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The Establishment of Fast-Track and User-Friendly Courts in Kabwe and Lusaka to Fight Gender-Based Violence Cases

Ambitions, development, and practice
(Minor Field Study)

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TABLE OF CONTENTS

<i>Preface</i>	<i>i</i>
<i>Acknowledgements</i>	<i>ii</i>
<i>Abstract</i>	<i>ii</i>
<i>Definitions and limitations</i>	<i>ii</i>
<i>Disclaimer</i>	<i>iv</i>
<i>List of abbreviations and acronyms</i>	<i>iv</i>
Part 1 Introduction	
1.1 Background	1
1.1.1 Fast-track and user-friendly	2
1.2 Purpose and scope of the study	2
1.3 Research methodology	6
1.4 Theory	8
1.5 Shortly about the Zambia legal system with focus on its judicial system	12
1.5.1 Structure of the court system	14
Part 2 The establishment of the courts	
2.1 The origin of the idea. International cooperation and conferences.	16
2.2 Legal sources. The AGBV Act. Protection and occupation orders.	17
2.3 A work of cooperation. GRZ – UN Joint Programme on GBV.	18
2.3.1 Parts involved	20
2.3.2 Swedish involvement in the project	21
2.4 Preparatory works	21
2.4.1 Discussions with domestic actors	22
2.4.2 Concept note and Working paper	22
2.4.3 Study visits to foreign jurisdictions including Sweden	23
2.4.4 Final report	23

2.4.5 The Anti-Gender-Based Violence (Court) Rules	25
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Part 3 Functioning of the courts so far

3.1 Opening of the courts	27
3.2 The court in Kabwe	27
3.2.1 Statistics from the court	27
3.2.2 Own observations	28
3.3 The court in Lusaka	29
3.3.1 Statistics from the court	29
3.3.2 Own observations	30
3.4 Functioning of the courts so far as perceived by the interviewees	31
3.4.1 Civil proceedings at the courts	32
3.4.2 Criminal proceedings at the courts	34

Part 4 Intended and unintended effects of the fast-track pilot project in the perspective of possible future development

4.1 Theory of intended and unintended effects of legal measures	38
4.1.1 Intended, stated effects of the establishment of the courts	39
a/ Establishment of fast-track and user-friendly courts	39
b/ Quick and effective disposal of GBV cases	39
c/ Ensuring victims' access to justice	41
d/ Establishing clear procedures and guidelines for the courts	43
4.1.2 Unstated but intended effects of the establishments of the courts	44
4.1.3 Unintended effects of the establishment of the courts	45
a/ Positive unintended effects	45
b/ Negative unintended effects	46
4.2 Plans for new courts	50

Part 5 Final thoughts	52
5.1 Possible future research	54
Attachments	64

Preface

This thesis is the result of a minor field study conducted in Lusaka and Kabwe, Zambia, in October and November 2016 and January and February 2017. It is about the fast-track and user-friendly courts to fight gender-based violence that have been operating in Zambia for approximately a year¹ as a pilot project. The thesis includes interviews with the main actors in the establishment process as well as in loco observations at the courts. After the field part of the project in Zambia was finished, the work was completed in Gothenburg, Sweden.

Before you start reading this thesis, a few words must be said:

When I first went to Zambia to conduct my minor field study on the newly established fast-track courts, my ambition was to do a classical study. To look at the process of establishment, the functioning of the courts so far, and at their possible future. Nevertheless, on the way, after having gotten deeper and deeper into the actual functioning of the courts, I started to feel more like an investigative journalist than a master's student in law. Then I realized that the process is different on different levels and must be perceived as such. These findings are published in the hope that they can have a positive impact on the status quo of the fast-track courts as well as – and especially – on their future functioning.

The described problems and gaps are challenges that I saw during my study visits and that I discussed with a number of Zambian lawyers in different positions within the Zambian legal system. The project has high ambitions and many committed stakeholders. The ambitions can be achieved for sure, but a great deal of both legal and technical effort must be put into them.

Having experienced some difficulties in the process of collecting data for this study, I have had longer time to reflect on the subject, which gave me some important insights and realizations. I first spent six weeks in Zambia in October and November 2016, and then had to interrupt the study to return for another four weeks in January and February 2017. This study would have been different if the research had been completed in December 2016 instead of February 2017. Additionally, during this time, my focus switched from the courtrooms and the equipment to the process as a whole because, as one of the interviewees said, 'The emphasis is so much on the courtroom. Not the process. [...] But the fast track is the process itself.'²

¹ Counted to the date of 15 April 2017.

² Interview with a magistrate (3), name withheld, 15 February 2017.

Acknowledgements

Appreciation is due to all the persons I interviewed in Zambia or was helped by in any other way. Not even one refused to answer my questions, and answers were provided with a commitment and seriousness that strengthened my belief that I have chosen the right topic. Further special appreciation is due to the National Programme Officer Pezo Mateo Phiri at the Swedish Embassy in Lusaka, who was my first contact in Lusaka and linked me with the people I needed to get in touch with. I would like to thank wholeheartedly my supervisor, Filippo Valguarnera, for his valuable comments and encouragement during the process of writing. I have met many obstacles on the way, but I always felt his support. Last but not least, this work would never have been completed without the immense support of my beloved husband and our two sons as well as the rest of my family. Thank you very much!

Abstract

This study gives a critical description of the establishment and functioning of the fast-track and user-friendly courts to fight gender-based violence cases in Zambia. The two courts were opened as pilot projects in January (Kabwe) and March (Lusaka) 2016 after four years of preparation and study visits by Zambian legal experts in countries around the world.³ Three areas are in focus: Firstly, the establishment of the courts, including the grounds on which the decision was made and the objectives of the project, including the Swedish involvement; secondly, the functioning of the courts so far, based on observations of court sessions and interviews with the actors; thirdly, an analysis of the state of fulfilment of the intended objectives versus the occurrence of unintended effects of the establishment as well as legal gaps in the project and the ongoing work to fill these. A discrepancy between the results to date of handling gender-based violence cases on the civil and criminal procedure sides will be shown.

Definitions and limitations

Firstly, this study works with the definition of gender-based violence (GBV) as stated by the Anti-Gender-Based-Violence Act. According to this definition, gender-based violence *'means any physical, mental, social or economic abuse against a person because of that person's gender, and includes—*
(a) violence that results in, or is likely to result in, physical, sexual or psychological harm or

³ Interview with Mr Gilbert Mwanza, Senior Research Officer, ZLDC, 21 October 2016.

suffering to the person, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life; and
(b) actual or threatened physical, mental, social or economic abuse that occurs in a domestic relationship'.⁴

This study does not attempt to problematize the definition as such since it does not fall within its aim, neither does the limited size of the work allow for it. Nevertheless, I am well aware of the fact that the use of the term has alternated with other terms such as 'violence against women', a name that has been used even in the draft version of the Protocol on Gender and Development of 2007,⁵ but was replaced in its final version of 2008 by the now-used term 'gender-based violence'.⁶ There is a substantial difference between the two terms, as the latter includes children.⁷ In Sweden for the time being, the locution 'våld i nära relationer'⁸ is used. This term overlaps in many (but far from all) aspects with the term 'gender-based violence' and in other countries with the term 'domestic violence'. For the reasons mentioned above, all these terms are treated as a part of the same 'issue'.

Secondly, the Zambian legal system is introduced shortly in order to put the existence of the court into a frame of a system that differs seriously from the Scandinavian legal systems. This allows a non-Zambian 'Nordic' reader to put the reading into a more understandable context. Nevertheless, the size of the study does not allow for more than a superficial presentation, and many facts that could have facilitated the understanding further will remain unexplained.⁹

Further, when reading this study, it must be kept in mind that the establishment of the two courts is a pilot project. As Simon Mulenga Kapilima from the Ministry of Gender put

⁴ The Anti-Gender-Based Violence Act (No. 1 of 2011), Section 3.

⁵ Protocol on Gender and Development adopted by the Southern African Development Community in 2008.

⁶ A. Van Eerdewijk and J. van de Sand, Violence against Women and Southern African Advocacy on the SADC Gender Protocol, p.202. In: A. Van der Vleuten, A. van Eerdewijk and C. Roggeband (eds.), *Gender Equality Norms in Regional Governance. Transnational Dynamics in Europe, South America and Southern Africa*, London, Palgrave Macmillan, 2014.

⁷ According to van Eerdewijk and van de Sand, 'the establishment of this connection is contested: Problem with that is, that they are not the same thing at all. Women are adults with agency. Children are minors that need to be protected. This leads to patronizing language towards women.' *Ibid.*, p. 198.

⁸ Meaning 'violence in close relationships'. For the Swedish definition, see <http://www.socialstyrelsen.se/valds-ochbrottsrelateradefragor/valdinararelationer/valdsutovare/definition>, (accessed in January 2017).

⁹ To a reader with an interest in the Zambian and other Southern African legal systems, see Martin Channock's modern classic *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia*, Cambridge, Cambridge University Press, 1985, for a background of the Zambian legal system. For more insights into the Zambian justice sector, see e.g. Joyce Shezongo-Macmillan's *Zambia. Justice Sector and the Rule of Law*, Johannesburg, Open Society Foundations, 2013.

it, '[L]ike with anything else, if you're beginning something new, you'll always have teething problems.'¹⁰

In addition, I was not able to get hold of all the reports written by the Zambian Law Development Commission (ZLDC), the institution responsible for the preparatory works before the establishment of the courts, because some of them are 'stamped as secret' and therefore not available to the public.¹¹

Also, as a result of the 2016 amendments to the Zambian Constitution, the new Family Court Division at the High Court is being established, but there was no easily available information about how and if this establishment will influence the future functioning of the fast-track courts.¹²

Last but not least, the status quo of the courts observed and described in this study reaches as far as Friday, 17 February 2017. Any changes in the status quo of the courts that occurred after this day were not taken into account.

Disclaimer

The views expressed by the author are personal, unless when quoting from an interview, and do not necessarily reflect the official position of the Zambian judiciary or other stakeholders involved in the process.

A clearance from the Zambian judiciary was not obtained, but a validation was carried through by a lawyer involved in the work of the fast-track courts.¹³

List of abbreviations and acronyms

The Act: Anti-Gender-Based Violence Act

AGBV Programme: Government of the Republic of Zambia – United Nations Joint Programme on Gender-Based Violence

AGBV Act: Anti-Gender-Based Violence Act

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

DRC: Democratic Republic of Congo

¹⁰ Interview with Mr Simon Mulenga Kapilima, Assistant Director of the Department of Gender Rights, Ministry of Gender, 10 February 2017.

¹¹ Interview with Gilbert Mwanza, *supra* note 3.

¹² Topic discussed in an interview with a magistrate (2), name withheld, 14 February 2017.

¹³ Name withheld, e-mail, 5 April 2017.

Fast-track courts: Fast-track and user-friendly courts to fight cases of gender-based violence / anti-gender-based violence fast-track courts¹⁴

GBV: gender-based violence

GRZ: Government of the Republic of Zambia

ICGLR: International Conference on the Great Lakes Regions

Joint Programme: Government of the Republic of Zambia – United Nations Joint Programme on Gender-Based Violence

LAB: Legal Aid Board

Law Commission: Zambia Law Development Commission

MoG: Ministry of Gender, Child and Development

MoJ: Ministry of Justice

NGOCC: Non-Governmental Organisations' Co-ordinating Council

NLACW: National Legal Aid Clinic for Women

NPA: National Prosecution Authority

SADC: Southern African Development Community

SI: Statutory Instrument

UN: United Nations

UNCSW: United Nations Commission on the Status of Women

UNDP: United Nations Development Programme

VAW: violence against women

WLSA: Women and Law in Southern Africa

YWCA: Young Women's Christian Association

ZLDC: Zambia Law Development Commission

¹⁴ The latter name is also used.

PART 1 INTRODUCTION

1.1 Background

The fast-track and user-friendly courts to fight cases of gender-based violence¹⁵ were launched on 22 January 2016 in Kabwe, Central Province and on 11 March 2016 in Lusaka, the capital city of Zambia, by the Chief Justice of Zambia, Irene Mambilima.¹⁶ According to the United Nations Development Program (UNDP), which co-financed the project with the Government of Zambia and some other actors – among them Sweden¹⁷ – this is a pioneering project in Southern Africa.¹⁸ It is a part of the Joint Programme on Gender-Based Violence between the Republic of Zambia and the United Nations (UN) that started in March 2012 and will be finished in December 2017.¹⁹ The main goal of the programme is to 'contribute to the reduction of gender-based violence in Zambia'.²⁰

According to the Zambian Government, the courts were established in order to 'increase access to justice for victims and alleged perpetrators alike by dealing with cases speedily' as well as 'reduce the time alleged perpetrators are detained before their cases are heard'. As many of the victims are children, the courts are meant to be child-friendly and 'allow protection for victims from intimidation and from facing alleged perpetrators'.²¹ In addition, the GBV cases should be speed up and 'concluded within the shortest possible time without compromising justice'²², i. e. the right to fair trial for the accused person must be ensured and the previously long detention times shortened.

The request to start researching the possibilities of establishing the courts was made to the Zambia Law Development Commission by then Minister of Justice Sebastian S.

¹⁵ Hereinafter also referred to as 'fast-track courts' or 'the courts'.

¹⁶ Zambia Law Development Commission, *ZLDC launches Anti Gender Based Fast Track and User Friendly pilot courts*, 2016, <http://www.zlde.org.zm/wp-content/uploads/2016/11/ZLDC-launches-Anti-Gender-based-Violence-Fast-Track-and-User-Friendly-Pilot-Courts.pdf>, (accessed in October 2016).

¹⁷ United Nations Development Programme, *Zambia Launches Second Fast Track Court to Expedite Gender Based Violence Cases*, 2016, <http://www.zm.undp.org/content/zambia/en/home/presscenter/articles/2016/03/11/zambia-launches-second-fast-track-court-to-expedite-gender-based-violence-cases-.html>, (accessed in October 2016).

¹⁸ Ibid. Nevertheless, there are sexual offences courts in South Africa, reintroduced in 2013. For more information, see South African Government, *Judicial System*, 2017, <http://www.gov.za/about-government/judicial-system#sexual>, (accessed in February 2017).

¹⁹ *Government of the Republic of Zambia (GRZ) – United Nations (UN) Joint Programme on Gender-Based Violence, Programme Document*, Lusaka, July 2012.

²⁰ Ibid., p. 7.

²¹ UNDP, *Zambia Launches Second Fast Track Court*, supra note 17. 'According to statistics from the Victim Support Unit (VSU) of the Zambia Police Service, there were 18,088 cases of Gender-Based Violence reported country wide in 2015. In 2014, there were 15,153 cases, amounting to an increase of 16.2 percent in the number of cases reported between 2014 and 2015. A total of 2,759 cases of defilement were reported country-wide, out of which 2,752 girls and 7 boys.' 2014/15 Zambia Police Report on GBV Statistics.

²² ZLDC, *ZLDC launches Anti Gender Based Violence Fast Track*, supra note 16.

Zulu in 2012 after a meeting of numerous stakeholders organized by the Non-Government Organizations' Coordinating Council (NGOCC).²³ The direct incitement came from the International conference on the Great Lakes Region held in Kinshasa on 28 July 2012, a follow-up to the ICGLR Heads of State and Government Kampala Declaration on Sexual and Gender-Based Violence. At this conference, Zambia, among others, committed to 'coordinate with their respective Chief Justices [...] to establish and strengthen Special Courts to handle SGBV cases and provide progress reports [about the development]'.²⁴ According to Gilbert Mwanza, a senior researcher at the ZLDC, The Kampala Declaration and The Great Lakes Conference were major impulses for the Zambian government to start the work on specialized courts.²⁵

1.1.1 Fast-track and user-friendly

A fast-track court is generally a court that is set up with an ambition to speed up the case management while guaranteeing the right to a fair trial to the parties involved.²⁶

A user-friendly court is a court that makes it easier for the end users to go through the court proceedings. Not seldom, these improvements focus on the victims, especially children, which also was the ambition in this project.

The existence of this kind of specialized court is also recommended by the United Nations as a part of the model framework for legislation on violence against women. This sort of legislation should 'provide for the creation of specialized courts or special court proceedings guaranteeing timely and efficient handling of cases of violence against women; and ensure that officers assigned to specialized courts receive specialized training and that measures are in place to minimize stress and fatigue of such officers'.²⁷

1.2 Purpose and scope of the study

The purpose of this study is to describe the establishment of the fast-track courts and critically assess their functioning so far. The study also aims to analyse the intended and unintended

²³ *Report on the establishing fast-track and user-friendly courts to deal with sexual and gender-based violence cases in Zambia*, Lusaka, Zambia Law Development Commission, September 2014, p. 5.

²⁴ *Ibid.*, p. 15.

²⁵ Interview with Gilbert Mwanza, *supra* note 3.

²⁶ The right to a fair hearing is also one of the objectives for establishing specialized courts, as prolonged proceedings – poor case flow management – result in violating this right for the accused. See Constitution of Zambia (Amendment), 2016, Section 18.1.

²⁷ *UN Handbook for Legislation on Violence against Women*, New York, United Nations, p. 19, available from <http://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf>.

effects of the establishment of the courts. Is the main objective behind the project, i.e. 'to expeditiously dispose of cases and to protect victims and witnesses from the unfriendly atmosphere that exists in cases of this nature'²⁸ – as well as the other objectives – being fulfilled by reaching the intended effects? Is the accessible justice under international human rights standards provided?

The ambition of this study, which is limited to both the size and time given, is not to dig too deep, but rather to cover most of the different aspects of the development and functioning of the courts.

The courts will be assessed in three main areas:

1. The rationales behind the establishment of the fast-track courts, the objectives of the establishment, and the process of their establishment as such. (Part 2)
2. Description and critical assessment of the functioning of the fast-track courts.²⁹ (Part 3)
3. Analysis of the achievements of the fast-track courts so far. The outcome of the courts' work in light of the objectives set up by the Zambian legal authorities, as well as the future plans and ambitions within the ongoing project to fight gender-based violence in Zambia. Ideas about possible improvements and ongoing reforms. (Parts 4 and 5)

Besides the main areas, some side tracks, such as Swedish involvement in the process and the current state of the Constitutional reform, especially relating to the conflict of laws within the area of family law in the dual legal system, will be partially explored.

Here come the specific questions and problems that regard the three areas of the study. It is obvious that many of the questions could stand for a study on their own, but the character of this work makes it possible to take up a relatively high amount of questions that can easily be examined later on in a deeper manner.

Regarding point 1:

According to the Zambia Law Development Commission, the rationale for establishing the fast track courts is 'to speed up cases of gender-based violence and to ensure that these cases are concluded within the shortest possible time without compromising justice'.³⁰ Naturally, the 'speeding up' of cases raises certain considerations regarding legal certainty as the central

²⁸ Report on the establishing, supra note 23, p.17.

²⁹ The limited time in which the courts have been functioning has been taken into account. As mentioned above, the Kabwe court opened in January 2016 and the Lusaka court in March 2016. See Definitions and Limitations, p. iv.

³⁰ ZLDC launches Anti Gender Based Fast Track, supra note 16.

requirement of the rule of law. The courts are supposed to be user-friendly, especially towards children survivors.³¹ Another mentioned objective is to 'expeditiously dispose of gender-based violence cases [...] and thereby satisfying Zambia's commitment in the Kampala Declaration'.³² Therefore must also Zambia's international and regional commitments within the area of gender-based violence be considered.

The project is partially financed by Sweden.³³ It is worth noticing that in Zambia, Sweden supports the establishment of the new specialized courts, while at the same time in the Swedish legal system, the attitude towards specialization and specialized courts is generally negative.³⁴ That naturally makes one wonder whether a project of this kind would be realizable in Sweden.³⁵

This brings up the following questions to focus on: What were the thoughts, especially the legal thoughts, behind the project? What were the intended effects of establishing a specialized court on gender-based violence? Is this project some sort of legal transplant? Had there been any research done on other legal systems and jurisdictions and their handling of the cases of gender-based violence?³⁶ Are there other courts of this kind in the world that could have inspired the project? Were the parts involved in the establishment aware of any possible unintended effects of the project, and has there been any research done on it?³⁷

³¹ The need for the courts to be more child-friendly was pointed out by the stakeholders that ZLDC communicated with during the preparatory works. See Report on the establishing, supra note 23, p. 22. This will be further described in Part 2.

³² *Establishing a fast track and user friendly court to deal with gender-based violence cases in Zambia*, concept note, Lusaka, Zambia Law Development Commission, Lusaka, March 2013, p. 8.

³³ *Appraisal of intervention, final*, Lusaka, Embassy of Sweden, 2014, p. 7.

³⁴ Se C. Diesen och E.F. Diesen, *Övergrepp mot kvinnor och barn. Den rättsliga hanteringen*, Stockholm, Norstedts Juridik, 2013, p. 182: '... man i svensk rätt i princip är emot specialisering och speciella domstolar'. Compare also P.O. Ekelöf och H. Edenstam, *Rättegång. Första häftet*, Stockholm, Norstedts Juridik, 2002, p. 113 f. for the negative attitude towards specialization: 'Inrättandet av specialdomstolar sammanhänger med att både rättsordningen och samhällsförhållandena i övrigt blivit alltmera komplicerade varvid det också blivit svårare att ha ingående sakkunskap på alla områden.'

³⁵ Australian researcher of South African origin Martin Chanock writes about the colonial (legal) experience in Zambia and Malawi in the book *Law, custom and social order*, where he also partially touches on this question. Supra note 9.

³⁶ Including the perception of the concept of GBV as such without going into much detail, as it is not the purpose of this study.

³⁷ Under intended and unintended effects of a legal measure are meant the effects as described by the Norwegian sociologist of law Thomas Mathiesen in his book *Rätten i samhället*, Lund, Studentlitteratur, 2005. See Part 4.1.

Regarding point 2:

Functioning of the project will be followed in researching the day-to-day work of the courts, both in Lusaka and in Kabwe, focusing on the transformation of the ambition of the project actors to guarantee a speedy process whilst guaranteeing justice and not threatening the principle of legal certainty. Has the right balance been struck?

The Zambian legal system is of pluralistic nature. The common-law system and the traditional customary law meet in a way unknown in the Swedish legal system. Both systems collide in a number of areas of personal law, mostly regarding marriage and other family issues as well as succession, inheritance, and land issues.³⁸ Apart from this aspect, it is also important to keep awareness of both sides of the legal process in Zambia, as the Anti GBV Act applies to the civil proceedings but – as will be shown later in this study – inspires and influences the criminal proceedings as well.

In addition, the courts are only accessible to those living close to the towns of Lusaka and Kabwe. In a country as vast as Zambia, with an area of over 750 000 square kilometres, the access to justice becomes not only a theoretical but also a very practical question of the sheer possibility of physically reaching the justice in the form of a magistrate court.³⁹

This brings up the following questions to focus on:

How are the courts functioning so far, both regarding the intended and unintended effects of their establishment? How does the process function on the civil and criminal sides? How are the ambitions of user-friendliness and speed being translated into the daily work of the courts? Can we see signs of the objectives eventually being achieved? Is it even possible to tell so far? Is the process fast enough, and how is the speed balanced towards the requirement of legal certainty? Is the dualism affecting the work of the courts, and if so, how?⁴⁰

³⁸ This provided that it is not 'inconsistent with other provisions of this Constitution or other written law; or [...] repugnant to justice and morality'. Constitution of Zambia (Amendment), 2016, Article 118. For more about the Zambian legal system, see Part 1.5.

³⁹ Even some of the interviews paid attention to this issue. See more under Parts 3 and 4. See also Shezongo-Macmillan, *supra* note 9, p. 23.

⁴⁰ As Siri Gloppen describes it in 'The Accountability Function of the Courts in Tanzania and Zambia', Zambia's legal system is 'marked by the deeply plural nature of [its] societ[y] as well as the colonial past. British common law lies at the core of the formal legal systems while local customary law dominates in the lower courts and personal law'. In: S. Gloppen, R. Gargarella, E. Skaar (eds.), *Democratization and the Judiciary*, Abingdon, Routledge, 2004, p. 82.

Regarding point 3:

The courts have now been working for a little longer than a year. With a starting point in the observations and interviews, an analysis of the functioning of the pilots based on Thomas Mathiesen's theory of intended and unintended consequences of a legal measure will be carried through. In addition, the ongoing works on the establishment of new GBV fast-track courts will be mentioned. A substantial part of the last chapter will be based on the author's opinions and insights, which were gathered whilst working with the study. This makes it possibly contested.

Some of the questions that are dealt with in these parts are as follows:

Has the establishment of the courts brought the planned changes into the handling and disposing of GBV cases? Have the objectives of the project put up by the ZLDC been reached? Is the project continuously assessed, and if yes, in what way? What are the ways of dealing with any malfunctioning – if there is any – either process-wise or equipment-wise? Is the future of the project in any way influenced by the assessment done, if there is any? What are the plans for the fast-track courts?

These questions will not be answered separately, but in the text and its different parts – questions from the first area in Part 2, question from the second area in Part 3, and questions from the third area in Part 4. In the final Part 5, questions from all the three areas can be touched again.

1.3 Research Methodology

The study is mostly based on empirical research methods of mostly qualitative character⁴¹ – interviews and observations as well as study of the documents and materials both of legal and non-legal content produced by the actors involved in establishing the new courts. The Zambian legislation in force including the amended Constitution, legal acts, and statutory instruments served as a natural starting point for legal analysis of the establishment of the courts as well as their present functioning and their future.

As most of the research part for this thesis was carried out in Zambia, some of the preparatory work took place via e-mail and phone conversations. Nevertheless, most work was done via old-school in-person visits, making phone calls, knocking on doors and talking to people who were in one way or another involved in the Anti-Gender-Based Violence (AGBV) Programme and the establishment of the courts.

⁴¹ C. Sandgren, *Rättsvetenskap för uppsatsförfattare. Ämne, material, metod och argumentation*, Stockholm, Norstedts Juridik, 2015, s. 49ff.

Most of the documents studied were obtained from the Zambia Law Development Commission (preparatory works), the Swedish Embassy in Lusaka ('risk assessment' document from Sida Sweden, Joint Programme documents⁴²), UNDP Zambia (Joint Programme documents, programme evaluation documents) as well as an NGO – Women and Law in Southern Africa (The Rules of Court).

The ambition of the author was to interview at least one representative from each group involved in the court project, which would be part of following: researchers from the Zambia Law Development Commission, magistrates of the fast-track courts, prosecutors, police investigators connected to some of the courts, defence lawyers, UNDP representatives (including the UN Joint Team on Gender-Based Violence), and programme officers at the Swedish Embassy in Lusaka. This was executed, and even more interviews took place with judges from both the High Court and the Court of Appeal, representatives of NGO's as well as a lawyer from the Ministry of Justice and a lawyer from the Ministry of Gender.

Nineteen interviews were conducted. Eight of the interviewed were women, and eleven were men.⁴³ The interviews were of a semi-structured nature, which means that a short interview guide was prepared before every interview with main questions that needed to be covered. This served as a starting point for the interview. As the discussion proceeded, further questions came up that followed the topical trajectories or, sometimes, even new trajectories taken up by the interviewed person. Interviews were conducted face to face and lasted between nine and sixty-nine minutes. They took place in Lusaka and Kabwe. All interviews were recorded in handwriting, and seventeen of nineteen interviews were recorded digitally as well. One person answered specific questions by e-mail.

Even some of the information obtained during informal conversations with lawyers at the courts has been recorded by hand (in writing) and is used in the study as an extra source of information to support the main source.

Observations of the courts' hearings, both in Kabwe and in Lusaka, were carried through. These were done to the extent of what time and the limited information given about the coming court hearings gave possibility to. Observations at the Magistrate courts in Lusaka⁴⁴ took place on several occasions within a three-week period⁴⁵. In all of the observed

⁴² See Part 2.3.

⁴³ Some of the interviewed persons did not wish to be quoted. Therefore, they will be neither mentioned by name nor identified by gender. Recordings of the interviews, together with the full names of the interviewed, are in the archive of the author.

⁴⁴ Both in the special fast-track courtroom 1 and in other rooms, e.g. courtrooms 6 and 11, at the Lusaka Magistrate Courts, where the fast-track court is situated.

cases, the victims were minors.⁴⁶ Observations at the fast-track court in Kabwe were compressed to one day.⁴⁷ Permission to visit the fast-track courts was obtained from the acting registrar of the subordinate courts,⁴⁸ and even participation at closed sessions (witness hearings of children) was allowed.

There is a distinct difference in the number of visits to the Lusaka court compared with visits to the Kabwe court. This should nevertheless not affect the credibility of the observations, as both courts are established by the very same legal act,⁴⁹ under the very same joint programme, and governed by the very same court act.⁵⁰

Regarding sources used, Part 2 of this study is based mainly on written material, whilst Parts 3 and 4 are to a larger extent found on interviews and observations. The final part is my own analysis of what was read, observed, and heard.

Literature used to support the analysis of the outcome comes from the legal writings within the areas of sociology of law, procedural law, law and development, comparative law as well as writings on post-colonial legal systems.

Both in choosing the interviewees and choosing literature and other sources for this study, a gender-equality perspective was present.

1.4 Theory

The theories used in this thesis come from several areas of thinking about law and its functioning (or not functioning) in the society. I chose to combine Cappelletti's and Garth's theory about access to justice with Glenn's and Zen's ideas about law and development as well as with Thomas Mathiesen's sociological approach to the evaluating of effects of a legal measure.

Depending on what role courts play in a society, they can function not only as a symbol of an almighty power of the ruler over the ruled people, but also as a tool for every individual to 'see and get justice done' on a very personal level. Therefore, the creation of new

⁴⁵ The dates of observations of GBV cases at Lusaka Magistrate Courts – Room 1, the fast-track court: Monday 30 January and Monday 6 February, *People vs Mwangala Muyauluka*, offence: indecent assault; Monday 6 February, *People vs Maurice Chimuka*, offence: defilement; Rooms 1 and 11: Thursday 9 February, *People vs Emanuel Phiri*, offence: defilement; Room 6: Thursday 9 February, *People vs Lucheya*, offence: defilement (case adjourned); Monday 13 February – Tuesday 14 February, *People vs Remmy Mulenga*, offence: defilement; Room 11: Tuesday 14 February *People vs Elias Lassana*, offence: defilement.

⁴⁶ There was naturally an ambition to observe cases with adult victims of GBV as well, but this turned out to be difficult to achieve due to the much rarer appearance of such cases at the Magistrate courts.

⁴⁷ Wednesday, 15 February 2017.

⁴⁸ Permission to visit the Lusaka and Kabwe Anti-GBV Fast Track Courts, see Attachments.

⁴⁹ The Anti-Gender-Based Violence Act (No. 1 of 2011).

⁵⁰ Subordinate Courts Act. Chapter 28 of the Laws of Zambia.

courts will often be connected to ambitions to bring about wider access to justice to 'the people', which, in our case, means survivors of gender-based violence. In this way, the rights of the victims can be made practical and effective, not only theoretical and illusory.

The theory of access to justice was described by Italian legal thinker Mauro Cappelletti⁵¹ and his American colleague, Bryant G. Garth,⁵² in their classical text *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*.⁵³ In this article, the access to justice is said to be filling two basic purposes of the legal system: 'First, the system must be equally accessible to all; second, it must lead to results that are individually and socially just.' The basic premise of the authors is that 'social justice [...] presupposes effective access [to justice].'⁵⁴ In other words, no social justice is possible without effective access to the courts.

Over the years, this theory has gotten a lot of attention and in 1981 was taken up by the European Court of Human Rights (ECHR) in *Airey v. Ireland*, a case of domestic violence with a victim unable to afford the cost of legal representation for proceedings at the High Court. In its judgement, the ECHR states, 'The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. [...] This is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial'⁵⁵ and concludes that this right / the applicant would be disadvantaged by not having a lawyer. That would not allow her to 'present her case properly and satisfactorily'⁵⁶. This view of rights can also be applied in our case in the context of ambitions of Zambian stakeholders to broaden the access to justice for the victims of gender-based violence.⁵⁷

When writing about specialized courts and specialized procedures as means of easier access to justice for 'ordinary people' – both plaintiffs and defendants – Cappelletti and Garth say that such a system 'must be characterized by low cost, informality, and speed, by active decision-makers, and by the utilization of both legal and technical expertise'.⁵⁸ Also,

⁵¹ Mauro Cappelletti (1927–2004), Italian jurist, professor of law at the University of Florence and Stanford University Law School.

⁵² Bryant G. Garth (1949–), professor of law, Southwestern Law School.

⁵³ G. B. Garth and M. Cappelletti, 'Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective', *Buffalo Law Review*, Volume 27, Issue 2, 1978, pp. 181-292. Available from <http://www.repository.law.indiana.edu/facpub/1142>.

⁵⁴ *Ibid.*, p. 182.

⁵⁵ *Airey v. Ireland*, no. 6289/73, §24, ECHR judgment of 9 October 1979.

⁵⁶ Cappelletti and Garth, *supra* note 53, p. 182.

⁵⁷ It will be shown later in this study that this view of rights is also very accurate for the accused party in the fast-track courts.

⁵⁸ Cappelletti and Garth, *supra* note 53, p. 241.

the authors see in the creation of specialized courts (and let us keep in mind that the text was published nearly 40 years ago) an attempt to 'give effective rights to the "have-nots" against the "haves": the unprecedented pressure to confront and attack the real barriers faced by individuals'.⁵⁹ These descriptions – although written a relatively long time ago and without mentioning specialized GBV courts in any way (as there were none at the time) – can be used as a measuring stick for the fast-track-court pilot project – both in civil and criminal proceedings – even if the article as such mostly refers to civil proceedings.

Some of the risks that Cappelletti and Garth saw in specialization are still highly relevant also in the context in which this study was conducted: 'We may be sceptical, for example, about the potential of access-to-justice reforms in fundamentally unjust societal orders. Judicial and procedural reforms, it must be recognized, are not sufficient substitutes for political and social reform.' Seen from this perspective, access to justice can be more of 'an economic or political than an institutional problem'.⁶⁰ It will be shown later in this study how the unjust societal situation is part of the challenges that the establishment process is encountering. How the access to justice for victims of gender-based violence gets more real and more effective depending on an individual's possibility to access the court both physically and economically.

The greatest risk, though, according to the author, is that by making the procedures too easy and too rapid, the 'product' will become 'cheap and unrefined. Instead the reforms should be carefully thought through by doing serious risk assessments and being aware of both "limits and potentialities" of the "regular courts, regular procedures, and regular attorneys"'. Because, as Cappelletti and Garth write, what we want to achieve 'is not to make justice "poorer," but to make it accessible to all, including the poor'.⁶¹ What was done in our case during the establishment of the courts seems to be a blend of carefulness and mistakes the authors have warned against.

Garth and Cappelletti have also warned against overly simplistic transplants of different reforms outside their original legal and political systems. Already in 1978, they wrote about the importance of monitoring the implementation and effects of such reforms.⁶² Here they touch on an area that has grown in importance during the years after the text was published, namely the (legal) development cooperation.

⁵⁹ Ibid.

⁶⁰ Ibid., p. 289.

⁶¹ Ibid., p. 291.

⁶² Ibid., p. 290.

The whole process of establishment of the courts as a part of a bigger AGBV joint programme between the Government of Zambia and the United Nations Development Programme is an example of a work of this kind. Canadian jurist H. Patrick Glenn⁶³ meant that in this area of international legal cooperation, old concepts (i.e. old western concepts) – development, customary law, the rule of law, and legal pluralism - are still being deployed, and in his opinion those are conceptual failures.⁶⁴ They are 'Western in origin and in content' and therefore 'inspire [...] resentment and provoke [...] conflict'.⁶⁵ It will be shown that requirements that originate from some of these concepts have most likely had a negative influence also on the project of the establishment of the fast-track court, mostly in terms of 'rushing things unnecessarily' in order to live up to the ideas and expectations of the donors and international partners.⁶⁶ Glenn refers to Amartya Sen and his work *The Idea of Justice*. Therein, Sen describes one of the problems with the concept of the rule of law as follows: The rule of law projects focus on 'getting the institutions right' instead of sticking to the original goals. In this way, such transcendental institutionalism focuses on 'institutional arrangements in society' instead of 'the actual societies that would ultimately emerge'.⁶⁷ However, if justice-enhancing changes are supposed to give the expected effects, they 'demand comparative assessment, not simply immaculate identification of 'the just society' or 'just institutions'.⁶⁸ This kind of unexpected/unplanned effect becomes obvious, *mutatis mutandis*, in projects such as the one described in this study when – by the time for evaluation - the 'success' is accounted for 'by the practice of funding agencies of evaluating projects by success in moving money “out the door”, measuring outputs and not outcomes'.⁶⁹

In our case, the push for the results and for getting the institutions right was obvious and can be seen both in the programme document as well as in the preparatory

⁶³ H. Patrick Glenn (1940–2014), Canadian jurist, Peter M. Laing professor of law at McGill University.

⁶⁴ H.P. Glenn, 'Sustainable Diversity in Law', in Tamanaha, B.Z., Sage, C. and Woolcock, M. (eds.), *Legal Pluralism and Development. Scholars and Practitioners in Dialogue*. Cambridge, Cambridge University Press, 2012, p. 100.

⁶⁵ *Ibid.*, p.101.

⁶⁶ *Ibid.*, p. 100.

⁶⁷ A. Sen, *The Idea of Justice*, Cambridge, Massachusetts, The Belknap Press of Harvard University Press, 2009, p.5–6. Even Chanock makes similar remarks in his *Law, Custom and Social Order*. He writes that 'in both types of social system legal things cast their shadow over only part of the area they were once assumed to cover. [...] In terms of the new states this raised the obvious question as to why they should be pursuing centralization and ironing out local-level "legal" systems when the model of the western state which they were trying to emulate was so badly misconceived.' See Chanock, *supra* note 9, p. 222.

⁶⁸ Sen, *ibid.*, p. 401.

⁶⁹ G. A. Sarfaty, 'Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank', *American Journal of International Law*, Volume 103, Issue 4, 2009, p. 669. See there: 'Since projects often take many years to yield results, promotion is not tied to favourable long-term outcomes. Rather, it is based on the approval of projects and the size of those projects in terms of money lent.' Cited in: Glenn, *supra* note 64, p. 100.

'papers'. In addition, the issue of measuring outputs and not outcomes when evaluating projects has been discussed during the research for this study. This will be shown in Parts 4 and 5.

The critics that H. Patrick Glenn comes with considering the rule of law besides the disconnection of it from 'the actual results of its implementation' as described above is also that despite the agreement on the 'necessity of necessity of the rule of law, there is no agreement on its essential characteristics'. Also and for second that 'the rule of law today gives every indication of failing in the Western jurisdictions from which it originated'.⁷⁰ Because of these reasons, Glenn proposes a new concept: sustainable diversity in law,⁷¹ which gives more attention to the various legal traditions and justice systems across the globe, including the non-state justice.

Naturally, one might ask, would this approach have led to different results in the studied project? And would the whole project have even been created?⁷²

1.5 Shortly about the Zambian legal system with focus on its judicial system

Defined by the preamble of its Constitution as 'a Christian Nation while upholding a person's right to freedom of conscience, belief or religion',⁷³ Zambia, a former British colony,⁷⁴ upon its independence in 1964 inherited a dual legal system consisting of the British common law as well as the 'traditional' customary law.⁷⁵ In the words of Siri Gloppen, Zambia's current legal system has British common law at the base of the formal legal system, whilst local customary law is used in the lower courts and personal law.⁷⁶

The legal dualism was introduced to the territory by Article 14 of the Royal Charter of the British South Africa Company.⁷⁷ The division of legal matters that leaves the

⁷⁰ Ibid., p. 99.

⁷¹ For more about this concept, see H. P. Glenn: *Legal Traditions of the World. Sustainable Diversity in Law*, Oxford, Oxford University Press, 2014.

⁷² To answer these questions, another study would be needed.

⁷³ Constitution of Zambia (Amendment), 2016, Preamble.

⁷⁴ Between 1889 and 1911, the land known today as Zambia was administered by Cecil Rhodes and his British South Africa Company (BSAC), who had rights to the whole territory granted to them by the British government by special charter. In 1911, the Protectorate of Northern Rhodesia was created, and in 1924, BSAC fully handed over the administration of Northern Rhodesia to the Colonial Office in London.

⁷⁵ Regarding how 'traditional' the customary system really is, see Martin Chanock's frequently cited work, *supra* note 9, e.g. Chapter 1: Social and Legal History in Central Africa. Legal mythologies: Imperial and African, p. 5 ff.

⁷⁶ Gloppen, *supra* note 40, p. 113.

⁷⁷ 'In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and laws of the class or tribe or nation to which the parties respectively belong, especially with regard to the holding, possession, transfer and disposition of lands and goods, and testate or intestate succession thereto, and marriages, divorces, legitimacy and other rights of property and personal rights, but subject to any British laws which may be in force in any of the territories aforesaid and applicable to the peoples or

jurisdiction over family and land disputes to traditional courts using customary law is still present in the Zambian legal system. Nevertheless, these courts are not recognized legally by the Zambian courts and form a part of the informal justice system.⁷⁸

The Constitution of 1991⁷⁹ reintroduced – after years of a one-party state under leadership of Kenneth Kaunda⁸⁰ – the multiparty political system and made changes to the government at all levels. The first multiparty election was held in 1991.⁸¹

The Constitution⁸² divides the powers between the Head of State and the Cabinet, the Legislature and the Judiciary having all separate functions.⁸³ The position of the President is central, as he/she is both the Head of State and Government and the Commander-in-Chief of the Defence Force.⁸⁴

The laws of Zambia are 'th[e] Constitution, laws enacted by Parliament, statutory instruments, Zambian customary law which is consistent with th[e] Constitution and the law and statutes which apply or extend to Zambia, as prescribed'.⁸⁵ Apart from these also decisions of superior courts of law such as Supreme Court and Constitutional Court constitute sources of law.

As a former British colony, some of the British legislation is still in force in Zambia. This is provided for by The British Acts Extension Act⁸⁶ that enables extension of application of certain British Acts to Zambia and amendments to certain British Acts in their application in Zambia. The English Law (Extent of Application) Act,⁸⁷ of 8 March 1963 declares to which extent the Law of England applies in the Republic.

In case of conflict between the customary and the statutory law, the statutory law ('the written law') takes precedence.⁸⁸ Therefore, although the traditional dispute mechanisms

inhabitants thereof.' In Royal Charter of the British South Africa Company, Article 14. See B. Harlow and M. Carter, *Archives of Empire: Volume 2. The Scramble for Africa*, Durham, Duke University Press, 2004, p. 376.

⁷⁸ Shezongo-Macmillan, supra note 9, p. 103 f. See Part 1.5.1.

⁷⁹ The original constitution of 1991, with amendments through 2009, can be found here: https://www.constituteproject.org/constitution/Zambia_2009.pdf?lang=en, (accessed 16 March 2017).

⁸⁰ Kenneth Kaunda, born 1924, together with Robert Mugabe of Zimbabwe, the last remaining of the original leaders of the independence struggles in former African colonies.

⁸¹ The elections of 1991 was won by the Movement for Multiparty Democracy that ruled Zambia until 2011. Patriotic Front (PF) is the current ruling political party.

⁸² Last amended in January 2016.

⁸³ C. Himonga, *Family law in Zambia*, Alphen aan den Rijn, Kluwer Law International, 2011, p. 16 f.

⁸⁴ Constitution of Zambia (Amendment), 2016, Article 91 (1).

⁸⁵ Constitution of Zambia (Amendment), 2016, Article 7.

⁸⁶ Chapter 10 of the Laws of Zambia.

⁸⁷ Chapter 11 of the Laws of Zambia.

⁸⁸ About the position of customary law in the Zambian legal system, see Shezongo-Macmillan, supra note 9, p. 24: 'No clear definition of customary law has been developed by the courts, nor has there been any systematic development of this subject as a matter of policy.'

(through use of traditional courts) are allowed, they must not go against the Constitution itself or other written law nor be repugnant to justice and morality.⁸⁹ One of the most notorious issues within this conflict of laws is the early marriage (also known as child marriage) – a phenomenon that occurs especially in the rural areas of Zambia. This is an issue that is widely discussed (not only) in Zambian legal circles, often in terms of prohibiting it as a so-called harmful traditional practice. Although the topic is directly connected to the issue of gender-based violence, it will not be further discussed in this study because of its complexity.

Regarding the position of international law within Zambia's legal system, the country is dualistic. Zambia has ratified all seven major international human rights treaties⁹⁰ as well as the human rights treaties of the African regional system.⁹¹

One of the known challenges to the Zambian legal system is the low number of practising lawyers – estimated to be around 1,000 in a country of over 14.5 million inhabitants.⁹² This leads to both an overload of pending cases as well as high costs of legal services.⁹³

1.5.1 Structure of the court system

The Zambian court system is defined by the Constitution.⁹⁴ Its structure is hierarchical. At the bottom lie the local courts with limited jurisdiction and sentencing powers, and above them come the subordinate courts of different levels (1 to 3). Above the subordinate courts lie High Courts, which reside in Lusaka, Kitwe, Ndola, Livingstone and Kabwe.⁹⁵ On top of them comes the newly established Court of Appeal, which hears appeals from, among others, the

⁸⁹ Constitution of Zambia (Amendment), 2016, Article 24(3).

⁹⁰ Nevertheless, of the optional protocols only the 1st Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) has been ratified.

⁹¹ See Shezongo-Macmillan, *supra* note 9, p. 3.

⁹² Since the independence when there were no Zambian lawyers but the number has risen to 938 in 2012 according to the statistics from the Law Association of Zambia. One of the reasons to this still low number is – according to many – the high failure rate at the Zambia Institute of Advanced Legal Education, the only Zambian institute for postgraduate legal studies. According to an article in Lusaka Times, recently there were only 16 passing of 360 students. See 'Government to take action on the low passing rate at ZIALE – Lubinda', *Lusaka Times*, 26 January 2016, <https://www.lusakatimes.com/2017/01/26/government-take-action-low-passing-rate-ziale-lubinda/>, (accessed 17 March 2017). See also: Shezongo-Macmillan, *supra* note 9, p. 76 ff.

⁹³ The topic has been discussed in several interviews as it also influences the issues addressed in this study. Interview with Mrs Mandy Manda, National Legal Aid Clinic for Women, Executive Director, 20 October 2016; Interview with Mr Gilbert Mwanza, Zambia Law Development Commission, Senior Research Officer, 17 February 2017.

⁹⁴ Constitution of Zambia (Amendment), 2016, Article 120.

⁹⁵ In the remaining provinces the judiciary conducts circuit courts every month, i.e., judge and advocates have to go to the place where there is no high court to hear the cases. Information obtained from a prosecutor, NPA, name and address withheld, e-mail, 5 April 2017.

High Court.⁹⁶ On the very top, we find the Supreme Court and the newly established Constitutional Court, which rank equivalently.⁹⁷ The Chief Justice is the head of the Judiciary.⁹⁸

Fast-track courts – the pilot projects that are subjects to this study⁹⁹ – are on the subordinate courts level. They are presided over by magistrates and their jurisdiction, and sentencing powers are governed by the Subordinate Courts Act.¹⁰⁰

*Figure: The court structure in Zambia*¹⁰¹

Supreme Court of Zambia		Constitutional Court	
Court of Appeal			
High Court Commercial Court		Industrial Relations Court	
Subordinate Court (Juveniles Court) (Fast-Track Court for Traffic Offences) (AGBV Fast-Track Court)	Revenue Appeal Tribunal	Court Martial	Lands Tribunal
Local Court		Small Claims Court	

There are no traditional courts in the picture above. This is because they do not fall within the official Zambian judicial system. Nevertheless, there is what Shezongo-Macmillan called 'passive tolerance of traditional courts', both because such courts allow for the administration of issues of customary law and practice as well as often represent the only real possibility of effective access to justice because of the distances and costs connected to processing issues via the official state courts. Justice practised by the traditional courts is of the restorative kind.¹⁰²

⁹⁶ Constitution of Zambia (Amendment), 2016, Articles 130 ff.

⁹⁷ Ibid., Article 121.

⁹⁸ Ibid., Article 136. The post is currently held by Madam Justice Irene Chirwa Mambilima, Zambia's first female Chief Justice.

⁹⁹ There are other specialized courts in Zambia, e.g. Traffic offences fast-track court.

¹⁰⁰ Chapter 28 of the Laws of Zambia.

¹⁰¹ The picture from Shezongo-Macmillan, supra note 9, p. 42. Updated by the author with changes as of 2016.

¹⁰² Shezongo-Macmillan, supra note 9, p.23. Restorative justice, the ambition of which is to restore the relationship between 'litigants'.

Part 2 THE ESTABLISHMENT OF THE COURTS

2.1 The origin of the idea. International cooperation and conferences.

The idea to establish the fast-track courts has its roots in the cooperation between countries in the Southern African region. Zambia is a signatory of The Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa, the African Charter on the Rights and Welfare of the Child, and the SADC Protocol on Gender and Development.¹⁰³

In December 2011, the states of the International Conference on the Great Lakes Region (ICGLR)¹⁰⁴ signed the Kampala Declaration on Sexual and Gender-Based Violence, which also included a work plan.¹⁰⁵ The Kampala Declaration was followed up by the ICGLR Regional High Level Consultation with Ministers in Charge of Justice and Gender in Kinshasa, DRC on 28 July 2012. In the communiqué from this meeting, the participating ministers committed themselves to, among other things, '[c]oordinate with their respective Chief Justices, where necessary, to establish and strengthen Special Courts to handle SGVV cases and provide progress reports to the Conference Secretariat by December 2012'.¹⁰⁶

As mentioned earlier, the Great Lakes Region Conference on ending GBV was identified as the primary incentive for the whole fast-track process.¹⁰⁷ According to an interview with a senior researcher at the ZLDC, then President Michael Sata, who participated in the conference, gave upon his return to Lusaka instructions to the judiciary to establish fast-track courts to deal with GBV by a deadline of 2015.¹⁰⁸ These instructions were sent to the Deputy Chief Justice. A referral from the judiciary was given to the Zambia Law Development Commission to 'conduct research and come up with recommendations on the

¹⁰³ Report on the establishing, supra note 23, p. 13.

¹⁰⁴ The Great Lakes Region consists of the following countries: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania, and Zambia.

¹⁰⁵ Report on the establishing, supra note 23, p. 14. The work plan can be found at:

http://www.operationspaix.net/DATA/DOCUMENT/7350~v~Plan_de_travail_sur_la_mise_en_oeuvre_de_la_Declaration_de_Kampala_sur_la_lutte_contre_la_Violence_Sexuelle_et_Basee_sur_le_Genre_VSBG_dans_la_region.pdf, (accessed 1 April 2017).

¹⁰⁶ Communiqué from ICGLR Regional High Level Consultation. Full text available at: <http://www.icglr.org/index.php/en/component/k2/item/222-nouvellesenglish>, (accessed 1 April 2017).

¹⁰⁷ Interview with Gilbert Mwanza, supra note 3.

¹⁰⁸ Ibid.

possibility of establishing fast track [...] courts'.¹⁰⁹ The formal request was made by then Minister of Justice Sebastian Zulu after a meeting organized by the NGOCC.¹¹⁰

2.2 Legal sources. The AGBV Act. Protection and occupation orders.

The establishment of the fast-track courts was enabled through the Anti-Gender-Based Violence Act, which was enacted by the Zambian Parliament in 2011. The Act is civil in its nature, and for criminal procedures, it is to be read together with the Criminal Penal Code and the Criminal Procedure Act Code.¹¹¹ In case of inconsistency between the Act and other written law, the Act prevails (*lex posterior derogat legi priori*).¹¹²

For the first time in Zambian legislature, this Act defines four different kinds of gender-based violence or abuse: 'physical, mental, social or economic'.¹¹³ The Act states that 'a single act may amount to gender-based violence',¹¹⁴ and it provides for filing of complaints of gender-based violence. It also establishes two kinds of orders for protection of the victims: protection orders and occupation orders.¹¹⁵ The Act prescribes time frames within which the different steps in the filing, handling, and granting of these orders must be held.¹¹⁶ The grant of a protection order does not exclude a person's criminal liability.¹¹⁷ According to the UN Handbook for Legislation on Violence Against Women, these kinds of protection orders 'are among the most effective legal remedies available to complainants/survivors of violence against women'.¹¹⁸ This is because they constitute an immediate remedy to complainants/survivors of gender-based violence.

¹⁰⁹ Report on the establishing, supra note 23, p. 5.

¹¹⁰ *Establishment of fast track and user friendly courts to deal with cases of gender-based violence in Zambia. Report on the study of the Indian approach to domestic violence*, Lusaka, Zambia Law Development Commission, January 2014, p. 4.

¹¹¹ The Anti-Gender-Based Violence Act, (No. 1 of 2011), Section 2 (1).

¹¹² *Ibid.*, Section 2 (2).

¹¹³ *Ibid.*, Section 3 (1). This kind of abuse comprises physical abuse; sexual abuse; emotional, verbal, or psychological abuse; economic abuse; intimidation; harassment; stalking; controlling behaviour; malicious damage to property; forcible entry into a person's residence; depriving a person or [...] a reasonable share of the use of the facilities associated with the person's residence; the unreasonable disposal of household; abuse delivered from various cultural or customary rites or practices; abuse perpetrated on a person by virtue of the person's age; as well as conduct that in any way harms or may harm another person.

¹¹⁴ *Ibid.*, Section 4.

¹¹⁵ *Ibid.*, Sections 10–23.

¹¹⁶ *Ibid.*, Sections 11–18 for protection orders and Section 20 for occupation orders. Nevertheless, the application forms for the orders were not given before in the Anti-GBV Court Rules of 2016; see 2.4.5.

¹¹⁷ *Ibid.*, Section 19.

¹¹⁸ UN Handbook, supra note 27, p. 45.

A major practical contribution of the Act is also that it requires the police to 'respond promptly to a request by any person for assistance from gender-based violence'.¹¹⁹ It will be shown later in this study how the formulation gave root to various parts of activism in gender-based violence cases in the criminal proceedings, or so is the impression of the author, based on her own observations and interviews.¹²⁰

The Act also established the so-called Anti-Gender-Based Violence Committee with broad authority within gender-based violence issues.¹²¹ The committee consisted of members specified by the Act,¹²² e.g. representatives from various ministries, the Law Association of Zambia (represented by the National Legal Aid Clinic for Women), and an NGO representative. The Rules of Court were drafted by this Committee.

Importantly, the AGBV Act also allows for the establishment of the fast-track courts. It defines the subordinate courts as the courts under the act¹²³ and, in Sections 40 and 41, enables the enactment of both rules of court and statutory instruments in order to better carry out the procedures and provisions of the Act. Such Rules of Court were adopted in January 2016.¹²⁴

The Act was big news in the Zambian legislative system but also has a number of weak points. As one interviewee put it, 'So I felt it was done in a hurry, and for that reason, we are missing out on many aspects of fast-tracking GBV cases.'¹²⁵

2.3 A work of cooperation. GRZ – UN Joint Programme on GBV.

As mentioned above, the establishment of the courts is, in a greater perspective, part of the Joint GRZ-UN Program on Gender-Based Violence, which has also been supported by the

¹¹⁹ Ibid., Section 7.

¹²⁰ As an illustration, here comes a piece of an interview: '[T]he change mainly for me it's the [...] attitude towards the offences. The mentality is that these offences should be dealt with quickly – with or without the equipment. [...] So, that's just that. It's not any case that you take time, there is activism on all the stakeholder that it's something that must be dealt with within the shortest possible time.' Interview with a prosecutor (2), NPA, name withheld, 15 February 2017.

¹²¹ The Anti-Gender-Based Violence Act (No. 1 of 2011), Section 31, especially Section 31(3) (g): 'deal with any matter relating to gender-based violence'.

¹²² Ibid., Schedule (Section 31 (2)), Section 1.

¹²³ '[T]he provisions of the Subordinate Courts Act apply with respect to service of process of any document issued pursuant to this Act and for which service is required.' The Anti-Gender-Based Violence Act, 2011, Section 35(1).

¹²⁴ For more about the Rules, see Part 2.3.5.

¹²⁵ Interview with a magistrate (2), supra note 12. See more about this issue in Parts 4 and 5.

governments of Sweden, Ireland, as well as the DFID.¹²⁶ The Standard Basic Assistance Agreement (SBAA) between UNDP and Zambia, signed in 1983, serves as the legal basis of the programme. SBAA serves programmes that, in their implementation, use funds mobilized through the One UN Fund.¹²⁷

The programme sets within its Outcome 2 – 'GBV survivors have increased access to an efficient justice delivery system' – a number of expected results, among which development of a strategy to develop fast-track courts and even a target number of four established fast-track courts is set up (starting from a baseline of zero).¹²⁸ To reach this target, the Zambian government is 'willing and has resources for establishment of fast-track courts'.¹²⁹ Within this outcome, even training of prosecutors and police officers for GBV cases is targeted, as is GBV skills training for customary adjudicators.¹³⁰

The programme is a part of Zambia's implementation of the provisions of the Convention of the Elimination of All Forms of Discrimination against Women (CEDAW), with 'particular focus on the recommendations on violence against women that are contained in the July 2011 CEDAW concluding observations and the recommendations of the Special Rapporteur on Violence against Women, its causes and consequences'¹³¹ as well as the implementation of Zambia's Anti-Gender-Based Violence Act of 2011.¹³² It also makes a part of Zambia's Sixth National Development Plan 2011–2015, which recognizes gender as a cross-cutting issue and has among its objectives to 'develop gender-responsive policies and legal frameworks'.¹³³

¹²⁶ GRZ – UN Joint Programme, *supra* note 19, pp. 2 and 18.

¹²⁷ Standard Basic Assistance Agreement (UNDP – Zambia) (adopted on 14 October 1983, amended 12 September 1986), No. 22392, in GRZ – UN Joint Programme, *supra* note 19, p. 37.

¹²⁸ *Ibid.*, pp. 29–30 (Expected result 2.3).

¹²⁹ *Ibid.*, p. 29 (Risks and assumptions 2.3).

¹³⁰ *Ibid.*, p.30 (Expected results 2.1 and 2.2).

¹³¹ *Ibid.*, p. 6. See also Committee on the Elimination of Discrimination against Women. Forty-ninth session. 11–29 July 2011. Heading Violence against women, Articles 26–27. See especially (b)–(d): '(b) ensure that female victims of violence have immediate protection, including expulsion of perpetrator from the home, guarantee that they can stay in secure and well-funded shelters, in all parts of the country, and that they have access to free legal aid, psycho-social counselling and adequate redress, including compensation; (c) ensure that public officials, especially law enforcement officials and professionals in the judiciary, health-care, social work and education are systematically and fully sensitized to all forms of violence against women and girls; (d) enhance the system of appropriate data collection on all forms of violence against women, including domestic violence, protection measures, prosecutions and sentences imposed on perpetrators [...]'.¹³²

¹³² GRZ – UN Joint Programme, p. 6. It is worth mentioning that the Zambia Law Development Commission, in its concept note on the establishment of the fast-track courts, also refers to the following international and regional instruments: Convention on the Elimination of All Forms of Violence against Women, Declaration on the Elimination of All Forms of Discrimination against Women, and the SADC Declaration on Gender and Development. In: Establishing a fast track, *supra* note 32, p. 3.

¹³³ GRZ – UN Joint Programme, *supra* note 19, p. vi.

It is important to see the establishment of the fast-track court as a piece of the larger puzzle: the project of building 'structures and clear procedures in dealing with cases of GBV'¹³⁴ that comprises the whole chain, from reporting the case, taking care of victims, and taking the case to court to prevention, education, and sensitization.

The Joint Programme between GRZ and UN on Gender-Based Violence, which was supposed to end in December 2016, has been extended by eight months plus four months for evaluation to December 2017.¹³⁵ According to the interviewed programme coordinator at the UNDP, the evaluation and quality assurance will be carried through by the Ministry of Gender and the UNDP. It will be done by three independent consultants, one international and two local, in order to eliminate bias.¹³⁶

2.3.1 Parts involved

The main parts of the Joint Programme on GBV are the Government of Zambia and the United Nations. This is the first programme that the UN in Zambia makes under the Delivering as one approach,¹³⁷ and its main goal is to 'contribute to the reduction of GBV in Zambia'.¹³⁸

The implementing partner is the Gender and Child Development Division, and among other partners are the Ministry of Justice, the Ministry of Home Affairs (with its Victim Support Unit¹³⁹), the judiciary, the Zambia Law Development Commission, Women for Change, the NGOCC, and the YWCA – representatives of most of which were interviewed for this study. In addition, other stakeholders interviewed in this study – specifically Women and Law in Southern Africa and the National Legal Aid Clinic for Women – take part in the programme.

¹³⁴ Report on the establishing, supra note 23, p. 5.

¹³⁵ Interview with a programme coordinator at the UNDP, name withheld, 18 October 2016.

¹³⁶ Ibid.

¹³⁷ Ibid., 'Delivering as One' is a relatively new system within the structures of the UN that aims to '[m]aking the UN System more coherent, effective and efficient', see <https://undg.org/home/guidance-policies/delivering-as-one/>, (accessed in October 2016).

¹³⁸ GRZ – UN Joint Programme, supra note 19, p. vi.

¹³⁹ '[E]stablished through the Zambia Police (Amendment) Act No. 14 of 1999 to ensure effective prevention, investigation and excellent service delivery when dealing with GBV and in particular with femicide, property grabbing, spouse battering and sexual abuse of girls.' Ibid., p. 4.

2.3.2 Swedish involvement in the project

The Joint GRZ–UN Programme on Gender-Based Violence has, according to the programme brief, been supported by the Embassy of Sweden with 60,000,000 SEK.¹⁴⁰

According to the programme officer at the Swedish Embassy in Lusaka, Sweden sees this part of the Joint Programme as one of its 'major achievements' because '[t]he buildings were there already and we aren't paying the magistrates either – as they get paid by the Zambian government – because they are the very same magistrates – they just changed the court'. In this way, the donors see the establishment of the courts as very sustainable. This establishment goes through 'an existing government programme'. Otherwise, the programmes often fail.¹⁴¹

Within the programme, Sweden gives special support to the work of the National Legal Aid Clinic for Women.¹⁴² This NGO, a project of the Human Rights Committee of the Law Association of Zambia, is dealing with the fast-track courts on a regular basis and its executive director has been interviewed for this study.

2.4 Preparatory works

Between the passing of the Anti-GBV Act and the establishment of the fast-track courts, there was a span of five years. During this time, preparatory works on different levels were being executed. In 2012, the Joint UN–GRZ Programme on Gender-Based Violence started, with its first implementation in May 2013.¹⁴³

As mentioned in the Background, the Zambia Law Development Centre was responsible for the preparatory works that preceded the establishment. The task given to the ZLDC by the judiciary was to 'identify best-practice models for the establishment' of the fast-track courts as well as finding 'the most effective method of administering law and the ultimate dispensation of justice for GBV cases'.¹⁴⁴

¹⁴⁰ Appraisal of intervention, supra note 33, p. 7.

¹⁴¹ Interview with Mrs Pezo Mateo Phiri, National Programme Officer, Embassy of Sweden, Lusaka, 10 October 2016.

¹⁴² Interview with Mandy Manda, supra note 93.

¹⁴³ Interview with Pezo Mateo Phiri, supra note 141.

¹⁴⁴ *Establishing fast-track and user-friendly courts to deal with sexual and gender-based violence cases in Zambia*, Working paper 1, Lusaka, Zambia Law Development Commission, March 2013, p. 5.

2.4.1 Discussions with domestic actors¹⁴⁵

The ZLDC started these works by talking to actors from the Zambian judiciary in order to see if they were experiencing any problems within the area and, if so, what kinds of problems.¹⁴⁶ For the sake of discussion, three workshops – in Kitwe, Kabwe, and Lusaka – were conducted with stakeholders from all across the country.¹⁴⁷ The areas discussed were 'user friendly concept, fast tracking cases [and time frames], procedure for the conduct of cases, sentencing and conduct of courts officials and withdrawal of cases and appeals'.¹⁴⁸

The first findings of this research were published in the concept note of 2013, and later submissions from the stakeholders were summarized in the September 2014 report of the ZLDC.¹⁴⁹ One of the most acute issues identified in the discussions was the poor case-flow management.

2.4.2 Concept note and Working paper

As mentioned above, the first concept note about the establishment of the fast-track courts is dated March 2013,¹⁵⁰ and it is a result of ZLDC's communications to different actors within the Zambian judiciary. It identifies following then-present challenges in handling GBV cases: absence of shelters for protection of victims and lack of funds; lack of communication strategy/sensitization/training; the current procedure on gender-based violence cases; and poor case-flow management.¹⁵¹

Based on the concept note, Working paper 1 was presented in May 2013.¹⁵² This paper states that 'providing accessible justice is a state obligation under international human rights' and repeats the challenges that were already identified in the concept note. As issues for further consideration, it names child-friendly courts, speedy disposal of cases, clear procedure and sentencing structure, and conduct of court officials. Here also the countries

¹⁴⁵ 'So, [...] we [...] as a model of methodology we started by saying we need to consult local persons in the justice sectors first to find out if we have a problem. Because if we're talking about this meanwhile we even don't have a problem – do we need this? [...] So, we did that and we came up with issues that were ...highlighted as why we need these courts. Of course, you've seen from our concept notes – some of the things: there was poor case flow management and so on.' Interview with Gilbert Mwanza, *supra* note 3.

¹⁴⁶ *Ibid.* The actors to whom the ZLDC communicated were not specified in the interview nor in the concept note.

¹⁴⁷ Working paper 1, *supra* note 144, p. 22.

¹⁴⁸ Report on the establishing, *supra* note 23, p. 18.

¹⁴⁹ *Ibid.*, pp. 21–24. See even the additional submissions, p. 24f.

¹⁵⁰ Establishing a fast track, *supra* note 32.

¹⁵¹ *Ibid.*, p. 7f.

¹⁵² Working paper 1, *supra* note 144, pp. 16–25. The author asked ZLDC for all the reports available, but there was no working paper 2 among them. According to the interviewed researcher, some of the reports are not available 'for the public'. Interview with Gilbert Mwanza, *supra* note 3.

chosen as best practice models to undertake comparative studies (Ghana, South Africa, India, the U.K., and the U.S.) are mentioned.¹⁵³

2.4.3 Study visits to foreign jurisdictions including Sweden

After the initial research showed a need to establish special proceedings to fight existing problems with handling GBV cases more efficiently, the Law Development Commission turned its interest towards foreign jurisdictions. Delegations of Commission researchers visited six different countries in order to gather experiences from their handling of cases of gender-based violence and do comparative studies. These were the following countries: Ghana (June 2013), The U.K. (England and Scotland; July–August 2013), the U.S. (July–August 2014), India (January 2014), South Africa (August 2014), and Sweden (July–August 2014).¹⁵⁴ These countries were chosen, after an assessment by the ZLDC, as 'best practice models in which to undertake comprehensive learning visits'.¹⁵⁵ After every visit, a detailed report was written.¹⁵⁶

According to Gilbert Mwanza of the ZLDC, the study visit to Sweden included visits to family courts (Familjerätten), prosecutors, offices (Åklagarmyndigheten), and the Swedish National Forensic Centre (NFC) and took place in Stockholm, Uppsala, Linköping, and Gothenburg.¹⁵⁷ One of the deeper impressions the Zambian delegation took during the visit was the use of video and audio recordings in witness proceedings at Swedish district courts. According to a person from the judiciary's IT department, the equipment for Zambian courts also arrived from 'somewhere in Scandinavia'.¹⁵⁸ The equipment installation in the courtrooms and witness rooms in Lusaka and Kabwe is reminiscent of a Swedish courtroom setup.¹⁵⁹

2.4.4 Final report

When all the study visits and discussions with the domestic actors were complete, the Law Commission submitted a longer report, dated September 2014, on the establishment of the

¹⁵³ Working paper 1, supra note 144, p. 21. Sweden is not mentioned among the countries.

¹⁵⁴ Source: Reports from the visits, ZLDC. Copies/pictures of the reports are in the archive of the author except reports from the USA and Sweden, which were never handed over. A summary of the findings is given in Report on the establishing, supra note 23, pp. 26–48.

¹⁵⁵ Report on the establishing, supra note 23, p. 26.

¹⁵⁶ Reports from the visits, ZLDC. See supra note 154.

¹⁵⁷ Interview with Gilbert Mwanza, supra note 93.

¹⁵⁸ Informal conversation with a person from the Judiciary IT Department, name withheld, 15 February 2017.

¹⁵⁹ Visits at the fast-track court in Lusaka (25 January 2017) and in Kabwe (15 February 2017). The author cannot though compare with the eventual use of similar equipment in the other jurisdictions visited.

fast-track courts.¹⁶⁰ This report contains a summary of the study visits that ZLDC representatives made to Ghana, India, the U.K., the U.S., and Sweden and details the lessons learned from these visits. The final chapter of the report comes with a number of recommendations, divided in eleven different categories, that refer to the 'three dimensions of justice':¹⁶¹ the structural (conduct and training of actors involved; fund for appeals by victims of GBV), the procedural (both police and court including time frames for civil GBV procedures; witness protection), and the normative (to expedite drafting of Rules of Court; 'the uncomfortable coexistence of traditional norms and statutory provisions').¹⁶²

The specific objectives of the study under the general objective mentioned above under 2.4¹⁶³ can be seen as objectives of the project as well. These are as follows:

- (i) To establish fast-track and user-friendly courts for both victims and perpetrators of GBV;
- (ii) To ensure quick and effective disposal of GBV cases;
- (iii) To ensure victims' access to justice as enshrined in the Zambian Constitution;
- (iv) To establish clear procedures for use by the proposed courts.¹⁶⁴

The document contains neither a further analysis of the recommendations nor an analysis of the expected and unexpected effects of the possible future impact of the stated objectives.

According to Gilbert Mwanza, the reporting is not yet finished.¹⁶⁵ The interviewee said that there have been other consolidated reports, but unfortunately for this study, those are only for internal use 'because we still have quality control, which our commissioners have to go through, and after our commissioners going through them, we share them with the masses'¹⁶⁶.

One part of the user-friendly concept was to install the audio and video equipment in the courtrooms and in the (newly planned) witness rooms. There is no such recommendation in the report.

In order to secure fast-tracking of civil cases, there is a recommendation to 'expedite drafting of Rules of Court'.¹⁶⁷ For the criminal procedure side, there is mention of different procedural changes, such as taking early pleas in GBV cases as well as a

¹⁶⁰ Report on the establishing, supra note 23.

¹⁶¹ Ibid., p. 17.

¹⁶² Ibid., p. 45ff.

¹⁶³ '[To] identify best practice models for the establishment' of the fast-track courts and to find 'the most effective method of administering law and the ultimate dispensation of justice for GBV cases'. Ibid., p. 5.

¹⁶⁴ Ibid., p. 6. See further in 4.1.1.

¹⁶⁵ Interview with Gilbert Mwanza, supra note 93.

¹⁶⁶ Ibid.

¹⁶⁷ Report on the establishing, supra note 23, p. 46.

recommendation that hearsay evidence should be admissible in cases of domestic violence and that written statements from victims should be allowed. Unlike Working paper 1 from May 2013, in the report from September 2014, there is no mention of the need to create time frames 'within which GBV cases should be disposed of'¹⁶⁸. To the best of the author's knowledge, the procedural changes regarding criminal procedure proposed by the ZLDC have not been implemented so far. According to several of the interviewees, this is because the changes are awaited to be carried through within the large amendments to the Criminal Procedure Code and the Criminal Penal Code that have been pending for a few years now.¹⁶⁹ One interviewee said that it is more effective to make all the changes at once instead of making small changes every now and then.¹⁷⁰

2.4.5 The Anti-Gender-Based Violence (Court) Rules

Section 40 of the AGBV Act states that the 'Chief Justice may, by rules of court, make provision with respect to the procedure on applications to any court under this Act'¹⁷¹. According to a commentary by Chief Justice Irene Mambilima, published in the Zambian media, lack of rules prescribing how the applications are to be made has resulted in the reality that 'no actions have been instituted under the Anti-GBV Act'.¹⁷² Because of this, the Court Rules were drafted by the Anti-Gender-Based Violence Committee.¹⁷³ The members of the Committee were designated in accordance with Section 31(2) of the Anti-GBV Act. After having been drafted, the rules were 'given to the judiciary, to the Chief Justice, and eventually to the Ministry of Justice for passing of the SI'¹⁷⁴ by the Zambian Parliament. The Zambian Parliament passed the proposed document in January 2016 under the name 'The Anti-Gender-Based Violence (Court) Rules'.¹⁷⁵

¹⁶⁸ Compare Working paper 1, supra note 144, p. 23.

¹⁶⁹ Interview with Mr Mwewa Chola, Deputy Chief Parliamentary Council, Ministry of Justice, 13 February 2017. Interview with a magistrate (2), name withheld, 14 February 2017.

¹⁷⁰ 'I think that the dilemma that arises is that "Do you do a small one just for those courts?" [...] A minor review just within those courts or do you do outside this programme, the one that has been going on for a long time, yes.' Interview with Hon. Justice Chalwe Mchenga, SC, 3 February 2017. To revise and reform the law in Zambia lies within the mandate of the Zambia Law Development Commission. Chapter 32 of the Laws of Zambia, Section 4(2) (a).

¹⁷¹ The Anti-Gender-Based Violence Act (No. 1 of 2011).

¹⁷² C. Kalombe, 'GBV Act gets rules', *Daily Mail*, 12 March 2016, <https://www.daily-mail.co.zm/?p=62152> (accessed 6 March 2017).

¹⁷³ Established by the Anti-Gender-Based Violence Act (No. 1 of 2011), Section 31 and the schedule to Section 31 (2).

¹⁷⁴ Interview with Mandy Manda, supra note 93.

¹⁷⁵ The Anti-Gender-Based Violence (Court) Rules, 2016. Statutory Instrument No. 8 of 2016.

The timing of the passing and its colliding with the opening of the first pilot fast-track court in Kabwe was not a coincidence. According to an interview, the opening has been postponed until the rules are passed through.¹⁷⁶ Without the rules and their guidelines on how to grant the orders the courts could not operate.¹⁷⁷

It is important to point out that these rules are valid for civil proceedings. For criminal proceedings, the Act refers to 'the Criminal Procedure Code, the Penal Code and any other written law'.¹⁷⁸ The possible lack of rules for criminal proceedings will be debated later in this study.

The subject of the rules is the Subordinate Courts (Civil Jurisdiction).¹⁷⁹ The rules give guidance to the courts that enables a prompt disposal of civil GBV cases by setting 'procedural and time frames' within which the (civil) cases must be handled. The rules also provide instructions for the service of process; proceedings of the court including judgement, review, and appeal; and application forms (formularies) for various types of documents connected to a protection and/or occupation order.¹⁸⁰ It will be shown later in this study how the Zambian protection orders function in the pilot fast-track courts so far.

According to some interviewed magistrates, the court rules also create the grounds for the judicial activism of fast-tracking the criminal GBV cases.¹⁸¹

¹⁷⁶ Interview with Mandy Manda, supra note 93.

¹⁷⁷ Interview with a prosecutor (1), NPA, name withheld, 2 February 2017.

¹⁷⁸ The Anti-Gender-Based Violence Act (No. 1 of 2011), Part I, Section 2 (1).

¹⁷⁹ The Anti-Gender-Based Violence (Court) Rules, 2016, Section 5.

¹⁸⁰ See *ibid.*

¹⁸¹ Interview with a magistrate (2), supra note 12. Interview with a magistrate (3), supra note 2.

Part 3 FUNCTIONING OF THE COURTS SO FAR

3.1 Opening of the courts

The first Fast-track and user-friendly court to deal with cases of gender-based violence was opened on 22 January 2016 in Kabwe, Central Province. The second Fast-track court was opened on 11 March 2016 in Lusaka, the capital of Zambia. Both courts were inaugurated by the Chief Justice of Zambia, Irene Mambilima.¹⁸² Ambassador of Sweden to Zambia, Henrik Cederin, represented the Swedish donor on both occasions.

3.2 The court in Kabwe

For the seat of the first fast-track court to fight cases of gender-based violence in Zambia, the town of Kitwe, the capital of Central Province, was chosen. The court is localized in the Kabwe Magistrate Courts complex and uses one of the previously existing courtrooms as the specialized court. The room has been renovated and specially equipped for this purpose.

3.2.1 Statistics from the court¹⁸³

According to statistics provided by the senior registrar of the Kabwe fast-track court since the opening of the court until the end of 2016, one civil case and fifty-eight criminal cases have been received. In 2017, as of this writing, eleven criminal GBV cases and no civil cases have been handled.¹⁸⁴

The only civil case of 2016 was withdrawn, and therefore, no protection orders or occupation orders have been granted by the court since its opening last year. This is due to the lack of motivation on the side of the victims, according to a magistrate of the Kabwe court.¹⁸⁵

Of the fifty-eight criminal cases from last year, forty-six have been disposed of and twelve were carried forward.¹⁸⁶ In the statistics, the following criminal offences are counted as gender-based violence: defilement, assault o.a.b.h.¹⁸⁷, assault on a child, grievous bodily harm, indecent assault on a child, indecent assault on a female, unnatural offence, attempted rape, rape, incest by male, and unlawful wounding.

¹⁸² ZLDC launches Anti Gender Based Fast Track, supra note 16.

¹⁸³ These statistics were obtained on the author's visit to the Kabwe court on 15 February 2017 by the senior clerk of court.

¹⁸⁴ As of 15 February 2017.

¹⁸⁵ Interview with a magistrate (3), supra note 2.

¹⁸⁶ Including withdrawal, acquittance, abatement, dismissal, and committing of the case to the High Court for sentencing.

¹⁸⁷ o.a.b.h. – occasioning actual bodily harm.

According to this year's statistics,¹⁸⁸ of the eleven GBV cases so far, five were disposed of and six carried forward.

Looking closer at the criminal offences, the average time for the disposal of a case was 24.4 days per case in 2016. In 2017, it is 25 days per case so far. These numbers should be compared with the original data on how long the cases used to take to conclude. Unfortunately, there are no such statistics available. According to information obtained by a previously interviewed prosecutor the situation is as following: 'We just all know that cases took longer but can't draw conclusive comparisons between pre fast-track courts' and post fast-track courts' time frames.'¹⁸⁹ This suggests a continuing trend of fast-tracking the cases – even though not sanctioned by any statute in the existing Criminal Procedure Code Act. It is, in the words of a magistrate from the Lusaka Court, rather a form of judicial activism that is connected to the magistrates' awareness of the seriousness of the topic¹⁹⁰ as well as the stamp of seriousness given to the issue by the AGBV Act of 2011 and the (Civil) Rules of Court of 2016.

The average number of the days it took for the witness to be heard by the court was not available in the handed in statistics from neither of the courts.

3.2.2 Own observations

The court was visited on Wednesday, 15 February 2017.¹⁹¹ No GBV cases were handled on that day. The special equipment is installed in Room 1 that has been, as mentioned previously, renovated especially for this purpose. The room is divided in two by a wall featuring mirror glass. In this way, the larger part serves as a courtroom, and the smaller part is the user-friendly witness room. In the witness room, a TV screen, a camera, speakers, and microphones are installed. In the interview, a magistrate said that the video and audio transmissions have earlier (possibly) been used in the court proceedings. Right now, they cannot be used because of sound problems.¹⁹²

¹⁸⁸ As of 15 February 2017. See supra note 183.

¹⁸⁹ Information obtained from a prosecutor, NPA, name and address withheld, e-mail, 7 April 2017.

¹⁹⁰ Interview with a magistrate (2), supra note 12. Confirmed in the interview with a magistrate (3), supra note 2. The magistrates came from two different fast-track courts.

¹⁹¹ The original idea was to visit the Kabwe court on several occasions, but due to practical time management reasons, this did not happen.

¹⁹² Interview with a magistrate (4), name withheld, 15 February 2017; Interview with a magistrate (3), supra note 2.

One of the interviewed magistrates summarized the situation by claiming, 'I have given up on it.'¹⁹³ When this magistrate tried to use the equipment, it did not work. The interviewee feels that it is better that the court proceedings go smoothly and without delay than to risk another failure and possibly jeopardize the whole ongoing session. Obviously, in this situation, the interviewed person experienced the need to balance the interests of the witness against the overall interests of a speedy and fair trial, and opted for the latter.

Unfortunately, neither on the day of the visit nor during the whole week were any GBV cases heard at the Kabwe court. For the sake of comparison, a forgery trial with two accused was observed.¹⁹⁴

3.3 The court in Lusaka

For the second pilot fast-track court, Zambia's capital, Lusaka, was chosen. According to some of the interviewees, this was partly because of the convenience of having a large magistrate's court complex already in place, which saved both money and time.¹⁹⁵ The court is localized in the Lusaka Magistrate Courts complex.

Originally, two courts were planned to be opened simultaneously, but due to financial issues, only Courtroom 1 at the magistrate courts was prepared by the time of opening.¹⁹⁶

3.3.1 Statistics from the court¹⁹⁷

The statistics were handed in by the Senior Registrar of the Criminal Registry. The civil statistics were recorded by the author directly from the record book at the Civil Registry. In 2016, nineteen civil cases and 207 criminal GBV cases were handled by the court. For civil cases, a decisive part consisted of protection orders; there were one or two occupation

¹⁹³ Interview with a magistrate (3), supra note 2.

¹⁹⁴ *People vs Wisdom Mwewa and Lilian Mwansa*, offence: forgery. The case did not differ in any way from the cases observed at the Lusaka Magistrate Courts. Nevertheless, this was the only trial of all the trials observed where the accused had legal representation (defence).

¹⁹⁵ Interviews with Pezo Mateo Phiri, supra note 141.

¹⁹⁶ Interview with a magistrate (2), supra note 12.

¹⁹⁷ Statistics for the civil cases were obtained from the Civil Registry of the court on 25 January 2017. For the criminal cases, only the statistics for year 2016 were available – received by the Registrar of the Criminal Registry on 16 February 2017. There is an obvious difference in the ratio of the cases disposed of and carried forward between the Lusaka (83 disposed of and 124 carried forward) and Kabwe court (46 disposed of and 12 carried forward). It was not in the power of the author of this study to research further on the statistical methods used by the courts and what the difference depends on.

orders.¹⁹⁸ On the criminal procedure side, eighty-three cases were disposed of and 124 were carried forward to 2017. In addition, two civil cases were handled in January 2017. Unfortunately, no more precise statistics were available that could enable the author to have a closer look at the time frames in which the cases have been disposed of alternatively carried forward. Therefore, it is impossible to count the average time for the disposal of a case.¹⁹⁹

3.3.2 Own observations

The court was visited on several occasions in January and February 2017.²⁰⁰ Six GBV cases, all of sexual nature and with minor victims, were observed.²⁰¹ The equipment was installed in Courtroom 1, the cases were observed in courtrooms no. 1, 6 and 11. The special user-friendly witness room is situated on the second floor.²⁰² In an interview, a magistrate said that the video and audio transmissions have previously been used in the court.²⁰³ This was confirmed also by an interviewed prosecutor. Nevertheless, the author did not succeed in seeing the equipment function, although on two occasions, attempts were made.²⁰⁴

During one observed proceeding with a 3-year old victim, after a fruitless attempt to use the special equipment, the court went to the chambers for taking the testimony.²⁰⁵ During two proceedings, where the victims were 3- and 8-years old, the court came down from the podium for taking the testimony. The magistrate, prosecutors, and interpreter sat by the table together with the victim.²⁰⁶ This way of handling the witness corresponds to the recommendation by the ZLDC that the 'proceedings in the fast-track courts [should] be informal'.²⁰⁷

In three of the observed cases, the minor victims were examined directly from the witness booth and had to identify the alleged perpetrator by walking to the accused bench and pointing at him.

¹⁹⁸ This according to an interview with a magistrate of the court, name withheld, 25 January 2017. In the record book, the occupation orders were not specified.

¹⁹⁹ Lusaka Court is now changing its method of registering the GBV cases, and subsequently, these kind of statistics should be soon available. Interview with a magistrate (2), supra note 12.

²⁰⁰ The list of cases supra note 45.

²⁰¹ One of the cases, *People vs Lucheya*, observed on 9 February 2017, was adjourned. See also supra note 45.

²⁰² The witness room was presented to the author at her first visit. Later, at an observation of a case, it turned out it was not the right room that had been shown.

²⁰³ Interview with a magistrate (2), supra note 12; Interview with a prosecutor (1), supra note 177.

²⁰⁴ Case *Remmy Mulenga*, supra note 45. The attempts were made both on 13 February and 14 February.

²⁰⁵ Ibid.

²⁰⁶ Case *Mwangala Muyafuluka*, supra note 45; case *Remmy Mulenga*, ibid.

²⁰⁷ Report on the establishing, supra note 23, p. 46.

The average number of days it took for the witness/victim to be heard by the court was not available in the handed-in statistics.

3.4 Functioning of the courts so far as perceived by the interviewees

'[T]he change mainly for me is the attitude towards the offences. The mentality is that these offences should be dealt with quickly – with or without the equipment. [...] So, that's just that. It's not any case that you take time, there is activism on all the stakeholders that it's something that must be dealt with within the shortest possible period of time. With or without the rules. With or without the facilities. [...] Everyone gives them particular attention – from the inception to the Court.'²⁰⁸ These words from an interview with a prosecutor sum up the general attitude the interviewed practising lawyers showed about the functioning of the GBV courts so far. When asked about the overall impact of the courts so far, most of the interviewees sounded either positive or very positive. They always mentioned challenges but often simultaneously talked about feeling a sense of urgency in these cases and trying to act in accordance with that feeling. Many spoke about 'teething problems', 'impediments', or 'challenges' that are natural for every new project.²⁰⁹ In addition, the interviewed often pointed out that the two courts are still pilot projects and should be viewed as such.

According to an interviewed magistrate, the overall positive of the fast-track court so far is that 'there are few cases which are withdrawn – because of fast-tracking'. In his/her opinion, the court itself is a positive because it has given 'dignity [and] confidence to the survivors'.²¹⁰ One of the interviewed, Mandy Manda of the NLACW, confirmed this impression: '[F]or those that have come forward and, you know, have been willing to have the cases prosecuted, we have seen tremendous improvement. We would just want to encourage the judiciary to open up the courts in other districts.' NLACW sees the development very positively as, from their experience, 'matters have been concluded expeditiously. [...] in terms of justice delivery [...] the cases have been disposed of [...] between thirty days to maybe ninety days to be concluded as opposed to the normal procedure, which would range may be from twelve months to years.' This has, according to her, also encouraged the survivors 'that have come forward and [...] have been willing to have the cases prosecuted'. NLACW greatly appreciates this improvement.²¹¹

²⁰⁸ Interview with a prosecutor (2), supra note 120.

²⁰⁹ E.g., Interview with Simon Mulenga Kapilima, supra note 10; Interview with a prosecutor (2), supra note 120; Interview with Gilbert Mwanza, supra note 93.

²¹⁰ Interview with a magistrate (2), supra note 12.

²¹¹ Interview with Mandy Manda, supra note 93.

Additionally, the UNDP representative confirmed positive outcomes of the higher sensitization of the people working with GBV-cases, stating, 'they send it directly to the specialized courts'. On the other hand, there is a limit to the speediness, especially regarding the rights of the accused, which perhaps have been somewhat forgotten on the way.²¹² (S)he added, 'The fast-track court is not only the building. It should be a mental picture as well.'²¹³

One magistrate summed up the impressions and thoughts of many other interviewees about the functioning of the courts by getting right to the point: 'It is a good thing. Especially if the [AGBV] Act can be amended.'²¹⁴

3.4.1 Civil proceedings at the courts

The civil proceedings under the AGBV Act that are handled by the fast-track courts are granting of protection and occupation orders.²¹⁵ The necessary preparations for fast-tracking of these proceedings were carried through before the opening of the fast-track courts as described above. The AGBV Act opened for a possibility to 'by rules of court, make provision with respect to the procedure on applications to any court under this Act, and in particular as to – (a) the manner and form for the commencement of an action under this Act'.²¹⁶ The Act also defined and introduced both protection orders and occupation orders to the Zambian legal system.²¹⁷ In the AGBV (Court) Rules, more time limits are imposed on the procedure of applying for, handling, and issuing of protection and occupation orders, and the application forms are given.²¹⁸ Several of the interviewed lawyers – both from NGOs and the magistrates at the courts – expressed a view that the fast-tracking of the civil procedure functioned well, mostly thanks to the clear time frames. 'It's a process that has been fast-tracked by the Rules.'²¹⁹

²¹² Interview with a programme coordinator, supra note 135.

²¹³ Ibid.

²¹⁴ Interview with a magistrate (3), supra note 2. The absence of amendments will be further discussed in Parts 4 and 5.

²¹⁵ Anti-Gender-Based Violence Act (No. 1 of 2011), Sections 10–23.

²¹⁶ Anti-Gender-Based Violence Act (No. 1 of 2011), Section 40 (a). Notice the formulation 'any court under this Act'.

²¹⁷ Ibid., Sections 10-23.

²¹⁸ See The Anti-Gender-Based Violence (Court) Rules (2016), Parts V and VI. More specifically, all the initial proceedings must be done within fourteen days from the date the case was struck out (Section 19 (2)). The judgment must be made within twenty-eight days of the conclusion of the hearing (Section 28 (3)).

²¹⁹ Interview with a lawyer, WLSA, name withheld, 28 October 2016.

The existence of the rules, in combination with the ground set by the AGBV Act, creates a clear procedural frame that is easily followed.²²⁰ Therefore, according to one interviewee, there is no need for a specialized court in this area, as every court must apply the procedure when handling the GBV cases.²²¹ This is also directly expressed in Section 40(a) of the AGBV Act, which says, 'any court under this Act'.²²² The formulation comprehends all the subordinate courts.

According to the persons interviewed who deal with civil cases, it is thanks to these rules that the proceedings go smoothly and the effects seem to be in accordance with the ambitions of the legislator – or, as the Chief Justice puts it, 'to enhance the interpretation of the Anti-GBV Act'.²²³ Nevertheless, the challenge of the protection and occupations orders seems to lie in the filing, as can be shown by the non-existing statistics from the Kabwe court and a relatively small number of granted orders at the Lusaka court. As one magistrate said, 'Civil cases are handled as well, but they are not as many because people don't know about the procedure.' This magistrate could recall 'four or five cases a month under civil procedure'.²²⁴ Also another interviewed tried to analyse why this is so: 'Fast-track courts are good for the people who have access to the civil law system but not the people from the country/rural areas who never get access to these courts.'²²⁵

In addition, fast-tracking of the civil cases lies in the procedure. The matters are settled in the chambers, and the Rules of Court apply to all the subordinate courts. According to an interviewed lawyer, what would be needed for more efficient fast-tracking of the civil cases is not as much the facilities – as the matters are often handled in the chambers – as to free up time for the magistrates put on these cases. This is because of an urgent work overload at the subordinate courts.²²⁶

In Lusaka, three magistrates have been assigned to deal with civil GBV cases.²²⁷ In Kabwe, there are four designated GBV courts, but these do not deal with civil cases, as there are, as previously mentioned, none.²²⁸

²²⁰ Interview with Mandy Manda, supra note 93; Interview with a lawyer, supra note 219; Interview with a magistrate, (1) supra note 198.

²²¹ Interview with a lawyer, supra note 219.

²²² The Anti-Gender-Based Violence Act (No. 1 of 2011), Section 40.

²²³ GBV Act gets rules, supra note 172.

²²⁴ Interview with a magistrate, supra note 198. Also, this number seems to be a bit exaggerated considering the overall number of the civil GBV cases at the Lusaka court for year 2016.

²²⁵ Interview with Pezo Mateo Phiri, supra note 141.

²²⁶ Interview with a lawyer, supra note 219. The matter of the staff establishment at the judiciary, which lies under the normal levels, was also discussed with Pezo Mateo Phiri who pointed it out as one of the problems that should be looked at. Supra note 141.

²²⁷ Interview with a magistrate (2), supra note 12.

3.4.2 Criminal proceedings at the courts

The criminal proceedings so far lack the Anti-Gender-Based Violence (Court) Rules that would correspond to those on the civil side. Regardless, it can be shown that the cases seem to have been given priority on all levels of their handling, which has also been confirmed by the majority of the interviewees. As mentioned above, there is a sense of urgency of the GBV cases and therefore they are prioritized, even though there are no sections in the Criminal Procedure Code that – so far – would support such behaviour legally. In this way, the priority handling of GBV cases by the subordinate courts becomes a form of 'judicial activism'. This very expression was used by an interviewed magistrate at the Lusaka court and confirmed by a colleague at the Kabwe court.²²⁹ There is reason to believe that similar attitudes towards the GBV cases are practised or about to be practised even by other subordinate courts across the country because of the increase in sensitization and training that the Anti-GBV message has effected during the past years.²³⁰

The question of the use of the special equipment was frequently discussed, as the equipment, in a certain way, came to symbolize the fast-track courts. From the information that targets the public – found on the Internet sides of the *Zambian media* as well as different stakeholders – this is perhaps the most 'marketed' aspect of the establishment of the courts.²³¹ On opening of the court in Kabwe, the head of the project was cited in *Times of Zambia* saying this about the proceedings: 'It will be very conducive because the magistrate as usual will be on the raised platform, the defendant in the dock as usual and the plaintiff in a hidden room but the procession will be moving on smoothly with the recordings nicely on the television scan.' This would make the fast-track court 'one of the best structures'.²³² This picture does not correspond to the observations of the court proceedings made for this study.²³³

²²⁸ Interview with a magistrate (3), supra note 2.

²²⁹ Interview with a magistrate (2), supra note 12; Interview with a magistrate (3), supra note 2.

²³⁰ Anyhow, this is just a theory of the author of this study that cannot be confirmed by any empirical observation, as no visits were paid to other subordinate courts.

²³¹ See e.g., 'The fast-track courts are equipped to be user and child friendly with improved technology to make processing of documents quicker.' http://www.ilo.org/addisababa/countries-covered/zambia/WCMS_449854/lang--en/index.htm, (accessed 20 March 2017); 'The two fast-track courts are equipped to be user and child friendly with improved technology to make processing of documents quicker. They are fitted with equipment which allows protection for victims from intimidation and from facing their alleged perpetrators.' *Zambia Launches Second Fast Track Court*, supra note 17.

²³² Haachizo, P., Gender fast track court milestone, *Times of Zambia*, 1 February 2016, www.times.co.zm/?p=78282, (accessed 5 April 2017).

²³³ See the list of the GBV cases observed, supra note 45.

All of the interviewed had an opinion about the special equipment and its use.²³⁴ None of the interviewed magistrates was currently using the equipment, as it was not functioning properly.²³⁵ A magistrate from the Kabwe court said (s)he has given up on using the equipment because of a previous bad experience. 'It was a total failure' when (s)he tried to use it, so s(he) is now 'doing it the old-fashioned way'.²³⁶ Another magistrate at the Kabwe court said there were 'no major challenges' to the project, only 'small issues, like sometimes when you don't have fuel to pick up your witness because, of course, the usual issues of funding'. Nevertheless, the very same magistrate did not manage to use the equipment the last time (s)he tried, about two or three weeks prior to the interview: 'I wanted to, there was a child witness that have come through, so I thought it was better for me to hear this witness from that aid so that we don't interface with the accused but I was, not able have that facility....'²³⁷ This interviewee was very optimistic about the future of the system and believed that the problems probably would be easily solved: 'Like any other system, when it starts then there will be this impediments.'²³⁸

According to an interviewed magistrate from the Lusaka fast-track court, that court started to use the equipment directly after opening. There have been problems with the equipment since the beginning, but they were able to handle these at first. However, since October 2016, they can't use it anymore. 'It's not useless but you can't use it. It's noisy, the sound. The picture is not so bad.'²³⁹ Until October, this magistrate had 'quite a number of cases' in which the equipment was used, 'but it's outside the law as we know'. Here, the magistrate meant that the use of the special equipment is not regulated by the Criminal Procedure Code. The very same magistrate also experienced the lack of rooms at the Magistrate Courts. Even the functioning equipment the Courtroom no. 1 cannot be used if that room is occupied, as is often the case right now. Better infrastructure is needed.²⁴⁰ Another magistrate of the Lusaka court named the technical problems as one of the major challenges of the project. 'It's not functioning very well, most of the time it is off. Technical problems.'²⁴¹

²³⁴ The equipment is used in criminal proceedings, as the civil cases are usually handled in the chambers. Interview with a magistrate (1), supra note 198.

²³⁵ This was the situation observed by the author at the courts between 25 January and 17 February 2017. Accordingly, the situation described stretches no longer than to the status quo of 17 February 2017.

²³⁶ Interview with a magistrate (3), supra note 2.

²³⁷ Interview with a magistrate (4), supra note 192.

²³⁸ Ibid.

²³⁹ Interview with a magistrate (1), supra note 198.

²⁴⁰ Ibid. The issue of lacking courtrooms has been taken up even by other interviewees. See Part 4 for further discussion about it.

²⁴¹ Interview with a magistrate (2), supra note 12. The issue seems to be discussed within the circles of persons even indirectly involved in the establishment of the courts. E.g., an NPA prosecutor who does not directly work

Nevertheless, most of the interviewed agreed that '[t]he main idea of the fast track is still carried on notwithstanding the equipment not working....'²⁴²

The issue of special equipment might be the most obvious to an amateur observer. Nevertheless, discussed equally as often were the procedural questions connected to the process of establishment of the fast-track courts. In the words of a lawyer from Women and Law in Southern Africa (WLSA), 'they haven't yet quite [...] set up the specialized courts, let me put it that way [...] not in terms of infrastructure, but in terms of procedure'. For handling of criminal GBV cases, the AGBV Act refers to the Criminal Procedure Code and the Penal Code, but these codes have not been amended for the purposes of fast-tracking as of now.²⁴³ Because of these reasons, several of the interviewed magistrates called their activity within the fast-track courts' criminal proceedings 'judicial activism'.

Fast-tracking as a form of judicial activism. An ad hoc solution invented by the magistrates?

The first time the term 'judicial activism' was mentioned was during an interview with a magistrate of the Lusaka fast-track court. (S)he was the first one who put a well-established expression to a situation described by several magistrates interviewed before him/her. All the magistrates that were heard for the purposes of this study described a similar situation: there is a stamp of urgency put on the GBV cases, but at the same time, 'there is a lacuna in the law ... [t]hat even criminal cases that come to your court, you must attach some sense of urgency to them. [...] It's not in the law but they attach a sense of urgency to those cases [...] – on account of the GBV.' And (s)he concluded, 'But we need the law.'²⁴⁴

For these purposes, the Lusaka court – as a 'matter of initiative' – assigned three magistrates to deal with matters of GBV. These three magistrates are exclusive for dealing with civil GBV cases. Nevertheless, for criminal GBV cases, the demand is much higher, and these are handled by many more magistrates, as the author experienced during observations of GBV cases at Lusaka Magistrate Courts. As mentioned above, the Kabwe court has assigned

with fast-track courts said, 'So what I've gotten is the information that the attempts to use the court facilities have not worked.' Interview with a prosecutor (2), supra note 120.

²⁴² Ibid.

²⁴³ Interview with a lawyer, supra note 219. The author of the study tends to agree with this observation. The issue will be further explored in Parts 4 and 5.

²⁴⁴ Interview with a magistrate (2), supra note 12. On account of the Criminal Penal Code: 'You won't find it [any specific rules or guidelines, ELT] because those statuses were not meant to fight the GBV.'

four magistrates to have exclusive competence to handle the GBV cases. Nevertheless, it has been confirmed in an interview that these cases are handled by all the magistrates.²⁴⁵

It is obvious that the judicial activism becomes a form of dealing with the situation when the necessary normative changes have not been carried through yet.

²⁴⁵ Interview with a magistrate (3), supra note 2.

Part 4 INTENDED AND UNINTENDED EFFECTS OF THE FAST-TRACK PILOT PROJECT FROM THE PERSPECTIVE OF POSSIBLE FUTURE DEVELOPMENT

In this chapter, the research base in the form of interviews and observations will be put into an analytic framework of the theory of Thomas Mathiesen. This in order to give answers to the questions asked in the first part of this study,²⁴⁶ among those: whether the objectives put up by the ZLDC were reached; whether the changes in the handling and disposing of GBV case were carried through successfully; and what are the plans for the courts.

4.1 Theory of intended and unintended effects of legal measures

In his book *Råtten i samhället (The Law and the Society)*, Norwegian sociologist of law Thomas Mathiesen analyses the different effects that a legal measure has when applied in a society. He points out that the law (e.g. legislation or courts, in our case) always works within a context and that it always works together with a number of other different relations or factors. In this way, the law always functions as a component in a complex social whole. The effect of a legal measure is nevertheless not to be confused with what is meant by 'effects' in the natural sciences.

Mathiesen divides the potential effects of a legal measure into four categories:

1. stated, intended effects
2. unstated effects that are nevertheless intended by big and powerful groups that influence the society
3. unintended effects that are nevertheless intended by some groups in the society
4. effects that are in no way intended either by the majority or by any minor groups.²⁴⁷

For the purposes of this study, this theory will be somewhat modified, and three of the above described categories will be looked into. (The third will not be analysed because of its too-specific character.) The intended and unintended effects of the specific objectives of the project put up by the ZLDC in the Report on the establishing will be examined under Categories 1 and 2. This because there is no further analysis given on the intended effects of the measures connected to the establishment of the fast-track court. The author is aware that this is a simplification of Mathiesen's theory but one that, *mutatis mutandis*, functions well for the purposes of this small study.

²⁴⁶ See Part 1.2, Purpose and Scope of the Study.

²⁴⁷ Mathiesen, *supra* note 37, pp. 29–31 and 67–68. Translation of Mathiesen's terms made by the author.

4.1.1 Intended, stated effects of the establishment of the courts

Using the obtained written materials from the ZLDC as a point of reference, the specific objectives of the studies made before the establishment of the fast-track courts were to '(i) establish fast-track and user-friendly courts for both victims and perpetrators of GBV, (ii) ensure quick and effective disposal of GBV cases, (iii) to ensure victims' access to justice as enshrined in the Zambian Constitution, [and] (iv) to establish clear procedures and guidelines for use by the proposed courts'.²⁴⁸

a/ Establishment of fast-track and user-friendly courts

The courts have been established in the form of two pilot projects in Lusaka and Kabwe. This objective has clearly been successful. Without the intended effect, there could not have been any study written about the functioning of the project so far.

b/ Quick and effective disposal of GBV cases

Civil cases

The disposal is quick, according to all the interviewed. The time frames were specified by the Court Rules in January 2016. ZLDC does not explain further in the report what is meant by 'effective disposal', but a reasonable guess would be that there should be no further increase in the civil GBV caseload. It seems that this goal is likely to be reached. The disposal of applications for protection and occupation orders is fast and efficient. Nevertheless, this might also correlate to the low number of cases.²⁴⁹

It is in this area that the challenge lies: to sensitize the victims to the existence of the civil remedies as well as strengthen them during the whole process – not only when applying for the order, but also before and after. Here, perhaps both the One-Stop Centres and the Zambia Police Victim Support Unit can play a role.²⁵⁰

One interviewed lawyer deemed it critical that the specialized proceedings should be spread across the country. Once the magistrates and other persons who work with victims of GBV are sensitized about the procedure, it will be much easier to 'capture them'. According to him/her, there is a lack of knowledge about GBV in general, the AGBV Act, and The Rules of Court in particular so that 'the moment you receive an application [e.g. for a protection

²⁴⁸ Report on the establishing, supra note 23, p. 6. See also Part 2.4.4.

²⁴⁹ Also, the handling of the civil GBV cases by other subordinate courts in the country could not have been explored because of the limited size of this study, which also only comprehends the two fast-track courts.

²⁵⁰ Interview with Mr Collins Hikalinda, Zambia Police Victim Support Unit National Coordinator, and Mr Achaje Magai, Inspector, Zambia Police, 31 January 2017; Interview with a programme coordinator, supra note 135.

order] under that form, the mode of commencement, they know immediately that they have to apply the Rules [...] of Court'.²⁵¹ The interviewee is of the opinion that there is a need 'to create specialized courts also under civil [proceedings] so that all these magistrates are freed of other work'.²⁵²

Last but not least, it must be said that the representatives of the NGOs that help women filing for protection and occupation orders and that were interviewed for this study were particularly content with the turnout of the civil proceedings within the establishment of the fast-track courts. They see the civil remedies as easier to pursue than criminal proceedings. According to the representatives for NLACW and WLSA, the procedure runs smoothly and the time frames are respected. As the executive director of National Legal Aid Clinic of Women, Mandy Manda, said, this procedure 'has encouraged the survivors of beating or GBV to report cases because they know they'll receive a hearing in good time, in a reasonable time'.²⁵³ On the other hand, it is important to point out that the specific conditions in Lusaka – an urban area – must be taken into account. Both interviews were conducted in Lusaka. In Kabwe, a semirural area, the reality appears somewhat different.²⁵⁴

Criminal cases

As mentioned above, there are no special rules for handling criminal GBV cases, and the AGBV Act refers to the Criminal Procedure Code and the Penal Code for handling of (criminal) cases of gender-based violence.²⁵⁵ It is not possible for the author to decide whether this consequence of the establishment was intended or not because of different messages given by different preparatory papers²⁵⁶ as well as different views given by the interviewees. Generally, it appears that the magistrates at the courts would like to see amendments to the Criminal Penal Code and the Criminal Procedure Code that would harmonize these statutes with the AGBV Act and make it possible, when handling a criminal GBV case, to move from the field of judicial activism into the area of regular judicial work regulated by Zambian statutory law.²⁵⁷ The amendments do not necessarily need to introduce time frames for the

²⁵¹ Interview with a lawyer, supra note 219.

²⁵² Ibid.

²⁵³ Interview with Mandy Manda, supra note 93.

²⁵⁴ This was also pointed out by an interviewed magistrate in Kabwe, supra note 2.

²⁵⁵ The Anti-Gender-Based Violence Act (No. 1 of 2011), Section 2 (1).

²⁵⁶ While Working paper 1 talks about the need to amend the Criminal Penal Code, there is no mention of such measure in the Report. Compare Working paper 1, supra note 144, p. 24 (under 'Issues for further consideration') and Report on the establishing, supra note 23, p. 45 f. (under 'Recommendations. 5.1 Procedure').

²⁵⁷ Interview with magistrates, supra notes 2, 13 et 198.

criminal proceedings. Some of the interviewees pointed out that this could bring more problems than positives into the well-established criminal penal procedure.

One interviewed magistrate stated that the missing sentencing competences for magistrates influence the process in a negative way. If all the cases could be completed at the subordinate courts instead of having to go to the High Court for sentencing, the handling would win a lot of time.²⁵⁸ On account of quick and effective disposal of GBV cases, one interviewed magistrate named this objective as one of the positives of the project, as it 'can be seen from the number of cases that have been reported, that have come into the courts [...]'.²⁵⁹

On the other hand, Gilbert Mwanza from ZLDC pointed out that 'the concept of fast tracking is not the issue of time frames' but 'the issue of a speedy and justified procedure'. Justice must not be rushed, as the rights of the accused must be taken into account as well, but it is rather an issue of 'not delaying the process unreasonably [because] we are not talking about rushing justice, but we are talking about removal of the delay in the justice'.²⁶⁰

Nevertheless, the objective of quick and effective disposal of the criminal GBV cases has not been accomplished satisfactorily yet. According to most of the interviewees, at least some changes in the form of amendments to the Criminal Procedure Code and Criminal Penal Code must be made if this objective is to be attained on a legal basis, not only on the basis of judicial activism.²⁶¹

c/ Ensuring victims' access to justice

Article 18 of the Constitution of Zambia provides for the securing of protection of law, including the right to a fair hearing and the right to be presumed innocent until proven guilty.²⁶² 'Access to justice' in the specific formulation is not mentioned. In the proposed Bill of Rights that was about to be made part of the Constitution but did not pass the referendum in August 2016, this right was included under Article 32(1): 'A person has the right to access justice.'²⁶³ Article 118(2) of the valid Constitution prescribes principles by which the courts

²⁵⁸ Interview with a magistrate (2), supra note 12.

²⁵⁹ Ibid.

²⁶⁰ Interview with Gilbert Mwanza, supra note 93.

²⁶¹ One of the interviewed had clear proposals about the changes that need to be done: 'Criminal Procedure Code should [...] be amended to create a time frame for [...] these matters how fast they'll be dealt with [...] and then also the Penal Code also needs to be amended to accommodate certain offences which the Anti-Gender-Based-Violence Act seemingly creates [...] but are not content in the Penal Code, which we use as a point of reference for charging for an offence and also [...] for sentencing [...].' Interview with a lawyer, supra note 219.

²⁶² Constitution of Zambia (Amendment), 2016, Articles 18 (1) and 18 (2).

²⁶³ The Referendum Act. (Law, Volume 2, Cap 14) (No. 35 of 2016). Available from <https://www.elections.org.zm/media/the-referendum-question-mobileversion.pdf>, (accessed 4 April 2017).

shall be guided, among them 'a) justice shall be done to all, without discrimination; (b) justice shall not be delayed'.

In Cappelletti and Garth's definition, 'access to justice' means that the system must be equally accessible to all and lead to results that are individually and socially just.²⁶⁴ It is important that this access is effective, not only theoretical. Under this objective, the establishment of the courts means a structural reform that helps victims who live within the coverage area of Lusaka and Kabwe to improve their practical access to justice.

Another structural reform was made operational in 2016 when, according to information provided by a prosecutor from NPA, a Witness Management Fund started to function in order 'to ensure that witnesses are provided for' in terms of travel, lodging, and food expenses. Establishment of a similar fund for witnesses was also among recommendations made by ZLDC.²⁶⁵ It helps in securing the witnesses and speeds up the whole court process when some unnecessary adjournments can be saved.²⁶⁶

On the other hand, victims of criminal GBV cases who live in remote areas still have limited access to justice. Here, the work of NGOs and other stakeholders on so-called 'One-Stop Centres' has improved the situation – as told to the author in interviews with NGO representatives²⁶⁷ – but establishment of new GBV courts improved after all the challenges of the pilot projects were identified as necessary and 'worked on'.²⁶⁸

Even on a procedural level, changes were introduced for both civil and criminal cases. The necessary normative changes were carried through for civil cases but not for criminal cases yet, as described and discussed above.

Two interviewees also pointed out challenges within the civil procedure, where both the normative and procedural changes were carried through. Nevertheless, a practical problem of the victims not filing or filing only seldom for protection and occupation orders remains.²⁶⁹ Naming the reasons why this is so would require further research.

²⁶⁴ Cappelletti and Garth, *supra* note 53.

²⁶⁵ Compare: Working paper 1, *supra* note 144, p. 25; Report on the establishing, *supra* note 23, p. 48.

²⁶⁶ Criminal Procedure Code Act. Chapter 88 of the Laws of Zambia, Sections 149-156.

²⁶⁷ Interviews Mandy Manda, *supra* note 93; Interview with a lawyer, *supra* note 219.

²⁶⁸ According to Gilbert Mwanza, this was also the reason why there were no more fast-track courts rolled out in the country yet. Interview, *supra* note 93.

²⁶⁹ See court statistics for civil GBV cases from Kabwe and Lusaka courts in Parts 3.2.1 and 3.3.1.

Accordingly, it is obvious that the objective of ensuring victims' access to justice by establishing fast-track and user-friendly courts has not been accomplished fully yet but it is clearly 'under construction'.²⁷⁰

d/ Establishing clear procedures and guidelines for the courts

Under this point, once again, the civil and the criminal procedure must be look at separately.

The civil procedure attained this objective when the Rules of Court passed Zambian Parliament in January 2016. The remaining challenge is to spread knowledge about the Rules, including spreading physical copies of the Rules through the country²⁷¹ as well as training the magistrates in how to approach and prioritize civil GBV cases.

The criminal procedure for handling GBV cases, on the other hand, appears right now to be a mixture of the well-established old procedure and some form of – by the magistrates self-imposed – judicial activism.²⁷² Most of the interviewed magistrates talked about a need for clearer guidelines. As one magistrate formulated it, 'If it's in black and white, it's easy.'²⁷³ According to the same magistrate, the only kind of information they got before the opening of the fast-track court in Lusaka was 'the Act and the Rules and you read them'.²⁷⁴ With guidelines for criminal proceedings at the fast-track courts still missing, there is space left not only for judicial activism, but also for arbitrary actions that should be avoided when the judicial authority is to be 'exercised in a just manner and such exercise shall promote accountability'²⁷⁵.

The interviewees also wished for instructions and more hands-on training for handling criminal GBV cases, including technical training on how to handle the new equipment.²⁷⁶

It is, therefore, obvious that a lot of work is still to be done for this objective to be accomplished, especially on the criminal side.

²⁷⁰ Access to justice of the accused is a burning issue and must be mentioned in this study as well. It will be shortly discussed in Part 5, as the analysed objective only talks about victims' access to justice.

²⁷¹ To get a physical copy (or a copy on a computer file) of the Rules of Court (Civil) constitutes a minor challenge. The author herself had to put some effort into getting one. The issue has been discussed in the interview with a lawyer from WLSA, supra note 219.

²⁷² See after Part 3.4.2.

²⁷³ Interview with a magistrate (1), supra note 198.

²⁷⁴ Ibid.

²⁷⁵ Constitution of Zambia (Amendment), 2016, Article 118.

²⁷⁶ Interview with a magistrate (1), supra note 198; Interview with a magistrate (3), supra note 2.

4.1.2 Unstated but intended effects of the establishment of the courts

The character of this objective makes it natural that the analysis of its effects will, at least partly rely on qualified, it is hoped, guessing on the part of the author.

Under this point, according to the author, it has become obvious during research for the study that there were some unstated objectives with the fast-track court project. The most apparent one was the ambition of the Zambian Republic to fulfil its international commitments. Besides, this objective is only partly unstated, as Zambia's commitments within the Southern African Development Cooperation community are widely known. It has simply not been put into the specific objectives of the report.²⁷⁷

It has been mentioned in Part 2 that there was a time limit given by then president Michael Sata upon his arrival from the Great Lakes Region Conference. This time limit was to establish fast-track courts by the year 2015. It is probably not a coincidence that it is the very same year that is stated in SADC's Protocol on Gender and Development: 'by 2015, enact and enforce legislation prohibiting all forms of gender-based violence'.²⁷⁸ In addition, an interviewed judge confirmed the ambitions of the Government that is 'becoming more aware of the gender issues'.²⁷⁹

Therefore, it is very probable that the state leadership felt some international pressure to deliver the institutions, or, in the words of Amartya Sen, 'to get the institutions right' and on the way lost its focus on the original goals of the project. From what has been shown about the functioning of the project so far, it is obvious that by the time the courts opened in January and March 2016, the ultimate focus was on the opening as such, i.e. on the 'institutional arrangements in society' instead of the actual societies that were meant to emerge if the objectives of the project were achieved.²⁸⁰ The feeling of rushing things in order to 'get them done' was expressed by several interviewees in informal conversations. One of the interviewed magistrates talked specifically about the Anti-Gender-Based Violence Act: 'I felt it was done in a hurry, and for that reason, we are missing out on many aspects of fast-tracking GBV-cases'.²⁸¹

²⁷⁷ Nevertheless, the international legal framework of the court establishment project is described in Chapter 2.1 of the Report. See Report on the establishing, *supra* note 23.

²⁷⁸ SADC Protocol on Gender and Development, Article 20 (1a).

²⁷⁹ Interview with Hon. Justice Florence Lengalenga, Lusaka High Court, 16 February 2017.

²⁸⁰ Sen, *supra* note 67.

²⁸¹ Interview with a magistrate (2), *supra* note 12.

4.1.3 Unintended effects of the establishment of the courts

a) Positive unintended effects

Here will be described the positive effects of the establishment that are not stated among the four specific objectives in the September 2014 Report on the establishing of the fast-track courts.

It was mentioned earlier that all the interviewees showed an overall positive attitude towards the establishment of the fast-track courts, mainly because of the importance the interviewees attributed to the issue of gender-based violence. Among the positive effects the interviewees mentioned were the changed attitudes towards the GBV offences – the new mentality that these cases 'should be dealt with quickly'.²⁸²

Some of the interviewed magistrates saw judicial activism as a positive unintended effect of the court's establishment: '[P]ositive unintended effect is that you are doing, you are being activists here and you are trying to fast-track even if the amendments in Criminal Procedure Act [are not] being legislated yet....'²⁸³ And another interviewed: 'There is activism on all the stakeholders.'²⁸⁴

A feeling of pride in a job well done could also be sensed on the side of the interviewed magistrates. One magistrate was especially positive. (S)he said that the emphasis of this project should lie on the process, not on the courtroom as (s)he felt happened now. (S)he continued: '[T]he fast track is the process itself. That is from when you take plea to adjournment or disposing of the case. That is the process that we are interested in. And with the fast track court, we are doing very well. I don't know if you are interested to see our statistics?'²⁸⁵

In this way, the motivation of the magistrates to believe that they can be able to make a difference for the sake of fighting gender-based violence in Zambia grows as their work gives direct results.²⁸⁶

²⁸² Interview with a prosecutor (2), supra note 120.

²⁸³ Interview with a magistrate (3), supra note 2.

²⁸⁴ Interview with a prosecutor (2), supra note 120.

²⁸⁵ See parts 3.2.1 and 3.3.1.

²⁸⁶ Naturally, not all the ways of fighting gender-based violence in Zambia are of restrictive nature, and many goals in the Joint GBV Programme are about prevention and education. It is just not within the scope of this study to write about them.

b) Negative unintended effects

*('[M]aking it clear that [...] legal things cast their shadow over only part of the area they were once assumed to cover.')*²⁸⁷

From what was written and quoted from the interviews previously, it is clear that there are quite a few effects of the establishment of the fast-track courts that were not intended from the beginning.

Civil procedure

For the civil procedure, the number of victims filing for protection and occupation orders is lower than expected. The court in Kabwe, within its first year of functioning, did not grant a single protection order and received only one application, which was subsequently withdrawn. In Lusaka, twenty-one protection and occupation orders were granted between March 2016 and January 2017. This in an area that is the most populated in Zambia, the Lusaka District having 2,330,200 inhabitants according to the latest population projections.²⁸⁸ If the access to justice for victims functions in this way it is neither real nor effective for many of them, just theoretical and for the sake of 'getting the institutions right'. It only allows to 'check' for another of the improvements on the list of the international commitments of the country.

In order to make filing for protection and occupation orders more accessible for its target group, the victims of gender-based violence, the reasons behind the low application numbers must be thoroughly examined. According to a magistrate interviewed in Kabwe, one of the reasons could be the lack of a social protection net for rural victims,²⁸⁹ who prefer to stay with the perpetrator (often a husband or partner) than face an uncertain future as a single woman and (often) parent.²⁹⁰ This negative social stratification effect, when the social and economic status of the victims appears to have a direct influence on their choice to file (or rather not to), was apparently not foreseen by the legislator.²⁹¹

²⁸⁷ Chanock, supra note 9, p. 222.

²⁸⁸ <https://www.citypopulation.de/php/zambia-admin.php?adm2id=0504>, (accessed 21 March 2017).

²⁸⁹ The word 'women' was used in the interview, as victims are predominantly women.

²⁹⁰ Interview with a magistrate (3), supra note 2. For more specific insights into the 'lived realities' of the victims of GBV, see the interesting study by Kenneth Mulife, *An assessment of the implementation of the Anti-Gender-Based Violence Act No. 1 of 2011 of Zambia in curbing domestic violence against women: A case study of the city of Lusaka*, Harare, University of Zimbabwe, April 2014.

²⁹¹ Another possibility is that the legislator chose not to foresee this effect in order to be able to 'get the institutions right' as quickly as possible.

Criminal procedure

From what has been described in Part 3.4.2, it is obvious that challenges on the criminal procedure side are of a character that must be dealt with in order to secure functioning of the fast-track courts within the existing legal frames in the country. These consequences could not have been intended when establishing the courts, as the goal was to 'get things done right from the beginning'. The 'lacunas in law', as one of the interviewed magistrates called them,²⁹² were known by both the legislators and other legal stakeholders involved in the process, but the author can only guess that there was a reliance on the long-planned amendments of the Criminal Penal Code and the Criminal Procedure Code being carried through in time. The problems that the magistrates are dealing with on a regular basis are among others²⁹³:

On the structural and logistical level, there is an apparent lack of courtrooms. Both fast-track courts have been given one courtroom each. In Lusaka, two courtrooms were planned originally, but the plans did not work out. In addition, the rooms are shared by two or three magistrates each, which makes it even more difficult when a GBV case comes up and the ambition is to fast-track it. As one interviewed put it, '[I]nfrastructure is a challenge.'²⁹⁴ Because of the limited space and a big caseload, especially at Lusaka Magistrate Courts, the GBV cases are currently handled in different rooms.²⁹⁵ Some of the interviewed used the Lusaka-based Traffic Offences Fast-Track Court as an example of a specialized court with a well-organized infrastructure – an own courtroom at the Civic Centre, own magistrates and specific dedication to certain issues.²⁹⁶

Additionally, questions of staff establishment in the judiciary arise in connection to the task of fast-tracking the GBV cases. In the opinion of an interviewed lawyer, the judiciary must allocate magistrates for these matters specifically. It has been shown earlier in this study that the allocation has taken place but is not sufficient capacity-wise.²⁹⁷

Another factor that further contributes to the described situation is the failing equipment. It is the impression of the author of this study that a magistrate does not feel motivated enough to leave his or her courtroom (which is his or her comfort zone) in order to

²⁹² Interview with a magistrate (2), supra note 12.

²⁹³ The author makes no claims on being able to catch all the challenges faced by the magistrates at the fast-track courts. Only those discussed and/or observed are taken up in this study.

²⁹⁴ Interview with a magistrate (2), supra note 12.

²⁹⁵ There are twelve courtrooms at Lusaka Magistrate Courts and five courtrooms at Kabwe Magistrate Courts. The author saw GBV cases being held or being written on the case list in most of the rooms of the Lusaka court.

²⁹⁶ Interview with a defence lawyer, LAB, name withheld, 30 January 2017; Interview with Simon Mulenga Kapilima, supra note 10.

²⁹⁷ Interview with a lawyer, supra note 219. See also supra note 226 about the issue of staff establishment.

move to a room with unreliable equipment and risk prolonging the hearing instead of making it fast-track and user-friendly. This impression was also confirmed in interviews with several magistrates.²⁹⁸

On this level also, the need for stronger technical support as well as technical training of the magistrates assigned to the GBV cases was not planned for.²⁹⁹ During an unplanned meeting with a person from the IT division of the Zambian judiciary, it was revealed that there is no clear division of maintenance competences between the distributor of the equipment and the courts' own IT staff.³⁰⁰

On the procedural level, besides the special equipment, the most discussed question in the interviews was whether there is a need for the Anti-Gender-Based Violence Court Rules for criminal proceedings. The author will not in any way try to analyse valid Zambian criminal statutes, as it is not in any way in her competence. Nevertheless, it seems obvious that there is a need to establish clearer procedures and guidelines for use by criminal fast-track courts, which obviously was one of the specific objectives of the whole project. The challenges that the magistrates face on the procedural side do not only relate to the issues of fast-tracking (the potential need of time frames) but also the user-friendliness of the courts.

The user-friendly concept of the courts, which includes special witness rooms and the use of audio and video recordings for hearing the victim or other witnesses and providing for communication between the courtroom and the witness room, is not only a logistic challenge. Right now, this arrangement also prolongs the procedure – and not only when the equipment does not function.³⁰¹

Furthermore, with missing guidelines, it is not clear how – or up to what age – a child witness should receive the special child witness treatment. The author has observed cases of defilement and indecent assault with 3- and 8-year-olds in which the court came down from the podium in order to hear the witness. On the other hand, the author also observed a case of

²⁹⁸ Interview with a magistrate (1), supra note 198; Interview with a magistrate (3), supra note 2; Informal conversation with a magistrate, name withheld, 15 February 2017.

²⁹⁹ During the author's stay in Lusaka in January and February, it came to her knowledge that the Joint GBV Programme donors were informed about the technical challenges and were about to act. Whether the situation has been solved or bettered remains unclear though.

³⁰⁰ Informal conversation with a person from the Zambia Judiciary IT Department, 15 February 2017.

³⁰¹ The author has observed two tries to use the equipment, one of which collapsed because of the non-functioning technique. The second try was successful technically, but the child witness did not manage to handle the poorly installed equipment in the special witness room, which requires to be able to watch the picture on the screen while listening to the sound coming from a completely different direction. Case *People vs Remmy Mulenga* observed on 13–14 February 2017. The situation described by one of the prosecutors in the case. Name withheld.

defilement with 10-, 11- and 13-year-olds that witnessed from the witness booth. These victims also had to identify the alleged perpetrator, who sat on the accused bench, from a distance of 1.5 metres.³⁰²

Apparently, these were not the intended consequences of establishing the fast-track courts. Keeping the criminal GBV proceedings the 'old-fashioned' way cannot be upheld if the planned changes are to be carried through.

On the normative level, the instalment of special equipment and its use is not contained as a special section in the Criminal Procedure Code. This situation only invites the defence to object to the use of 'illegal' techniques in the courtroom. A magistrate in Kabwe has already experienced this kind of objection during hearings when the equipment was used.³⁰³ In the interview with a lawyer from the Legal Aid Board (LAB) in Lusaka, the author was informed that LAB is considering making these kinds of objections too.³⁰⁴ One of the interviewed described the situation as a need for the Criminal Procedure Code to marry with the physical infrastructure that has been built for fast-tracking.³⁰⁵

In addition, with the introduction of the fast-track procedure, which so far has been managed by judicial activism, to the criminal courts, the need for strengthening of the defence for the accused became more evident. Out of all the cases observed, only in one did the accused have legal representation. In two of the observed GBV cases, the accused were not able to formulate a single question during the cross-examination.³⁰⁶ The rights of the accused were mentioned in ZLDC's (final) report, but these rights were not included in the specific objectives, which focused instead on victims' access to justice. According to an interviewed prosecutor, 90 percent of the accused in Zambian subordinate courts do not have legal representation. This does not correspond well to the right to a fair trial guaranteed by the Zambian Constitution, Section 36 of the Bill of Rights.³⁰⁷ The lack of defence in subordinate courts was also discussed in an interview with a prosecutor from the NPA and a magistrate.³⁰⁸

³⁰² List of cases supra note 45.

³⁰³ Interview with a magistrate (3), supra note 2.

³⁰⁴ Interview with a defence lawyer, supra note 297.

³⁰⁵ Interview with a lawyer, supra note 219.

³⁰⁶ Cases: *Remmy Mulenga* and *Elias Lassana*, see supra note 45.

³⁰⁷ In accordance with Article 7.1 c of the Banjul Charter (African Charter on Human and People's Rights) even the 'right to defence, including the right to be defended by counsel of [...] choice is guaranteed.'

³⁰⁸ Interview with a prosecutor (1), supra note 177; Interview with a magistrate (2), supra note 12 – This magistrate also talked about the ex officio legal representation of the accused sent for sentencing to the High Court. (S)He called it 'minimal. [...] It is just for sentencing and litigation.'

Furtherly, the fact that the sentencing is often reserved for the High Court because of magistrates' limited sentencing powers prolongs and possibly even 'kills' the case, which was perhaps successfully started in the fast-track court. In the opinion of an interviewed magistrate, it would be good to 'select all these offences, which hinge on GBV, [a]nd subject them to the same rules as the civil aspects of GBV. So, even if it is defilement, it can be tried by the sub-court and confirmed by the sub-court. Just by enhancing the sentencing.' In such a way, the whole process would get a notable speed-up.³⁰⁹

Last but not least, the very same magistrate talked about the existing imbalance and even contradictions between the broad definition of 'GBV' given by the Anti-Gender-Based Violence Act and the narrow view of GBV offences, which are not even defined as such by the Criminal Penal Code. This magistrate suggested looking at the Zimbabwean Domestic Violence Act. According to the interviewed, this act offers an 'all-in-one solution' – 'They cite the offences and they attach them to penalties to them. [...] Everything connected to the GBV has been identified and consolidated in one statute.' In that way, the magistrates do not need 'to fish around – this time they go this way to find the offence, this time they go this way to look for a definition of this... It's confusing.'³¹⁰

4.2 Plans for new courts

According to several interviewees, new courts are on their way to being opened. The interviewees gave different information as to the number of courts that would open: it varied from one (Chipata) to three (Chipata, Ndola, and Livingstone) to four (Chipata, Ndola, Livingstone, and Mongu). According to one interviewee, the UN looked into the new openings in 2016, and the judiciary showed them the premises in Chipata. Additionally, the judiciary's IT staff participated. '[E]verything was supposed to be set up last year but it's been quiet, I think, on the, on the part of UNDP.'³¹¹

On the account of the new courts, Gilbert Mwanza of the ZLDC said, '[T]he courts are here to stay but they couldn't roll out the whole country because we didn't know what will be the challenges. So now that we know the challenges are coming up it's time to work on them. So as we're working on [it], they will be working on Livingstone, Chipata, Ndola and Mongo courts. They are not expecting to have those similar problem because they have been worked on already.' It is crucial to do a proper 'clean-up' of the pilot court projects

³⁰⁹ Interview with a magistrate (2), supra note 12.

³¹⁰ Ibid.

³¹¹ Interview with Hon. Charles Kafunda, Chief Registrar, Lusaka High Court, 13 February 2017.

in Lusaka and Kabwe so that the challenges they have encountered will not be repeated with the other courts.³¹² This approach was also confirmed in the interview with Simon Mulenga Kapilima of the Ministry of Gender '[the new courts] should take into account all the challenges and difficulties that would have been faced by these two'.³¹³

According to the latest information from the Judiciary funding from the UNDP for the Ndola, Livingstone, and perhaps Chipata courts is awaited. 'If the Courts are funded then this year they will be set up.'³¹⁴ Whether the UNDP will finance the establishment of new fast-track and user-friendly courts remains unclear. The author did not manage to get an answer from the representative despite several attempts.

³¹² Interview with Gilbert Mwanza, *supra* note 93.

³¹³ Interview with Simon Mulenga Kapilima, *supra* note 10.

³¹⁴ Name withheld, e-mail, 21 March 2017.

Part 5 FINAL THOUGHTS

In this study a project was described that makes a part of a major programme to combat gender-based violence, intended to improve the situation for thousands of (mostly) women and children who fall victim to this violence every year. After having spent about 10 weeks talking to the stakeholders and observing the courts in Lusaka and Kabwe, my main impression of the project is that the ambitions were very high, but the reality of it is much more sober, as the courts are not fully functioning as intended. This was described in the previous chapters.

The fast-track and user-friendly courts to fight gender-based violence are right now fast-tracking criminal GBV cases, only thanks to the judicial activism of the magistrates as shown in the study. Additionally, the courts are meant to be user-friendly so that the traumatized victims, both adults and (especially) children, do not need to relive their painful experiences or be intimidated by the accused. Based on the interviews conducted in Lusaka and Kabwe, and on the observations in the GBV courtrooms in Lusaka, it is apparent that the courts so far do not live up to the role they have been set up to play in the Zambian judiciary. Instead, the user-friendliness of the court depends in every single case on the willingness, attitude, and knowledge of the magistrate presiding over the court.³¹⁵

It is also my impression that the commitment and level of personal motivation for the project varies depending on the level of the project. Amongst the people directly involved in the creation of the courts – both the theoretical background and the 'practical' establishment including working within the new established structure – the commitment and desire to make the change and to give the survivors a better chance for a fairer and faster legal process is unmistakable. On the other hand, there is reason to believe that at the highest level, the establishment of the court is just another thing to check as 'done' on the long list of demands and pressures from international partners and donors. The wish is to live up to their expectations and guarantee a future positive response for upcoming projects. 'Getting the institutions right'³¹⁶ makes it easier.

The one part of the project that seems to be functioning as intended is the civil side: the protection orders (and, to a far lesser extent, even occupation orders) are being issued. The courts do not need to try to invent their own fast-tracking procedure by rushing

³¹⁵ During the courtroom observations, differences in attitude toward child witnesses amongst different magistrates were observed, but it is not within the scope of this study to discuss these further.

³¹⁶ Glenn, *supra* note 67, p. 100.

things. They only need to follow the existing rules of court.³¹⁷ Therefore, there actually does not seem to be a need for a specialized court once the procedure has been settled. Instead, in civil procedure, the focus should now lie on sensitizing and encouraging the victims about the orders.

In connection with the theory of access to justice described in Part 1.4, a question arises: has the establishment of the fast-track court created a real and effective access for the survivors, or is this access only a chimera? A serious answer to this question would require a more complex study over a longer period. From the limited amount of research that I had a chance to carry through and which was mostly focused on the fast-track courts, it seems like a lot of anti-GBV work has been done and is being done in the field with the One-Stop Centres and shelters for victims by NGOs such as NLACW, WLSA, and YWCA. Thanks to the hard field job of these organisations the victims' access to justice increases and the survivors see that justice can be carried out practically. Nevertheless, this work does not lie directly within the aim of the study.

On the other hand, within the specific field of this work the attempted changes for victims of serious GBV crimes who attend criminal court sessions, are not always being transformed into reality because of both legal obstructions and technical problems. The situation creates frustration amongst the magistrates, which should be taken seriously. In one interview with a magistrate, I heard words that will stay with me for a long time: 'For me [...] it's moot that you come here and come and do research and nothing happens. Because, for years, they have been calling us for workshops and asking us the same thing but nothing happens.'³¹⁸

Despite all the challenges and, as some call them, 'teething problems', it will not be the frustration and shortcomings that I remember from this study. It will be the pride that I heard in the voices of the magistrates, prosecutors, and NGO representatives whom I interviewed when they told me about the changing statistics, about victims daring to go to court, about changing societal attitudes towards GBV crimes. The feeling that they are part of a change for the better and that, despite everything, things will get better – as they always do in Zambia.

³¹⁷ The Anti-Gender-Based Violence (Court) Rules, 2016.

³¹⁸ Interview with a magistrate (3), supra note 2.

5.1 Possible future research

My main impression after having carried out this research is that I have only scratched the surface of the topic. So many aspects of the topic would deserve an in-depth look. Even this study would have needed more time and space to capture the big picture. Following, I list some of the ideas that could be worth further researching.

In the interviews, one of the most discussed questions was the one about the need for Rules of Court for criminal proceedings. Some argued for and other against, but everyone agreed that putting time limits to criminal procedure cases is far more complicated than doing it within civil procedure. Why is it so? Similar attempts in India could be used for comparison.

The need for the long-planned amendments to the Criminal Procedure Code and the Criminal Penal Code becomes very apparent in the interviews and could be a subject of research per se.

It has long been a matter of discussion whether Article 23(4) d, e, and f of the Zambian Constitution, which allows for exceptions mostly regarding matters related to marriage, should be removed.³¹⁹ The existence of this exception for customary law in the Zambian Constitution has also been discussed and criticized in international organizations of which Zambia is a part, e.g. the UNCSW.³²⁰ It should be of great interest to examine if and how this duality in legal matters regarding family law shows in the functioning of the courts.

Another question that popped up continuously was why did the donors not pay more attention to the legal complexity of a project of this kind during the assessment phase?

Further, this project was partly supported by Sweden. It was previously mentioned that the attitude towards specialization and specialized courts in Sweden is generally negative. Therefore, it would be interesting to research why a country might choose to support building of institutions abroad that they do not really believe in establishing back home. Why is this so, and if successful, could this project be in some way inspirational for Sweden? If not, what then makes the difference in the possibility for financing legal specialization abroad and nota bene in a developing postcolonial legal system, but not in the home country? Is it possible that the threshold of legal certainty is perceived as higher in the Western legal systems than in the post-colonial legal systems?

³¹⁹ GRZ – UN Joint Programme, *supra* note 19, p. 6.

³²⁰ At the 57th session of the United Nations Commission on the Status of Women (UNCSW), 4–15 March 2013, Zambia's representative talked in its statement, among others, about the 'engagement of traditional leaders as custodians of tradition and agents of change in addressing issues relating to early marriages'. Report on the 57th Session, p. 5.

Last but not least, if the project continues, and if, after the two pilot courts, the other three or four courts will be opened in upgraded form and free of all the 'teething problems', it would be of great value to do an impact evaluation of the courts' establishment after a longer period – possibly five years.³²¹ That could inspire and help other countries to create similar models to fight gender-based violence all around the world.

³²¹ One of the interviewees that did not wish to be quoted expressed a personal opinion that a lot of knowledge is lost when evaluating only outcomes (short-term evaluation) but not impacts (long-term evaluation).

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Mr Mwewa Chola, Deputy Chief Parliamentary Counsel, Ministry of Justice, 13 February 2017.

Mr Collins Hikalinda, Zambia Police Victim Support Unit National Coordinator, 31 January 2017.

Hon. Charles Kafunda, Chief Registrar, High Court, Lusaka, 13 February 2017.

Hon. Justice Florence Lengalenga, High Court Lusaka, 16 February 2017.

Mr Achaje Magai, Zambia Police Victim Support Unit Inspector, 31 January 2017.

Mrs Mandy Manda, National Legal Aid Clinic for Women, Executive Director, 20 October 2016.

Mrs Pezo Mateo Phiri, National Programme Officer, Embassy of Sweden in Lusaka, 10 October 2016 and 8 February 2017.

Hon. Justice Chalwe Mchenga, SC, Court of Appeal, 3 February 2017.

Mr Simon Mulenga Kapilima, Assistant Director of the Department of Gender Rights, Ministry of Gender, 10 February 2017.

Mr Gilbert Mwanza, Senior Researcher Officer, Zambia Law Development Commission, 21 October 2016 and 17 February 2017.

Lawyer, Legal Aid Board, name withheld, 30 January 2017.

Lawyer, Women and Law in Southern Africa, name withheld, 28 October 2016.

Magistrate (1), Magistrate Courts, name withheld, 25 January 2017.

Magistrate (2), Magistrate Courts, name withheld, 14 February 2017.

Magistrate (3), Magistrate Courts, name withheld, 15 February 2017.

Magistrate (4), Magistrate Courts, name withheld, 15 February 2017.

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ATTACHMENTS



REPUBLIC OF ZAMBIA THE JUDICIARY

In reply please quote:

No.....

All communication should be addressed
to the Chief Administrator, to the Judiciary
and not to any individual by name
Telephone: +260 211 252016
Fax: +260 211 251743
Telegraphic address: JUDICIAL

CENTRAL ADMINISTRATION
PLOT No. 438 INDEPENDENCE AVENUE
P.O. BOX 50067
LUSAKA, ZAMBIA

7th November, 2016

Ms. Elena Lakso Tesakova
Plot 103
Kudu Road
LUSAKA

**RE: PERMISSION TO VISIT THE LUSAKA AND KABWE
ANTI-GBV FAST TRACK COURTS**

The above subject matter refers.

I write to notify you that the Chief Administrator of the Judiciary, has granted you authority to visit the Lusaka and Kabwe Anti-GBV Fast Track Courts. Kindly note that you will be required to brief the Chief Resident Magistrate - Lusaka Magistrates Complex and Principal Resident Magistrate - Kabwe upon arrival at the respective stations.

By copy of this letter, the Chief Resident Magistrate - Lusaka Magistrates Complex and Principal Resident Magistrate - Kabwe are accordingly informed.

T. S. Musonda
ACTING REGISTRAR - SUBORDINATE COURTS

- c.c. The Chief Resident Magistrate
Lusaka Magistrates Complex
LUSAKA
- c.c. The Principal Resident Magistrate
KABWE

Jag, Elena Lakso Tesáková, registrerades på kursen första gången HT16. Jag har omregistrerats en gång och inte deltagit i något tidigare examinationstillfälle.