

REPORT OF THE COMMITTEE ON LEGAL AFFAIRS, GOVERNANCE, HUMAN RIGHTS AND GENDER MATTERS FOR THE FIRST SESSION OF THE TENTH NATIONAL ASSEMBLY APPOINTED ON 8TH NOVEMBER 2006

Consisting of

Mr J J Mwiimbu, MP (Chairperson); Mr J C Kasongo, MP; Mr A Mbewe, MP; Mr B Sikazwe, MP; Mr H J C Mtonga, MP; Mr E Sing'ombe, MP; Rev V M Sampa-Bredt, MP; Mr B M M Ntundu, MP.

The Honourable Mr Speaker,
National Assembly,
Parliament Buildings,
LUSAKA

Sir,

Your Committee have the honour to present their Report for 2007.

Functions of the Committee

2. In addition to any other duties placed upon them by Mr Speaker or any Standing Order or any other order of the National Assembly, the duties of the Committee on Legal Affairs, Governance, Human Rights and Gender Matters are as follows:

- (i) to oversee the activities of the Ministry of Justice, Gender in Development Division(GIDD) and other government departments or agencies directly related to the operations of your Committee;
- (ii) to study, report and make appropriate recommendations to the Government through the House on the mandate, management and operations of government ministries, departments and/or agencies on issues related to your Committee;
- (iii) to carry out detailed scrutiny of certain activities being undertaken by government ministries, departments and/or agencies under their portfolio and make appropriate recommendations to the House for ultimate consideration by the Government;
- (iv) to make, if considered, necessary, recommendations to the Government on the need to review certain government policies and/or certain existing legislation; and
- (v) to consider any Bill(s) that may be referred to them by the House.

Meetings of the Committee

3. Your Committee held twelve meetings during the year under review.

Procedure Adopted by the Committee

4. During the course of their deliberations, your Committee considered and adopted the following programme of work for 2007

- (i) consideration of the issues of the Action-Taken Report on your Committee's Report for 2006;
- (ii) detailed study and consideration of submissions on Women, Land Acquisition and Customary Law: A Legal and Gender concern;
- (iii) detailed study and consideration of submissions on the Criminal Justice System and Congestion in Zambia's Prisons;

- (iv) detailed study and consideration of submissions on the Governance System in Zambia – the Constitutional Review Process; and
- (v) tours arising from deliberations.

Operations of the Committee

5. Your Committee requested detailed memoranda from Permanent Secretaries of various ministries and Chief Executives of institutions and Non-Governmental Organisations on the topics contained in the Programme of Work. Thereafter, your Committee invited witnesses to appear before them to exchange views with them based on the written submissions.

Your Committee also scrutinised the responses in the Action-Taken Report on the Report of your previous Committee. Your Committee also undertook tours to selected institutions.

PART 1

CONSIDERATION OF TOPICAL ISSUES

TOPIC I: WOMEN, LAND ACQUISITION AND CUSTOMARY LAW: A LEGAL AND GENDER CONCERN

6. Your Committee recognise that land is one of the critical resources in development which should be accessed by all, regardless of their gender. Your Committee also recognise the challenges women in Zambia face because of the dual system of law which recognises both Customary and Statutory legal regimes. They also observe that Customary law varies with tribe and it tends to be generally discriminatory against women.

Your Committee, Sir, also acknowledge that the Government has a significant role to play in ensuring that all individuals exercise their rights without being discriminated against by virtue of their gender.

Your Committee sought to undertake the study with the ultimate objective of:

- (i) finding out whether there was a deliberate policy by the Government to empower women with land;
- (ii) finding out what Government's policy was on the domestication of international instruments that fight against gender discrimination in the existing legal framework as regards women's rights;
- (iii) advocating for the amendment of the articles in the Constitution that were discriminatory in nature as regards the application of Customary law to the rights of women; and
- (iv) finding out what support the Government had rendered to women in acquiring and owning land especially in customary land.

To assist them undertake the study objectively, your Committee invited the following witnesses to provide written submissions on the subject:

- (a) the Permanent Secretary, Ministry of Lands;
- (b) the Permanent Secretary, Gender in Development Division (GIDD);
- (c) the Executive Director, Non-Governmental Coordinating Council (NGOCC);
- (d) the Executive Director, Women and Law in Southern Africa (WLSA);
- (e) the Executive Director, Women in Law and Development in Africa (WILDAF);
- (f) the Executive Director, National Legal Aid Clinic for Women;
- (g) the Chairperson, Lands Tribunal;
- (h) the Coordinator, Zambia Land Alliance;
- (i) the General Secretary, Council of Churches in Zambia; and
- (j) the General Secretary, Zambia Episcopal Conference.

The Stakeholders Concerns

Your Committee heard that Zambia's adherence to a dualist legal framework had posed a considerable number of challenges to its citizens, especially women. This was because both statutory tenure and customary tenure were not administered from the assumption that there ought to be an equitable distribution of land between men and women. Accordingly, the rules and conditions governing both Statutory tenure and Customary tenure were modeled from the premise that did not pay due regard to the social and economic background of the country in which women had been a marginalised lot and thus deserved affirmative action measures.

The fight for women's rights required that laws relating to land acquisition and also those dealing with complaints on land matters should be reformed so that even issues relating to customary tenure could also be dealt with.

Your Committee heard that among the laws that needed reform when it related to land ownership by women were the *Intestate Succession Act*, the *Lands Act* and the *Lands and Deeds Registry Act* as well as the *Housing (Statutory and Improvement Areas) Act*.

Further, reform was needed in the sense that it should be clearly stated that a woman could own real property in her own capacity without hiding in the shadow of the husband or male relative. Reform of the intestacy laws needed to relate to the ownership of the matrimonial home by the woman after the husband's death. Currently, the provision only gave a life interest to the surviving spouse. Basically, the law had indirectly made ownership of real property not realisable and as such needed reform. Harmonisation of Statutory law and Customary law was cardinal in a dual system like ours.

Your Committee was informed that the following measures needed to be put in place in order to address this issue:

- (i) new policies and the *Land Act* should explicitly include a provision to compel the Ministry of Lands, the Lands Tribunal, City Councils and other stakeholders in the nation to desegregate data according to gender and disseminate the same to the public;
- (ii) policy and law should categorically spell out an easy process of acquiring land by poor rural women in order that they do not go through the current rigorous procedures;
- (iii) since rural women were not economically empowered, the Government should establish a scheme where women would be helped to pay for land and then pay back in installments;
- (iv) schemes should be put in place to help these rural women with implements to develop those lands;
- (v) there should also be a national awareness building programme to change the whole mindset about the role of women, rural or urban, in development through land ownership;
- (vi) the Government needs to seriously engage chiefs through Gender in Development Division (GIDD) to sensitise them on the *Convention on Elimination of Discrimination against Women (CEDAW)* and the Government's commitment to this Convention and how chiefs could contribute towards achieving this by empowering women with land as is the case with HIV/AIDS. This should be done in local languages;
- (vii) the Lands Tribunal should be decentralised to all districts of the nation to enable rural women to appeal for arbitration at places closer to home; and
- (viii) the Republican President should use his constitutional power to influence chiefs to give land to women as had influenced chiefs to give land to investors.

Your Committee heard that although the Government had taken the view that it would progressively realise rights contained in the preamble to the Constitution, which were economic, social and cultural rights, this was not happening. They observed that many women's rights were economic, social and cultural in nature.

Your Committee heard that, although many international instruments had been signed and ratified, they could not be used in the country's legal system because they had not been domesticated.

Since Article 62 expressly vested the country's legislative powers upon Parliament, it could not, legally speaking, make any international instrument into law. The most that National Assembly could do in such matters was to seek clarifications from the Cabinet Minister responsible for the treaty in question as well as advice on the implications of such a treaty to the country through the Committee on Foreign Affairs.

Due to this legal framework, domestication of international instruments tended to be premised more on moral than legal obligation, which made any advocacy for domestication difficult.

Your Committee were informed that domestication of international instruments should only be done through Parliament. In that way, the spirit of the Constitution would be met and the instruments would be self-effecting, having been legislated upon by the legislative body as part of the ratification process.

Your Committee heard that the most notable way of assisting vulnerable women would be to adopt affirmative action measures in land alienation relating to women, adopt the Mungomba Constitutional Review Commission recommendation to repeal Article 23 [4] [c] of the current Constitution and create a Women's Development Fund, as was the case with the youths, and encourage lending financial institutions to give loans to women.

Land policy and legislation that provided affirmative action with at least fifty percent (50%) of land being allocated to women applicants and measures to inform women of their right to apply and their entitlement to land allocation should be put as a deliberate government policy.

Your Committee heard that there was need for the Government to consider giving women incentives such as soft loans, streamlining of systems or policies such as fertilizer support programmes and cattle re-stocking exercise.

Government's View

Your Committee heard that the Government recognized that gender inequalities still existed in the application and practice of laws. This was because of application of its dual legal system where statutory law existed alongside customary law. Application of statutory law provided for equality between women and men, whereas the application of customary law may have had a tendency of subordinating women's rights to masculine preferences, and, therefore, contributed to discrimination against women and girls.

Harmonising of Statutory and Customary Laws had not been successful because customary laws were not written; they existed in traditions and practices.

Your Committee were further informed that, in 2003, the Government, through Zambia Law Development Commission and the Ministry of Justice, initiated a restatement of customary law. The objective of this assignment was to ascertain current customary laws and their conformity with current socio-economic and political values of the country as reflected in statutory laws. This exercise was intended to avoid conflict between the two laws and to ensure non-discrimination.

Your Committee heard that the situation regarding duality of statutory and customary law remained the same. The Ministry of Justice needed to expedite the finalisation of the restatement exercise and disseminate the results to the public.

Your Committee heard that Gender in Development Division (GIDD) had worked very closely with the Ministry of Lands during the formulation of the Draft Land Policy that brought out the reservation of thirty percent (30%) of titled land for women as prescribed in the National Gender Policy of 2000. This measure

had been introduced as part of the mechanisms of economically empowering women and enhancing their property rights, particularly through ownership of land.

With regard to this provision, your Committee were informed that the Ministry of Lands had developed a Policy that would ensure that women were allocated 30 percent of all available land and still be able to compete with men for the remaining 70 percent of the land. This policy was intended to empower women economically in terms of ownership of economic resources. The Gender in Development Division (GIDD) had also been co-opted in the Ministry of Lands' Allocation Committee in order to facilitate the empowerment process.

In addition, your Committee were informed that GIDD and other key stakeholders would embark on awareness creation campaigns on this policy to ensure that all categories of women participated, accessed and benefited fully from this policy provision.

The Ministry of Lands was also committed to inform all councils that, when implementing this policy, they should consider 30 percent allocation of land to women in their respective councils.

The Ministry was also creating an Information Centre, which would contribute towards informing women and female youth of the availability of and procedures for acquisitions of land.

The Fifth National Development Plan (FNDP), as focus for implementation and coordination for 2007, had gender-mainstreamed in all sector chapters in addition to the stand-alone and specific chapter on Gender. The Government worked with Non-Governmental Organisation Coordinating Council (NGOCC) in facilitating the mainstreaming of gender into the FNDP.

Your Committee was informed that, one strategic objective among GIDD's mandate was to facilitate domestication of regional and international instruments on gender and human rights, including information dissemination.

Your Committee heard that GIDD advocated and lobbied the Government and the Legislature in particular, for comprehensive domestication of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC), which contributed to improvement on the status of women and children in Zambia.

The Ministry of Justice also supported GIDD's efforts through signing, ratifying or acceding to these international instruments to which Zambia was a State Party. GIDD and the office of the Minister for Gender and Women in Development, therefore, requested the Ministry of Justice to speed up the process of ratifying and domesticating these documents, among other important human rights instruments.

Your Committee further heard that GIDD, in collaboration with Civil Society Organisations such as the Non Governmental Organisation Coordinating Council (NGOCC), Women and Law in Southern Africa (WLSA), and Women in Development in Africa (WiLDAF) was disseminating information on implementation of the *Beijing Platform for Action and the Convention*. In order to ensure systematic dissemination of gender related information, the Government, through the Public Service Management Project would, in the first and second quarters of 2007, embark on a process of developing a Gender and Development Communication Strategy.

Your Committee were informed that Zambia was a full member of the United Nations *Commission on the Status of Women (CSW)* for the next four years beginning January 2007 and was also a signatory to the following international, regional and sub-regional instruments that related to Women and Children's Humanitarian and Social Issues; Economic Development and Regional Integration; Democracy and Good Governance; Peace and Security:

- (a) the declaration on the Elimination of Violence Against Women, (UN, 1993);
- (b) the African Charter on Human and People's Rights, (AU, 1981);

- (c) the SADC Declaration on Gender and Development, 1997; and its Addendum on the Prevention and Eradication of Violence Against Women and Children, 1998;
- (d) the International Conference on the Great Lakes Region (IC/GLR) Dar es Salaam Declaration on Peace and Development, December 2004; and
- (e) the December 2006 IC/GLR Pact on Peace, Security and Development.

Your Committee heard that Zambia had not yet signed the *African Charter's Protocol on the Rights of Women in Africa*; the *Optional Protocol on the Elimination of all Forms of Discrimination Against Women* and the two *Optional Protocols on the Convention on the Rights of the Child*.

Nonetheless, some provisions of the *Convention on the Rights of the Child and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)* had been domesticated through the Amended *Penal Code (Act No. 15 of October 2005)* and Policy documents such as the National Gender Policy and National Child Labour Policy, 2006.

Your Committee were informed that GIDD strongly recommended that the Ministry of Justice Directorates of Legislative Drafting and International Law and Agreement should take an audit of Zambia's implementation status of all signed and non-signed international and regional instruments.

Your Committee heard that Government policy on allocation of land to women as stated in the National Gender Policy and the Strategic Plan of Action and the Land Policy was being adhered to by the Ministry of Lands as attested by published names of applicants in the print media, who were allocated plots after interviews. Selection of applicants after two recent interviews exceeded 30% and women were allocated 40% of the plots. When advertising availability of plots women were always urged to apply. The 30% empowerment policy was being implemented by district councils, who were agents of the Ministry in land allocation and the Ministry monitored adherence to the directive.

Your Committee were informed that in rural areas, land was owned and occupied by both men and women under customary tenure and that 94% of all the land in Zambia constituted customary land. Distribution of land for settlement by villagers to men and women was done by traditional rulers, namely, chiefs and head persons, according to the customs.

Comparative statistics for land distributed under customary tenure was not available.

As for the 6% State land, whose distribution was done by the Ministry of Lands, national statistical figures were currently not gender disaggregated. The Ministry of Lands was redesigning the system to capture gender parameters on all properties.

Your Committee were informed that, comparatively, the sample from Lusaka City on two recent adverts showed the pattern set out below.

(i) ***October 2006 Advertisement***

Of the 741 applications received, 299 were women, representing a percentage of 40%. From the available 75 plots, 40 were allocated to women representing 53%.

(ii) ***January 2007 Advertisement***

Upon advertisement, 250 applications were received and out of these, 96 were women, representing a percentage of 38%. From the available 40 plots, 23 were allocated to women, representing 57%.

Your Committee were further informed that the assistance rendered by the Government to women in acquiring and owing land was in the form of land advocacy programmes where Ministry of Lands officials visited chiefs in their palaces and urged them to also consider allocating land to women in their own right.

In urban areas, district councils were also urged and sensitised to recommend women for allocation of plots.

Your Committee further heard that the main legal challenge faced by women in rural areas in acquiring and owning land with regard to customary law was the unwritten customary laws and practices that prohibited women from owning land in their own right. Under customary law, land was owned by men, hence land user rights of women depended on marriage. Upon dissolution of marriage or death of the husband, the wife lost user rights for land that the couple had been using. Therefore, the *Intestate Act* needed to take into account land, as was the case with property left by deceased persons.

Your Committee heard that there was need to legislate for land rights of women in customary areas so as to prevent widows and young children from losing their birth right and rights to own land.

Committee's Observations and Recommendations

Your Committee observe the following:

- (i) there exist discriminatory laws, in particular *Article 23 (4) (c,d) of the Constitution*, which provide for discrimination against citizens on the basis of personal and customary laws;
- (ii) the *Intestate Act* did not provide for ownership of customary land to be inherited by the surviving spouse; and
- (iii) the Government had not adopted and domesticated various protocols relating to women's rights that it was a State party to.

In view of the above, your Committee recommend that:

- (i) as a matter of urgency, *Article 23* of the Constitution should be amended to conferring of land rights to women;
- (ii) the *Intestate Act* should be amended to enable farming land held under customary land tenure system to be inherited by the surviving spouse and children;
- (iii) the Government must adopt and domesticate all protocols that relate to women and children's rights;
- (iv) the *Marriage Act* must be amended so that women married under custom can be entitled to fifty percent of the marital assets; and
- (v) a Women's Empowerment Fund be created with guidelines on its administration to enable women access financial resources.

TOPIC II: THE CRIMINAL JUSTICE SYSTEM AND CONGESTION IN ZAMBIA'S PRISONS

7. Your Committee recognise that the issue of congestion in prisons and other detention facilities is one of the most serious problems currently confronting the prisons authorities in Zambia.

The need to decongest the prisons is imperative due to the serious implications on the welfare of the prisoners. Your Committee acknowledge that issues of hygiene and health, even for inmates, are a human rights concern. Therefore, they are of the view that the need to decongest these facilities is a matter deserving urgent attention.

Your Committee, therefore, undertook a study in this regard to:

- (i) establish what was being done about the inadequate capacity of existing prison facilities;
- (ii) advocate for the judiciary to have a stipulated time limit within which cases have to be disposed of;

- (iii) find out what had been done and what can be done in the administration of alternative means of sentencing to prison terms; and
- (iv) find out what coordination existed among the three arms of the criminal justice system in ensuring speedy disposal of cases.

Your Committee invited the following witnesses to submit memoranda on this issue:

- (i) the Permanent Secretary, Ministry of Home Affairs;
- (ii) the Commissioner of Prisons;
- (iii) the Chief Immigration Officer;
- (iv) the Director, Human Rights Commission;
- (v) the Attorney-General; and
- (vi) the Inspector-General of Police.

The submissions given by the various stakeholders are set out below.

Stakeholders' Views

Your Committee heard that Zambian prisons were overcrowded resulting in a host of human rights violations. The list of violations included degrading and inhuman treatment resulting from the conditions under which they were living, violations to the prisoner's rights to health, clean and safe drinking water, protection from prolonged/unlawful detentions, their rights to a fair trial and secure protection of the law as provided under the Zambian Constitution. Their very basic right to life was compromised by the conditions under which the prisoners were forced to live.

Some of the causes of congestion in Zambia's prisons included:

- the slow judicial process;
- inadequate judicial officers to preside over the matters (cases);
- delayed delivery of judgements;
- lack of adequate transport within the Prison service (particularly in this case for the purpose of ferrying prisoners to and from court);
- inadequate housing facilities for prisoners i.e. cells – most of Zambia's prisons were built in the colonial days and were now ancient monuments in need of major refurbishments or replacement. The physical state of these prisons was lacking both in security and fitness for human habitation; and
- non-attendance of court particularly for remand prisoners (i.e. suspects that were awaiting trial and had not yet been convicted) – this particular category of prisoners often suffered unlawful or prolonged detention, particularly when they had been arrested for minor offences or for offences that attracted a minimal sentence.

In determining correct sentences, the courts needed to bear in mind:

- (i) the views of the Legislature expressed in legislation such as the *Penal Code*; and
- (ii) that public interest in criminal law was publicly enforced not only with the object of punishing crime but also in the hope of preventing it. It was hoped that sentences would deter both the offender and would be offenders.

Your Committee were informed that lack of facilities within the prison system had resulted in failure on the part of the state to separate different kinds of offenders such as juveniles and adult prisoners and also in accordance with their offences resulting in a number of prisoners becoming habitual offenders after their incarceration as opposed to being reformed persons as was intended by their being imprisoned.

Your Committee were informed that, for the criminal justice system to function effectively and efficiently and to deliver on its intended objective, there was need to ensure that:

- (i) the Criminal Justice System (CJS) was adequately equipped with necessary financial, human and other resources;
- (ii) alternative forms of punishment be considered in an effort to decongest prisons particularly in respect of minor offences; and
- (iii) alternative forms of sentencing to be considered can include increased use of compensation and restitution orders and community service, in all cases, bearing in mind the implication on the protection of the fundamental rights and freedoms not only of the offenders but also of the public.

Cooperation and concerted collaborative efforts between the component institutions of the Criminal Justice System was necessary to help decongest Zambia's prisons, all the while carrying out its intended functions and protecting rights of the offender and members of the public.

Your Committee heard that administering alternative means of sentencing needed to be handled with caution, since most cases that went before the courts of law were criminal by nature. Nevertheless, the stakeholders were of the view that, applying community service upon conviction, in minor offences, be only at the discretion of the courts of law where the culprit had been proved beyond any reasonable doubt that he/she could not escape.

The stakeholders were of the view that it would be a good approach for the judiciary to have a stipulated time limit within which to dispose of cases. They proposed a thirty days ultimatum as an ideal time limit for the judiciary to dispose of cases, especially those regarding minor offences.

Your Committee were informed that there was need for domestication of international conventions Zambia had ratified, particularly the social and economic ones, improvement of the efficiency of the legal system through increased numbers of court rooms, judges, magistrate and prosecutor.

A multifaceted approach through concerted efforts by all stakeholders was required to ensure that justice was done expeditiously as 'justice delayed was justice denied'.

The objectives of the Criminal Justice System, in summary, should therefore be:

- (i) to reduce the level of crime, disorder and offending;
- (ii) to improve people's feeling of safety and the confidence of the whole society/nation in the criminal justice system;
- (iii) to improve the treatment of victims and witnesses; and
- (iv) to protect the rights of accused persons.

The Government's Views

The Permanent Secretary, Ministry of Home Affairs, informed your Committee that it was true that most of the prisons in Zambia were congested, i.e., there were about **15,000** inmates occupying infrastructure which were meant for **4,000** prisoners only. There had been no new prisons facilities built or expanded for a long time other than the uncompleted Mwembeshi Maximum Prison in Lusaka.

Furthermore, the staff establishment in the Prison Service was not adequate. There were about 1,856 prison officers, giving a ratio of one officer to eight prisoners, which was a violation of the law that provided for a ratio of one to four.

Inadequacy of infrastructure had led to difficulties in classification of prisoners. For example, juveniles and other remandees were mixed without distinction.

Your Committee heard that the Government was at the moment putting its resources into two projects, namely, phase one of the Mwembeshi Maximum Prison and Kamfinsa Prison.

When the Mwembeshi Maximum Prison Phase One is completed, it would decongest Lusaka and Kabwe based prisons, while the refurbishment of the Kamfinsa Prison, which was quite big, would decongest all Copperbelt-based prisons.

Your Committee were informed that Zambia had relied on imprisonment as the main form of punishment for crime. However, it had now been recognised the world over that imprisonment was not always the best way of dealing with offenders.

According to Judge Dennis Challer, “imprisonment is extremely costly to the tax payer, destroys prisoner self-esteem and denies society of prisoner’s productivity. It fails to repay victims, is followed by recidivism and ignores accountability for the criminal wrongdoing”. These factors made imprisonment unattractive, hence the need to seek alternatives. The alternative was the **Community Service Order** which got its momentum from the Kampala Declaration on Prison Conditions in Africa. This was a result of the recommendations made by forty African countries, Zambia included, held in Kampala, Uganda, from 19th - 20th September, 1996.

The Kampala Declaration contained a section on alternative sentencing which recommended that Community Service and other non-custodial measures should, if possible, be preferred.

Your Committee heard that Community Service legislation in Zambia was introduced in 2000 and it existed in the form of amendments to three principal statutes, namely, the *Penal Code – Chapter 87 of the Laws of Zambia, Act No. 13 of 2000* and the *Criminal Procedure Code – Chapter 88 of the Laws of Zambia, Act No. 13 of 2000*.

The introduction of Community Service as a non-custodial punishment was therefore a result of worldwide penal reforms. It had also been influenced by local and regional pressures against worsening prison conditions and the treatment of offenders.

In view of the above, the Government had found it necessary that community service sentencing be resorted to more frequently as this would greatly assist reduce the pressure on prisons. Consequently, a committee of stakeholders was put in place to run a pilot programme which would facilitate the imposition, implementation and management of community service orders. The Committee was currently putting the final touches for starting the pilot programme.

However, your Committee were informed that despite community service sentencing legislation being in place in Zambia since 2000, it had suffered implementation setbacks and courts rarely impose community service sentences on convicted persons.

A number of reasons were given for this adverse development and these included:-

- (i) shortage of authorised officers or non-appointment of authorised officers to supervise the sentences;
- (ii) non-availability of resources and facilities for authorised officers to use when supervising the sentences; and
- (iii) absence of clearly defined activities to be undertaken by convicted persons when carrying out a community service.

On the need for the judiciary to have a stipulated time limit within which cases have to be disposed of, your Committee heard that the Ministry of Home Affairs felt that such a law would create more problems than it would be intended to solve. Some cases, by their nature, were difficult and were not easily investigated. In the event of such a law coming into force, courts may be forced to release potential criminals who may have stayed in custody longer than the law may have stipulated.

Notwithstanding the above, if this issue was to do with delays in disposing of cases in courts, then it was advisable to have an effective integrated Criminal Justice System which should include more court rooms, more magistrates and judges, qualified prosecutors and professional investigators. The system could lead to less congested prisons.

Your Committee heard that the Government supported and encouraged the Judiciary, the Police and the Prisons, (as the three arms of the Criminal Justice System), to liaise and interact in order to find solutions to certain administrative problems which came about as a result of joint day to day operations. This was being done at district, provincial and central levels.

However, the way forward for the three arms of the Criminal Justice System would be to facilitate a speedy flow and sharing of information, shared infrastructure and resources.

Your Committee were informed that limited resources had slowed down the Government efforts to improve prison conditions. However, indicators were now being seen of possibilities of Government financial position drastically improving for such institutions as the Zambia Prisons Service.

The Permanent Secretary stated that, in the recent past, there had been some remarkable improvement in the prison service and prisons. Your Committee heard that the Government had procured a fleet of trucks to ease and quicken movement of inmates from one place to another. Furthermore, tractors were purchased and distributed to each province to boost production of food for feeding inmates.

The Permanent Secretary also stated that all provincial prisons had been fitted with electrical cooking pots in order to, at least, feed the inmates twice a day. In addition to the above, 15,000 mattresses for distribution to all prisons were procured.

Your Committee heard that the Government, under the Administration of Justice priority area of the Governance Chapter of the Fifth National Development Plan (FNDP), was implementing a programme designed to improve access to justice for all, including the poor and vulnerable, women and children.

This programme would be achieved through development of an effective and accountable justice sector that was capable of meeting needs and interests of poor, vulnerable and marginalised people. Key Access to Justice Institutions involved in the programme included the Zambia Police, the Legal Aid Board, the office of Director of Public Prosecutions (DPP), the Judiciary and the Prisons Service.

Regarding congestion in Zambian prisons, your Committee heard that the issue of remandees as a cause of congestion in Zambian Prisons was a serious matter that required an urgent solution.

The Police were trying their best to address this problem in the following ways:

- (i) the Inspector General of Police had given a directive to all Officers-in-Charge to ensure that Police bonds were given to suspects who were alleged to have committed minor cases or cases that were bonded order to avoid unnecessary detentions and thereby minimising congestion in both police cells and prisons;
- (ii) Police had come up with a re-training policy, where Officers-in-Charge and Criminal Investigations Officers were taught, among other topics, the concept of overcrowding in cells and prisons and on how best to decongest prisons, to ensure that officers did not only learn and have practical answers to the problem at hand but also disseminated this knowledge to their subordinates;

- (iii) Police Criminal Investigators were being sensitised on the need to do their investigations in an expeditious manner so that cases were disposed of without much delay; in this way, suspects would not be held longer than was necessary; however, in a case that was not bondable or bailable, congestion could be minimised if such a case was speedily investigated; and
- (iv) Ensuring that stakeholders and three arms of the Criminal Justice System work together as a team; since each one of the units making up the Criminal Justice System had its own problems, working together among them could easily solve the problem of congestion in prisons.

In addition, holding workshops and seminars for all the stakeholders in the Criminal Justice System could enhance their interaction and thereby be in a position to find common solutions to the problem of congestion in prisons.

The majority of prisoners were convicts and this had significantly contributed to congestion in some prisons. Therefore, the Government had embarked on the process of transferring convicted prisoners from congested prisons like Lusaka Central Prison and Kabwe Maximum Security Prison to Kamfinsa Prison. Through this exercise, they had transferred a total of eight hundred and thirty three (833) prisoners to Kamfinsa, of whom one hundred and sixty four (164) prisoners were from Lusaka and six hundred and sixty nine (669) prisoners were from Kabwe Maximum Security Prison. Consequently, they had significantly reduced congestion at the above mentioned two prison establishments. They was room to accommodate at least five hundred (500) more prisoners at Kamfinsa because eight dormitories were currently not occupied.

Your Committee heard that as of 11th June 2007, prisons had a population of fourteen thousand three hundred and ninety five (14,395) prisoners broken down as follows:

• Convicts:	9062
• Remandees:	4545
• Prohibited Immigrants:	146
• Condemned:	299
• Juvenile Remandees:	162
• Juvenile Convicts:	153
• His Excellency's Pressure:	28

Fifty-three prisons were made to accommodate five thousand five hundred (5,500) prisoners. This meant that they had an occupancy rate of two hundred and sixty two percent (262%) or one hundred and sixty two percent (162%) overcrowded.

Committee's Observations and Recommendations

Your Committee observe the following:

- the problem of congestion was a serious one deserving urgent attention as it was a human rights issue;
- prison infrastructure was currently inadequate to cater for the large numbers of prisoners, hence the congestion;
- the sentencing policy in the Judiciary needed to improve to avoid custodial sentences which led to overcrowding in the prisons;
- prison personnel lacked motivation as their conditions of service remained poor;
- prisoners were held for long periods without being taken to courts;
- there was inadequate funding to the prisons, police, judiciary and the DPP's office; and
- there was no coordination among the stakeholders in the Criminal Justice System.

In this regard your Committee recommend that the Government should:

- build more prison facilities to accommodate the increased prisoner intake;
- renovate existing prison facilities;
- improve communication, cooperation, and coordination among criminal justice institutions and other stakeholders;
- increase competence and motivation of personnel in criminal justice institutions;
- improve funding to the prisons, police, the judiciary and the DPP's office;
- identify prisoners held for a long time and make recommendation for their release from custody depending on the nature of the offence; and
- establish a co-coordinating mechanism among the offices of the Police, Prosecutions and Courts in order to strengthen investigations and prosecutions.

TOPIC III: THE GOVERNANCE SYSTEM IN ZAMBIA – THE CONSTITUTIONAL REVIEW PROCESS

8. Your Committee are aware that the issue of enacting a new Constitution is paramount to good governance. They also realise that the constitutional review process is important in ensuring that the Constitution stands the test of time.

Your Committee acknowledge that the Government has a significant role to play in ensuring that the people of Zambia have a good Constitution.

In this regard, your Committee requested detailed information on the following:

- (a) the role of the Constitutional Review Commission;
- (b) views on the adoption of the Constitution through a Constituent Assembly; and
- (c) views on what needed to be done to improve the Constitutional making process.

Your Committee invited submissions from the following witnesses:

- (a) the Permanent Secretary, Ministry of Justice;
- (b) the Attorney General;
- (c) the Law Association of Zambia;
- (d) Transparency International – Zambia;
- (e) the Zambia Law Development Commission; and
- (f) the Executive Director, NGOCC.

The submissions were as follows:

Stakeholders' concerns

Your Committee heard that Constitutional development was not a new thing to Zambia. Since independence, Zambia had had four constitutional reviews. Constitutional changes followed upon recommendations from the Chona (1970), the Mvunga (1990) and the Mwanakatwe (1993) Commissions,

resulting in the 1973, 1991 and 1996 Constitutional enactment respectively. Various factors, among them, economic and political necessitated these reviews.

Unfortunately, each Constitution had been rejected by most Zambians because of lacking constitutional legitimacy. This was primarily because the *Inquiries Act, Chapter 41* of the *Laws of Zambia*, (that establishes a “Commission of Inquiry”) gave the Government the powers to reject or accept people’s recommendations and make any modifications that the Government desired through a document commonly referred to as the Government “white paper”.

As a consequence, the 1996 Constitutional Amendments continued to raise a lot of concerns that required comprehensive review. For example, the 1996 Constitutional Amendments did not incorporate economic, social and cultural rights, children’s and women’s rights in the Bill of Rights. In addition, flaws were noticed in electoral legislation and practice, such as, the presidential election petition process and use of the public media.

As a consequence, in April 2003, the President appointed the Mung’omba Constitution Review Commission to review the Constitution in order to enhance democracy and good governance. The President of the Republic of Zambia, in his speech at a meeting with members of the Constitution Review Commission and other stakeholders on 4th May 2003 at State House in Lusaka, noted that the current Constitution does not provide a good basis for political, social and economic emancipation. He further noted that the Constitution was not only defective, inadequate and oppressive in many ways, but that it had become altogether suffocating and a source of conflict and confrontation in Zambia.

Your Committee were informed that the appeal for a Constitution that would ‘stand the test of time’ appeared to be a fundamental demand that was generally shaping the economic, political and ethical minds of the public in Zambia. This was rightly so because the significance of a good Constitution was key to democracy, good governance, the rule of law and development of the country.

Unfortunately, the constitution review process in Zambia had been seen to lack constitutional legitimacy by most Zambians, thus challenging the very basis of its existence.

Your Committee heard some of the issues of concern are as set out below.

(a) **Legal Framework for the Constitutional Review Process:**

The current Government, like others in the past, constituted the Constitution Review Commission under the *Inquiries Act*. The *Inquiries Act* established a “Commission of Inquiry” and gave the Government the powers to reject or accept people’s recommendations and make any modifications that the Government desired through a document commonly referred to as the Government “white paper”.

It had strongly been felt that the *Inquiries Act* provides a conducive environment for the Government in power to push into the Constitution its own agenda as opposed to the people’s agenda, thus the process being seen only as Government driven as was the case with the 1996 Constitutional Amendments when the Government rejected about 70 percent of the good and positive recommendations made by the Mwanakatwe Constitution Review Commission.

(b) **Mode of Adoption:**

The current Zambian Constitution had no provision relating to “adoption.” Adoption was a concept that was not recognised by the Constitution and not part of the practice of the Zambian Parliament. Because of the Constitution’s silence over the matter, the Executive had unilaterally adopted the draft Constitution and tabled it to Parliament. The Mung’omba Commission observed in its final report that although the term “adoption” was not defined in the Constitution, “adoption of the Constitution by popular mode” was ordinarily understood to mean that people themselves made the Constitution and gave it their seal of approval.

Your Committee were informed that Civil society, opposition political parties, and an increasing voice of citizens submitted, considering a Constituent Assembly as the preferred and most democratic method of final adoption for the proposed constitution. Arguments forwarded were that the manner in which a constitution was adopted had major implications for its legitimacy. A pre-requisite for the legitimacy of the Constitution was that the people should be involved either in its adoption or its enactment, and thus the recommendation that the next Constitution should provide for adoption of the Constitution through a Constituent Assembly. Further, advocacy had been towards the need for a referendum to enable a complete overhaul of the present Bill of Rights to include second and third generation social entitlements.

On the issue of what needed to be done to improve the system of enacting a new Constitution, your Committee heard that unless the concerns raised above were addressed, any future Constitution Review Processes would continue to be marred with suspicion and would lack any form of legitimacy if respect for human dignity with regard to an individual's right to participate in constitution-making was not assured. In other words, the way a process – in law or in practice – was designed either assured respect for people's views (the source of the content and custodians of a Constitution) or disregarded people's input. Therefore, the process largely determined and/or protected the content. These two aspects – process and content – needed not be discussed in isolation.

Such a realisation had prompted civil society groups in Zambia to consistently argue that if a Constitution was a “mirror” of people's aspirations, visions, beliefs and values, then it must be a popular document, a document debated and adopted by a broad-based representative body (referred to as either Constituent Assembly or National Convention).

It was clear that people had lost confidence and trust in their leaders when it came to issues to do with making of the Constitution. Thus, there was need to move from the traditional way of making the Constitution to a new way that would be generally accepted and thereby ensure that the Constitution stood the test of time. To improve the system of enacting a new constitution in Zambia, not only for this generation but for more generations to come, there was need to put in place an Act of Parliament that would address and lay down the procedure of enacting a Constitution.

Your Committee were informed that the proposed Act could be called the “Constituent Assembly Act”. It was not necessary to have a Constituent Assembly Technical Committee as was the situation currently. The Constituent Assembly Act should put in place a Constituent Assembly that would work on the constitution and adopt it.

A constitution that was perceived as being imposed on a large segment of the population or having been adopted through manipulation of the process by one of the stakeholders was unlikely to gain sufficient popularity or legitimacy to endure the test of time.

Your Committee were informed that the fact that successive governments had used the *Inquiries Act* to come up with new constitutions did not in any way render it the best method through which a new constitution should be adopted. As earlier alluded to, the *Inquires Act* actually subtracted from the process of legitimising any new constitution.

Popular democracy demanded institutionalisation of a culture of consultation and reciprocal control with regard to law-making and use of power and privileges. Adoption of the Constitution through a Constituent Assembly was one of the most transparent ways of furthering the culture of consultation. In order to safeguard democracy, much more should be required to effect a constitutional amendment than the will of the majority party in Parliament. Popular consultation in the form of a Constituent Assembly should in fact be entrenched in constitutional practice as a mechanism for obtaining the mandate of the people on constitutional matters and as a deterrent to amendments. In addition, involvement of people in the adoption of a national constitution was an educational experience for them and would enable them to focus on the contents of the Constitution in a manner they would not if the situation was otherwise.

Your Committee heard that the Government was right to say that there was a challenge when it came to enacting the Constitution using a Constituent Assembly in that there was currently no law to govern this process. However, it was not impossible to enact legislation to allow for such a process.

The advantage with a Constituent Assembly was that its product would be widely accepted because people who would be involved and incorporated in the process would come from a cross section of members of the society. It was a well known fact that the National Assembly, despite being a House representing all Zambians, had most of the major groups in the country not represented. This was due to the competitive type of the electoral system used in Zambia.

Your Committee heard that under a Constituent Assembly, proposals had been made to include all Members of Parliament as part of the Constituent Assembly, thus guaranteeing the protection of people's views. The Constituent Assembly Act could further spell out clearly the work of the National Assembly which could merely be the enactment and not the review of the adopted Constitution. Thus, the National Assembly would not remove or add anything to the adopted Constitution.

They also submitted that adopting the Constitution through a constituent assembly would be proper and on firm grounds as the National Assembly would still exercise its legislative powers of enacting the Constitution.

Your Committee heard that according to one eminent Zambia lawyer based in the United States of America, the process of adopting a Constitution was as important as its substance. The process needed to be legitimate and, in order for it to be legitimate it needed to be inclusive. It should represent the interests of all the people in the country. People needed to be made to feel that they owned the process. A constitution should be the product of integration of ideas from the entire major stakeholders in a country, i.e., all political parties both within and without Parliament, organised civil society and individuals in society. Constitution making structures must be open to views and opinions of all stakeholders, who must be given a meaningful opportunity to make their views known. The process must be transparent, that is, it must be undertaken in full view of the country and the international community.

Asked to comment on what the stakeholders' views on the work of a Constitutional Review Commission were, your Committee was informed that the Constitution Review Commission established under the current legal provision (the *Inquiries Act*) did not inspire a lot of confidence in the constitutional reform process. Constitution Review Commissions in most instances had endeavoured to present very good recommendations on how people wanted to be governed in their report. In the case of the John Mwanakatwe Constitutional Review Commission, the final product was the submission in 1995 of a document entitled the Report of the Constitution Review Commission. The 300-page suggestions/recommendations made by the Mwanakatwe Commission, however, have been gathering dust and the then Government rejected 70 per cent of the recommendations. Such actions renege recommendations on how Zambians ought to govern themselves.

It was further heard that another area of concern with regard to the Constitution Review Commission (CRC) was that of appointments to the CRC. Currently, the composition of a CRC was the prerogative of the Executive. Other interest groups like political parties and civil society organisations had no say on who got appointed to the commission. This had seen the appointment of people who were seen as representing their own interests as opposed to the interests of the people.

Your Committee heard that the Constitution-making process always determined the content of the Constitution. Those wielding political powers, and not the people, have had the final say on the character of the Constitutions of Zambia. For instance, the people of Zambia had said to all three Commissions appointed in the last fifteen years that a presidential candidate must receive 50 percent plus one of the valid votes cast for him or her to be declared a winner but this had been rejected by the Government under the 1996 Constitutional Amendment. One can therefore conclude that this deliberate effort by all the Governments since independence to undermine popular demands was to further promote Government interests.

Your Committee were informed that the first step towards correcting past constitutional failures and establishing a viable constitutional order in Zambia was to change the constitutional perspective which had determined Constitution making. The future Constitution of Zambia must be popularly determined in order

to give it legitimacy and a truly national character, instead of being identified with a small group of people or the Government.

To achieve this goal in Zambia the stakeholders proposed the following:

- (i) the Constitution must be adopted by a Constituent Assembly. The body must be made up of one or two representatives from each ward in Zambia, popularly chosen by the people in that ward. Each ward must have its own meetings and agree on what they would like to see in the Constitution. In addition, interest groups must be reasonably represented. The body must be assisted by experts in various fields who will deal with technical matters, but the final decision must be that of the body. The procedure suggested was no doubt costly but, given the country's experience, this would be a worthwhile investment;
- (ii) Constitution making must take place at a time when there was a national consensus for a new constitution to be drafted or when it was possible to enlist wide support for the exercise. It was not enough that a particular leader saw such a need. Its frequency in a country eroded the sanctity of the Constitution;
- (iii) the agenda stage should not be disregarded. Success or failure emanated from this stage; it was impossible to succeed in a constitutional development process with a poor agenda; subsequent amendment of an agenda was usually due to political pressure; at this stage, the essential confidence and trust of the people would have been destroyed;
- (iv) transparency and accountability were essential to successful implementation of the constitution-making process; transparency insisted that every procedure should be open and above board, while accountability required that the body conducting the process be elected directly by the people;
- (v) there should be a comprehensive and objective public awareness campaign for the people to be familiar with the process; the campaign should not be used to advance a government's preferred direction; a comprehensive and objective public awareness campaign would ensure that the people felt part of the process;
- (vi) civic education by the state and civil society must be objective, and not inhibited; to enhance the people's knowledge of constitutional issues to ensure that submissions were relevant; otherwise, consultation of the people became a mere formality;
- (vii) the consultation process should be well thought out, so that the people have specific guidance on the substance of the consultation; it would be wasteful to spend vast resources and solicit irrelevant submissions;
- (viii) the Government should not play any role in evaluating the submissions as this destroyed the entire purpose of the consultation and would take away the people's aspirations;
- (ix) experts in constitutional law should play a major role in shaping and evaluating provisions of the Constitution; it was essential that a Constitution assisted in meeting the people's deliberate aspirations. Only experts could see through a provision and evaluate its utility; and
- (x) the Constitution should be able to stand the test of time as this would give it respect and recognition as a grand norm; 'if a Constitution was going to be changed at will, nothing would distinguish it from ordinary statutes.'

Your Committee was informed that Parliament, as the final authority in the adoption of the Constitution, had not played its role as custodian of the people's interests. Voting on Constitutional Bills had been conducted on partisan lines. Since Members of Parliament from the ruling party generally lacked independence from the Executive and looked to the Executive for appointment to ministerial positions, they

had basically been voting in accordance with the Executive's wishes, not necessarily the wishes of their Constituents.

This had been a threat to the durability and legitimacy of the Constitution. Thus, previous Constitutions have been regarded as a product of the Executive of the time. They had not won the confidence and loyalty of the people.

The Government's Views

The Permanent Secretary at the Ministry of Justice stated that the Government was committed to the Constitution Review Process and to ensuring that a Constitution that would stand the test of time was enacted. In order to demonstrate this commitment, the Government initiated the Mun'gomba Constitution Review Implementation Committee to develop a road map that would guide the Constitution making processes; including the Constituent Assembly.

Your Committee heard that the Constitutional Review Commission (CRC) was appointed by Statutory Instruments in 2003 and 2004 by His Excellency, the President, Dr Levy Patrick Mwanawasa, SC. The CRC was tasked to collect views by all practicable means from the general public, in such places, within Zambia, as it might have considered necessary, and from Zambians living abroad, on what type of Constitution Zambia should enact.

The Permanent Secretary submitted that the CRC was also tasked to recommend on whether the Constitution should be adopted, altered or re-enacted by the National Assembly, by a Constituent Assembly, by a national Referendum or by other methods. In addition, the CRC was mandated to recommend ways and means of implementing the recommendations relating to the adoption of the Constitution in view of existing Constitutional provisions.

In line with its mandate, the CRC submitted a report and Draft Constitution on 31st December 2005 simultaneously to the President and to the public.

Your Committee were informed that in its report, the CRC recommended that:

- the current Constitution should be repealed and replaced;
- the Constitution should be adopted by a Constituent Assembly followed by a national Referendum;
- the Constituent Assembly should be given legal effect by an Act of Parliament laying down the processes, procedures and allocating of necessary resources and the composition and functions of the Constituent Assembly which should, inter alia, include:
 - (a) deliberating on the report of the Constitution Review Commission and Draft Constitution;
 - (b) adopting the Constitution, subject to a national Referendum; and
 - (c) referring the adopted Constitution to a national Referendum.
- the CRC also recommended that the result of the Constituent Assembly was to be final and legally binding subject to the outcome of the national Referendum. This process would be implemented by a resolution of the Constituent Assembly.
- the CRC recognised the fact that the function of the Constituent Assembly would not be legislative but that the outcome of the national Referendum would be referred to the Legislature whose function would simply be to enact a Bill to bring the new Constitution into effect.

Having submitted its report, the CRC had no further role to play in the Constitutional Review Process and it had since been dissolved.

On the adoption of the Constitution through a Constituent Assembly, on 2nd February 2006, His Excellency, the President Dr Levy Patrick Mwanawasa, SC, addressed the nation on both radio and

television on the matter of legislating a new Constitution for Zambia. In his address, the President indicated that the new Constitution would be adopted through a Constituent Assembly as recommended by the CRC.

He also indicated that the Constitution making process would be charged on the general revenues of the country and contributions from well wishers. He, however, stated that the Constitution making process would depend on the availability of resources since this process needed to be considered with other national development priority sectors.

He further indicated that the Government would set up a small non-partisan Committee to propose a roadmap for the implementation of the mode of adoption of the Constitution.

On 16th February, 2006 the President appointed the Constitution Review Process Implementation Committee, comprising of the following institutions:

- Ministry of Justice;
- Ministry of Information and Broadcasting Services;
- Ministry of Finance and National Planning;
- Central Statistics Office;
- Electoral Commission of Zambia; and
- Zambia Police Force.

On 21st February 2006, the Committee commenced its work guided by the following Terms of Reference to:

- (i) study the recommendations of the Constitution Review Commission in regard to the mode of adoption of the Constitution;
- (ii) study Government's position as announced by the President on 2nd February 2006;
- (iii) propose the road map for the implementation of the position in (i) and (ii) above;
- (iv) consider and draw up the budget for the effective implementation of the road map;
- (v) coordinate the mobilisation of the financial resources in conjunction with any organisation or individual for the implementation of the road map;
- (vi) render periodic reports to the Minister of Justice and Attorney-General;
- (vii) consider any other matters incidental to the above; and
- (viii) prescribe its own procedure of conducting its business.

To speed up the Constitutional Review Process and adoption of a new Constitution, the Government, at its meeting of the 19th December, 2006, considered the report of the Constitution Review Process Implementation Committee. In discharging its mandate, the Committee formulated the Roadmap for the implementation of the process as set out below.

- (i) ***Work of the Constitution Review Process Implementation Committee (CRPIC)***
The Committee should continue to oversee the Constitution Review Process on behalf of Government. It was proposed that a Secretariat be established. This activity would last for eighty-seven weeks.

- (ii) ***Cabinet decision on Road Map***
A Cabinet decision would be required to approve the report of the Committee. This process was estimated to take four weeks (1 month).
- (iii) ***Issuance of Statutory Instrument initiating the Referendum***
Arising from the decision by Cabinet, the President should issue a Statutory Order by way of a Statutory Instrument to initiate the holding of a Referendum. This process should take approximately one week.
- (iv) ***Determining the number of Persons entitled to be registered as Voters for the Referendum***
A sample census to determine the number of persons entitled to be registered as voters for the Referendum was required to be undertaken. This process should take approximately forty-eight weeks (12 months).
- (v) ***Process of Conducting a Referendum***
The Referendum necessary to amend Article 79 of the Constitution would then be implemented. The process should take approximately twenty-four weeks (6 months).
- (vi) ***Cabinet decision on the Amendment of article 79 and Constituent Assembly Bills***
In order to establish a Constituent Assembly, Cabinet was required to make a decision on the Bill for the amendment of Article 79 and the Bill for the establishment of the Constituent Assembly. This process was expected to take twelve weeks (3 months).
- (vii) ***Gazette Notice for Amending Article 79 and the Draft Constituent Assembly Bill***
A Gazette Notice was required to inform the public of a Bill amending Article 79 of the Constitution and another for the establishment of the Constituent Assembly. The time-frame for this process should be four weeks (1 month).
- (viii) ***Enactment of Article 79 and Constituent Assembly Bills***
Following steps (vi) and (vii), Parliament was expected to enact the amendment to Article 79 and the Constituent Assembly Bills. The process was estimated to take approximately five weeks (1 month and 1 week).
- (ix) ***Issuance of a Statutory Instrument to setting up the Constituent Assembly Secretariat***
The Ministry of Justice was required to issue a Statutory Instrument setting up the Constituent Assembly Secretariat. The Ministry of Justice should take approximately one week to issue the requisite Statutory Instrument.
- (x) ***Appointment of Constituent Assembly Secretariat***
On the appointment of Constituent Assembly Secretariat Support Staff, Cabinet was expected to second staff to the Secretariat of the Constituent Assembly. This step would take approximately three weeks.
- (xi) ***Secretariat's work***
The Secretariat would commence its work which was categorized as Pre-Constituent Assembly Sessions and Post Constituent Assembly Sessions. This activity was expected to take approximately forty weeks (10 months).
- (xii) ***Constituent Assembly Elections***
The Constituent Assembly Elections would be undertaken. The activity was expected to take approximately twenty-four weeks (6 months).
- (xiii) ***Constituent Assembly Sessions***
The Constituent Assembly sessions would then be undertaken. The activity was expected to take approximately twenty-four weeks (6 months).

(xiv) ***Assent and Commencement of the Constitution***

The National Assembly should enact the Constitution of Zambia Act, which would then be assented to by the President. This step was expected to take 8 weeks (2 months).

Cabinet took note of the above recommendations and was of the view that while the Roadmap was substantially in order, there were certain steps that required inclusion or correction. Cabinet, therefore, made the following observations:

- (i) Step 3 should be 4 and vice versa. This was necessary because the Statutory Instrument to initiate the Referendum could only be done after the census to determine the number of persons entitled to be registered as voters had been determined.
- (ii) After determining the number of persons entitled to be registered as voters in the Referendum, a registration process had to be commenced in order to capture those eligible persons on to the register. This was in line with the provision of the *Referendum Act, Cap. 14*. This would further entail that National Registration Cards would have to be issued to enable all eligible persons participate in the Referendum.
- (iii) Between steps 8 and 9, there was need to provide for the Assent to the Bills by the President.
- (iv) After step 13 above and upon the Draft Constitution being adopted by the Constituent Assembly, there would be need to hold a Second Referendum to specifically address the question of alteration of the Bill of Rights or Part III of the Constitution. This was a necessity under the provisions of Article 79 (3) of the Constitution. Therefore, the second Referendum would be step 14. In order to achieve this step, there would be need for a second census and second registration of persons entitled to be registered as voters at that stage.
- (v) The current step 13 above should be corrected to read Enactment of the Constitution by the National Assembly and Assent by the President. For purposes of clarity, it was necessary that the enactment process was clearly cited.

Cabinet also observed that the duration provided for each step did not reflect the realistic time required to achieve the respective steps. However, for purposes of progress, Cabinet decided to commence the implementation of the Roadmap by providing for the initial activities of the Roadmap in next year's budget. This meant that implementation would commence after the budget of 2007 had been approved.

The Government wanted to re-affirm its commitment to the Constitution Review Process and specifically to the adoption of the Constitution through a Constituent Assembly. However, it was the duty of the Government to ensure that the intent and letter of the law was fully adhered to in the process.

Committee's Observations and Recommendations

Your Committee make the following observations and recommendations:

- the current Constitution needed to be repealed and replaced;
- the Constitution should be adopted by a Constituent Assembly followed by a national Referendum;
- the Constituent Assembly should be given legal effect by an Act of Parliament laying down the processes, procedures and allocating of necessary resources and the composition and functions of the Constituent Assembly;
- there was need for transparency and accountability to successfully implement the constitution making-process;
- a comprehensive and objective public awareness campaign was essential for the people to be familiar with the process; the campaign should not be used to advance the Government's preferred

direction; A comprehensive and objective public awareness campaign will ensure that the people feel part of the process; and

- civic education by the state and civil society must be objective, and not inhibited. It must enhance the people's knowledge of constitutional issues to ensure that submissions are relevant;

Your Committee, make the above recommendations for the following reasons:

- (i) a Constituent Assembly would be more representative of the Zambian people than the National Assembly. In terms of its composition, it would be a larger, more inclusive and broad-based body. The composition would be inclusive of all stakeholders. The members would be elected or selected to represent specific interest groups;
- (ii) in terms of legitimacy, participation at elections of members of the Constituent Assembly was more likely to be massive than the low voter turn out often seen in Parliamentary elections. This meant that the Constituent Assembly was more likely to have a stronger popular mandate to perform its appointed task than the National Assembly would;
- (iii) the Constituent Assembly would work independently and would be free from the control of any person or group of persons. It would be better placed to advance the national interest than the Executive and the National Assembly who may be tempted, as had happened in the past, to put their personal interests above those of the nation;
- (iv) a Constituent Assembly conceived as a sovereign body would have complete authority to deliberate upon and adopt the Constitution. Since it would be sovereign in its own right, it would not depend on any outside body to authorise its actions, either before or after its work is concluded. The President's signature to the enacted constitution would not be the monopoly of the Constituent Assembly. Rather, the signature would not be considered as mere authentication or certification but that the document he signs was that which in fact the Constituent Assembly had adopted;
- (v) it was the desire of the majority of Zambians, as evidenced from the Mun'gomba Commission report and press statements issued by the Church, NGO, Chiefs and others, that the next Constitution should be adopted by a Constituent Assembly; and
- (vi) adoption of the Constitution by a Constituent Assembly would impart concrete meaning to the idea of the Constitution as being derived from the people, which notion transcends the realms of legal fiction into political reality.

Sir, as you are well aware, before your Committee's report could be tabled, Government introduced the National Constitutional Conference Bill (NAB No. 26 of 2007). Consequently, your Committee was assigned to consider the National Constitutional Conference Bill whose report has since been tabled and debated. The Committee wishes to bring out the following salient points which are important to the governance system in Zambia:

Summary of Stakeholders' Concerns

The following is a summary of the concerns raised by various stakeholders who appeared before your Committee when considering the National Constitutional Conference Bill:

Clause 4: Composition of the Conference

Your Committee were informed that the criterion for appointing Non-Governmental Organisations' (NGOs) representatives is not clearly expressed in the Bill. It was felt that with an estimated 12,000 NGOs in Zambia, it is necessary that there is a fair representation of NGOs taking into account the sectoral backgrounds of NGOs on the Conference so as to cater for different fields of NGOs.

Further it was proposed to your Committee that the composition of the Conference should include the following:

- (i) two representatives from the General Nursing Council;
- (ii) proportional representation of Conference members;
- (iii) two representatives from the Professional Centre of Zambia; and
- (iv) the five Senior Citizens should be nominated by the Senior Citizens Association of Zambia.

Clause 5 (1): Chairperson and Vice-Chairperson

It was submitted to your Committee that in order to be in consonance with the CRC recommendations, the Chairperson and Vice-Chairperson should be appointed by the Conference itself, instead of the President. It was submitted that this would enhance the support and confidence of Conference members which is cardinal for the success of the process.

Clause 6(4): Tenure of Office and Vacancy

Your Committee heard that the Secretary to the Cabinet should not be empowered to remove any member of the Conference from office. The stakeholders feel that removal of a member from office should be the mandate of the Conference itself acting through an appropriate Committee of the Conference. The Secretary to Cabinet should only come in to formally inform the concerned erring member.

Clause 10: Dissemination and Adoption of Report

Stakeholders are not comfortable with the word 'recommend' to the Minister wherever it appears under this Clause. They feel that in its common parlance, the word 'recommend' connotes liberty to reject or alter the recommendations by the Minister.

Clause 11(4): Appointment of Secretary and Deputy Secretary of the Conference

Your Committee heard that in order to enhance the autonomy and effectiveness of the Secretariat, it is important for a different institution, rather than the Minister, to determine the terms and conditions of the Secretary and Deputy Secretary.

Clause 12(1): Employment of Experts and other Staff

Some stakeholders submitted to your Committee that the power to engage experts and consultants should be the preserve of the Conference itself and, therefore, should not be subject to approval by the Minister. They feel that the Secretary to the Conference should determine whether or not it is possible under the budget to engage expert services.

Clause 13: Functions of the Conference

Most stakeholders informed your Committee that they support the three part process of Adoption by the Conference, Approval by the Referendum and Enactment by Parliament. In this regard, they feel that sub-clause (2)(a) of Clause 13 should be removed from the Bill.

Clause 14: Principles for democratic and secure adoption process

Your committee heard that although Article 62 of the current Constitution vests legislative powers in Parliament, it is important, for the purposes of harmony during the constitutional making process, to put in place a provision that will ensure that Parliament will not alter the contents of the Constitution upon recommendation from the Conference.

Clause 16(1): Drafting Committee and other Committees

Your Committee heard that in order to enhance confidence in the work of the Conference, the Conference should identify, nominate and submit names of the drafting Committee who have expertise in legislative drafting, for appointment by the Secretary to the Cabinet.

Clause 21: Prohibition of Publication or Disclosure of Information to unauthorised persons

Some stakeholders feel that an unauthorised person, to whom information should not be published or disclosed, ought to be defined in the interpretation section of the Bill.

Clause 32(3): Dissolution of the Conference

The stakeholders are uncomfortable with the Republican President being mandated, under the Bill, to dissolve the Conference. They feel that there is need to forestall arbitrariness, particularly where the President, for one reason or another, feels agitated and decides to dissolve the Conference.

COMMITTEE'S OBSERVATIONS AND RECOMMENDATIONS

9. Your Committee observed that, generally, most stakeholders supported the Bill. In this regard, your Committee recommended that the Bill be supported by the august House, subject to the following amendments:

- (i) the definition of the word 'Adopt' in Clause 2 of the Bill may be maintained but the word 'recommend' the adopted Constitution to the Minister in Clause (25) (1) of the Bill should be substituted with the word 'submit';
- (ii) the number of representatives from political parties should be equal to the number of representatives from church mother bodies;
- (iii) the Bill should provide for two modes of dissolution of the Conference. That is, by the Conference itself or, where it is not possible for the Conference to dissolve itself, by the Republican President, as the case is with Parliament;
- (iv) representatives from each security wing be reduced to one (1) from three (3) while senior civil servants be reduced to four (4) from ten (10).
- (v) the decision to refer the whole, or part thereof, of the adopted draft Constitution to a Referendum, be reserved for the Conference;
- (vi) the Chairperson and Vice-Chairpersons should be appointed by the Conference itself;
- (vii) the criteria for determination of senior citizens, eminent Zambians and freedom fighters be as follows:
 - (a) one (1) freedom fighter from each province of Zambia who should have played a role in the freedom struggle and should not be below the age of 65 years at the date of appointment;
 - (b) one (1) senior citizen from each province of Zambia who must have held public office and not below the age of 60 years at the date of appointment; and
 - (c) one (1) eminent person from each province who has distinguished himself or herself in a particular field for a period of not less than ten (10) years of continuous service.
- (viii) the Bill should provide that the Conference may 'add' under Clause 13(3) to the CRC draft Constitution;
- (ix) the representatives from any other church mother body should be qualified in the following words:

"any other Church Mother body registered under the Societies Act, provided that such Mother Body had been in existence for a continuous period of not less than ten (10) years at the time of appointment."

- (x) The Chief Justice should not be part of the Conference as his ability to adjudicate on matters arising therefrom might be compromised.

Following the concerns by the stakeholders and the recommendations by your Committee the National Constitutional Conference Bill was amended and passed by the House. The amendments effected in the House are as set out below.

Clause 2: Interpretation

In the definition of the word ‘adopt’ in Section 2, the word ‘recommend’ was substituted with the word ‘submit’ and, consequently, in Section 25 (1) the word ‘recommended’ was substituted with the word ‘submitted’.

Clause 4: Composition of the Conference

- (a) Section 4(1) (c) increased the number of representatives from each Church Mother body from two to three, although the Committee’s recommendations was to have an equal representation as that of political parties which is six representatives each.

Furthermore, although Section 4 (1) (c) (iv) has provided the mode of qualification for any other Church Mother body, the recommendation was to have a body that had been in existence for at least ten years and not five years as stated in the Act.

- (b) Section 4 (1) (q) reduced the number of representatives from each security wing from three to two although the recommendation was to reduce the number from three to one.
- (c) Section 4 (1) (ii) maintained the number of senior civil servants at ten. Your Committee’s recommendation was for it to be reduced to four.
- (d) Section 4 (1) (s) increased the number of eminent Zambians to nine from five and specified the mode of determination of eligibility for appointment.
- (e) Section 4 (1) (t) increased the number of senior citizens to nine from five and specified the mode of determination of eligibility for appointment, although the age restriction has been reduced from the recommended not below sixty years old to at least fifty-five years.
- (f) Section 4 (1) (a) specified the mode of determination of freedom fighters eligible for appointment.

Your Committee further recommends that the provincial delegates should consult amongst themselves to identify the eminent Zambians, senior citizens and freedom fighters from their provinces. This will reduce the suspicion on the criteria used for selection.

Clause 5: Chairpersons and Vice Chairperson

Section 5 (1) vests the power to elect the Chairperson and Vice Chairpersons in the Conference.

Clause 7: Oath of Office

The proviso under Clause 7 which implied that the Chief Justice could be part of the Conference has been deleted in Section 7.

Clause 13: Functions of the Conference

Section 13 (3) empowers the Conference to ‘add’ to the draft Constitution.

Clause 32: Dissolution

Section 32 (3) empowers the Conference to dissolve itself.

Your Committee further observes that out of the recommendations although amended, were not taken entirely as presented by your Committee. They also observe that two of the recommendations were completely not incorporated in the National Constitutional Conference Act No. 9 of 2007, namely:

- (i) The recommendation to have an equal number of representatives from political parties and Church Mother bodies; and
- (ii) to reduce the number of civil servants from ten to four.

Your Committee are of the view that, although the Bill has now become law, these two recommendations and all the above observations should further be considered as they remain contentious. Therefore, your Committee recommends that the National Constitutional Conference Act be brought to Parliament and further be amended to include these recommendations in their entirety to ensure that the process of enacting a new constitution is all inclusive and acceptable to all.

PART II

TOUR REPORT

10. In order to complement their study on the topical issues, your Committee conducted tours to the following institutions:

- (i) Mukobeko Maximum Security Prison
- (ii) Mporokoso State Prison
- (iii) Mumbwa State Prison
- (iv) Katombora Reformatory School
- (v) Lusaka Central Prison

TOUR OF MUKOBEKO MAXIMUM SECURITY PRISON - KABWE

Your Committee under took a tour of Mukobeko Maximum Security Prison in Kabwe to conduct an on-the-spot check of the conditions prevailing at the institution. They were met by the Officer-in-Charge who took them on a conducted tour of the prison. The Deputy Regional Commanding Officer joined the entourage from the Commissioner's office. Your Committee only managed to tour the male section of the prison due to time constraints. Apart from meeting with convicts and remandees, your Committee met with the prison staff.

During the tour, your Committee observed the following:

- (i) procurement of foodstuffs was done by central administration;
- (ii) there were obsolete security gadgets in the prison
- (iii) prison facilities were dilapidated;
- (iv) there were no beds and blankets in the prison and very few mattresses;
- (v) there were not enough prison officers to match the number of prisoners;
- (vi) prison cells were congested;
- (vii) diet was poor and inadequate;
- (viii) lack of equipment for rehabilitation of inmates;
- (ix) inadequate funding;
- (x) general lack of accommodation for prison officials; and
- (xi) delays in taking suspects to court

Based on the above, your Committee recommend that:

- (i) funding the prison should be improved;
- (ii) equipment should be replaced;
- (iii) more prison cells should be built and existing ones rehabilitated;
- (iv) accommodation for prison officers should be improved;
- (v) the diet for the convicts should be improved and quantities increased;
- (vi) more prison officers should be deployed to the prison;
- (vii) procurement of foodstuffs for the prisons should be decentralized;
- (viii) modern security gadgets should be fitted at the prison;
- (ix) suspects should be taken to court on time to avoid infringement of their rights to a speedy and fair trial;
- (x) more beds, mattresses and blankets should be purchased; and
- (xi) Ministry of Home Affairs officials should visit the prison to have an up to date status of the prison.

TOUR OF MPOROKOSO PRISON

Your Committee undertook a tour to Mporokoso State Prison and were met on arrival by the Officer-in-Charge who gave them a brief before taking them on a conducted tour of the prison. Your Committee had a chance to meet with the prisoners and prison officers.

Your Committee made the following observations:

- (i) the prison infrastructure was dilapidated;
- (ii) prisoners had no uniforms;
- (iii) lack of beds, beddings and mattresses;
- (iv) lack of accommodation for staff;
- (v) poor diet;
- (vi) warrant holders were based in Kasama thereby delaying court cases;
- (vii) inadequate funds were allocated to the prison;
- (viii) lack of transport; and
- (ix) lack of staff uniforms.

In view of the foregoing, your Committee make the following recommendations:

- (i) the Government needs to refurbish the infrastructure at the prison;
- (ii) there is need to purchase beds, beddings and mattresses for the inmates;
- (iii) there is need to purchase uniforms for the inmates;
- (iv) there is need to improve the diet for the prisoners;
- (v) transport should be provided to the prison;
- (vi) uniformed staff should be provided with uniforms or uniform allowance;
- (vii) there is need to decentralise the warrant holders;
- (viii) conditions of service for prison staff need to be improved; and
- (ix) prisoners need to be taken to court on time.

TOUR OF MUMBWA PRISONS

Your Committee toured Mumbwa Prison and were met on arrival by the Officer-in-Charge. They were taken on a conducted tour of the prison dormitories and the gardens.

Your Committee made the following observations:

- (a) there were inadequate toilets and bathroom facilities in the dormitories;
- (b) prisoners had no uniforms;

- (c) the institution needed beds, mattresses and blankets;
- (d) food rations for the prisoners were poor;
- (e) kitchen facilities were inadequate; and
- (f) land within prison grounds was being alienated to private developers by the local authority.

Consequently, your Committee make the following recommendations:

- (a) the Government should refurbish the prison dormitories and provide them with adequate toilets and bathrooms;
- (b) there is need for the Government to purchase uniforms for the inmates;
- (c) beds, mattresses and blankets should be purchased for the inmates;
- (d) kitchen facilities should be improved;
- (e) Central Administration should allow the prison to utilise the food grown at Mwembeshi to feed the inmates; and
- (f) land within the precincts of the prison should not be alienated to private developers but be reserved for expansion purposes.

TOUR OF KATOMBORA REFORMATORY

Your Committee toured Katombora Reformatory and made the following observations:

- (a) prison dormitories and window panes were dilapidated;
- (b) there were not enough pots in the kitchen and there was need to fit electrical pots;
- (c) lack of beds, mattresses and blankets;
- (d) lack of equipment for training of the inmates;
- (e) inadequate teaching staff;
- (f) the environment for female juveniles was not conducive;
- (g) the number of officers manning the institution was inadequate;
- (h) the Reformatory gardens were able to cater for the vegetable requirements of the inmates;
- (i) prison staff did not wear uniforms and were not paid any uniform allowances; and
- (j) conditions of service for prison officers were still very poor.

Your Committee recommend as follows:

- (a) the Reformatory should be refurbished before the infrastructure completely breaks down;
- (b) the kitchen should be well equipped with electrical pots and other kitchen staff to assist the young prisoners to prepare their meals;

- (c) beds, mattresses and blankets should be purchased for the institution as a matter of urgency;
- (d) equipment for training of inmates should be procured as what was there was now obsolete;
- (e) facilities for female juveniles should be built;
- (f) teaching staff should be increased;
- (g) increase the staff manning the prisoners;
- (h) officers should be paid their uniform allowances; and
- (i) conditions of service for prison staff should be improved.

TOUR OF LUSAKA PRISONS

Your Committee were unable to tour Lusaka Prisons as the Commanding Officer who was supposed to take them on a conducted tour of the prisons was busy launching the “Keep Zambia Clean” campaign with the Permanent Secretary at the Ministry of Home Affairs, on the proposed date of the tour.

Your Committee wish to express their disappointment over this apparent lack of consideration of the Committee’s work by both the Permanent Secretary, Home Affairs and the Commanding Officer for Lusaka Province. This was so because the tour programme had been circulated prior to the tour being undertaken.

PART III

CONSIDERATION OF THE ACTION-TAKEN REPORT OF THE COMMITTEE'S REPORT FOR 2006

11. Your Committee considered outstanding issues in the Action-Taken Report of the Committee's Report for 2006.

HUMAN RIGHTS COMMISSION

Your previous Committee had requested a progress report on the vacant positions in the establishment of the Human Rights Commission. They had observed that the provincial centres were in urgent need of qualified staff as they were being administered by under-qualified and/or junior clerical staff.

Your Committee was informed that, despite Treasury Authority being granted to the Commission in 2002, a number of vacant positions had not been filled because budget ceilings that were given to the Commission in 2004, 2005 and 2006 did not cater for recruitment for vacant positions. Therefore, the staffing levels were at 30 percent of the approved establishment.

The Secretary to the Treasury informed your Committee that, funding to the Human Rights Commission had been inadequate due to Government policy of prioritising funding to key sectors such as Health.

Your Committee were informed that the Government was aware of the staffing needs of the Commission but, due to budgetary constraints, it could not do much.

Observations and Recommendations

While noting the response, your Committee wish to be updated on the current status and urge the Government to consider prioritizing funding to the Human Rights Commission to improve its capacity.

DEPARTMENT OF LEGAL AID

Your previous Committee had requested the Permanent Secretary to furnish them with a progress report on the independence of the Directorate of Legal Aid as regards funding and its impact after implementation of the legal provisions making it autonomous.

Your Committee was informed that, through Act No.17 of 2000, the Legal Aid Department was transformed into a board, with a Legal Aid Fund, and further amendments were made. However, the Board was not yet fully operational as a number of logistical measures had not yet been put in place. New Board members had since been appointed and plans were under way to recruit professional staff, including paralegals. It was hoped that, when the Board was fully operational, many issues pertaining to the operations of the Legal Aid Department such as funding would be addressed.

The Secretary to the Treasury informed your Committee that some funds had been released and there would be some improvements in the operations of the Department.

Observations and Recommendations

Your Committee, while noting the response, request a progress report on the status of funding for the Department.

POLICE AND PRISONS SERVICE

Your previous Committee had recommended that the conditions of service for the Police and Prisons Service should be improved to address problems such as corruption amongst the officers. The Committee had also recommended that these conditions of service be harmonised with those of other defense wings.

Your Committee was informed that the Conditions of Service for the Ministry of Home Affairs were tied to the Final Restructuring Report which was submitted to Cabinet Office for approval. The Ministry was still awaiting Cabinet approval.

The Secretary to the Treasury informed your Committee that funding for the Police and Prisons Service was released through the Ministry of Home Affairs. Your Committee were informed that actual release of funds was based on the Ministry's budgetary requirements.

Observations and Recommendations

Your Committee note the response but wish to urge the Ministry of Home Affairs to improve the conditions of service for the Police and Prisons Service and equate them with those of other security wings.

Your Committee further wish to urge the Government to expeditiously release funding to the Police and Prisons Service.

Your Committee request a progress report on the Final Restructuring Report submitted to Cabinet Office and Cabinet response.

CONCLUSION

12. In conclusion, your Committee wish to express their gratitude to you, Mr Speaker, and the Clerk of the National Assembly for the support rendered to them during the year. They are indebted to all witnesses who appeared before them, for their co-operation in providing the necessary memoranda and briefs. Your Committee are hopeful that the observations and recommendations contained in this report will help in the formulation and implementation of gender-based legislation, improvement in the prisons' environment and enactment of a Constitution that will stand the test of time through good governance systems in Zambia.

J J MWIIMBU, MP
CHAIRPERSON

AUGUST 2007
LUSAKA