

THE ADMINISTRATION OF JUSTICE IN THE LOCAL AND SUBORDINATE  
COURTS OF ZAMBIA: AN OVERVIEW OF THE APPROPRIATENESS OF  
THE PRESENT STRUCTURE, PROCEDURE AND QUALIFICATIONS OF  
PERSONNEL

BY

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degree of Master of Laws

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DECLARATION

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this dissertation represents my own work which has  
not previously been submitted for a degree at this  
or another University. 2011/12

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APPROVAL

This dissertation submitted by NYAMBE MUKELABAI is approved as fulfilling part of the requirements for the award of the degree of Master of Laws by the University of Zambia.

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## ABSTRACT

This dissertation undertakes to examine the application of the concept of justice to the practical realities of court processes and administration in the Local and Subordinate Courts of Zambia, that is the lower courts - other than the High Court and the Supreme Court.

The thesis is divided into four parts. Part one comprises one chapter; part two consists of two chapters. Part three has one chapter which is divided into two sections; and part four has three chapters.

Chapter one discusses the concept and intricacies of justice.

In chapter two an historical background to the present Local and Subordinate Courts in Zambia, is undertaken. It concentrates on the period 1890-1924 when colonialism first set in through the rule of the British South African Company (BSA Co.).

Chapter three carries further the historical investigation of the evolution of the local courts and subordinate courts during the period 1924-1964 when the country was under direct British Rule taking over from the company.

These chapters trace the origins of these courts or what may have been analogous to them, from the very early time of colonisation to the time of independence. Issues of the kind of personnel that preside over these courts, their qualifications and the socio-economic climate existing at different periods that may have had some influence on the

court structures and function, are noted.

Chapter four focusses on the post-independence developments with emphasis on the changes that were made to the structure of the Local and Subordinate Courts including new policy pronouncements which were put into effect.

In Chapter five we examine some of the existing setbacks to the administration of justice in these lower courts. This chapter particularly looks at the role of and problems that two related institutions for the administration of justice (the Police and Legal Aid Department) have brought.

Chapter six brings to the fore problems identified in the course of the earlier chapters, in order to try and assess and suggest possible improvements and solutions.

Chapter seven concludes the discussion by way of summary of some fundamental aspects and issues brought out in the main text of the dissertation.

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N. Mukelabai

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LIST OF ABBREVIATIONS

B.S.A. Co.	British South African Company.
N.I.P.A.	National Institute of Public Administration.
P.L.C.O.	Provincial Local Courts Officer.

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## INTRODUCTION

The assurance of the existence of a proper environment, structures and processes for meting out equal justice for all cannot be over-emphasized. It so happens that many institutions, especially those that have a colonial legacy have tended to stagnate in their role and structure in spite of dynamic socio-economic and political changes that may have taken place.

We strongly feel that the administration of justice in the courts of Zambia is one of such areas that have been overtaken by events. We shall concentrate on only the lower courts (that is, the local and subordinate courts) in this work, for the good reason that it is here that the bulk of litigation is disposed of. This study therefore endeavours to bring to the fore, existing problems and other related issues in the administration of Justice in the Local and Subordinate courts of Zambia. It further assesses whether there is actual need to abandon or change certain administrative and structural roles of these courts to suit new developments. The need for change may also come out of the realisation that the courts may still be portraying the hallmark of a decadent colonial system. Some problems and issues to be investigated and discussed in the administration of justice in these lower courts will include:

(a) Present qualifications and competence of court justices.

Ours is an adversary system in which the parties involved carry on under the watchful eye of an impartial umpire by the title of a judge. His duty is to decide which facts he will accept as proved according to law.

Crimes are public wrongs and civil wrongs are private wrongs. Civil justice is administered according to one set of forms, criminal justice according to another set. The outcome of the proceedings, too, is generally different. Civil proceedings, if successful, result in a judgment for damages, or in a judgement for the payment of a debt.... or in an injunction or decree of specific restitution or specific performance.... or in an order for the delivery of possession of land, or in a decree of divorce or in an order of mandamus, prohibition, or certiorari, etc. Criminal proceedings, if successful, result in one of a number of punishments ranging from hanging to a fine. The administration of Justice properly so called, therefore involves in every case two parties, the plaintiff and the defendant, a right claimed or a wrong complained of by the former as against the latter, a judgment in favour of the one or the other, and execution of this judgment by the power of the state if need be.... in a wider sense (the administration of justice) includes all the functions of courts of justice, whether they conform to the foregoing type or not? For rules, rules of procedure have to be observed in addition to the substantive principles. A properly constituted court will, then, be expected to adhere to the procedural and substantive rules. Justice will not be done if the judges or justices are ill-qualified, incompetent or

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(c) Socio-Economic Impacts on the Law. Matters which call for a judicial decision sometimes have a socio-economic background or require that this background be taken into account before a decision is made. As a matter of established procedure, judges are constrained to do their reasoning within the narrow confines of legislation and prior decision. But,

".... there is need .... even in countries with a concerned and dedicated judiciary, for law reform commissions to keep the law under constant surveillance and suggest reform in such a manner that the suggested reform does not stand out as an inconsistency against its (socio-economic) background but fits harmoniously into its surroundings."<sup>4</sup>

An appraisal of the existing socio-economic situation will thus be made from time to time.

(d) Costs and Access to Justice. It is common for people to think of the legal profession as something that has to deal with property and the preservation of the interests of the society's privileged classes.

This is justified to the extent that:

"The best legal skills are rarely available to disadvantaged sections of the community... The common law trial rests on the supposition that representation of the two parties before the court is equally matched... when however there can be great discrepancies between the skill and experience of the lawyers representing the two parties... Money can buy this skill and the availability of the best legal talent for the rich and powerful tilts the scales of justice in their favour"<sup>5</sup>

It is therefore important that the disadvantaged are assisted in one form or the other. This may be through a government department such as the Legal Aid department in this country. But whether such assistance meets the demand for justice for all, is another matter.

A legal system, in order to fulfill its function properly, must aim at the creation of order as well as the realization of justice... A legal system that cannot meet the basic demands of justice will be unable, in the long run, to provide order and peace for the body politic.<sup>6</sup>

In various doctrines such as 'the rule of law', 'natural justice,' 'the independence of the judiciary' it has often been maintained that every citizen should be equal before the law and face an impartial tribunal. In practice however, these ideals have not been realised to the desired extent as those with money, contacts and skill have been able to manipulate the legal system.<sup>7</sup>

- (e) Court Process. Inadequate court structures and space have led to the stalling of court process and consequently to congestion of cases. This is not compatible with the ideal of speedy justice, not to mention costs incurred with lost time. Other contributing factors have pertained to the frequent incidence of inefficiency, incompetence and general lack of co-ordination between these courts and the Police, prosecutors and other personnel- especially as to issues of bringing persons to court in time (from custody), mediocre prosecutions and unnecessary calls for adjournments.

It is with a view to the problems and issues outlined that we investigate the administration of justice in the Local and Subordinate Courts of Zambia.

- (f) Review of Literature related to the problem. Much has been written on the general concept of justice and probably less on its actual application to the day to day court process. An insight of the past and present court structure helps us understand some of the major

problems faced in the administration of justice.

Dr. J. Kanganja in a thesis which was probably the first of its kind in this country, carries out an elaborate trace of the evolution of the modern judicial system in Zambia. He brings out the difficulties encountered by the colonialists in their endeavour to find an administration of justice which would satisfy everyone in a plural traditional society. In all, the thesis highlights the development of a dual system of law (Customary law and the received English law) in different types of courts.

William Church, in his An Introduction to the Law in Zambia, 1974, documents the structure of our court system and the general principles of law applied in these courts. He assists us, perhaps more on his historical trace of the socio-economic situation that *affected the development of the urban courts, than on the actual aspect of the nature of justice that prevailed.*

In his study of Urban Native Courts in Northern Rhodesia, 1953, A.L. Epstein presents us with a more broad and comprehensive outline of the impact of the socio-economic situation (especially the rural-urban migration) on the kind of an administration of law and justice that developed. The sudden influx of Africans from different tribal groupings presented the problem of what kind of customary courts would be set up in the urban areas to cater for people with diverse customs, traditions and other backgrounds.

The long held belief that only the modern urban and English type of courts would, and do follow the principles and procedures of justice is somewhat questioned by M. Gluckman in his Judicial Process Among The Barotse, 1955. He finds in the Lozi traditional system of justice the observance of settled principles such as

those of precedent. The administration of the law is not random as such. Guidelines are discernable in this system.

But speaking about the administration of justice per se, still leaves us with the problem of finding the objective idea of the word 'justice'. Philosophical and other theoretical writings on justice have been presented over a long period of time.

Edgar Bodenheimer has a concise chapter on the aspects of justice in his Jurisprudence. 'The Philosophy and method of the law.' He identifies many diverse theories of justice written by other jurists. A major debate on the issue has been that of the jurisprudential opposite camps of the positivists and naturalists. St. Augustine and St. Aquinas, in their natural law theories are supportive of the view that for law to be law at law, it needs the primary element or content of justice. The other camp, notably Austin and Kelsen, contend that justice is not necessarily a prerequisite in validating a law as such.

Other problems in the administration of justice pertain to the personnel of the courts itself and the procedures followed. Wade, in Administrative Law, writes on the issue of the abuse of power or procedure. Sir Allen Kemp has also touched on this issue in his Aspects of Justice. But perhaps as earlier indicated, the issue of the applicability of justice in day to day court process, may be investigated further by observing that process and getting an insight of the system and structure by talking to persons directly involved. To this end, contributions have been included here, from officers in the legal system - especially on matters pertaining to personnel, logistics and others affecting the application of the ideal of justice.

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PART ONE

THE CONCEPT OF JUSTICE

CHAPTER ONE

WHAT IS JUSTICE?

The topic of this inquiry necessarily calls for an attempt aimed at elucidating the general concept or idea of 'justice'. Many writers and jurists alike have grappled with the meaning of the concept of justice in all its ramifications. It has widely been accepted that justice is one of the most elusive of man's ideals. For example, an eminent American jurist, Professor Bodenheimer makes the following pertinent remark:

"Many diverse and discrepant theories of 'true justice,' each claiming absolute validity, have been set forth by thinkers and jurists in the course of the centuries."<sup>1</sup>

It is also clear that the idea of justice of one age may not correspond with those of another, which may be different in cultural and historical background and content. Views of justice have been as variant as norms and customs of different societies. In this light, then, no principle of justice is universal, eternal or immutable. The concept is relative, its standards highly diverse with time and place. It is therefore not surprising to come across juristic remarks such as that;

"Society which looked upon slavery as axiomatic or on caste as divinely ordained would have difficulties with concepts of universal individual equality. A great contemporary world problem is the formulation of a common set of justice principles across cultural barriers."<sup>2</sup>

It is still recognised that certain ideals have become to be regarded as 'semi-absolute' precepts of justice in our own time and place. A 'common sense of justice' has become to be considered as vital for the existence of men. This has arisen from the experience and inter interaction of man with one another. Lord Reid, in Ridge v. Baldwin,<sup>3</sup> has refuted claims that the concept of justice is practically meaningless due to definitional problems. He says the fact that something cannot have its scope delimited or measured does not mean that it does not exist.

Classifications of the concept of justice have included those of 'natural' justice, distributive justice, social justice, corrective justice, judicial justice, administrative justice and positive justice.<sup>4</sup> One of the earliest notions of justice derives from the natural law doctrines. It has been postulated under these doctrines (natural law) that, justice cannot exist without regard to the laws of nature. In other words justice already exists independent of man. It exists in natural law which man ought to discover. The natural law doctrines teach, among other things the existence of a natural legal system analogous to the system of positive law, and that to be acceptable, the positive laws have to be compatible with those of the natural system of law. So much so that, according to St. Thomas Aquinas,<sup>5</sup> for example, justice meant justice according to divine reason, and human justice fell also within the scope of reason. A law would be an unjust law if it was in contradiction to divine reason. An act would be an unjust act if it did not accord with the moral values taught by the church in the light of its understanding of divine reason. "Both in philosophy and in theology the ethical nature of justice has found its most idealistic expression in the conception of natural law in the form of a moral instinct common to all men, or of a divine dictate 'written on men's hearts' or of institutions which are found to be, or are supposed to be, universal among all human societies"<sup>6</sup>

In its expression as a social virtue, material ideals of the concept of justice have also been formulated. Justice has been considered here, to demand an objective, unbiased and considerate attitude towards others, a willingness to be fair and a readiness to give or leave to others that which they are entitled to have<sup>7</sup>. Aristotle,<sup>8</sup> for example distinguished between general and particular justice. He said in the general sense justice is the sum of all social virtues and it aims at distributing things such as money, goods, enjoyment of public assets, honours and other social goods, equally among persons who are within the pale of equality. John Locke<sup>9</sup> saw the granting of and securing of individual inborn rights of life, liberty and property as constituting justice. John Rawls<sup>10</sup> expressed justice as a complex of three ideas; liberty, equality and reward for services contributing to the common good and that social and economic inequalities must be arranged so as to be of greatest benefit to the most disadvantaged. Mill<sup>11</sup> attempts to discover a common attribute or collection of attributes present in situations and enumerates some as including the aspects that it is unjust to deprive any person of his personal liberty, his property or any other thing which belongs to him; it is just that each person should obtain what he deserves and unjust that he should obtain what he does not deserve, and it is unjust to break faith with anyone, or violate an engagement or disappoint expectations raised by one's conduct if those expectations have been raised knowingly or voluntarily.

Hence, in general terms, the social description of justice is concerned with the respect of the principles of reciprocity between persons, the adjustment or shifting of advantages and burdens for purposes of social control. Ultimately, the consequence is that any serious invasion of the socially approved distribution of advantages should be met by the grant of appropriate remedies for the persons injured.

The forgoing conceptions of idealized justice through the eyes of natural law and social virtue, are not without fundamental objections or questions. For example, from the point of view of perfect justice, slavery and serfdom cannot be justified. But Aristotle's natural law tells us that equals should be treated equally and unequals unequally and to him this is just - so that slaves would not, in the Aristotlian thought system qualify for an equal share in the social good, slaves not being equal with citizens.<sup>12</sup> The concept of justice in this sense leads itself to rhetoric. According to Hobbes,<sup>13</sup> apparent injustice on the part of a ruler was not injustice and not re-dressible on earth, whatever might be the ruler's accountability when he met his maker.

Using, thus, Aristotles and Hobbes views, a ruler today may claim his rule to be just in spite of glaring unequal treatment of different classes of citizens in his realm. (Such as the Apartheid system in South Africa) In terms of social control or reconciliation of interests, it is normally expected that when wrongful injury has been done to material interests as, for example, by unlawful invasion of property or disappointment of contractual expectations, the function of justice should be to restore to the victims that which has been wrongfully deprived. Or in the case of criminal acts, one ought be

punished - that is, there should be a form of retribution. But it is asked whether retribution is just and moral. When atrocious crime has been committed, is it just or moral that indignation of the community should express itself in infliction of punishment or pain on the perpetrator? Is this not itself a perversion of justice? This point may be analogous to the crude form of the social conception of justice which is said to have been that of the primeval law of returning good for good and evil for evil. Sir Carleton Kemp Allen, illustrates this old form of justice with the words;

"Only the day before yesterday it was part of the social code that when a gentleman was insulted or assaulted, his proper appeal to justice was not to call a policeman, but to draw his sword."<sup>14</sup>

This sense of justice then, as a principle of harmony or equilibrium does not quite stand well if taken to the extreme of exact moral tit-for-tat.

On the other hand, when we speak of the administration of justice per se, we really refer to the application of the moral principle of justice to existing laws when rights and duties have been disputed by rival claims. Without an institutionalised legal system or law enforcement agencies, man redresses his wrongs by his own hand. The modern state's machinery of the administration of justice has gone a long way into being a more civilised substitute for primitive or anarchic justice. Private vengeance has been replaced by the administration of criminal justice; while civil justice has taken the place of violent self help. In short, justice cannot be accomplished without an orderly system of judicial administration which will ensure the equal treatment of equal situations. The point is best argued by Fitzgerald as follows, that;

"There is much evidence that the administration of justice was in the earlier stages of its development merely a choice of peaceable arbitration or mediation, offered for the voluntary acceptance of the parties, rather than a compulsory substitute for self-help and private war. Only later, with the gradual growth of the power of government did the state venture to suppress with the strong hand the ancient and barbarous system, and to lay down the peremptory principle that all quarrels shall be brought for settlement to the courts of law."<sup>15</sup>

The administration of justice thus, may include the evaluation of the substantive rules, principles and standards which are the component parts of the normative character. It examines the fairness and reasonableness of these rules, principles and standards and their application and effect upon parties to a claim or dispute. The realization of justice in this respect will demand that two situations in which the relevant circumstances are the same should be dealt with in an identical way. It is recognised that human nature, personality, character and other attributes can never be equal or the same. Friction is inevitable. Thus in order to make co-existence at all possible, some regulative principle is necessary to preserve a measure of balance.

The idea of justice is in its administration further linked with the concepts of the right to be heard before an impartial adjudicator who directs his mind to the issue before him. There ought to be avoided, the use of wrong procedure or abuse of power. The courts should presume that the foregoing, which really constitute principles of natural law, are implied mandatory requirements. Justice, then, in the modern acceptation would postulate an equal claim by all human beings to it, (justice) through the medium of the courts. No one should carry unnecessary privilege or status that exempts him from the ordinary jurisdiction of the land. The administration of justice is no respecter of persons. Conversely, justice is a respecter of all persons!" Justice

should...be shown with both eyes wide open, but with the same clear, calm gaze on all who come before it."<sup>16</sup> The problem in the foregoing lies in the fact that justice is not necessarily inherent in the notion of law. Law which may be considered to be unjust may still exist as law nevertheless; though law which in its content has had regard to justice has a higher chance of survival and enforcement. While St. Augustine and St. Aquinas for example, considered justice to be the overriding objective of the law and consequently came to the conclusion that an unjust law lacked the attribute of a law,<sup>17</sup> legal positivists like Austin and Kelsen regarded law predominantly as a system of order designed to import certainty and regularity to human relations, and they relegated the problem of justice entirely to the non-legal and wholly subjective domain of personal evaluation.<sup>18</sup> The argument of the positivists is that law does not exist to fulfill the ideals of justice. The two are separate. Law may be devoid of the notions of justice but may be retained to fulfill an inescapable urgency for security and certainty in social life. The reason why men enact laws is not answered by reference to the idea of justice but to human need.<sup>19</sup>

This philosophy, hence, regards law as a composition of commands from an identifiable sovereign or government designed to ensure order in society. The validity and binding force of such commands is upheld regardless of their intrinsic and substantive content. What we have then, is a structure with formal procedure in the enactment of law and as long as the necessary rules and directives are followed, the law will have authoritative force and application. The reasonableness or unreasonableness of that law will be inconsequential. This view asserts that justice is not an independent criterion to be used in determining the righteousness of law and if the term injustice is used in a sense which

suggests disagreement with the content of a legal norm, it is held that its only meaning can be the expression of a subjective and irrational preference by the utterer of the criticism.<sup>20</sup> People do criticize as unjust, laws which they nevertheless obey because they may consider it to be more beneficial to do this than bring confusion or chaos on society by insubordination.

Some of the problems of the notion of justice which are to be found in the administration of the law are illustrated thus:

(a) If all or most members of a collective entity are subjected to an equal status of slavery or oppression, there is no reason to assume that justice has been achieved through equal treatment of equals.

(b) If a number of criminals who have committed identical derelictions of a light character all receive the death sentence or terms of life imprisonment

the mere fact that equality of punishment was accorded to them does not constitute compliance with the notion of justice.

(c) The equality view of justice fails to articulate the fact that justice is concerned not only with a comparison of individuals, social groups, and legally relevant situations for the purpose of determining their essential likeness or dissimilarity, but also aims at the proper judicial treatment of unique situations and unusual combinations of events not lending themselves to such a comparison.

(d) Justice seeks to administer a fitting punishment for a particular crime committed under a highly exceptional constellation of facts, defying analysis according to stereo-typed and generalized criteria of judgment.<sup>21</sup>

In summing up on the question, 'what is justice'? We feel it apt to trace the fundamental ideas from their earliest inception. Plato<sup>22</sup> saw justice as a relation that existed between various or different parts of society and the social organism. Justice existed when everyone was doing his duty in his rightful place and concentrated on what he was best at doing. Roles were not to be confused because some people were born to be rulers and others to be subjects, others were destined to be artisans while others were professionals. Plato went on to retort that;

"A man who attempts to govern his fellow men when he is only fit to be a farmer or craftsman must be deemed not only foolish but also unjust."<sup>23</sup>

Of course, as noted earlier, plato's view assumes the existence of natural law principles or norms which place everyone in their rightful roles. It assumes that these principles are entitled to recognition regardless of whether or not they have found formal expression in the positive law of the state or community. The pursuit of justice in the administration of the law, on the other hand, calls for considerations of a different character. Even assuming that an allocation of rights, duties and offices has been accomplished by legislative or other means, justice still requires some accommodation and synthesis between individual and community values. To the greatest extent possible, freedom, equality and other rights should only be accorded with the common good in mind. In spite of these problems encountered in the administration of law and understanding of the idea of justice, on the surface, tendency especially of the layman, has been to place the function of justice in a strait-jacket and hence generally expects that;

"If one member of the community has encroached upon the rights, privileges or property of another member, corrective justice will re-establish the status quo by returning to the victim that which belonged to him or by compensating him for his loss....that justice is the constant and perpetual will to render to everyone that to which he is entitled."<sup>24</sup>

The ideas of justice discussed here, cannot be met without the existence of some other elements or factors such as those of a proper legal structure and personnel. The work that follows, therefore, tries to expose some of the issues that may and do make the realisation of the ideal of justice, difficult.

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22. Ibid: p. 179
23. Ibid: p. 179
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PART TWO

THE COLONIAL BACKGROUND TO THE PRESENT SUBORDINATE  
AND LOCAL COURTS OF ZAMBIA

## CHAPTER TWO

### BRITISH SOUTH AFRICAN COMPANY RULE (B.S.A. CO.) 1890 to 1924

#### 1.0. THE ADVENT OF COMPANY RULE

Tracing the creation of an institution and its objectives is important in that we are able to assess its role at changed times. It is from here that we should be able to determine the appropriateness of such institution to present times. Has such institution matched the changing socio-economic circumstances, or do certain of its characteristics need any modifications?

This chapter looks at the colonial background and the legacy of the Subordinate and Local courts during the period of the British South African Company rule, that is, from 1890 to 1924. We shall, in examining this background, keep in sight issues of structure, personnel, the law obtaining, procedure and qualifications of personnel.

Cecil Rhodes, who embarked on a commercial venture to Central and Southern Africa, was granted a Royal Charter by the British Crown, after much lobbying, in 1899. This Charter entrusted the administration and the development of the Bechuanaland Protectorate and the countries lying North, (which embraced what was to become Zambia) to the British South African Company (Which is hereinafter referred to as 'the Company').

The first notable courts established at this time were the Consular Courts. The Secretary of State for the Colonies in the British government was empowered by Article 19 of the Africa Order-in-Council, 1899 to issue judicial warrants to Company employees to enable them to hold consular courts. These courts exercised unlimited civil and Criminal jurisdiction. Articles 12 and 45 of the Africa-Order-in-Council, 1899 provided that the

law to be enforced was that for the time being in force in England, that is, principles of common law and equity. As these were courts considered to be in the sphere North of the Zambezi, they were subject to reviews made by a court of Appeal in the Cape of Good Hope in South Africa.

Some salient features surrounding the establishment of these first courts need to be mentioned here. The Company was established and later granted a Royal Charter - primarily for opening trade and exploiting minerals in South-Central Africa. The territory was too large in relation to the small number of company administrators. These consular courts were thus undermanned and ill equipped from the outset.<sup>1</sup> Africans living in the territory (and the majority of course) were thus allowed to continue for the time being to settle their disputes in accordance with their traditional ways. Tribal chiefs who had always spearheaded the observance of African Customary Law were not obstructed in their role of settling disputes. No African laws or customs were as yet legally recognised in the Africa-order-in-Council. It appears then, that these consular courts were established to exercise jurisdiction over British subjects only. Rules relating to the conduct of civil proceedings in the consular Courts were required to be framed,

"So...as to secure, as far as may be, that cases shall be decided on their merits according to substantial justice, without excessive regard to technicalities of pleading or procedure and without unnecessary delay."<sup>2</sup>

Article 35 of the Africa-Order-in-Council went on to say that no proceedings determined by a Consular Court could be invalidated on the ground of,

"... any informality, mistake or omission so long as, in the opinion of any court before which any question arises, the essential requisites of law and justice have been complied with, or may be met by amendment."

It is not quite surprising that the above provision should have been made, considering that the administrative officers of the company who held these courts were lacking in legal qualifications. The Africa Order-in-Council did not even specify the qualifications required for one to hold a Consular Court. In the absence of proper judicial officers, and in view of the unsophisticated nature of the territory's development, these company administrative officers were the sentinel of what constituted justice at the time. They could sit, according to Article 92 of the Africa-Order-in-Council, with assessors if they thought it necessary. These assessors were to be 'indifferent British subjects of good repute, resident in the district of the court or belonging to a British ship'.<sup>3</sup>

As shall be seen later, the question of involving mere administrative officers in the judicial system was debated upon from time to time. 'Justice' in modern times includes the conduct of cases where regard is paid to matters of formality, errors, omissions and other technicalities. But the Africa-Order-in-Council as cited earlier provided that such matters could not invalidate proceedings determined by the Consular Courts. Suffice it to say again that this was probably in recognition of the fact that laymen could not be expected to go into the rigours of legal artistry. It is doubtful, hence, whether these courts complied at all with the essential requisites of law and justice as we understand them today.

With the approval of the British Government, the Company decided to divide this British sphere North of the Zambezi into two - namely,

North-Eastern Rhodesia with its headquarters at what is today Chipata (formally Fort Jameson) and North-Western Rhodesia - Barotseland, with its headquarters at what is today Kalomo and later Livingstone. The significance of this division was that by virtue of their respective orders-in-Council, that is, the North-Eastern Rhodesia Order-in-Council 1900 and the North Western Rhodesia Order-in-Council, 1899 two separate judicial systems were established.

1.1. NORTH-EASTERN RHODESIA - 1900-1911

With the coming of the North-Eastern Rhodesia Order-in-Council came the establishment of the Magistrates Courts by Article 29(1) of the same. The jurisdiction of these Courts was to be over all persons within the districts assigned to them. The power to appoint persons to preside over Magistrates Courts was vested in the Company's Administrator but with the approval of the Secretary of State for the Colonies.<sup>4</sup> Unlike the judges of the High Court at this time, the Magistrates fell under the terms of the civil service of the North-Eastern Rhodesia Regulations, 1901. The Magistrates Courts Regulations, 1904 came to govern jurisdiction in Civil matters. The courts could

"preside over any cause, matter, person or company...provided the amount of the value of the claim involved in a particular suit did not exceed fifty pounds (£50)"<sup>5</sup>

As for Criminal jurisdiction, they could try

"All crimes and offences against the law for the punishment of which any penalty is by law provided, committed by any person within the local limits of the jurisdiction of any Magistrate..."<sup>6</sup>

And between 1901 and 1904 a Magistrate's Court could impose:

- (i) a fine of up to twenty pounds (£20); or
- (ii) a term of imprisonment (with or without hard labour) not exceeding six months in duration; or

(iii) Corporal punishment by whipping, provided the number of strokes did not exceed twenty-five.<sup>7</sup>

As from 1904 a Magistrate could impose:-

(i) a fine of up to twenty-five pounds (£25); or

(ii) a term of imprisonment (with or without spare diet, or with or without solitary confinement) not exceeding twelve months in duration; or

(iii) Corporal punishment by whipping, provided the number of strokes did not exceed twenty-four strokes.<sup>8</sup>

Article 17 of the North-Eastern Rhodesia - Order-in-Council provided that laws or customs which governed the civil relations of the so called 'Native' population were to be left undisturbed unless they were an impediment to the exercise of her Majesty's power or jurisdiction. But by Article 21(1) of the same, Magistrates courts could apply or be guided by this Native law and custom. (We shall not at any point use the word 'Native' in a derogatory sense as it appears to have been used by the Colonialists). The Article read:

"In all civil cases between Natives the... Magistrates Courts, shall be guided by Native law, so far as that law is not repugnant to natural justice or morality or to any order made by her Majesty in Council, or to any regulation made under this order".

Thus African Customary law guided Magistrates in cases between Africans in Civil matters. This was not extended to Criminal jurisdiction. In so far as the Africans themselves were concerned, their tribal courts which existed de facto, guided them well enough in their disputes. Tribal bonds were still very strong and tribal Chiefs continued to exercise judicial functions. It was also strategic for the colonialists to allow tribal courts for purposes of indirect rule.

English law would also have been too advanced for the local population anyway and it would not have done to confront them by suddenly imposing alien law.

Even at this stage, there were no particular qualifications which an individual was required to possess, before he could preside over a Magistrate's Court. It was still the practice to appoint persons who were already holders of administrative posts in the company. Administrative and judicial functions were thus still largely undifferentiated. When it was suggested in some 'quarters' in 1904 that it would in fact be safe to entrust Magistrates with the powers to try murder cases, a Mr. P.J. Macdonnel, a legal adviser to the Company and public Prosecutor had this to say in disfavour of the startling suggestion:-

"Taken as a whole the standard of Judicial work in the territory is a low one. The officials are without exception devoid of professional training, as is indeed the case with nine-tenth of the judicial work throughout the Empire. But here the inexperience goes further. Few of the men in the service seem to have read any law or have thought about the problems of administering justice and nearly all of them give the impression of never having been in a law court in their lives. Judicial work even of the simplest kind is not easy work. It needs common sense plus the habit of thinking consecutively, of linking things in a chain of cause and effect plus a certain amount of actual knowledge. The lack of Knowledge does not so much matter, it is the lack of consecutive thinking which is depressing".<sup>9</sup>

These lay Magistrates were further said to be not applying principles of English law to a significant level.

"In the settlement of these cases (crimes) the District Officers (Magistrates) had no laws or regulations to guide them, nor were they men versed in English law; happily so perhaps, or they might have been embarrassed in many of their decisions..."<sup>10</sup>

An Administrator noted personally that,

"In judicial matters we were not expected to state exactly what proclamation, Regulation or statute an offender was charged under; we simply stated the offence, quoted the evidence (generally) and the sentence. Records were kept in a large ledger which as a rule was not seen by any superior officer, until judge Beaufort when acting as Administrator travelled around and visited the out station. There was no appeal".<sup>11</sup>

By virtue of Regulation 57 of the High Court Procedure Regulations (under which Magistrates Courts were required to conduct their cases the powers to prosecute all alleged criminal offenders in North-Eastern Rhodesia was vested in the Crown Prosecutor who could delegate the same. But the Company did not exercise its powers to appoint a public prosecutor on behalf of the Crown. And so for most of the time, Magistrates were both judge and prosecutor. All in all cases in these Courts were tried as expeditiously as possible, without the due formalities and expectations. Authorities were hardly cited nor plausible reasons given for particular verdicts.<sup>12</sup>

Apart from the Magistrates Courts in North-Eastern Rhodesia, there existed the Native Commissioners Courts which were not directly established by the North-Eastern Rhodesia Order-in-Council. They were to be established by the Queen's Regulations, though they begun functioning as early as 1901 without this formal establishment. These courts were not exactly analogous to the present local courts but in some ways represented the latter's origins. Officers, called Native Commissioners, presided over these Courts. The General duties of these Commissioners to start with were,

"...to take census of the Native population, to collect hut-tax and other native revenues and they were responsible for the welfare, peace and good conduct of the natives under their charge".<sup>13</sup>

It was with the above in mind that when these commissioners constituted the Native Commissioners Courts, they held such courts;

"for the settlement of purely native cases, recognition being given to established law and custom in so far as it is not repugnant to natural justice and morality".<sup>14</sup>

Native Commissioners Regulations were enacted formally in 1908 but their jurisdiction was to be such as was exercised by Magistrates under the Magistrates Courts Regulations, 1904. In Civil Cases, assessors in the name of a Chief or headman could be called upon to advise the Native Commissioners on questions of African law or Custom.<sup>15</sup> Initially these civil cases centred around issues of debts, breaches of contract, claims for hut-tax and divorce. In Criminal matters they were expected to apply provisions of local statutory law and principles of British Law. A Native Commissioner could impose a term of imprisonment with or without hard labour, not exceeding six months, a fine of up to five pounds or corporal punishment with lashes not exceeding ten.

Proceedings were determined summarily without the requirement for written pleadings.

As with the Magistrates, the North-Eastern Rhodesia Order-in-Council did not specify qualifications required for appointment as Native Commissioners. They were firstly company administrators before they sat to constitute courts of law. They had no formal legal training but were favoured because it was taken that they understood the African's way of life and were thus able to offer sagacious judgements in their cases. Though, like the Magistrates, Native Commissioners were required to administer principles of British Common law and Equity, in

practice they did not adhere to this. They administered justice according to their own notions of what was just;

"... it being in these arcadian days when good men administered pure but rough justice untrammelled by legal technicalities and the interference of professional lawyers, who do not know, the ways and psychology of the people".<sup>16</sup>

The bulk of civil cases between Africans, in spite of the existence of the Native Commissioners courts, were still heard by their own tribal courts. The traditional methods of settling disputes had yet to be legally recognised. As Allot put it;

"It is a fundamental principle or practice of English Constitutional law relating to the acquisition of dependent territories that existing bodies of law and rights held thereunder are, so far as possible, maintained in force after acquisition..."<sup>17</sup>

1.2. THE JUDICIAL SYSTEM IN BAROTSELAND - NORTH-WESTERN RHODESIA, 1900 - 1911

The establishment of a Company judicial system in Barotse or North-Western Rhodesia was slower than had been the case for North-Eastern Rhodesia. This was, firstly, because the Company wanted to adopt as far as possible the legal principles that were being moulded in North-Eastern Rhodesia. Secondly, a powerful paramount Chief called Lewanika, was in command of much of this area with an already organised and well established traditional authority and judicial system in place. Hence the Company had had to actually conclude some treaties with Lewanika earlier on (Lochner Concession 1890 and Lewanika Concession 1900) which set conditions as regarded the Company's rights for mineral prospecting, use and disposal of land in Lewanika's area. One condition had been that nothing contained in the agreement (Lewanika Concession, 1900) would affect the Chief's

constitutional power and authority as chief of the Barotse nation.<sup>18</sup>

It was in view of this that legislation which purported to confer jurisdiction on any court in North-Western Rhodesia had to take into account the rights which were reserved to Lewanika and his people. The Barotseland valley was initially excluded by wish of Lewanika from the jurisdiction of any courts that were to be established.

The first courts that were established in other parts of North-Western Rhodesia were the Administrator's Court. Although this court had jurisdiction to try all civil cases (irrespective of the race of the parties involved) in practice it only heard matters between Europeans. This court was also presided over by laymen who in practice did not adhere to principles of English law.<sup>19</sup>

But importantly in addition to the Administrator's Courts, the Administration of Justice Proclamation, 1905 established the Magistrates Courts. These courts had both civil and criminal jurisdiction over all persons irrespective of race. They indeed had power to apply rules and principles of English law and local statutory laws and Native laws and Customs were appropriate.<sup>20</sup> Interestingly, appeals from the Magistrates Courts went to the administrators Courts which had power to vary, set aside or confirm verdicts. In criminal matters, the Magistrates Courts (which were constituted by company officials appointed on the basis of knowledge of customs and laws of the subject people) could impose on all offences defined by the Law in force in North-Western Rhodesia.

- (i) a term of imprisonment (with or without hard labour, with or without spare diet or with or without solitary confinement), not exceeding twelve months; or
- (ii) a fine not exceeding twenty-five pounds (£25); or

(iii) Corporal punishment by whipping - the number of lashes not to exceed twenty-four.<sup>21</sup>

As elsewhere, formal legal qualifications were not insisted upon in North-Western Rhodesia. The need, though, to have legally trained Magistrates had been recognised from an earlier period. It was now intended to appoint magistrates,

"provisionally on the official proving himself by examination at a later date conversant with magisterial law and steps were being taken to hold such examination in December of 1906".<sup>22</sup>

There was a requirement that these Company officials should pass a civil service law examination prepared by the University of Cape of Good Hope in South Africa. Nevertheless it still proved difficult to secure personnel who had passed this examination. The judicial system thus continued to rely heavily on untrained administrative officers.

It is perhaps appropriate to comment further on this aspect of laymen taking up the reins of judicial adjudication. Certain standards are naturally expected from one who assumes the role of judge - especially in our modern society. Whereas in less complex and less commercially advanced societies the administration of justice tends to be more informal and devoid of legal artistry, it is still expected that decisions be made rationally. But at the same time, the handling of matters in a less standardised and principled manner, may easily lead to abuses and questionable decisions. We cannot here amply present evidence that suggests that cases at this period of time were decided irrationally - suffice it to refer to the few citations of views that were expressed (which we quoted earlier)

about the undesirability of employing administrators as magistrates for the same reasons highlighted above . A layman could not be less interested in following certain procedural rules and legal standards - and not to mention settled principles of law. The standards of ideal justice would not be met for example, if the judge were to toss a coin. Those bestowed with the task of judging must conform to established rules - though of course novel cases may require the making of a new rule. The very knowledge that judges are adjudicating according to set rules enhances predictability and helps the planning of social activities within certain limits. It may even confer on legal advisers the ability to settle a case out of court.

"Laws, however impeccable their content, may be of little service to human beings and may cause both injustice and misery unless they generally conform to certain requirements which may be broadly termed procedural... The principles which require courts, in applying general rules to particular cases, to be without personal interest in the outcome or other bias and to hear arguments on matters of law and proofs of matters of fact from both sides of a dispute are often referred to as rules of natural justice".<sup>23</sup>

Due to the unavailability of legal counsel at the time (though some litigants once in a while retained legal practitioners who normally practised in Bulawayo or Salisbury in Southern Rhodesia to represent them before courts in North-Western Rhodesial Courts), Magistrates were usually prosecutors - cum-justices. Emphasis must be made on the point that ideally, to guarantee objectivity and increase the probability that the enacted law will be applied according to its tenor the courts should be impartial and hear arguments and proofs from both sides of a dispute. This can best be exposed when litigants are represented by Counsel.

And by Section 1 of the Native Commissioners Proclamation, 1908, the Native Commissioners Courts were established in North-Western Rhodesia. The establishment of these courts was not without apprehension as to usurping the existing judicial powers of the chiefs in the area. Proposals were that every officer in the company's administration who was in charge of a Native District should be given restricted and carefully guarded authority over Africans.<sup>24</sup> The courts were to exercise jurisdiction similar to that of magistrates but confine themselves to dealing with disputes involving Africans. No specific qualifications were required before a person could be appointed Native Commissioner though persons with a sound knowledge of Native Law, custom and language were recommended. Africans, in civil matters, could commence suits in the magistrates court or Native Commissioners courts. In North-Western Rhodesia (unlike in North-Eastern Rhodesia) Native Courts had no power to order lashes. Again, unlike in North-Eastern Rhodesia, Native Commissioners Courts in North-Western Rhodesia (in civil as well as Criminal cases) could apply rules of Native law and Custom in cases between Africans provided the native law or custom in issue was not

"incompatible with the due exercise of His Majesty's power and jurisdiction".<sup>25</sup>

The Company administration was not too happy with the exemption of Barotseland in particular, from its jurisdiction. Around 1908 attempts were being made to establish Native Commissioners' Courts in Barotseland by effecting certain amendments to the law. All in all, though and except in few instances,<sup>26</sup> the Native Commissioners' Courts still had no civil jurisdiction in Barotseland as such cases were being largely determined by traditional Courts. In practice, Barotse traditional courts retained some recognizable degree of judicial autonomy.

1.3. THE MERGING OF NORTH-EASTERN RHODESIA  
AND NORTH-WESTERN RHODESIA - 1911

It is only necessary here, to examine whether there were any major changes in the judicial system with the merging of North-Western Rhodesia and North-Eastern Rhodesia. The Company argued for the bringing together of the two territories mainly for economic reasons.

On 17th August, 1911, the Northern Rhodesia Order-in-Council formally came into effect. This order, governing the now Northern Rhodesia territory, borrowed heavily for its judicial system from that of the defunct North-Eastern Rhodesia Order-in-Council. A Magistrates Court Proclamation was made in 1913 and was somewhat based on the Magistrates' Court regulations of North-Eastern Rhodesia, 1904 and partly on the Administration of Justice Proclamation of North-Western Rhodesia, 1905. All officers previously invested with judicial powers continued to exercise them.<sup>27</sup> Thus, generally, judicial functions were continued in the same manner. Some notable minor changes, though, were that:

By Section 121 of the said proclamation these Magistrates Courts could not now determine the validity or otherwise of, or dissolve, a marriage, or try cases involving the legitimacy of any child, but had jurisdiction to determine the validity or otherwise of any polygamous marriage contracted under native law and custom. In criminal matters, and by provision of Section 17, they could try murder cases with assessors but could not punish any offender by a fine exceeding twenty-five pounds (£25) or by imprisonment (without spare diet or solitary confinement or both) for a period exceeding twelve months. Lashes were limited to 24 and where they

exceeded 12, approval of a judge had to be obtained. The High Court controlled these courts by hearing appeals and varying or reversing their decisions, or ordering new trials in any matter. Magistrates were also required by Section 77 to submit reports of criminal cases every month for review by the High Court. Proceedings in these courts were also now required to be determined in accordance with the rules of court made by the High Court from time to time.<sup>28</sup>

The fact that the High Court could now monitor cases in the Magistrates Courts more closely was at least an assurance that errors or omissions in procedure made by lay magistrates could be rectified.

The Native Commissioner Courts Proclamation which was also enacted in 1913 was largely drawn from the Native Commissioners Regulations of North-Eastern Rhodesia, 1908. This Proclamation empowered Native Commissionerrrs and Assistant Native Commissioners to exercise the jurisdiction enjoyed by Magistrates under the provisions of the Magistrates Courts Proclamation, 1913. But Native Commissioners Courts were empowered to determine mainly civil and criminal cases in which 'Natives' were involved.<sup>29</sup> The Native Commissioners Courts power to impose punishment was also limited. They could only impose a sentence of imprisonment with hard labour for a term not exceeding six months or a fine of up to five pounds (£5). The number of lashes was limited to ten (10). Like the North-Eastern Rhodesia Order-in-Council, 1900, the Northern Rhodesia Order-in-Council, 1911 provided for the application of Native law and Custom in civil cases between native as long as it was not, again, repugnant to natural justice or morality.<sup>30</sup>

1.4. THE CASE OF BAROTSELAND AFTER 1911

By a letter from the Administrator of North-Western Rhodesia to the High Commissioner and dated 23rd December, 1910, the Paramount Chief, Lewanika, of Barotseland, was assured that as much as possible, the laws made under the Northern Rhodesia Order-in-Council would not interfere with native custom and usage in Barotseland

"Save where such custom and usage are repugnant to the law of England, that is to say such Customs as permit slavery, the practices of witchcraft and the killing of people".<sup>31</sup>

Magistrates and Native Commissioners Courts in Barotseland could try cases only if:

- (a) a non-native was involved either as a plaintiff, defendant or accused; or
- (b) the offence charged was punishable according to the law in force in the territory by death or by imprisonment exceeding six months or by a fine exceeding one hundred pounds or by lashes exceeding twelve; or
- (c) the punishment according to native custom for the offence charged was repugnant to English law. Barotse traditional courts retained jurisdiction where natives only were involved and where the punishments outlined above did not apply. In Civil cases between natives, the Magistrates and Native Commissioners had no jurisdiction.

Thus, as regards the judicial system in Barotseland,, there was a conflict between the traditional courts and statutory courts. Sometimes the traditional courts handled serious criminal cases which the Magistrates courts thought should have been for them to dispense.<sup>32</sup>

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CHAPTER THREE

BRITISH PROTECTORATE 1924 TO INDEPENDENCE IN 1964

The Company in 1924 handed over direct control of Northern Rhodesia to the British government. It had become considerably expensive for the company to continue running the territory. A new Order-in-Council, the Northern Rhodesia Order-in-Council, 1924 came into effect. A governor now assumed and was authorised to exercise on behalf of the crown all the powers and jurisdiction that the crown held under the foreign Jurisdiction Act, 1890 or otherwise under the 1924 Order-in-Council. An Executive Council and a legislative Council with full powers and authority to enact laws (ordinances) were for the first time established in Northern Rhodesia. The legislative Council was expected to enact ordinances which would assist the raising of revenue, ensure peace, good order and government. According to Article 22 of the 1924 Northern Rhodesia Order-in-Council, Native laws and customs were to be recognised and respected. It said,

"All ordinances to be passed by the legislative Council shall respect any native law or customs by which the civil relations of any native chiefs, tribes or populations under His Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction".

In spite of the fact that the 1924 Order-in-Council repealed the 1911 Northern Rhodesia Order-in-Council, the judicial system did not undergo a radical change. Under Article 21 of the 1924 Order-in-Council, all existing laws (i.e. laws in force in Northern Rhodesia prior to 1924)

were to continue in force. Article 41 of the same order, preserved somewhat, the status quo of the legal system in Barotseland albeit minor modifications.

2.0. RURAL TO URBAN MIGRATION: THE RISE OF URBAN NATIVE COURTS

A.L. Epstein<sup>1</sup> carried out a study on the rise of Urban Native Courts in Northern Rhodesia. He says that from the earliest days of the present century, Africans had been leaving their tribal areas, and moving to other territories in search of work. The development which made this possible was the opening of the copper mining industry. Organised prospecting in the twenties had revealed the enormous mineral resources of the area now known as the Copperbelt and by 1930 the whole of this narrow strip was in the midst of a construction boom... The emergence of an Urban African population was a direct response to the demand for labour that arose on all sides.

Further to this, Epstein observed that the social structures of various bantu tribes varied significantly, and which still do today, and this had a relevance and effect on the legal system. Normally within the village the headman, in virtue of his position as head of a kinship group, held an informal and unorganised court and settled the affairs of his people. This kind of administration of justice thus partook of a 'personal' quality and determined in large measure the character of the law that was administered. Because tribal society was dominated by face-to-face personal relationships every situation of conflict at once involved many people, and the communal need to resolve the tension was great.

The task of the justices was thus conceived as the restoration of social harmony and the maintenance of village unity.<sup>2</sup>

The problem, thus, of the industrialization of the African was identified. It was clear that the colonial authorities were no longer dealing with a tribal system - a social system, linked to the soil, in which men co-operated with their kinsfolk in all their economic activities, had been replaced by one which, in its major aspects, differed little from those of Urban communities the world over. The administration, thus, had to devise some machinery for settling the innumerable petty disputes that were inevitable in this situation. Crime, at least in its more serious manifestations remained the responsibility of the Administration, and such cases were dealt with by European magistrates. At first, all other disputes, generally involving some claim under customary law, were settled at the 'BOMA'. This procedure was bound to be a temporary measure, for the lack of adequate staff soon made it impossible to cope with the amount of litigation that was being brought.

The solution adopted at some centres was to advise litigants to take their cases to the courts of certain neighbouring chiefs, whose tribal areas adjoined the railway strip. The system was not very satisfactory. Many Africans resented having their cases heard by the chief of an alien tribe, and complained of the injustice of his decision. Thus, about the beginning of 1936, the possibility of establishing Urban Native Courts along the lines suggested by magistrates, to have jurisdiction over Urban Africans, begun to be mooted.<sup>3</sup>

When they were finally set up, Urban Courts stood upon the same legal basis as all other Native Courts throughout the territory. Their constitution, organisation and powers, as well as the system of law they were to administer, were governed by the same instrument from which tribal courts derived their authority.

In terms of the composition of these courts, the principle adopted was to have tribal councillors sent to the urban centres by certain native authorities. Court members were chosen among those tribes whose members were thought to predominate in the township in question, and from whom therefore the bulk of the litigation might be expected to come.

There were objections from some quarters over the 'representative' nature of these court members. At a session of the African Representative council in 1949, an African lamented:

"The trouble arises from the different customs and even different languages spoken by the different tribes. And then the representatives of the various chiefs take up the attitude as if they were the chiefs themselves, but they do not know the customs of my people, and the result is that my people do not get satisfaction... as far as the representatives of the chiefs are concerned I must say that their people are well looked after but these people whom I have mentioned in the motion are not."<sup>4</sup>

In the day to day administration of justice these courts were invested with considerable powers in both civil and criminal matters. The proper exercise of these powers was statutorily controlled and sanctioned by the system of supervision and the right of appeal. But in practice supervision was rarely adequate.

The main charges levelled against the Urban Native Courts were;

1. that court members were guilty of bias in that they received bribes, and they allowed themselves to be influenced by extraneous considerations such as the tribe or social standing of the litigants; and
2. that the procedure they followed in conducting the cases was bound to be prejudicial to a fair hearing.<sup>5</sup>

Not much evidence was though, actually adduced to support most of the accusations. The provincial commissioner in Kasempa had this to say in response to the accusations:

"It seems that anxiety exists in the minds of some people that frequent miscarriages of justice occur in the native courts. This is unfounded for:

- i. Court members know better than anyone else the Africans respect for justice and normally they're unlikely to risk the public indignation and unpopularity that would result from unjust sentences;
- ii. every African knows of his right of appeal but exercises it rarely because he has been satisfied that justice has been fairly administered".<sup>6</sup>

It was noted again, that when Africans complained against the Urban Courts, they laid less emphasis upon the venality of court members than upon the way in which the courts were organized. They objected to the 'tribal basis' of this organisation, and implied that a litigant appearing before a bench on which his own tribe was unrepresented would not receive a fair hearing. For example, a case in which a Kasai woman from the Belgian Congo complained that she

had been stopped on the road and interfered with by the defendant,... the man's defence, that he thought the woman was a prostitute, was accepted by the court on the grounds that all Kasai are prostitutes anyway.<sup>7</sup>

As time went on then, the conditions of urban life were at once reflected in the African's new social habits, in the changing structure of his social relations, and in his modes of thought. This meant that the Urban Courts would face a situation in which the very basis on which certain customary claims rested came to be questioned and would no longer be acceptable to a section of the community.

#### 2.1. THE SUBORDINATE COURTS

Looking at Magistrates Courts in this period, we note that they were firstly renamed "Subordinate Courts" in 1933. This all began as part of the Governor's intention to gradually amend the law governing Magistrates' and Native Commissioners' Courts. A draft Subordinate Courts Ordinance and a draft criminal procedure code were produced by one judge.<sup>8</sup> It was also desired by the judiciary that the administration of Justice in these courts be put in the hands of legally qualified persons who would devote all their time to judicial work. All serious offences including homicide would no longer be tried by magistrates. The Subordinate Courts Ordinance 1933, established three classes of court, namely:

Subordinate Courts of the first class, second class and third class. The first class was to be presided over either by a provincial commissioner or by a Resident Magistrate. The second class by a

District Commissioner and the third class by a District Officer.<sup>9</sup> Almost every administrative officer was deemed to be able to hold a Subordinate court of a class corresponding to his rank. Only Resident Magistrates were divorced from administrative duties. Thus in spite of the expressed desire for legally qualified personnel to hold these courts, most members of the subordinate courts at this time were still also members of the executive.<sup>10</sup>

Proceedings before the subordinate courts could be heard either by a magistrate sitting alone or with two or more assessors. Courts of the first class could determine personal suits which arose from contract or tort of both, provided the amount or value involved did not exceed two hundred pounds (£200). They could also issue the writ of Habeas Corpus, appoint guardians for infants, and make affiliation and maintenance orders under the Bastardy Laws Amendment Act, 1872. The second class subordinate court could determine those matters whose amount or value claimed did not exceed one hundred pounds (£100). And for the third class subordinate court, the amount was pegged at not more than twenty-five pounds (£25).<sup>11</sup> The subordinate courts were also empowered to try some criminal matters defined by the Penal Code or any other relevant law. Subordinate courts of the first class were empowered to impose any sentence of imprisonment with or without hard labour not exceeding two years, without the necessity of confirmation of sentence by the High Court and they could impose a fine of up to £100. The second class court could impose any sentence of up to one year's imprisonment with or without hard labour or a fine of up to

fifty pounds (£50) without the necessity for confirmation. The third class court could impose a sentence of imprisonment of up to six months and a fine not exceeding twenty five pounds (£25).<sup>12</sup> And by virtue of Section 12 of the subordinate courts ordinance, 1933, all classes of subordinate courts were empowered to administer:

"the common law, the doctrines of equity and the statutes which were in force in England on the 17th August, 1911..."

In addition, they were permitted to observe and to enforce the observance of any native customary law between natives provided it was not repugnant to justice, equity or good conscience. However they could apply customary law in cases between natives and non-natives if it appeared that substantial injustice would be done to any party by a strict adherence to the rules of any law or laws other than native customary law. In criminal cases, a magistrate could even recommend that legal aid be granted to an accused person if it appeared

"that it was desirable in the interests of justice that a prisoner should have legal aid in the preparation and conduct of his defence at his trial... and that his means are insufficient to enable him to obtain such aid..."<sup>13</sup>

A subordinate court of the fourth class was later established to relieve pressure.<sup>14</sup> This class was to be presided over by what were called Cadet Officers. These cadets had had some form of legal training in England but had no local experience. They could imprison one for not more than three months, impose a fine not exceeding twenty-five pounds (£25) or order corporal punishment not exceeding eight strokes. By further amendment to the Subordinate Courts Ordinance, 1933,<sup>1</sup>

the Governor could now only designate not more than three magistrates as "Senior Resident Magistrates". The then Acting Attorney General explained the reasons for this new designation thus:

"At the present moment all Resident magistrates exercise a uniform jurisdiction. That has got considerable disadvantages because the most newly recruited, the youngest magistrate, can exercise the same jurisdiction as the most senior of them. The most senior magistrate should have acquired a great amount of experience in the years in which he has been attaining his seniority and that experience should be made use of. Accordingly, it is proposed that by means of another measure a Senior Resident Magistrate will have larger powers than that of an ordinary Resident magistrate. The difference will be in the amount of sentence which he, the senior Resident magistrate, will be empowered to award."<sup>16</sup>

The position now was such that, as much as possible, only persons legally trained were to be appointed to positions of Resident magistrate and a Senior Resident Magistrate could now impose a sentence of up to five years imprisonment. In 1956 even the powers of the subordinate courts of the first class (other than the Senior Resident Magistrate court) second class and third class were increased - such that these courts could now impose any sentence of up to three years' imprisonment. In civil matters, the senior Resident Magistrate's court could now try any suit which arose from contract or tort or both, where the value of the property or the debt or damage - claimed did not exceed four hundred pounds (£400).<sup>17</sup> The Senior Resident Magistrate's court could now also enforce certain civil judgements or orders passed by the High Court. There were members of the legislative council, though, who argued that these changes were

not enough because in the period 1933 to 1959 the value of money had dropped considerably and that it was costly for litigants to commence actions in the High Court. This is one point which we touch on in the later chapters as regards the maximum claims in civil cases in subordinate courts, compared to the drop in the value of our money.

## 2.2. THE NATIVE COURTS

Let us now examine the Native courts in this same period - these are what are analogous to our present local courts. As outlined earlier, the British found it convenient to let Africans arbitrate in their familiar traditional ways though the tribal courts were not legally recognised as such. There was pressure later from recommendations of various sections including a commission<sup>18</sup> appointed at one time, that tribal courts should be accorded legal recognition. The majority of Africans, it was realised, settled their disputes in these tribal courts anyway. It was recommended that Africans,

"should be governed by and through their chief and headmen aided by tribal Councils, with the object kept always in view of taking upon themselves a slowly increasing amount of responsibility and self-government"<sup>19</sup>

The general view was that Native authorities and their courts should be established by law. After a lot of debate and opposition a Native Courts Bill was finally drafted, The Native Courts Ordinance was promulgated as Ordinance No. 33, 1929. The power to create and prescribe the composition of Native Courts was exercised by the Governor.<sup>20</sup> These Native Courts were now to consist of such Chief, headman, elder or Council of elders in the area assigned to them as the

Governor would direct.<sup>21</sup> A district officer could also, subject to the directions of a Provincial Commissioner, sit in any Native Court in his District as adviser. But in practice only Chiefs were appointed to be Native Court members - though they did sit with assessors from time to time to assist them.<sup>22</sup> The Ordinance did not specify how Native Court members were actually to be selected and appointed. The tenure of the Court members was also not established.

The Native Court Rules, 1930, created two grades of Native Court - Courts of the first class and second class.<sup>23</sup>

Native Courts of the first class were empowered to pass any sentence of:

- (i) imprisonment (with or without hard labour) not exceeding three months;
- (ii) a fine not exceeding ten pounds (£10).
- (iii) whipping not exceeding ten strokes, or
- (iv) any two of the above mentioned punishments.<sup>24</sup>

Native Courts of the second class were empowered to pass any sentence of:-

- (i) imprisonment (with or without hard labour) not exceeding one month;
- (ii) a fine not exceeding five pounds (£5)
- (iii) whipping not exceeding six strokes, or
- (iv) any two of the above mentioned punishments.<sup>25</sup>

By Rule 25 of the Native Courts Rules the District Commissioner, if satisfied (in his Magisterial capacity) that a case in question from the Native Courts had been properly tried, could then issue a warrant

authorising the imprisonment of the convicted person in the local district prison. And by Rule 26 of the same, all sentences of corporal punishment were to be carried out in a district prison in the presence of a District Officer. Before any sentence of corporal punishment could be carried out, a District Officer had to satisfy himself by reading the record of the proceedings, that the trial had been conducted properly and fairly (i.e. in his magisterial capacity).

As to jurisdiction, a Native court was expected to exercise over natives:

"... such jurisdiction in Civil and Criminal matters as the Governor in Council may grant to it".<sup>26</sup>

The term 'Native' meant "... any native of Africa, neither of whose parents are of European, American or Asiatic race".

Both classes of Native Courts were accorded civil jurisdiction by the Native Courts Rules in

- (a) all matters relating to marriage, divorce and return of dowry under native law and custom;
- (b) all matters relating to inheritance and succession to property under native law and custom, and
- (c) all matters relating to the custody and maintenance of children.<sup>27</sup>

Rule 10 of the Native Court Rules, 1930 gave all classes of Native Courts jurisdiction to try criminal cases in respect of acts or omissions which were offences against either native law and custom or specified written laws in force in Northern Rhodesia. Rule 11

specifically excluded certain classes of cases from the jurisdiction of Native Courts; these were,

- (a) cases in which a Native was charged with an offence punishable by the law of the territory with death or imprisonment for life or an offence in consequence of which death was alleged to have resulted (i.e. murder or manslaughter).
- (b) cases relating to witchcraft; and
- (c) cases in which a non-native was involved or in which a non-native was an essential witness.

In 1936 the Native Courts System underwent some re-organisation worth a mention here. The Native Courts Ordinance, 1936 now created three classes of Native Courts.

Class A. - could handle civil claims of up to twenty-five pounds (£25) and in criminal matters could sentence up to one month's imprisonment, impose a fine of up to five pounds (£5) or order up to six lashes.

Class B. - could handle claims of up to fifty pounds, (£50) sentence up to three months imprisonment, impose a fine of up to ten pounds (£10), or order up to ten lashes.

Class C. - could handle claims amounting to one hundred pounds (£100), sentence up to six months imprisonment, impose a fine of up to twenty pounds (£20), or order up to ten lashes.<sup>28</sup>

Chiefs considered senior or more important were usually accorded Class B or C warrants to handle more serious civil and criminal matters. Again, this Ordinance remained silent as to the security of tenure of court members. Court members could, however, be dismissed by the District Commissioners but subject to the

Governor's approval on grounds of abuse of power, untrustworthiness, incapacity to exercise judicial power justly, and for any other reason deemed sufficient. The 1936 ordinance also empowered the Governor to direct Native Courts to submit oral or written reports of all cases they tried to either A District or Provincial Commissioner. Appeals were also established - and these went to the District Commissioners Court (Subordinate Court) and finally to the High Court. The majority of Native Court litigants were, nevertheless not keen on making appeals to Subordinate Courts presided over by European Magistrates who were not conversant with African languages and customs. Besides, Africans could not grasp the principles of English Law and Procedure. <sup>29</sup>

### 2.3. THE STATUS OF BAROTSELAND

The treaties that the British government had concluded with the Barotse nation, enabled it to continue in force, even when it assumed direct control of Northern Rhodesia affairs from the company in 1924, all rights and privileges reserved for the benefit of the Barotse nation. <sup>30</sup> The position was such that in both civil and criminal matters Barotse tribal courts were left to determine all cases in which the Lozi people or members of their subject tribes were involved. But these tribal courts had no jurisdiction in civil or criminal cases in which a non-native was involved, either as a plaintiff, complainant or as an accused or defendant, in any criminal case where the offence alleged was punishable on conviction by a sentence of death or a term of imprisonment exceeding six months, or a fine exceeding one hundred pounds (£100) conflicts over jurisdiction still arose nevertheless among the protectorate administrative officers, judicial officers and Barotse tribal

officials. A contributing factor to this conflict was the absence of a law clearly regulating the relationship between statutory courts and Barotse tribal courts. There were also no rights of appeal from the Barotse tribal court decisions or orders, to any other courts. Thus, the special status quo of Barotseland affected the establishment of Native Courts in that area. The treaty rights could not be modified without paramount Chief Lewanika's approval. As time went on the British government intensified negotiations to persuade the Chief to agree to the general jurisdiction of Native Courts in his area in the same way as it was in the rest of Northern Rhodesia. An agreement reached in 1936 actually specified in its clause five the enjoining of the Governor to recognise;

- (i) The Paramount Chief's Court at Lealui
- (ii) the Morena Mokwai's court at Nalolo;
- (iii) Native Courts of the first class at Balovale, Kaunga, Libonda, Mankoya, Manyinya, Mwanj and Sesheke.

The agreement also provided that the Governor was to recognise an unspecified number of native courts of the second class to be presided over by Silalo Indunas and located at places to be specified by the paramount Chief at a later date. But like other Native Courts in other parts of Northern Rhodesia, the Native Courts in Barotseland were denied jurisdiction in cases of:-

- (i) homicide
- (ii) witchcraft
- (iii) cases where a non-native was involved
- (iv) cases where the accused was a native government servant.

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Thus it was really the Paramount Chief's Court and the Morena Mokwai's Court which had no companion in any parts of Northern Rhodesia after this agreement. To this extent the position in Barotseland was still unique. The Chief's Court at Lealui was made a supreme court for Native Appeals from the Mulena Mukwai's court and also from the Native Courts of the first class. Subsequent appeals in criminal cases were to proceed from the paramount chief's court to a Subordinate Court of the first class (presided over by a Provincial Commissioner) and from this Court a further appeal could be lodged in the High Court. In civil cases, however, the agreement provided a direct right of appeal from the Paramount Chief's court to the High Court.<sup>31</sup> By Clause 6 of this Jurisdiction Agreement, 1936 Court members to preside over Native Courts of the first and second class were to be appointed by the paramount chief with the consent of the Governor

The effect of the Barotse Native Courts Ordinance of 1936, and the Jurisdiction Agreement 1936, was that the Paramount Chief's Court remained practically the most important court in Barotseland. Up to the time of Independence in 1964 these circumstances changed little.

#### 2.4. AN OVERVIEW OF THE PROBLEMATIC ISSUES IN THIS PERIOD

We would like to assess at this point certain important factors that had to be grappled with in this period, regarding personnel, their qualifications, dual nature of the judicial system and the place of African Customary Law in both types of court.

While the Governor could under the Northern Rhodesia Order-in-Council, 1924 Article 33(1) appoint Magistrates to preside over Magistrates courts no qualifications were specified for one to possess

before they could be appointed to the office of Magistrate. These magistrates were administrative officers from the executive wing even at this time. Only Resident Magistrates as noted before, and who came later, were divorced from administrative roles. Most of these administrative officers were thus not legally trained but exercised a lot of judicial powers. The appointment of such officers to judicial functions was defended on the argument that the circumstances existing in Northern Rhodesia made this unavoidable. The then Acting Attorney-General, Mr. Fitzgerald pointed out that:

"These (Subordinate Courts presided over by administrative officers) are still open to the objection that you have very wide jurisdiction conferred on non-professional judges. The elements of danger involved in any system by which the administration of the law is in the hands of the executive are of course obvious to everyone, but, as the country is organised at the moment and owing to the limitations imposed on our financial resources, that is inevitable. I cannot help feeling that the evils - What I consider evils of this system are in this country very much mitigated owing to the extra-ordinary efficient work done in the judicial line by the provincial administration in the territory. It naturally follows when you endow non-professional judges with extensive powers of jurisdiction that you must also protect the public from mistakes which may be made by giving easy facilities for appeal, and I am satisfied that a perusal of this Bill will satisfy honourable members..."<sup>32</sup>

On the other hand, due to lack of legal training, it was observed that these administrative officers administered justice according to their own notions of what was good under the prevailing circumstances. The Northern Rhodesia Law Reports abound with cases in which the High Court altered decisions and sentences passed by Subordinate Courts, either because the latter courts acted without

legal authority or exceeded whatever authority they possessed or because the procedure adopted was irregular. Quite often persons who were convicted by Subordinate Courts which acted without or in excess of their jurisdiction, or adopted irregular practices or procedure, suffered the whole punishment imposed, before the matters reached the attention of the High Court.<sup>33</sup>

The issue about employing full time legally qualified magistrates instead of lay administrative officer settlers had been considered even at the time of company rule but had not been put into effect on the ground that the territory's state of development did not warrant the making of such positions. And besides, it was argued, these persons would not have much work to do as there were few cases. It was argued also that the practice of employing administrative officers to do judicial work was administrative expedient and reduced government expenditure in that less men were employed and that these men were familiar with the languages, habits and mentality of Africans:

"... the African must, the district officer felt, be protected from what he considered to be the legalism of the professional judge or magistrate. These men, he was convinced, knew nothing of the African mentality or way of life (i.e. professional men) never learning a vernacular language or coming into contact with an African, save as a domestic servant or an accused person in the dock. The administrative officer, however, with a certain unconscious arrogance, was convinced that he understood the African people he administered, whose language he was expected to learn, and with whom he came into daily contact both at district headquarters and when on tour. According to this view, it was highly desirable that the district officer should be, and should remain, the district magistrate... understanding the needs of African people, would therefore, it was maintained dispense to them substantial justice without undue regard to technicalities, as understood by such officers".<sup>34</sup>

This defence justified the exercise of judicial and executive powers by the same people- and people who did not even possess minimal legal qualifications. It was also argued that the Africans themselves, who formed a larger segment of the population, did expect their rulers to even resolve their disputes.<sup>35</sup>

But looking at certain ideals and principles of justice it is asserted and has been interated that justice should not only be done, but should manifestly and undoubtedly be seen to be done. It may not be said that justice is seen to be done where persons wielding executive powers are also judges over other men. The doctrine of the separation of powers emphasizes the separation of functions and personnel of the executive, legislative and judiciary, to ensure the attainment of maximum individual liberty and protection of the law. In 1946, the then Chief Justice Sir Charles Cox, in a letter addressed to the Governor, said:

"... nor can it be denied, notwithstanding the pronounced success of most administrative officers as magistrates, that they're put in a most invidious and difficult position when they have to discharge every function in regard to a court case. An allegation of a criminal offence reaches a District Officer in an out-station. He listens and decides there is something to investigate. He investigates, takes statements from witnesses and comes to the conclusion that an offence has been committed. He accordingly arrests so and so and charges him. The District Officer must then turn himself into an impartial and unbiased magistrate whose mind is still completely open, who presumes that the man he arrested and charged is innocent and who is prepared to listen again judicially to the statement on which he has already reached a conclusion as investigator..."

In other words, attempts to preserve impartiality were under the greatest strain when these courts were faced with the task of trying anyone who may have appeared to them as a threat to colonial authority and the maintenance of law and order. Judges continued to lobby for legally trained officers, unlike the British government authorities who stood for the use of administrative officers. Mr. Justice Rodger E. Hall argued:

"I consider that legal training of administrative officers should be encouraged in every possible way... There can be no question to my mind that reading for the Bar is of the utmost value to administrative officers; not only for the sake of the knowledge gained but also because it teaches a man to consider points from a legal aspect... To my mind, it is no less important that an administrative officer should dispense justice according to legal practice and procedure than that, say, a veterinary officer should deal with animals scientifically... In such a country as this, where the natives have neither the lawyers, nor the money to engage them, even if they so desire, it seems to be of paramount importance that administrative officers should be given every facility to pursue legal studies".<sup>36</sup>

As to Native Courts, the first problem that arose during debate for their establishment was whether they should be controlled and supervised by administrative officers or the High Court. The Governor had suggested that if cases of hostility, corruption or bias were to occur, the executive could move in and intervene to see that justice was done. Judge Logan was alarmed and opposed; He said:

"the administration of justice and what pertains thereto, should be in the hands of the judge and not the executive and I feel strongly that the ultimate authority of the High Court in matters relating to the administration of justice should not be ousted".<sup>37</sup>

The Governor was of the view that if the High Court had direct supervision over the Native Courts, rigidity would eventually creep into the proceedings and this would not be in line with the objectives of Native Courts. The judge observed that the so called common sense justice, quite often unintentionally produced injustice of the worst kind and more particularly so, when those who administered it knew they were free from intervention from the High Court. But the Governor again emphasized that the Native Courts were being established to enable African communities to settle their:

"... own petty affairs which means so much to their happiness, which they're by far the most competent tribunals to settle their disputes and which in a well organised native community, should never come before a tribunal constituted on European lines".<sup>38</sup>

The Governor wanted District Commissioners to be given the fullest powers of supervision over Native Courts since they were in close proximity to natives and knew what action to take if a native court did not arrive at a correct decision.

The Commissioners could transfer the action to their own court or simply advise what the court members should do so. The Governor still in his letter to the Secretary of State for the colonies said:

"by establishing a system of native courts in a territory such as Northern Rhodesia where such courts had no legal recognition before, though some tribal courts maintained their existence and functioned, it was more important to set up an elementary system to start with... but with adequate safeguards for supervision and the prevention of abuses, than to attempt at the outset

to tie the courts down with limitations and restrictions based on the experience got in the High Court and the Subordinate Courts in the territory".<sup>39</sup>

Still on Native Courts, although as we noted earlier, in practice Chiefs sat alone or only with assessors in Native Courts, initially it had been desired that these courts be composed of groups of village elders and should not consist of a single individual as this was alien to African Custom and fraught with risks of injustice and partiality - that there were

"two considerations which should be kept in mind in this connection. In customary law disputes are always settled before 'many people'. Initially a dispute comes before the village headman in virtue of his position as of a kin group, and together with other important people of the village he will attempt to reconcile the parties...".<sup>40</sup>

Native Courts functioned with Chiefs presiding because these chiefs were believed to be respectable and conversant with tribal customs and laws. Educational qualifications or knowledge of the English language were not of significant consideration. In any case, among the African population illiteracy was common. Tenure of court membership was not specified. It is understood that the court members and clerks were paid very low wages. Assessors were not being paid at all until 1949.

For sometime, out of court adjudications were tolerated - even by the Native Courts Ordinance of 1929. It was recognised that such had always been a way of resolving intra-family disputes, personal quarrels over land and so on. These settlements were tolerated as long as they did not resort to awarding inhuman

punishments or remedies or enforcing unconscionable bargains or other customary practices that would offend the repugnancy test. But it was at the same time kept in mind that out of court settlements could be utilised as a means of usurping the powers of duly constituted Native Courts or any other courts for that matter, that were established under statute.

The 1931 Annual Report on Native Affairs stated that the main complaints about the day to day running of Native Courts pertained to delays in the hearing of cases, constant adjournments, and the lack of enforcement of sentences and orders. People were allowed a lot of time in which to pay fines or compensation and as a result successful parties had to return to court more than once to try and enforce judgement. The quality of case records kept by Native courts was also a constant source of complaints. Native courts also had a tendency to rely on hearsay evidence. Illiterate old chiefs and assessors continued to be the pillars of justice in these courts. Apparently, for as long as these courts did not glaringly pass outrageous decisions or orders, they were tolerated.

Even up to the Native Courts Ordinance of 1960, no major changes took place in the system. One minor modification was that now Native Courts were to be 'established' in areas not under tribal authority whereas they were to be 'recognised' in areas under tribal authority because,

"...originally the Native Courts were, in fact, confined to those native courts in rural areas presided over by a chief and it was possible to recognise them. But when a new Urban Court has to be set up in a new mining township, it is impossible to talk of recognition because one is creating something which has not existed before and therefore that court will be established and not recognised".<sup>41</sup>

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PART THREE

POST INDEPENDENCE DEVELOPMENTS

## CHAPTER FOUR

### THE LOCAL AND SUBORDINATE COURTS

This chapter investigates changes that were made to the judicial system to suit new policies of an independent nation. It was expected that certain characteristics of the colonial dual judicial system would be discarded.

We saw in Chapter one that the system of law introduced from the very outset in 1899 by the company differentiated between Europeans and native Africans. Section 14 of the Royal Charter of October 29, 1899, which entrusted the administration of Northern Rhodesia to the British South African Company, authorised this differentiation. There was separation as to the administration on one hand of received English Law and that of Customary Law on the other, by different sets of courts. In a way Customary Law was actually looked down upon as an inferior system- which was tolerated for administrative purposes and for the preservation of harmony among the local population.

#### A. THE POST-INDEPENDENCE LOCAL COURTS

At the establishment of the then Native Courts, the Governor at the time argued that these courts be supervised by District Commissioners - thereby, to a large extent placing the administration of justice in the hands of the executive - much to the displeasure of the judicial fraternity. The Governor reiterated that since District Commissioners were in closest touch with natives, they were in the best position to know what action to take, if in their opinion a Native Court had not arrived at a correct decision. Some judges, of course, strongly opposed this

on the ground that supervision by administrative officers would lead to a usurpation of what was properly a task of the higher courts. In fact, it could lead to serious miscarriages of justice.<sup>1</sup> The Governor on the other hand also opposed review of Native court decisions by professional judicial officers for the other reason that it would bring into the Native Courts System too technical an approach to dispute settlement.

### 3.0. THE LOCAL COURTS ACT, 1966

This Act was preceded by the presentation of a Bill in the Parliamentary Debates of early 1966 by the then Minister of Justice, Dr. Konoso. The only changes that had been made in 1964, the year of independence, had been the abolition of the Ministry of Native Affairs and the bringing of the Native Courts under the Ministry of Justice. This Bill, then, as pointed out by the Minister of Justice, sought to remove some unfavourable colonial provisions, and to induce clauses which would suit the new nation.

It was firstly resolved that the 'ugly' word 'Native', be removed and substituted by nomenclature which was acceptable to present civilised standards. The Native Courts came to be known as the Local Courts. Unlike prior to independence when the executive played a major role in the supervision and review of the Native Courts, another objective of this Bill was to seek to separate the judiciary from the executive - to stop administrators from being judges, and to establish an independent judiciary as the hallmark of justice. To ensure a fair trial, one of the principles we strive for today is that one should not be both a maker of and a judge on the law. The Minister

of Justice (Dr. Konoso) also stated that due to lack of proper supervision of the Native Courts, bribery and corruption were not unknown. The Local Courts Act, therefore, transferred the supervision of the local courts from the provincial administration to Local Courts Officers and Magistrates of the judiciary.<sup>2</sup> For the first time Native Courts became part of the judiciary Department and were brought under the overall control of the Chief Justice. From time to time, approximately every month, these Local Courts Officers are supposed to ask for court records of all Local Courts and check them for any miscarriage of justice. They have the power to quash judgements of Local Court justices.<sup>3</sup>

As to appointments of persons to preside over these Local Courts, the Local Courts Act now provides that all officers in Local Courts Administration are to be appointed by the Judicial Service Commission.<sup>4</sup> Magistrates, Local Courts Advisers and Justices are now appointed by one judicial authority - this important duty has been taken away from the executive wing of government. It has been iterated that the judiciary must be independent of the executive if justice has not only to be done, but has to be seen to be done. Justices must be free from influence of any government. It is in this light that this change in the Local Courts Act was welcomed by members of Parliament.

It will again be recalled, that Native Courts were presided over by chiefs who had been chosen for this role, by government officials. Chiefs have since been

"persuaded to withdraw from their judicial functions."<sup>5</sup>

Over the issue of leaving out the Chiefs in judicial functions, the Bill was not without opposition. An opposition member of Parliament<sup>6</sup> argued that the Bill would, on the foregoing issue, upset the stability of the country. He said until now people were contented with the judgements given by Chiefs. Leaving out chiefs would bring strong discontentment and confusion in the traditional systems of settling disputes. (Some old tribal courts were apparently going to be amalgamated into one Local Court). It would also make chiefs idle, he said. This argument did not hold as it was pointed out that Chiefs had a lot of other administrative work to do in their areas.

There had been, in fact, during the colonial period complaints about the unsuitability of old illiterate Chiefs, and equally illiterate and inefficient court clerks presiding over Native Courts. The general understanding today, has been that now the Judicial Service Commission in consultation with Chiefs and other elderly men, appoints persons who have had some form of education and are also particularly well versed in the customary law of their localities (We mention this aspect of the qualifications of Justices required in the Local Courts in the Fifth Chapter). It is worthy of note, still, that during Parliamentary debates in the National Assembly in 1976, members of Parliament voiced their concern about the lacunae of today's Local Courts. Included in these complaints were observations about the low standard of education of Local Courts members, poor record keeping, delays in hearing cases and high handed conduct on the part of court members and other staff.<sup>7</sup> The Local Courts Act does not specify the qualifications required of Local Court members.

An opposition Member in Parliament<sup>8</sup> during debate on the Local Courts Bill, cited a clause, which is now Section 15 of the Local Courts Act, which bars lawyers from appearing in Local Courts. He stated that if the lawyer was brought before the Court as an accused (as opposed to representing someone, for which Section 15 bars him) he would have the advantage of citing a bulk of legal materials which Local Court Justices (who are only expected to have had at least a modest education) would never understand. The Minister of Justice referred him to Sub-Section (2) of Section 15, which was Clause 15(2) at the time, and which states that subject to the directions of the Local Courts Advisor, a Local Courts Officer may sit as an adviser in any Local Court in any proceedings in which a Legal Practitioner appears before such court... in respect of a criminal charge... The opposition member still questioned the unspecified educational qualifications of this Local Courts Officer. He emphasised that the Judicial Service Commission should ensure that members appointed to these courts had enough basic training to at least enable them to read the law they were to administer. As the situation stands today, nothing much has changed over the educational requirements except that from time to time the Local Court Justices are sent to the National Institute of Public Administration (NIPA) for short courses in some elementary principles and procedures of law.

The barring of lawyers from practising in Local Courts has actually been justified on this very point that Local Courts Justices do not have any formal legal training. They would obviously be at a

disadvantage if lawyers were allowed to appear before them. And besides, the presence of lawyers would bring into operation some procedural, evidentiary technicalities and refinements into the Local Courts and rob them of their desire to operate on simple and informal lines. Another reason was that lawyers would not be conversant, or familiar with customary laws, not to mention the costs to litigants and language barriers.

The Local Courts Act, having repealed the Native Courts, Barotseland Native Courts and the Native Court of Appeal Ordinances, requires as per provision of Section 56 of the Subordinate Courts Act, that appeals from the Local Courts now go straight to the Subordinate Courts of the First and Second Class. Jurisdiction is now extended to all persons irrespective of race (unlike previously when these courts were directed at Africans).

It is interesting at this point to compare the maximum jurisdiction of the present Local Courts to that of the Native Courts' jurisdiction under the Native Ordinance of 1962.

Section 5 of the Local Courts Act provides that Local Courts can:

(a) in civil matters determine claims of up to K200 (except in matrimonial and inheritance claims where this limit can be exceeded);

(b) impose fines not exceeding K400,000.

whereas Section 6(1) of the Native Courts Ordinance, 1962 provided that these courts could:

- (a) determine civil claims of up to £200 (two hundred pounds) - (except in matrimonial and inheritance claims where this limit could be exceeded);
- (b) Impose fines of up to £100 (one hundred pounds);
- (c) Order probation or imprisonment for a period of up to two years;
- (d) order corporal punishment of up to twelve strokes of the cane.

It is clear that the powers of today's Local Courts are much less than those of their pre-independence counterparts. Where a civil claim was maximised at £200 in the Native Courts Ordinance, it is K200 in the Local Courts. This would suggest that at the time of the enactment of the Local Courts Act, the value of the Zambian Kwacha was equivalent or stronger than that of the British pound. But as the situation stands today, traumatic economic changes have overtaken this comparison. The Zambian Kwacha, at the time of writing, is about twenty six times lesser in value than the British pound (officially). The figures in the Local Courts Act have not changed. It is still claims of up to K200 for civil matters and fines of up to K400. It is twenty-three years ago since the Local Courts Act came into effect. Persons who want to claim higher figures (especially on the ground that the value of the Kwacha has dropped so much) have to resort to the higher courts. This means, again, incurring costs. If the figure for civil claims in the Local Courts were raised to reflect the reality of the situation, more people would

be served as they would take advantage of the simple procedures and minimal expenses of the Local courts. A Chipata Local Courts Clerk informed this writer that it has been recommended to the Ministry of Legal Affairs from time to time that the figure for civil claims in Local Courts be raised to at least K5,000 but to no avail.<sup>9</sup>

In cases of a criminal nature, the Local Courts Act has retained the provision which excludes the Local Courts from exercising jurisdiction in cases in which a person is charged with an offence in consequence of which death is alleged to have occurred or which is punishable by death.<sup>10</sup>

### 3.1. CONCLUSION

The Local Courts Act was seen in a way as an effort to make the courts in general and the Local Courts in particular became part of the Judiciary. No longer would the local courts operate in the rural areas simply to contain the population of those areas without much regard for justice.

The training of Local Courts Justices or the educational requirements for their appointments do not appear to be well defined up to now.

Offences that the Local Courts try under Customary law are not defined and the penalty is not prescribed as such within any written law. The Subordinate Courts and High Courts refer to the provision of the penal Code and Criminal Procedure Code. It would seem that there is a contradiction here in that, whereas Section 12(2) of the Local Courts Act allows Local Courts to try criminal offences that are of a certain nature and allows them to do this without reference to any written law as to definition of offence and penalty, Section 20 (8) of the Constitution of Zambia says no person may be tried without

reference to the definition of the offence and penalty appearing in a written law. It was hoped that this anomaly would be rectified with the subsequent codification of Customary Laws, into written form, like the Penal Code. This has not yet been done.

B. POST-INDEPENDENCE SUBORDINATE COURTS

Not much appears to have changed as regards Subordinate Courts. The few changes that took place came with the repealing of the provisions of the Subordinate Courts Ordinance, 1933 by the Subordinate Courts Ordinance (Amendment) Act of 1965.

3.2. CHANGES BROUGHT BY NEW ACT

The Subordinate Courts had previously been presided over by Provincial Commissioners, District Commissioners, District Officers and Cadet Officers. Section 3 of the Subordinate Courts Act now says there shall be three classes of courts (first, second and third) to be presided over by a Senior Resident Magistrate, Resident Magistrate or Magistrate for the first, and ordinary Magistrates for the second and third classes respectively. The judicial roles of the Subordinate Courts and Local Courts have now been separated from those of the executive. By Section 5 of the Act,

"The Judicial Service Commission acting in the name of and on behalf of the President may appoint persons to hold or act in the Office of Senior Resident Magistrate, Resident Magistrate or Magistrate of any class."

Section 7 of the Subordinate Courts Act empowers Subordinate courts to try any offence under the Penal Code or any other written law for the time being in force. We note, though, that in 1972 the powers of the Subordinate Courts in dealing with convicted criminal offenders were increased considerably. Previously a Senior Resident Magistrate could impose a sentence of imprisonment not exceeding *five years*. *Under the above Section, as amended in 1972, he can now* impose a sentence of up to nine years. The rest of the magistrates could only impose a sentence of up to three years. As the said Section as amended now provides, a Subordinate Court presided over by a resident magistrate can impose a sentence of up to seven years imprisonment. A subordinate Court presided over by a magistrate of the first class can impose a sentence of up to five years, whereas a Subordinate Court other than a court presided over by a senior resident magistrate, a resident magistrate or a magistrate of the first class can impose a sentence of up to a term of three years.

Even as of now, neither the Constitution nor the subordinate Courts Act stipulates the minimum qualifications which a person must possess before he can be considered for appointment as a Magistrate. The Judicial Service Commission regulations (which appear as subsidiary legislation to the Constitution) only say that in exercising powers in connection with the appointment of judicial officers, the Commission shall have regard to the maintenance of the high standard of integrity and efficiency necessary in the judicial service.<sup>11</sup>

In practice the Commission normally recruits and appoints Magistrates from persons who have either successfully completed a Magistrates' Training Course conducted at the National Institute of Public Administration (NIPA), or Law graduates from the University of Zambia who have successfully completed the Legal Practitioners' Qualification Examination set by the Zambia Council for Legal Education after a one

year course of study at the Law Practice Institute. Persons who qualify from the Magistrates' Course at NIPA are usually appointed to the position of Magistrate Class Three. And as their course consists of the basic subjects and principles of law, for a period of about seventy-two weeks (previously it was thirty-six weeks), they are usually referred to as Lay Magistrates.<sup>12</sup> Sometimes these 'lay' magistrates proceed for further studies at the University to obtain a law degree. Thus, as it is, it is not mandatory for a magistrate to be a professional. Those who are considered lay magistrates can be promoted only as far as Magistrate Class One. Graduates from the University of Zambia usually start at the position of Resident Magistrate while already experienced persons may be appointed as Senior Resident Magistrates.

Finally, interesting to note is the composition of the Judicial Service Commission. It consists of the Chief Justice as Chairman, the Attorney General, the Chairman of the Public Service Commission, the Secretary to the Cabinet and any other members appointed by the President.<sup>13</sup> All members of the Judicial Service Commission are appointed by the President. Of significance is the fact that some of these members belong to the executive wing of government. It is questionable, then, whether this Judicial Service Commission insulates judicial appointments from political pressure.

PART FOUR

ASSESSMENT OF SOME PROBLEMS AND AREAS FOR  
POSSIBLE CHANGE OR IMPROVEMENTS

## CHAPTER FIVE

### THE IMPACT OF SOME RELATED INSTITUTIONS ON THE ADMINISTRATION OF JUSTICE

It is essential to briefly highlight some problems that have affected the administration of justice in Local and Subordinate Courts and which are caused by some related institutions.

#### 4.0. THE POLICE

It is of public notoriety that accused persons on remand or committed for trial and required to be brought to the Subordinate courts (or the High Court for that matter) have either been brought late or not at all. Many unnecessary or preventable adjournments have been caused in the process. Cases have thus not been disposed with in an expeditious manner and this has reflected badly on the ideal of speedy justice. Prisoners and witnesses alike, have also been inconvenienced. We proceeded to find out who was responsible for this part of procedure, that is, the actual transportation of these persons to the Courts and in time too.

Under Section 65(1) of the Prisons Act,

"Accused persons on remand or committed for trial, who are required to attend court, may be taken for that purpose into Police custody at the prison to which they have been committed and shall remain under Police supervision and guard until returned to the prison or discharged by the court."

It would appear, then, that the responsibility of taking persons from the prisons to attend courts, lies with the Police. The section goes on at clause (2) to say that

"Where on the removal of any prisoner from any prison the number of prison officers is insufficient to provide escort for such prisoner, the officer-in-charge of the prison from which the prisoner is to be removed may, with the general or special permission of the Commissioner of Police, deliver the prisoner to any Police officer detailed for such duty."

When a Police officer is in charge of such prisoners, they are deemed to be in his custody so that,

"escape from the custody of the Police officer shall... be escape from lawful custody for the purposes of any law."<sup>1</sup>

And indeed prisoners have escaped on numerous occasions either while being transported to the courts or from the courtrooms themselves. But as regards the transportation of prisoners to the courts, this writer asked for the view of the Provincial Local Courts Officer (PLCO) in Chipata. He said:

"Delays by the Police in bringing persons to court is something the judicial department is aware of. The Prisons depend on the Police as regards taking the prisoners to court. The Police simply present their warrants at the prisons and the concerned prisoners are put in the custody of the Police. The Police have always given the excuse of the lack of transport for delays and failure to bring persons to court. This problem has caused frequent adjournments of cases and sometimes the courts have discharged accused persons in frustration."<sup>2</sup>

A magistrate<sup>3</sup> emphasized that the Police were responsible for bringing accused persons to courts but always attributed their delays and failures to lack of transport. Witnesses, he said, are also inconvenienced as from time to time they are turned away and

required to attend court later - a later time at which they may not turn up at all. As for the accused persons, it means they stay in custody much longer than necessary - and the prisons also remain congested. Asked on the same matter the Permanent Secretary and Solicitor General, Ministry of Legal Affairs had this to say:

"There are several factors that affect the bringing of persons to court. Included are reasons of ineptness of personnel, lack of transport and adjournments from the courts themselves. (Meaning that the more times the court adjourns a case, the more times an accused person who is in custody, will need to be transported between the prisons and court). This problem is common in most Commonwealth African nations - if not the World at large. But still this is not a justification for the shoddy performance in this area. When a person is in custody, you are certainly not being fair to him by causing such delays. For this reason I think that is why courts sometimes readily give bail. Human delays can be avoided (i.e. general inefficiency) and something should be done about it. But resolving the transport issue is difficult. Other jurisdictions (especially European Countries) have placed a limit for the duration of trials. If the Police fail to bring an accused person in the stipulated time for trial, such person is acquitted. But again such freeing of accused persons can be harmful to society which would like to sustain as many convictions as possible. All in all, as a matter of fact, the courts, prosecutors and lawyers have also contributed to delays."<sup>4</sup>

A Senior Prosecutions Officer,<sup>5</sup> (Administration) had his own views over the matter. These views, he said, were based on his own observation and experience as a Police officer and prosecutor. He said the failure by police to transport accused persons from custody to the courts either

at all or in time was not notorious enough to be taken as amounting to an erosion of the ideal of justice. In his experience, about 90% of the scheduled court sittings were held and very few adjournments could be attributed to the non availability of accused persons. The lack of transport from time to time, to transport accused persons was due to the unfavourable economic climate. Ideally every Police station he said, should have had its own prison van. The town of Monze for example has no prison - it relies on the one in Mazabuka - from where it has to get a prison van as well everyday. Only Ndola and Mongu have a situation where the distance between the courts and prisons is a walking distance. But it is not infrequent for accused persons to escape from the custody of Police officers escorting them from the said prisons to the courts. In the alternative, he suggested that courts be built within prison premises so that the justices, rather than the accused persons should do the moving. Delays would be minimised. He gave an example of the existence of such a system in the United States of America.

One factor which was causing adjournments he said was that of persons jumping bail. The Police cannot do anything about this since it is the justices who grant the bail.

Another issue related to the institution of the Police has been that of shoddy work and general incompetence of a good number of prosecutors from the Police. A lot of unnecessary acquittals have been attributed to the problem of shoddy prosecutors and society has suffered. It is to be observed that many prosecutions in the subordinate courts are carried out by the Police - these are Policemen who apart from their normal Police training have also specialized for a short

period of one year in prosecution work. This writer attempted to find out from court records the rate of acquittals caused by incompetent prosecutors but failed to get the opportunity through either the senior court clerk or Registrar of the High Court for Zambia. This writer went on to ask whether it would not do to up-grade the training of prosecutors - not only to make it more rigorous, but for persons to come from the public at large for the training rather than almost solely from the Police. The Provincial Local Court Officer in Chipata revealed that this suggestion had been forwarded to relevant authorities from time to time- for a more intensified prosecutors training. It was also suggested that even lawyers could be prosecutors in the subordinate courts. A magistrate<sup>6</sup> agreed that some prosecutors were below par. He noted that institutions like the Prices Control Commission, Wildlife authorities and the Anti-Corruption Commission were using their own prosecutors and said it was not necessary to rely on the Police prosecutors. The public was far from amused about acquittals that were brought about by shoddy prosecuting.

The Permanent Secretary, Legal Affairs, contributed on this issue by saying that the use of Police prosecutors had initially only been a stop-gap measure because there were not enough professional men, especially lawyers. He said if more lawyers were willing to become State Advocates the government would do away with Police prosecutors and he saw no reason why the training of Police prosecutors should not include the public at large. As the position stood now, lawyers were shunning state advocacy in preference for the private sector.

On the question of the incompetence of some Police prosecutors, the senior prosecutions officer said this was not true because the

training of Police prosecutors for one year was adequate. Sometimes the Police officer who joined with school certificates (full) spent six months in basic prosecutors training and then another twelve months in an advanced prosecutors course. He went on to assert that a Constable trained as a prosecutor at the National Institute of Public Administration (NIPA) was better than a graduate state advocate trained at the Law Practice Institute (LPI). The record of convictions in cases of Police prosecutors, he said, were or could be as high as 95% which could not be compared to those handled by counsel from the State Chambers. (Well this is probably because the Police prosecutors handle many more cases in the subordinate courts than the State Chambers deal with in the higher courts). He said people who complain that acquittals are due to shoddy prosecutions only do so because they had an interest in the case in the first place. The policy, he said, has been that when there isn't sufficient evidence to convict, they do not proceed with the case.

A common causer of erroneous judgments and unnecessary acquittals, he said, should be attributed to the fact that many magistrates and some judges do not have clean hands. They have been corrupted or influenced unduly in many cases. He cited a criminal case in which the magistrate adjourned the case to a particular date. The magistrate later decided to call the case three days earlier than the date he had adjourned it to. The prosecutor in the case was not informed on the new development. When the matter came up, the magistrate decided to acquit the accused because the prosecutor was not in court in spite of later protestations from the prosecutor over the dates for the hearing of the matter. It was later noted that the

accused was at this time engaged in building a house for the magistrate and renovating the subordinate courts buildings. (The magistrate in the foregoing case is now a judge).

The senior prosecutions officer said the incident cited above was common place. Accused persons sometimes knew of the judgments long before they were delivered. The High Court he said, is not exempt from the same and thus sufficient supervision of the lower courts over such matters cannot be expected.

The only recommendations he could make over the issue of prosecutors were those of the need to have them do refresher courses from time to time. In the past prosecutors could avail themselves to books and pamphlets continuously but these are no longer available to them; and secondly to bring the prosecutors directly under the office of the Director of Public Prosecutions for purposes of control. At the moment the Chief of Police could change or transfer any of the prosecutors to other duties from time to time and this affected their work. A specialized system under the Director of Public Prosecutions could improve the rankings of the prosecutors. As of now the highest man in the prosecutions is a Senior Superintendent.

Judges sometimes assert the principles of justice per se as against the plausible solicitations of immediate expediency... vindicating something which is of higher ultimate value than any ephemeral policy... In a sense it is highly inexpedient, from the point of view of society, that a person guilty, on plain facts, of serious crime should escape punishment on a purely technical matter of evidence or procedure.<sup>7</sup>

#### 4.1. THE ROLE OF THE LEGAL AID DEPARTMENT

Finally in this chapter, and worthy of mention is the role of the Legal Aid Department in the dispensation of justice. This department was created after the realisation that not every litigant could afford the near astronomical fees charged by private lawyers. It was meant to cater especially for persons facing criminal charges who could not afford private lawyers. It was thus a welcome institution and hopes were high that the needy would also be accorded fair trials.

In proposing a Bill to the Legal Aid Act in 1967 the then Vice-President, Mr. Kamanga said,

"Government has for some time now been giving anxious consideration to the plight of the legally under-privileged, which comprise the masses of our people. There is need for legal assistance both in civil and criminal cases unlike the poor persons Defence Ordinance which only catered for serious criminal offences."<sup>8</sup>

Whatever the defects of the machinery it does appear that those ultimately responsible for the administration of criminal justice accept that a man accused of a crime should be entitled to proper legal representation.

Everyone agrees with the principle that any man accused of crime should be properly represented, and that, if he cannot afford it himself, it should be done at the expense of the State.

Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty, property or reputation who are *not able to pay for it.*<sup>9</sup>

The court is not concerned to carry out its own enquiries. It does not demand attendance of witnesses, call for the production of documents... or indeed ask its own questions. Each side must substantiate its own case from its own resources and it is a fundamental principle that there should be very little intervention on the part of the tribunal who are there to preside and to judge.

The prosecution will almost invariably have unlimited resources, at least in terms of manpower... and their experience is bound to be infinitely greater than that of the average defendant...

Conducting a defence, or even making a plea in mitigation is not merely a matter of exercising common sense... How many laymen... would know the circumstances in which a submission of no case to answer would be made at the conclusion of the prosecution case?

The cross-examination of witnesses involves skill and legal knowledge... When defendants are giving their own evidence, in the absence of legal representations, they seldom describe incidents clearly or chronologically.<sup>10</sup> But as it is, the department has performed below expectation. The department has, as has constantly been highlighted, faced a lot of operational problems especially those of lack of staff (lawyers), and inadequate funding. It has thus been rather centralized (in Lusaka). conditions of service there have not been good enough to attract lawyers.

Highlighting the problems of the Legal Aid Department, a legal counsel noted the following:

- (i) Manpower Shortage. The conditions of service at the department have not been attractive to lawyers embarking on a practising career. Those in the private sector have continued to be much better and do improve from time to time.

- (ii) Transport to the Courts and other outlying areas without Legal Aid Offices. Here he could only point out that there has hardly been a time when Government has provided adequate transport means for the department.
- (iii) The number of Legal Aid Offices. These are only situate at Lusaka, Kabwe, Ndola and Livingstone. The department, thus, has had great difficulty trying to cover as many areas as possible. Most people do not even know of the existence of the department. In areas where there are no legal Aid Offices, there initially was the requirement to set up legal committees in these same areas to recommend persons entitled to legal Aid. The Act (Legal Aid Act Cap 546) does in fact provide for these legal committees. These committees are virtually non-existent as of now.

Many persons in the rural areas are thus not being catered for. The department has also tended to favour handling mostly High Court Criminal cases because of the legal requirement (constitutional) that accused persons have to be represented for capital offences. The bulk of the people, thus, end up defending themselves and in the process prejudicing their cases.<sup>11</sup> This writer observed in Chipata, where High Court Sessions were taking place at the time, the nature of the task of the Legal Aid Department when it sent lawyers to outlying areas such as this. The Department was at this time representing persons charged with murder cases, which were in all about sixteen during the short period I was there (about two weeks).<sup>12</sup> Worthy of note again, was the fact that there is only one law firm in Chipata representing, nearly the whole province.<sup>13</sup> Previously, accused persons

had been assured of Legal aid when they were faced with serious criminal cases but that was now a thing of the past.<sup>14</sup> The problems have been realised for a long time and one would think that it is a matter of trying to resolve each of them if we take justice for all seriously. The preamble to the Legal Aid Act (Cap 546) read,

"An Act to provide for the granting of legal aid in civil and criminal matters and causes to persons whose means are inadequate to enable them to engage practitioners to represent them; and to provide for matters connected with or incidental to the foregoing."

Section 8 of the Act provides that the High Court may issue a legal aid certificate where it considers that the accused has insufficient means to enable him to engage a practitioner to represent him. The Director of the Legal Aid Department or a Legal Aid Committee may also consider applications for legal Aid in both criminal and civil matters.<sup>15</sup>

Until well into this century, the law was regarded largely as a commodity to be bought by those who could afford it and to be denied to those who could not... In general, economists consider that charging the consumer the full cost to the community of providing goods and services performs the useful social function of distributing the limited resources to the community with the maximum efficiency, which market economists generally equate with the maximum social advantage... But the need for expenditure on most litigation is exceptional and unexpected. Needs for housing, clothing, food and other essentials can be planned and budgeted for in advance. A family

is very unlikely to be able to foresee the need to bring or defend a case in court any more than it can foresee some medical catastrophe.

Litigation can be very expensive, and most persons have virtually no savings: among this majority are most of those with low incomes. Thus if no provision were made to pay the legal costs of poor persons, the poor would rarely use the civil courts - particularly the higher courts.

The rise of legal advice or aid should be a prerequisite for the citizen to obtain justice... The citizen needs some knowledge even to be aware that he needs professional legal help. He needs also to have confidence in the law. If the law is regarded as something which is on the side of 'them' and not of us, legal help will not be sought when it is needed... Moreover the scheme is far from remunerative for the lawyer who on the whole is not keen to participate in the scheme.

It is quite indefensible to deprive poor persons of any remedies which the law recognises. If any action is socially approved, there can be no justification for denying any citizen the right to bring it, whereas if it is socially unacceptable, it ought not to be available to any by purchase.

It is said that legal services like health services are essential rights of citizenship and thus should be available without charge. The enjoyment of health is said to be a basic human right. Similarly it is argued that the rule of law is also a basic human right and thus no one, rich or poor, should have to pay to obtain what the law allows.<sup>16</sup>

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## CHAPTER SIX

### POSSIBLE CHANGE OR IMPROVEMENTS TO THE PRESENT SUBORDINATE AND LOCAL COURTS SET UP

Having traced the nature of the administration of justice in the Subordinate and Local Courts, it is perhaps necessary at this stage to look at the possible changes or improvements to these courts, that could be effected. We are now in a fairly modern, complex, commodity and money oriented world. Social institutions like the courts may have to constantly try to keep abreast of new developments and situations. Taking into account the present structures of these courts and the environment they have been working in, we investigate and identify areas that we feel could be worked on in order to prevent further deterioration of the system of justice.

Issues we propose to look at and some of which we described in our colonial background include:

- (i) The adequacy of present court space (buildings and room space) and the existence of sufficient personnel to man them;
- (ii) the appropriateness of the present qualifications of Local Courts Justices and Magistrates;
- (iii) Delays in disposing of cases;
- (iv) The possible abolition of Local Courts and their integration into Subordinate Courts.

#### 5.0. STRUCTURAL PROBLEMS

In examining the question of the adequacy of court structures, it ought to be appreciated at the outset that Zambia's population

has just about doubled since independence. 'Rural to Urban' migration has also been an unprecedented feature in post independence Zambia with so many of the unemployed roaming the streets and obviously contributing to the high crime rate. There has not at the same time been a corresponding increase in court establishment. These courts, most still bearing the old colonial mark, are now handling more people than before and this has led to a congestion of pending cases.

The author had an opportunity to interview the provincial Local Courts Officer for Eastern Province over this issue of courtroom space.<sup>1</sup> According to him, his Province, unlike other provinces, could actually utilize whatever space was available, to handle matters. Coincidentally, as this discussion was going on, a Magistrate was making arrangements for use of an adjacent room which happened to be Council Chambers, for court session. He was forced to utilize this room because the High Court Sessions were taking place at this time in Chipata and his usual court room had been taken over by the same. But the Provincial Local Court Officer did admit lack of space by saying that in Chipata town for example (in his Province), some local court houses which had been built sometime back using semi-Kimberley bricks, had collapsed due to torrential rains. The trial sessions for these courts, he said were now being held under trees.

The same issue was brought before the attention of a Magistrate (whom we had interviewed on other issues as well) in Chipata.<sup>2</sup> He conceded that court room space was not enough and this had led to the

use of rooms that were not originally designed to be court rooms. On many occasions, accused persons and witnesses were being inconvenienced, he said. They were from time to time asked to attend court at other adjourned dates due to lack of courtrooms. This had even led to prosecutors asking that their cases be withdrawn because witnesses who had to travel long distances to attend court could not do so on the many occasions they were asked to do so. He further said sometimes the courts tried to make up for such delays and inconveniences by backdating their rulings.

It would appear that this problem has been more common in the post-independence era due to the rise in population, rural-urban migration and the simple fact that not many new court buildings have been put up. Frequent adjournments or withdrawal of cases on this account cannot be said to tally well for expeditious justice. We again addressed this issue to the Permanent Secretary and Solicitor General for Zambia.<sup>3</sup> Firstly he admitted the shortage of court room space, but said it was up to Provincial Councils to plan for the building of some court rooms. They had not done so probably due to the perennial sing song about financial constraints, he said. Again congestion of cases has been the result. He noted, however, that the subordinate courts and local courts Acts do not actually envisage the specific designation of a certain type of buildings as being court rooms; but that in fact any available space can be used to constitute a court - for example community halls and school classrooms. This writer pointed out to him, though, that it has been generally accepted in civilised societies

principles in deciding their cases. Looking at the situation now, we asked ourselves whether the present qualification requirements of magistrates and local court justices are appropriate to our more complex society. Presently, there is no statutory prescription as to the required qualification of Magistrates; nor is there any statutory definition of the classes of Magistrates i.e. Resident, Senior Resident and Principal Resident. The class of a particular magistrate it would seem is determined by the terms of his appointment. The power to remove magistrates from office is exercised by the Judicial Service Commission, acting in the name and on behalf of the President of the Republic of Zambia.

Neither the Constitution nor the Subordinate Courts Act stipulates the minimum qualification which a person must possess before he can be considered for 'appointment' as a Magistrate. However, Regulation 10 of the Judicial Service Commission Regulations 1972 provides that persons to be recruited and appointed as Magistrates by the Judicial Service Commission should come from

- (i) persons who have successfully completed the Magistrates' Training Course conducted at the National Institute of Public Administration (NIPA).
- (ii) Law graduates from the University of Zambia who have successfully completed the Legal Practitioners Qualifying Examination set by the Zambia Council for Legal Education, after a one year course of study at the Law Practice Institute (LPI).

The Magistrates Training Course has been a thirty-six week course with the participants invariably being holders of the General Certificate of Education and receiving instructions in the following subjects:

- (i) General Principles of Law
- (ii) Constitutional Law
- (iii) Criminal Law
- (iv) Criminal Procedure
- (v) Evidence, Law of
- (vi) Contract, Law of
- (vii) Tort, Law of
- (viii) Local Statutory Laws

(It came to our attention during the time of putting down the final draft of our work that this period of thirty six weeks magisterial training in the above subjects has been doubled).<sup>4</sup>

Persons who successfully complete the NIPA course are usually appointed to the position of Magistrate Third Class. In essence what it all boils down to is that we have had and still do, Magistrates who have studied only this thirty-six week course at NIPA, presiding in the Subordinate Courts. At the same time lawyers who have been appearing before these Magistrates have studied for a Law degree of four years at University and one year at the Law Practice Institute before being admitted to the Bar. The Magistrates have had the last say in the proceedings. Our judicial system thus still allows unprofessional magistrates. Of course this is not quite compatible to the Administrative Officers of the colonial era who presided over these courts without any legal training but the society we are in would seem to have developed to an extent where it requires parallel development in the qualifications of personnel such as that of the courts. The up-grading of

qualifications for the members of the Subordinate Courts would be of utmost value not only for the sake of the knowledge but also because it would enhance one to consider issues from a more legal aspect- dispensing justice according to proper legal practice and procedure.

"The just judge administers the law with even-handed detachment. The just law giver takes into account the interests of all persons and groups whom he is under a duty to represent. Thus understood, justice is a principle of rectitude which requires integrity of character as a basic precondition."<sup>5</sup>

With due respect to 'Lay' magistrates, when non-professional men are endowed with extensive powers of jurisdiction, the public must be protected from errors and other injustices which may not receive the attention of the higher courts. We asked whether it was not time yet for us to stipulate that all Magistrates should now be professionals; (holders of a Bachelor of Laws Degree and Practising Certificate). The Provincial Local Court Officer for Eastern Province revealed that this had been suggested - but only to the extent that after their initial training Magistrates should go for a further three years at NIPA to acquire a DIPLOMA and probably, subsequently end up at University. This recommendation was made to the Chief Justice of Zambia by the Magistrates Association of Zambia. The Provincial Local Courts Officer said, though, that this recommendation had been made from the realisation that a lay Magistrate, if he ever reached Class 1 of the Subordinate Court through promotion would not likely proceed further due to minimal legal qualifications. One Magistrate in Chipata felt, though, that the present qualifications of Magistrates did not affect their performance

or prejudice cases. He asked where all the present lay Magistrates would go if it were suddenly to be 'decreed' that all Magistrates should be professionals.

The Permanent Secretary, Ministry of Legal Affairs,<sup>6</sup> was of the opinion that the issue of the qualifications of Magistrates was relative. The guiding factor he said, was whether the present Magistrates were discharging their functions ably. He admitted that the initial engagement of lay Magistrates had been a stop-gap arrangement, due to the fact that there were hardly any qualified Magistrates available - but said they were still doing well. An inhibiting factor to the professionalising of the position of Magistrate he said was also of a financial nature. There would be a new establishment requiring new salaries and new conditions of service, not to mention new office accommodation and housing which would all have to be commensurate with the new station. A major complaint he had heard about Magistrates was that of abusing their positions by being corrupted, rather than that they could not do their work. He was not aware, he said, of any public outcry about Magistrates failing lamentably in their duties. But if need be, he said, lay Magistrates could constantly be inculcated with a sense of ethics and conduct through seminars and workshops in order to try and protect the public from abuses. He went on to give an example of the United Kingdom where he said in spite of the availability of many trained lawyers, there was no requirement that all Magistrates should be professional men.

As to qualifications of Local Courts Justices, it has been said that educational standards are not particularly relied on when recommending persons for appointment though it is usually preferred

that they have attained at least Grade Seven. The Provincial Local Courts Officer for Chipata goes on to say that persons are normally recommended from those who for example are former Policemen, former Educationists and other persons known to have worked very closely with Chiefs in the former Native Courts. These are recruited from their local areas where they are also known to be conversant with their own customs. As to their workings, the Provincial Local Courts Officer was satisfied that the Local Courts were 'doing well' though he noted that in some areas, local court functions were being overridden by 'courts' constituted by chiefs and local headmen. The Permanent Secretary for Legal Affairs was also of the opinion that the general populace seemed to be happy with Local Courts, especially that they were simple, informal and lacked legal technicalities in the disposal of cases. He cited the United Kingdom and Canada as some of the developed countries which had so many informal small claims courts which in a way could be compared to our Local Courts.

## 5.2. INTERGRATION

In spite of this confidence in our Local Courts exhibited by these persons of judicial ranking, the author attempted to suggest to one of them the possibility of intergrating the Local Courts into the Subordinate Courts to create a single judicial system. This, the author suggested could mean the abolishing of the Local Courts altogether. We looked at this issue from the following viewpoints:

- (i) The need for an efficient, modern system for the administration of justice and proper personnel for the same;

- (ii) The certainty of the law in existence at any particular time;
- (iii) The position of African Customary Law in our modern society.

We begin by firstly assessing the position of African Customary Law during the colonial era.

The British Colonial Administrators found it convenient to allow Africans as much as possible to continue with their own system of traditional arbitration. In any case it would have strained the handful of staff that the British had, to have them handle judicial matters which had always been dispensed within tribal courts. It was also realised that it would be easier to induce acceptance of British rule by leaving the native population under their familiar customary laws, than to attempt to force them to live under an alien law. Africans had always readily obeyed and respected their own tribal authorities in the dispensation of matters. But later developments like the discovery of mineral deposits on the Copperbelt saw the surge of rural-urban migration. Africans from different tribes converged into the Urban areas to supply the much needed labour. And as more and more Africans came to consider themselves as urban dwellers, it became difficult to simply transplant the customary law system from its tribal setting to an Urban society undergoing rapid industrialization. Africans found themselves bringing cases before native courts on which their own chiefs did not sit and which applied customary laws different from their own. We see today, thus, that in our local courts emphasis on the application of customary law has dwindled from the traditional way

as now cases are not looked at so much in regard to the acquaintance with the parties, knowledge of their kinship ties and status within their tribes. The urban local courts cannot,

"avail themselves with any frequency or regularity of these methods which were so characteristic of and important to Customary Law in its original setting.<sup>7</sup>

Members of the local courts who have been selected from rural areas may be quite unfamiliar with urban problems. And as the number of educated urban Africans has grown, less and less of them have agreed to be subjected to customary laws no longer acceptable by them. As regards this situation, would it be useful then, to simply integrate the local courts into the modern Subordinate Courts? This question is related, and brings us to the issue of the possible need for an efficient, modern system for the administration of justice.

"Undoubtedly the question of whether certain factual differences between men and things warrant a differentiating treatment by the law has received diverse and inconsistent answers in the course of history. Such divergences of opinion lend apparent strength to the argument that the notion of justice is not amendable to rational cognition and, even if not totally subjective, represents at best a social convention resting on majority conviction or at worst a forcible imposition of standards of equality and inequality by a ruling class...

An existing legal system may be felt to be just, or at least tolerably reasonable, by the community as long as it satisfies the basic needs and demands of the people. By virtue of a change in economic or social conditions, technological advances, governmental mismanagement, or deterioration of a ruling elite, this state of general satisfaction may give way to discontent and a widespread conviction that the existing legal order should be displaced by one better adapted to the peoples' sense of justice. If a piecemeal adaptation of the law to newly arising conditions and problems cannot be made because of inertia or resistance to needed change, a

social crises or revolution will sometimes bring about a substantial reform or overhauling of the legal system which will close or at least lessen the distance between the two paramount goals of the law."<sup>8</sup>

Let us refer to a statement made by the then Attorney General, in the Parliamentary Debates of the Republic of Zambia National Assembly in 1966. He said:

"...Sir, it is obvious that the local courts will continue for some years, but I personally hope that they will wither away, that this Act (Local Courts Act) is an interim measure to deal with their administration and good government during a period of years and that in future we will have 'One Nation, One Judiciary'."

And in 1976, the Chief Justice had this to say:

"The policy as I know it is to ultimately integrate the Local Courts into the Subordinate Court system... In my opinion the factor that seems to have delayed the integration is the absence of readable documentation and Codification of the various customary laws within the country. Once these laws are codified, the pace towards integration would be speeded up."<sup>9</sup>

One writer,<sup>10</sup> remarked that a civil procedure meant to apply to both the Subordinate and Local Courts has been on the drafting table for sometime now. It was asked of the Permanent Secretary, Ministry of Legal Affairs, whether he would be in favour of the abolition of the Local Courts and creation of a system where jurisdiction of the Magistrates or Subordinate Courts and the High Courts would be extended to embrace all those aspects hitherto reserved to customary law and practice and therefore achieve a

necessary and essential unity of laws.

He said in answer, that he did not see any readily available reason or reasons for the abolition of the same. He said the simplicity of the Local Court procedure and its similarity to traditional arbitration proceedings was actually contributing to the quick and easy dispensation of justice in which litigants were able to follow what happens in court. We observed nevertheless, that with the increase in the number of properly qualified magistrates and more magistrates courts, legal process could still be quickened and we would perhaps do away with the many abuses and malpractices that may be inherent in the local courts system and thus ensure greater justice for everyone. We need a system of administration of justice which takes into account our dynamic and changing society and the cosmopolitan and heterogeneous nature of our urban population. Our modern development almost makes it imminent for us to introduce more up to date methods of determining the truth than the simple methods adopted by the local courts. Further, after a considerable number of years of independence most of our judges and magistrates are now indigenous persons who are often as familiar with customary law and custom as the members of the local courts. They also have the added advantage of legal training and experience. This argument for integration has been countered on the point that it is not necessarily the case that judges and magistrates are knowledgeable in customary law as local court members are.

"A good number of these same judges and magistrates were brought up in Urban areas and had very little contact with

the operation of customary law in their native locality. The result of this state of affairs is that there are many instances, where a magistrate, for instance, is as ignorant of the customary law of his locality as a foreigner."<sup>11</sup>

But it would still appear that legally trained persons would be in a better position to avoid errors of law and would facilitate certainty and growth of the law. The interpretation of customary law would be done better with an allowance of flexibility and adaptation to a changing modern society. Can laymen keep abreast of these changes?

The other issue is that of the certainty of the law.

"Law must be stable, and yet it cannot stand still."

"The command of stare decisis and the observance of enacted statutory norms are therefore apt instruments for the promotion of order.

While the doctrine of precedent, born of the desire for order and regularity demands that a fact situation which in the past has been decided in a certain way should be decided in the same fashion today, the equality contemplated by justice is not necessarily an equalization of past and present decisions... Thus, conflicts between stare decisis and justice will arise whenever the value judgments of the past no longer conform with those of the present."<sup>12</sup>

The worst judge, with the least innate sense of justice, can nearly always find an example, of how a particular situation has been handled by other judges; and this accumulation of experience is the strongest argument in favour of the English system of precedents. It is true, and it daily becomes more observable, that the examples and analogies placed before the judge often conflict, and he has no easy task in choosing between them, but even that very conflict, together with the

opposing arguments of counsel also steeped in the 'taught tradition', at least acquaints him thoroughly with the relevant considerations of which his decision is based; and that is often far from true of individual, unschooled opinions of the justice or injustice of laws. Sometimes - and indeed more often than might be supposed - there is no exact authority to cover the instant case:... In the absence of positive authority, he generally reasons by analogy as nearly as possible to authority, and his decision... is of a highly trained technique in weighing rival considerations.<sup>12</sup> It has been doubtful whether the doctrine of precedent has been applied satisfactorily or at all in local courts.

"They have generally not only failed to follow their own previous decisions but have also given decisions in conflict with existing decisions of superior courts. The effect of this state of affairs, has been, it is contended, to create a chaotic rather than a systematic development of customary law."<sup>13</sup>

This has been countered by the claim that since local courts are not required to administer common law, the doctrine of binding precedent which is a common law rule has no application to local courts. But it has been cardinal in legal process that one involved in litigation should have an idea (by reference to decision on a similar matter) about the outcome of the matter or how the court will go about making a decision. A decision of a lawsuit usually results from the application of a rule or rules - be they customary or otherwise - to the facts of the matter. Within appropriate bounds judicial reliance on precedents possesses such great value that one would not contemplate abandoning it.

"But there may occur some very rare and unusual situations under special political conditions, where certain deficiencies and inadequacies of the enacted positive law have become so glaring, irremediable, and intolerable that a break through of elementary justice must be permitted as an ultima ratio.

... the existing positive structure of the law is necessarily incomplete and gap ridden and ... numerous opportunities for introducing considerations of justice, reason, and equity will present themselves to those concerned with the application and interpretation of the law."

In other words,

"There is serious doubt, ... whether a social system fulfilling the requirements of order and legal certainty can be... effective without the presence of a substantial ingredient of justice.

The notion of justice does not exhaust its vitality in the postulate of equal treatment. It also requires an individualized treatment of situations which exhibit unique or extraordinary features and cannot be adequately handled by the application of strict rules or by comparing the case before the court with previously decided cases. In such instances, a departure from or relaxation of fixed norms may be necessary and desirable in the interest of justice, whereas order tends to favour regularity and invariant adherence to rules."<sup>14</sup>

Gluckman, in his book, 'Judicial Process among the Barotse' saw the use of settled principles among the Lozi people in their dispensation of cases. He says:

"Lozi law in general is partly a body of very general principles relating general and flexible concepts (e.g. 'you cannot sue your host if a fish-bone sticks in your throat' - volenti non-fit injuria), and ... (if you leave the village you lose rights in its land; a son must respect and care for his father')"<sup>15</sup>

No doubt such customary law principles would have to be applied in traditional court settings. The urban setting is one of forgotten or hardly applied settled principles.

As we noted earlier, the desire to integrate these courts was voiced even in the early years of Zambia's independence. It would appear that the failure of Zambia to fulfill this expressed desire is more related to the financial mess it is in than that integration is not necessary. Apparently the local courts do not impose a heavy burden on the budget of the state and are inexpensive for the litigants. They are considered cheap and convenient and are accessible to the people. The economy, it has been indicated, would not allow for integration. There are said to be about 415 local courts in Zambia, 90% of which are in rural areas. It would mean appointing an equal number of new magistrates or reducing the number of these local courts and changing the remainder to magistrates courts. The increased number of magistrates would require office accommodation as well as housing which would be commensurate with their status. It would, it is further argued, be unlikely that persons would agree to work in unattractive rural conditions. Would the government be able to meet the salaries for the large number of new magistrates with their supporting staff?

In Uganda and Tanzania, though, integration has somewhat been achieved. There is one hierarchy of lower courts established by a single Act of Parliament. Unlike in Zambia, therefore, there is no division of courts into subordinate and local courts in these

two countries. But success in the case of Tanzania for example in attaining this integration is attributed to earlier anthropological research which assisted in the recording and modifying of customary law for purposes of selecting those which were generally acceptable and had the force of law.

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## CHAPTER SEVEN

### CONCLUSION

It is perhaps worthwhile here to trace the main issues that have featured in our discussion of the administration of justice in the local and subordinate courts. Certain attributes, problems and probable areas for change or improvement were identified in the work. When we looked at the colonial era we noted mainly that probably due to the scanty nature of the population in the territory and lack of staff, magistrates and Native Commissioners carried out judicial functions side by side with administrative work. They dealt with disputes in a very informal manner as they possessed neither a legal nor a formal anthropological training. Their dispensation of justice was nonetheless tolerated on the grounds that they had common sense, a very thorough knowledge of the African tribesman and other experience acquired over many years of touring their districts. As time went on though, powers of review of the High Court ensured tighter supervision of the lower courts. A Legal adviser was also appointed at one time to cause local courts to submit their cases to him every month for scrutiny. Some form of legal training was also called for and members of these courts now had to record their proceedings. The extent of these changes was not as significant as envisaged.

While it was desired and convenient for the colonialists to let Africans continue with their traditional ways of resolving disputes, many new offences were introduced previously unknown in

tribal life. They came into existence through the problems created by contact between tribal Africans on the one hand and a dominant European group on the other. The Europeans claimed the sole right to deal with serious crimes of violence, especially murder. Many murders were for example, caused by allegations of witchcraft, and the Administration attempted therefore to make such allegations illegal. Thus, before the formal legal establishment of Native Courts later on, for a long time two distinctly different systems of judicial administration developed - the officially recognised courts administering English law (and, infrequently, customary law in civil cases between natives); and the de facto tribal courts administering customary law.

New pressures developed on the judicial structure with the beginning of labour migrations to the newly discovered mineral ore areas. Men from different tribes concentrated in the same area. The problems caused by this migration led to the decision to create Urban Native courts comprising justices who were members of the tribes most numerous in their areas. Although expressed at times, little was done by the time of Independence in 1964 to conform the rules and procedures followed in Native courts with those of the magistrates courts and High court. And nothing had been done towards codification and unification of the various customary laws.

In general, major changes in the administration of justice were shelved because it was considered that such changes could only have led to added expense for training and supervising personnel capable of following set procedures and administering codified rules.

After independence, the view that the customary law system was inferior, tolerated only for convenience and other strategic reasons, was discarded and segregation in the jurisdiction over persons removed. It is noted though, that the present law says where a customary law is in conflict with a statutory law, the latter shall prevail.<sup>1</sup> The system of supervising Native courts through District Commissioners was also done away with as this was regarded as placing the administration of justice into the hands of the executive. Independence saw the abolition of the Ministry of Native Affairs and the supervision of Native Courts transferred to Local Courts Officers and Magistrates of the judiciary - thus making the Native Courts part of the Judicial Department. In 1966 the Local Courts Act came into force and provided that all judicial officers in the local Courts Administration were now to be appointed by a Judicial Service Commission. Chiefs were removed from the role of court justices in these courts. The Native Court of Appeal was abolished, such that by the provisions of the Subordinate Courts Act, Section 56, appeals from the Local Courts now go straight to the Subordinate Courts of the first and second class.

In the area of Subordinate Courts, Magistrates were also now to be appointed by the Judicial Service Commission. These were now expected to possess certain legal qualifications.

As to adjournments, discharge of accused persons and other issues that have helped undermine speedy justice, we noted the contribution of another institution, the Police. Failure to bring accused persons and witnesses to court due to lack of transport, has often resulted in persons being discharged, frequent adjournments being made or accused persons spending longer periods in

custody. Mediocre prosecutions have also contributed to the acquittal of persons - much to the disadvantage of society. As mentioned earlier, this has probably had something to do with the nature of the training of prosecutors and the lack of lawyers to take this up. It has mostly been left to the Police. The Legal Aid Department was not to be left out in ensuring that justice gets to all. But this Department has never quite lived to expectations due to lack of proper staffing - which apparently has been caused by unattractive conditions of service. The government has not thus been able, 'due to lack of funds', to decentralise the system to cater for a wider spectrum of persons needing legal Aid.

In our fourth Chapter, finally, we isolated issues which seemed to require attention for purposes of change or improvements. These included the adequacy of present court buildings, qualifications of local and subordinate court justices, congestion of cases, possible integration of local and subordinate courts and others. Urban migration and population expansion have rendered the court rooms, mostly built for the colonial period, inadequate. This has also contributed to the congestion of cases - what with the high crime rate caused by a poor economy. As if in a vicious circle, this problem apparently cannot be helped due to the bad economic situation the country is facing.

Whereas up to now Magistrates are not necessarily professional (with many still being lay magistrates) it has not

been considered very urgent to professionalize the system. A two year course exists which has been deemed appropriate. While they are better trained, legally, than the colonial administrators, upgrading of their qualifications would enhance the dispensation of justice more according to proper legal practice and procedure and lessen suspect pronouncements in courts.

A policy to integrate the local courts into the subordinate courts had been declared some years after independence, to achieve a unity of laws but has never been effected. This policy went to the extent of drawing up a civil procedure code to apply to both the Subordinate and the Local Courts. Arguments for the preservation of the status quo - on grounds of the simplicity in local court procedure and its easy dispensation of justice - have been advanced. For the integration argument, there has been a call for the need to up-date methods of determining the truth than the simple methods adopted by the local courts which may be subject to errors and biasness. The general arguments for integration, which have been applied in some other African countries, have been accepted but for Zambia the question of finance now prevails. The local courts do not claim a large share of the budget while integration would require a larger staff with new office and housing accommodation to run in line with their new status. New structures would have to be built, new salaries paid and so on, a situation which remains far fetched in the present bad socio-economic position of the country.

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Northern Rhodesia Order-in-Council, 1911

B. ORDINANCES

Native Courts Ordinance, 1929  
Native Courts Ordinance, 1936  
Subordinate Courts Ordinance, 1933  
Subordinate Courts Ordinance (amendment) 1959  
Poor Prisoners Defence Ordinance, 1945

C. PROCLAMATIONS

Administration of Justice Proclamation, 1905  
Native Commissioners Courts Proclamations, 1908  
Native Commissioners Courts Proclamation, 1913  
Magistrates Courts Proclamation, 1913

D. REGULATIONS

Magistrates Court Regulations, 1904  
Judicial Service Commission Regulations. In 1972  
edition of the Constitution of Zambia

E. RULES

Native Courts Rules, 1930  
Native Courts Rules, 1936

F. ACTS

Constitution of Zambia, Cap 1 of the Laws of Zambia  
Subordinate Courts Act, Cap 45 of the Laws of Zambia  
Local Courts Act, Cap 54 of the Laws of Zambia  
Legal Aid Act, Cap 546 of the Laws of Zambia.

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