‘Several days’ is what 24 leaders said; ‘one week’ said 21 leaders; ‘two weeks’ said seven leaders; and ‘one month’ said one leader. In short, it takes a maximum of one month for the Traditional Court to resolve a matter. This is a short period of time, especially when compared to State Courts. Perhaps, it is one of the reasons why the Traditional Court is so popular, coupled with the fact that it applies a law that many people identify with.

Dispute	Number of Cases Heard in a Year
Land disputes	57
Witchcraft	40
Adultery	38
Domestic violence	35
Theft of crop, livestock	30
Defilement	8

- **Which of the following disputes are heard in the Traditional Court and on average how many of these cases are heard every year?** (The respondents had a long list of cases from which to choose, and below is an extract of some of the cases that they selected.)

Based on the table above, there are three pertinent facts worth highlighting: First, it is not surprising that the Traditional Court hears land disputes and in such large numbers. Zambia has two types of land tenure: state land and customary land. Traditional leaders are empowered by legislation to administer customary land and preside over its disputes as a traditional DRM.⁷⁰ As far as the people are concerned however, the Traditional Court is not just a DRM, it is a Court that applies a constitutionally recognised source of law – ACL. But because it is not constitutionally recognised as a Court of law, the authority of the Traditional Court is at times undermined, hence some Chiefs have complained of instances where people disregard its decisions, knowing that they do not carry the force of

law. In 2010, the House of Chiefs “called on Government to recognise Traditional Courts and strengthen their verdicts.”⁷¹

Clearly, there is an inconsistency between the Constitution, which does not recognise the Traditional Court, and legislation, which permits traditional leaders to deal with matters such as customary land disputes. It may be argued that the former creates the judicature and the latter recognises informal and traditional DRMs. However, field data reveals that the Local Court, which is a formal Court, refuses to hear customary land matters and instead refers them to the Traditional Court. This means that the Local Court recognises and respects the Traditional Court as though it were a formal Court with original jurisdiction in customary land matters. In short, there is a **de facto** though not **de jure** recognition of the Traditional Court by the formal justice sector.

Second, the Witchcraft Act provides that it is an offence to call anyone a witch or wizard.⁷² Thus whoever brings such a claim before a formal

Court will be found guilty of violating the Act. Yet, for many people in rural Zambia, witchcraft is real; and it is believed that some people do bewitch others. By hearing these cases, the Traditional Court gives people an opportunity to air their concerns and grievances. Whether or not witchcraft is real is secondary, and so is the argument that the ruling of a Traditional Court cannot put an end to witchcraft. The primary issue is that the Traditional Court addresses a concern that ordinary people have, as opposed to preventing them from airing that concern.

As noted by the head of research at the ZLDC in interview:

“ Chiefs are important in the dispensation of justice in areas relating to culture and where there is no danger of repugnancy. The Constitutional provision which does not recognise Traditional Courts makes this part of justice delivery outside the mainstream. But in the rural areas where there [are no state courts], Traditional Courts are vital to ensure law and order. The traditional leaders act as custodians of peace and stability. For the time being, and as long as there is no capacity created for the real judicature, these Traditional Courts remain all there is in the remote parts of Zambia.”⁷³

Third, although the number of cases is lower than when it comes to the land disputes and

witchcraft cases, the Traditional Court also hears child sexual abuse cases. The table above shows that they hear an estimated average of eight such cases in a year. This means that in addition to the family there is another entity that presides over child sexual abuse cases, in a manner that is neither known nor regulated by the State.

2.3.3 PROBLEMS

Much as the Traditional Court is meeting a need that the recognised judicature is unable to meet, there are serious impediments that surround it and its work. To begin with, it is an illegal Court, in that the Constitution does not recognise it as a Court. Many are lobbying Parliament to do so, but that is yet to happen.

The Traditional Court violates written law by entertaining witchcraft cases and thereby permitting one to call another a witch or wizard. Although I do not agree with the Act and support the hearing of these matters,⁷⁴ the fact is that the law currently prohibits accusing one of witchcraft. Until it is amended, it ought to be respected.

Further, no comprehensive study has ever been undertaken to show how many Traditional Courts exist in Zambia and how they operate. No one supervises, monitors or evaluates their work. Apart from old and scanty studies, there is no evidence of how they handle complainants and whether or not they respect human rights law.

Last but certainly not least, there is no empirical data on how many defilement cases the Traditional Court hears in a year, or what decisions the Court reaches in these cases. For instance, are the Court's rulings in line with the Penal Code or not? For a criminal offence this serious, and a problem as rampant as outlined in the introductory section of this article, the State must gain control of what happens when child sexual abuse cases are adjudicated upon.

CHAPTER 3

'DEFILEMENT' AND THE RIGHTS OF THE CHILD

It is a known fact that when a child is sexually abused, many of the child's rights are violated. Examples include her freedom from physical, emotional and psychological torture; her right to health; right to privacy; right to human dignity and bodily integrity; right to development; and in some unfortunate cases, her right to life. These rights are guaranteed in many human rights instruments including the CRC, the International Covenant on Civil and Political Rights (ICCPR) and the ACHPR, all of which Zambia have ratified. In this section, I will not outline how the above named rights and others are violated by the abuse. Rather, I wish to zoom in on the indirect effect (on the rights of the child) of the law and how the ITJS deals with child sexual abuse. It is my humble submission that the law and how the ITJS handles child sexual abuse cases altogether transgress the child's human rights, specifically the right to psychological recovery and social reintegration; right to an effective remedy; freedom from exploitative use; and right to human dignity.

3.1 THE RIGHT TO PSYCHOLOGICAL RECOVERY AND SOCIAL REINTEGRATION

As already noted in section 1, child sexual abuse is called 'defilement' in the laws of Zambia. To 'defile' is to make impure.⁷⁵ It is to damage or make unclean;⁷⁶ to take away something valuable. The connotation thereof is that a defiled child is impure, damaged and unclean. The effect of using the term 'defilement' in law, is that the child is punished twice: first by being sexually abused and second by being labelled unclean. Thus the physical violation of the child's body and human rights is actually kept alive by its name in law. Article 39 of the CRC provides that:

” States parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of ... any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment ... Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.”

The term 'defilement' and its effect goes against Article 39 of the CRC as it flies in the face of the child's psychological recovery and social reintegration in society. In order for Zambia to abide by this obligation and avoid the negative effect described above, Zambia will have to amend her laws and use the term 'child sexual abuse' as opposed to 'defilement'.

It may be argued that the above submission can only be substantiated with evidence from the ground, showing that indeed children who have been sexually abused are affected psychologically by the term 'defilement'. But as the maxim goes, "justice must not only be done; it must also be seen to be done". It is difficult to envisage the law doing justice, while adding to the injustice, be it potentially or actually. In anything, if the term 'defilement' is removed in law, it is highly likely that the stigmatisation will be reduced; and more cases might be reported and therefore filters into the formal system which better protects the rights of the child.

3.2 THE RIGHT TO AN EFFECTIVE REMEDY

To begin with, Article 2(3) of the ICCPR requires that "states parties **make reparation to individuals** whose covenant rights have been violated."⁷⁷ Virginity damages are not reparation to the sexually abused child: they are compensation under ACL, which goes to the parents of the sexually abused child. This means that the ITJS fails to provide means of redress for the child who has been sexually

abused. As rightly argued by the Human Rights Committee:

” Without reparation to individuals whose covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2(3), is not discharged.”⁷⁸

Also, Article 2(3)(a) of the ICCPR provides that "any person whose rights or freedoms in the ICCPR are violated shall have an **effective remedy.**"⁷⁹ As a state party of the ICCPR, Zambia has the duty to ensure that children whose rights are violated have access to an effective remedy. The Human Rights Committee has expounded on this right as follows:

” Article 2(3) requires that in addition to effective protection of covenant rights, states parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.”⁸⁰

In other words, there must be a direct relation between the punishment of the offender and the protection of the rights of the offended – e.g. imprisonment of the offender protects the child against possible future violation by the same offender; and it might deter others from committing the same offence. The question that begs an answer here is whether or not compensation paid as virginity damages does vindicate the child's rights. Indeed some of

the compensation might go towards covering the child's medical bills, but how is the child's right to dignity and freedom from psychological torture vindicated when her parents are compensated?

The Human Rights Committee puts it this way: "what the ICCPR requires is that there ought to be **appropriate compensation** for human rights violations."⁸¹ In the South African case of **Fose v Minister of Safety and Security**, the Constitutional Court addressed the question of what is appropriate compensation or appropriate relief. It held that:

” An appropriate relief will in essence be relief that is required to protect and enforce the Constitution. ... If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”⁸²

In the case of **Sanderson v Attorney General, Eastern Cape**, it was held that appropriateness requires suitability, which is measured by the extent to which a particular form of relief vindicates the constitution and **acts as a deterrent** against further violations of rights.⁸³ Most certainly, virginity damages, which at most amounts to the highest compensation order that the Local Court can impose – i.e. three US dollars – can neither vindicate constitutional rights nor deter anyone.

Lastly, Article 24 of the ICCPR stipulates that such remedies should be appropriately adapted so as to take account of the **special vulnerability** of certain categories of persons including **in particular children**. Most certainly, virginity damages do not take account of the vulnerability of the children. If they did, they would at least be so high as to have a deterrent value. The punishment in the Penal Code was recently increased to a minimum of 14 years imprisonment as an attempt to deter future offenders.

In sum, the family, the Local Court and the Traditional Court do not give sexually abused children an effective remedy. Without an effective remedy, there is no justice for the sexually abused child.

3.3 EXPLOITATIVE USE OF THE CHILD

As a state party to the CRC, Zambia undertakes to protect the child "from **all forms of sexual exploitation** and sexual abuse". In fact, Zambia is mandated in Article 34 to take all appropriate measures to prevent the "exploitative use of children in unlawful sexual practices". It is here submitted that when an adult realises a material benefit from an unlawful sexual practice such as early marriage or child sexual abuse, that is exploitative use of the child. By allowing virginity damages claims in courts of law, the state is permitting the exploitative use of children in unlawful sexual practices; hence Zambia is violating Articles 34 and 19(1) of the CRC.

3.4 THE RIGHT TO HUMAN DIGNITY

All international human rights treaties reaffirm the dignity and worth of the human person. This includes that of the child. Article 16 of the ICCPR provides that “everyone shall have the right to recognition everywhere **as a person** before the law”.⁸⁴ Article 10 of the ICCPR declares, that: “all persons ... shall be treated with humanity and with respect for the inherent dignity of the human person.” In the case of **S.W. v the U.K.**, the European Court on Human Rights held that the protection of dignity “is the very essence” of the European Convention on Human Rights and that protecting dignity is a matter of civilisation.⁸⁵

In section 2.1.3 above, an argument is made to the effect that the child is treated like property when it is the family and not the child who is compensated for the sexual abuse. The treatment of another human being like property transgresses Articles 10 and 16 of the ICCPR. Additionally, it not only undermines, but also erodes the concept of human dignity, and raises questions of whether or not the ACL concept of compensation is compatible with human rights law as well as civilisation. Unfortunately, this is a wide and deep discussion that falls outside the scope of this article. Nonetheless, it is an important one and it must take place in a forum that is firstly, open to embracing the good in both ACL and human rights law; and secondly, embarking on the long journey of influencing the elimination of the negative elements in the two.

The question that begs an answer is whether compensation under the ITJS in the form of virginity damages – USD 3.00 maximum – could ever reconcile a child who has been sexually abused, with her abuser. To answer this question, one would have to interview children who have been sexually abused and analyse their sentiments. While this question is a pertinent question when the matter is viewed from a human rights perspective, it does not even arise in the context of ITJS, as it is the family and not the child that is considered to be the victim of the civil wrong of deflowering.

3.5 THE RIGHT TO EQUAL PROTECTION BEFORE THE LAW

Article 26 of the ICCPR affirms that:

” All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

In short, the above quoted Article obliges Zambia to firstly protect all its subjects, and secondly accord them equal treatment. Although the focus of this article is on the ITJS, it is important to point out provisions in written

law, which aid violation of rights through the ITJS. It is my contention that section 138(1) of the Penal Code violates the international law obligations that Zambia has to protect and accord equal treatment to its subjects. To begin with, section 138(1) of the Penal Code states that:

” 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”.⁸⁶

The word 'and' between 'unlawfully' and 'carnally' implies that it is possible to carnally know a child in a lawful manner. In other words, not all carnal knowledge of a child is unlawful. This formulation of the law is wide enough to encompass and permit carnal knowledge of a child under African customary laws and practices, such as early marriage. As a state party to international human rights law, which mandates the state to protect the child, it is unacceptable and detestable for Zambia to have such a provision in statute law today.

The principle of equal treatment before the law requires that the laws of Zambia treat every child in the same manner as others in similar conditions and circumstances. By permitting children who are subject to African customary law to be violated sexually, section 138(1) of the Penal Code accords differential treatment

to African and non-African children in Zambia, thus it flies in the face of the principle of equal treatment before the law.

That notwithstanding, I am of the opinion that section 138(1) must distinguish between offenders. Currently, the prohibition in section 138(1) is a blanket prohibition that does not look at the profile of the offender and the circumstances under which the carnal knowledge took place. So for example, a 12-year-old boy who had carnal knowledge of his 15-year-old girlfriend could face punishment as prescribed in the Penal Code. It does not matter that the two were in a relationship, and that the girl did not refuse to engage in the act. Much as a minor cannot give consent, when punishing the offender, the law must distinguish between instances where the offender is an adult who raped the girl child; and those where the girl child willingly engaged in the act with a fellow minor. Most certainly, it is unfair to treat the 12-year-old boy in the scenario outlined above, in the same way as a 40-year-old man who had carnal knowledge of a two-year-old girl child. In short, the argument presented here is that the law fails to offer adequate protection to the boy child who has committed a sexual offence, which is not as vile as rape or the usual cases of defilement. Yet, Zambia is obliged under Article 3(2) of the CRC to “undertake to ensure the child such protection and care as is necessary for his or her well-being”.

Lastly, the remedy of 'virginity damages' also differentiates between children, if not in practice, then on paper. The term 'virginity damages' insinuates that this claim is available only if the child abused was a virgin at the time of abuse. What if this is the second or third time that the child has been sexually abused? Does that result in a situation where no compensation is merited? What does that suggest about the worth and dignity of such a child?

In conclusion, it is clear from the above, that Zambia's national laws have some serious flaws, which are not compatible with cardinal principles in international human rights law. As pointed out in section 1.4 above, Zambia is a dualist state that has not incorporated any of the provisions analysed here. Nonetheless, by virtue of being a state party to the CRC, ICCPR, the ACHPR and many other international human rights treaty, the government of Zambia has a major responsibility to fulfil: it must ensure that none of its laws violate children's rights; and that all children are adequately protected by the law.

CHAPTER 4

RECOMMENDED SOLUTION: THE INSTITUTE OF AFRICAN PHILOSOPHY, GOVERNANCE AND HUMAN RIGHTS

It is clear from the discussion in the previous chapters that there are many underlying and deep-rooted issues that will have to be addressed before children who are sexually abused can begin to access justice in the ITJS in Zambia. Some of these issues are:

- What powers should the family unit in Zambia have? Should it be allowed to operate as an adjudicating body, and if so, to what extent?
- Who should be compensated for the violation of the child's rights – is it the child alone? Will the family accept that? How will the state get the family to understand and accept the rationale behind taking away their traditional right to compensation in cases of child sexual abuse?
- Should the Traditional Court be recognised in law and regulated like other courts?
- Should legal representation be allowed in the Local Court? Should the presiding officer there, be an officer of the law?

Evidently, there is a dire need for critical thinking, dialogue, wide and in-depth consultation with various stakeholders, field

research and publication in the area of ITJS in Zambia. It is proposed here, that the solution to the problems outlined in this article is to establish an entirely new institute whose sole task will be to spearhead the development of ACL and ITJS: The Institute of African Philosophy, Governance and Human Rights (IAPGHR).

The concepts of African philosophy and human rights are often regarded as being mutually exclusive. Many proponents of human rights consider ACL to be largely incompatible with human rights. However, much as some principles in the two schools of thought fly in the face of each other, experience shows that it is possible for the two to co-exist. African philosophy is embodied in the ACLs, customs and traditions of the peoples of Africa. There are many positive concepts in African philosophy, which, if enhanced, would not only protect the right to culture and ensure the continued existence of ACL, but also help solve some of the problems which Africa is currently facing. A good example is **uBuntu**. Another is that of compensating a victim of a crime, with

the aim of bringing about reconciliation and restoration.

At the same time, it is obvious that some aspects of African philosophy (e.g. compensating the parents of a sexually abused child) are contrary to human rights laws such as the right to an effective remedy, and freedom from exploitative use. The reason for bringing together African philosophy and human rights in the endeavour to develop the ITJS and ACL is so that:

” The underlying values of ACL are taken into account, thus ensuring that human rights are advanced more effectively than they would be if the common law [or legislation or any other law] were applied in African communities.”⁸⁷

Therefore the IAPGHR will purposefully and selectively utilise norms from African philosophy and human rights law to develop both ACL and the ITJS. In that way, the IAPGHR can aspire to fill the conceptual gap between African philosophy and human rights law.

4.1.THE STAKEHOLDERS

The IAPGHR will not be a state institution, an NGO, international organisation, an academic entity or panel of experts. It will be a joint venture between all these, and ordinary people. The latter is a necessity. As correctly noted by Professor Allott, any intervention that goes against what people “habitually do, think and

want, run[s] the risk of total or partial failure in effectiveness.”⁸⁸

Each of the above-named bodies has shown an interest in developing ACL: e.g. Zambia has a Law Development Commission whose mandate includes developing ACL; NGOs like Women and Law in Southern Africa (WLSA) and the Zambia Land Alliance (ZLA) were established not only to promote women’s rights but also to develop ACL and thereby curtail its violation of human rights; the ‘uBuntu Project’ at the University of Cape Town and the ‘United Nations Educational, Scientific and Cultural Organisation Chairs in Africa’ aspire to extract and build on positive concepts in ACL.

Thus the stakeholders of the IAPGHR will be ordinary people, the State, NGOs, international organisations, academics and other experts (e.g. psychologists, economists, researchers, political analysts, anthropologists, sociologists and lawyers). These stakeholders must be willing to reason with one another, compromise and accommodate diversity, except where that would violate fundamental principles of law and human rights norms. They are all needed to ensure that the IAPGHR analyses data correctly and publishes reports that will adequately inform government and other interested parties. By working together, there will be a minimal bias and distortion of facts, thereby increasing the possibility of truly and successfully reforming ACL and the ITJS. So together, the stakeholders of the IAPGHR

can come up with innovative, effective, and yet least intrusive strategies, to influence the development of ACL and ITJS.

4.2 THE VISION

The vision of the IAPGHR is to see human rights respected and justice accessed in all fora, including in the ITJS.

4.3 THE MISSION

The mission of the IAPGHR is to:

1. Bridge the gap between ACL and human rights law;
2. Embrace and enhance the positive elements embodied in African philosophy which are reflected in ACL and the ITJS;
3. Influence the advancement of ACL so that it reaches a stage where it does not fly in the face of human rights norms; and
4. Ensure that ACL, customs and traditional practices do not lag behind or conflict with written laws.

4.4 THE OBJECTIVES

The IAPGHR's objectives are to:

1. Be a platform for interaction and dialogue between the State and communities; and between progressive and non-progressive communities;
2. Ensure that harmful traditions and practices either cease or reform to the degree that they no longer infringe upon human rights and written law;

3. Have a positive and measurable influence in the development process of ACL and ITJS; and to
4. Develop law in practice rather than law in books and statutes.

4.5 THE ACTIVITIES

The IAPGHR will employ both a top-down approach and bottom-up approach, for there are strengths in both methods that are necessary for reengineering and developing ACL and ITJS. The activities of the IAPGHR will fall in three broad categories aimed at developing both ACL and ITJS: training and education, research and activism.

The activities of the IAPGHR in relation to training and education will be to:

1. Develop the curricula for and conduct training of LCMs, clerks and messengers;
2. Conduct regular training sessions so all serving LCMs possess knowledge of relevant laws and are able to apply them;
3. Conduct human rights education so that all serving officers respect human rights;
4. Translate and simplify written law such as the Penal Code and the Constitution; and distribute them widely so people know and understand the exact content of the law;
5. Teach ACL, as there is currently no institution in Zambia that does so, despite the importance and relevance of this body of law in Zambia.

With regard to research, the IAPGHR will engage in applied research, otherwise known as action – oriented research. Thus the IAPGHR will:

1. Continually establish both the official and living ACL through field research (using interviews, case studies, focus group discussions) as well as studying texts such as the ZLDC's Restatement of ACL;
2. Analyse the advances and draw-backs in the Institute's work, then publish and publicise them so all stakeholders know the progress made, and challenges faced, in developing ACL and ITJS;
3. Invite feedback from all interested parties and hence tap into society's invaluable information, guidance and ideas;
4. Disseminate information through publications such as newsletters and reports; and
5. Introduce the culture of law reporting in the Local Courts in order for case records to be accessible to researchers and therefore of use in the process of developing ACL.

Concerning activism the IAPGHR will:

1. Distribute all relevant materials (e. g. copies of legislation) to serving LCMs;
2. Have discussion forums where the various stakeholders meet, dialogue, deliberate and agree on the course of action;
3. Create awareness among the people through workshops, seminars and

campaigns about, e.g. the role of the family in child sexual abuse cases, how it violates written law and the importance of bringing such matters before the formal justice system;

4. Sensitise people by 'mirroring back' to the community the harm caused by certain ACLs and practices through video diaries, documentaries and plays made by the community members for use in their community and others;
5. Facilitate discussion and debate in the community, on radio and television about provisions in written law and their effect on provisions in ACL (e.g. the effect of section 5 of the ISA on the ACLs of inheritance);
6. Give communities that have developed their laws and practices a platform from which to share with other communities the reasons for and means of their reform. The platform could be either on radio, television or in the community; and
7. Inform the three organs of State about what is happening in the community, make recommendations, and go back into the community and implement mechanisms geared towards change.

In several of the activities above, the IAPGHR will collaborate with various entities – e.g. the judiciary, the ZLDC, the Zambia Human Rights Commission and the University of Zambia. The IAPGHR's activities will be in line with the mandate of the African Commission in Article 45 of the ACHPR, which is to 'collect

documents, undertake studies and research on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, and disseminate information'.

The IAPGHR will use top-down and bottom-up approaches, as both are needed to develop ACL and ITJS. Using the top-down approach, the IAPGHR will, one by one, identify the principle, tradition or practice in need of change; and determine the yardstick(s) by which to measure and influence their reform. Using the bottom-up approach, the IAPGHR will select and implement the activities best suited to achieve the desired change.

NOTES

INTRODUCTION AND BACKGROUND TO THE STUDY

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- 18 Kane, M., Oloka-Onyango, J. and A. Tejan-Cole. (2005) **Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor** p 11.
- 19 Local Court Act As amended by Act 18 of 2003, Chapter 29 of the Laws of Zambia, Volume 4.
- 20 Subordinate Court Act, Chapter 28 of the Laws of Zambia.
- 21 The repugnancy clause does not subject ACL to human rights law and yet among all the areas of law, this is the one that it most conflicts with.
- THE THREE ITJS IN ZAMBIA AND HOW THEY HANDLE THE CASE OF CHILD SEXUAL ABUSE
- 22 Sections 2 and 5 of the Intestate Succession Act 5 of 1989, as Amended by Act 13 of 1994, Chapter 59 of the Laws of Zambia, Volume 4.
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- 30 Interview with YWCA on 17th October 2012.
- 31 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.
- 32 Interview with VSU National Coordinator on 7th August 2012.
- 33 These are the Police, CCPU, Magistrate's Court, Local Court, Local Govt., Traditional Leaders, Village Headmen, LAB, Church, Mosque, Paralegals, SWO, NGO and Family.
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- 35 DIHR (Danish Institute for Human Rights). (Kerrigan, F. et al) (2012) **Access to Justice in the Republic of Zambia: A Situation Analysis carried out on behalf of the Governance Secretariat**. p. 280.
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- 39 See argument on treating children like objects under Zambian cultural beliefs and practices in Children's Coalition. (2012) Joint UPR Submission – Zambia – October 2012. Submitted to the United Nations Office of the High Commissioner for Human Rights. p. 6.
- 40 In essence, this means that African customary norms and practices need to change. The recommendation made in Chapter 4 of this study is an all-encompassing and feasible way in which to reform African customary laws, systems and practices.

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- 42 Convention on the Rights of the Child, General Assembly resolution 44/25 of 20 November 1989.
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