TRADITIONAL COURT PROCEDURAL MANUAL

TENURE AND GLOBAL CLIMATE CHANGE (TGCC)
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DISCLAIMER

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ACRONYMS AND ABBREVIATIONS

IDIQ Indefinite Delivery/Indefinite Quantity
PDLA Petauke District Land Alliance
STARR Strengthening Tenure and Resource Rights
TGCC Tenure and Global Climate Change
USAID United States Agency for International Development
BACKGROUND

The Tenure and Global Climate Change (TGCC) task order is funded by the United States Agency for International Development (USAID) under the Strengthening Tenure and Resource Rights (STARR) Indefinite Delivery/Indefinite Quantity Contract (IDIQ). The aim of the task order is to identify and test models that strengthen resource governance and property rights as they relate to programming that recognizes the rights of households and communities and leads to improved planning to reduce deforestation and forest degradation and increase the resiliency of vulnerable populations.

TGCC supports pilot tenure interventions that strengthen land rights as an enabling condition for the promotion and adoption of sustainable land use practices, particularly agroforestry, through work in the Chipata and Petauke Districts of Zambia’s Eastern Province. The work has also evolved to support policy engagement and research around customary land administration in Zambia.

TGCC is addressing these tasks by using a combination of intensive field implementation, local partnerships, and case studies, literature reviews, participation in international communities of practice, and workshops and conferences. TGCC is a five-year project which commenced in March 2013 and completed field work in Zambia in early 2018, and its global focus is coordinated with and through USAID missions and other international organizations. The project is supervised by USAID’s Land and Urban Office.
1.0 INTRODUCTION

Zambia’s 288 chiefs administer the majority of Zambia’s rural and peri-urban land through customary practices. These practices include the allocation and administration of land and the resolution of conflicts and disputes through a traditional court system. While customs differ across the country, between chiefs and Zambia’s 72 tribes, there are commonalities among the systems and best practices that can be promoted, particularly within the traditional court structure, which is commonly composed of a chief and his/her advisors.

The objectives of this procedural manual are therefore to:

1. Create a uniform framework regulating the structure and functioning of traditional courts in the resolution of disputes.
2. Enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes.
3. Facilitate the full, voluntary and meaningful participation of community members in traditional courts in order to create an enabling environment which promotes the rights enshrined in the Bill of Rights of the Constitution.
4. Affirm the values of customary law and customs in the resolution of disputes, based on restorative justice and reconciliation.
5. Enhance access to justice by providing a forum for dispute resolution to all parties.
6. Promote and preserve traditions, customs and cultural practices beneficial to communities and persons.

These guidelines seek to:

1. Improve customary justice systems by providing guidance and information on nationally accepted practices for systems that deal with customary justice.
2. Contribute to the improvement and development of the policy, legal and organizational frameworks regulating the range of customary court systems that exist in Zambia.
3. Enhance the transparency and improve the functioning of traditional court systems.
4. Strengthen the capacity and operations of: traditional leaders; judicial authorities; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned with dispensation of justice.

1.1 NATURE AND SCOPE

Key principles in the scope and application of the guidelines include the following:

1. These guidelines are voluntary.
2. These guidelines should be interpreted and applied consistent with existing obligations under national and international law. They are complementary to, and support, national, and international initiatives that address human rights and initiatives to improve governance. Nothing
These guidelines can be used by traditional leaders; judicial authorities; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned with justice systems in Zambia.

4. These guidelines are basic and applicable to any traditional system. Taking into consideration the national context, they may be used and adapted by all traditional leaders.

5. These guidelines should be interpreted and applied in accordance with national legal systems and their institutions.
2.0 CUSTOMARY SYSTEMS

The following guidelines address aspects of the customary justice system with regards to rights and responsibilities; policy, legal and organizational frameworks; and delivery of services.

2.1 POLICY, LEGAL, AND ORGANIZATIONAL FRAMEWORKS

Zambia’s traditional governance system administers a traditional court system that dispenses justice primarily in rural areas. Customary law has been used since time immemorial, as a tool for dispute resolution. Customary law must be construed to mean the accepted body of customs and practices of communities which evolve over time in accordance with prevailing circumstances.

Traditional leaders have historically used customary law to resolve land disputes, marital matters, succession and inheritance disputes and many more.

To this day, the institution of traditional leadership still employs customs to resolve disputes. As a result, customary law continues to play an integral role in the resolution of disputes in communities. Traditional courts are established in accordance with the various traditional governance systems in the country.

A traditional court by definition may mean a customary institution or structure, which is constituted and functions in terms of customary law and custom, for purposes of resolving disputes, in accordance with customary imperatives. This is not exclusively the jurisdiction of the individual or the chief, but rather the full set of institutions from village headpersons to area and specialist advisors to the chief that dispense justice.

The Chiefs’ Act\(^1\) recognizes traditional rulers, and therefore by extension, traditional courts, which are an integral part of traditional governance. However, the only resemblance of statutory recognition is in section 50 of the Local Court Act when it provides:

\[
\text{Any person who, not being duly authorised under this Act ... purports to exercise judicial functions as a local court justice.... shall be guilty of an offence....}
\]

\[
\text{Provided that nothing in this subsection shall be deemed to prohibit any African customary arbitration or settlement in any matter with the consent of the parties thereto if such arbitration or settlement is conducted in the manner recognised by the appropriate African customary law.}
\]

In this proviso, we find the justification for customary courts when it provides for arbitration or settlement conducted in the manner recognised by customary law. Therefore, this section could be interpreted as allowing the continued operation of traditional courts.

However, there is no uniformity in the application of the standards of procedures in appointment of presiding officers, conduct of parties during proceedings and in passing of judgments. This arises from the fact that traditions vary across cultures. Further, there is no uniform practice of procedure prescribed either by customary or statutory law. These inconsistencies have led critics to label

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1 Chiefs’ Act Chapter 287 of the Laws of Zambia
traditional courts as kangaroo courts and not to regard them as institutions of justice, but rather as institutions perpetuated at the behest and gain of traditional leaders.

This arises mostly from a comparative analysis of the Local Courts\(^2\), established by statutory law with its guiding schedules and in written form. In urban areas, local courts are thought to be the only courts that administer customary law, hence the confusing plurality of the traditional court system with the same mandate. It is imperative to note that traditional courts are still functioning in the rural parts of the country, and that they constitute viable justice delivery systems. This is in spite of the fact that the Local Court Act attempted to outlaw them, and the fact that they are not directly recognized either by the constitution or by statute. The introduction of local courts was also intended to uplift the standing of these courts to a national character through uniform administration of customary law, and to separate chiefs from the administration of justice. This has resulted in parallel administration of customary law by traditional and local courts particularly at the local level, which if not handled carefully can cause friction between the two systems.

Nevertheless, traditional courts have continued being the most used choice of dispute resolution for the majority of Zambians. Even in areas where there is a local court, people still elect by their own volition to go to a traditional court, because customary law is premised on the principle and spirit of voluntary affiliation, and that its application is accessible to those who choose to live in accordance with its evolving values and abide by its practices and customs. Further, many who subscribe to customs and practices embedded in customary law voluntarily elect to have their disputes resolved in terms of their customs and practices in traditional courts, due to the following reasons among others:

1. Accessibility – these courts are accessible anywhere as a litigant can walk to the nearest traditional leader and lodge a complaint;

2. Flexibility – the court system is so flexible that no stringent arduous process of filing is required for the matter to be properly before the court;

3. Quick disposal of matters – matters are resolved amicably and in a timely and efficient manner as no time is wasted. Mostly a matter is resolved within a week of its lodging;

4. Principle of reconciliation – in resolving disputes, there is promotion of the principle of reconciliation, because living in harmony is for the communal good and high priority is placed on the maintenance of human relations; and

5. Traditional governance system – these courts are part of the governance and administration system.

One of the biggest weaknesses of traditional court systems is the lack of enforcement mechanisms of their judgements. It is conversely the greatest advantage that local courts have over traditional courts. Additionally, a question that commonly arises is related to what orders a traditional court can make and who has the authority to enforce that order.

With the intensification of cross ethnic marriages, mobility and settlement of persons of different ethnicities all over the country, socio-economic values, and international aspects such as gender equality, good governance and human rights confirms foresight for a customary traditional system with a national uniformity in its jurisdiction.

Therefore, these guidelines are meant to be a source of knowledge to guide how traditional courts can bring uniformity to handling disputes in their respective jurisdictions.

\(^2\) Local Court Act Chapter 29 of the Laws of Zambia.
2.2 GENERAL GUIDING PRINCIPLES

In all matters before the traditional courts, the court should endeavour to abide by the following principles:

1. The right to human dignity – no person shall be treated in a degrading and inhuman manner before a traditional court as such no person in any manner whatsoever, shall be intimidated, manipulated, threatened or denigrated.

2. Equality and fair public hearing – a person appearing before a traditional court shall be entitled in full equality to a fair hearing by an impartial tribunal.

3. Respect for human rights and freedoms – it will be the object of the traditional courts to give adherence to human rights and freedoms to litigants before it regardless of sex, age, tribe, or any social affiliation or status.

4. Presumption of innocence – everyone appearing before a traditional court has the right to be presumed innocent until the contrary is proved.

2.3 PRINCIPLES OF RESTITUTION AND RECONCILIATION

One overarching principle of the customary justice system is to bring about reconciliation of the parties and to restore harmony in the community, rather than retribution or the award of deterrent damages. Since traditional courts are there to promote the maintenance of human relations, they should place reconciliation paramount in the justice delivery system. Where no actual damage or injury is suffered, courts should belabour for an apology to suffice. In terms of restitution, courts should endeavour to minimize the overcharging of parties who have lost the case, but should attempt to put the party to be compensated in a near position as would have been had the injury not occurred. It would be advisable that depending on the level of the court, they may charge minimally, and place a standard limit that will cut across the board. Since restitution is not retributive, it is recommended that there be no punitive measure in the sentence passed.

Since traditional courts are courts of law under customary law which are intended to promote the equitable and fair resolution of certain disputes, in a manner that is underpinned by the value system applicable in customary law and customs, they must endeavour to promote the following:

- Access to justice;
- Prevent conflicts in the community;
- Maintain harmony and co-existence; and,
- Resolve disputes where they have occurred, in a manner that promotes restorative justice, peaceful co-existence and reconciliation.

Since the proceedings and decisions of traditional courts are the outcome of collective deliberations of members of the traditional courts and are not presided over by judicial officers, there is need to have these principles reflected in their decisions.
3.0 REGULATIONS

Traditional courts are prohibited from imposing any punishment involving death, mutilation, grievous bodily harm or imprisonment. This is an important limitation, prescribed by the Local Court Act, particularly regarding imprisonment.

“Courts where lawyers are not allowed to represent accused persons, should not have the power to deprive the subject of his liberty.”

The questioning is aimed at seeking simple truth and is not as rigorous and intimidating as cross-examination by legal practitioners in regular courts.

The formal rules of procedure and evidence should not be imposed on traditional courts as the customary procedure is generally compatible with rules of natural justice.

3.1 ADMINISTRATION OF JUSTICE

3.1.1 Limitation of Liability of Members of Traditional Courts

A member of a traditional court is not liable for anything done or omitted in good faith:

1. In the performance of any function; or
2. In the exercise of any powers vested in them according to customs.

3.1.2 Composition of and Participation in Traditional Courts

1. Members of a traditional court must:
   a. Consist of women and men, pursuant to the goal of promoting the right to equality; and
   b. Be convened by a traditional leader or any person designated by the traditional leader.
2. Traditional courts must promote and protect the representation and participation of women, as parties and members thereof.
3. Traditional courts must put measures in place to promote and protect vulnerable persons, with particular reference to the elderly, children and the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual orientation or gender identity.

3.1.2.1 Composition of Traditional Court

4. For every traditional court there must be a clerk or secretary who is appointed, designated by the chief or chairperson of the said court.
5. No specific number of presiding officers are required for a quorum to be met.
6. Odd numbers of three to five persons compose a validly constituted sitting.
7. Moreover, no gravity of the matter determines the number of adjudicators to be present, as long as the Chairperson is in attendance, a matter can proceed.
3.1.2.2  Appointment of Presiding Officer

Qualifications:

1. Presiding officers are traditional leaders in the chiefdom, mostly senior headpersons or Indunas.
2. These are appointed by the chief, by virtue of longstanding experience with traditions and customs, coupled with their full understanding of matters of a traditional nature.
3. No age limit is proscribed, but experience with traditions is a requirement.

3.1.2.3  Court Hierarchy

1. The system starts with a group of villages, presided over by a group of senior headpersons.
2. Then the area Induna which caters for a slightly larger area, before it culminates into the whole chiefdom with a Palace Court.
3. Apart from territorial or geographical jurisdiction, there is no limitation of disputes that could be heard by any court.
4. Any matter can commence at the lower court, usually the village court.
5. Transfer or exchange of human personnel between chiefdoms of a similar culture in handling disputes can be done with consent of the chief.

3.1.2.4  Transfer of Cases

1. A case is transferred from one court to the other when it lies on appeal from a lower court to a higher one within the chiefdom.
2. There is no transfer of cases between chiefdoms.
3. Appeals from a traditional court to a local court may be made but may represent a challenge, as they will deal with the same custom and mostly, the local presiding magistrates follow the recommendations of the chief.

3.1.2.5  Supervision

1. There should be transparency and accountability of the traditional courts to ensure that these minimum rules are followed.
2. Procedures need to be closely monitored to ensure compliance with minimum standards of natural justice. Such close monitoring of traditional courts would be in recognition of the special dispensation given to the chiefs, while remaining aware of the need to be vigilant with respect to possible abuse of power by the traditional court justices.

3.1.3  Role, Functions, and Responsibilities of Traditional Court

The role, functions, and responsibilities of the clerk or secretary of a traditional court include the following:

1. Issuing summons;
2. Keeping an attendance register of sessions of traditional courts;
3. Keeping records of proceedings of traditional courts;
4. Keeping record of all cases reported to traditional courts;
5. Filing decisions of traditional courts;

6. Advising traditional courts on cases that should be referred to any other customary institution or structure or court or forum;

7. Transferring disputes to any other traditional court, court or forum;

8. Dealing with, recording and filing the information received in the prescribed manner; and

9. Submitting prescribed reports at the end of each quarter of a financial year to the secretary of the chief in the prescribed manner.
4.0 NATURE OF TRADITIONAL COURTS

The traditional court system is made up of such different levels as are recognised in terms of customary law and custom.

4.1 RECORDS

A record of a traditional court case must note the parties, the claim or charge, the defence, the judgement and the date of the judgement. The record must be signed by the chief or signed on his/her behalf and filed with either the chief (if it is the chief’s court) or sub-courts headed by the Induna. The purpose of this record is to show that a particular case was in fact heard by the court for purposes of processing an appeal or assistance in execution of judgement.

4.1.1 Record of Proceedings

A traditional court must, in the prescribed manner, record or cause to be recorded in the official language:

1. A file number of the dispute;
2. The date on which the dispute was dealt with;
3. The nature of the dispute;
4. A summary of the facts of the dispute;
5. The names and addresses of the parties and their witnesses;
6. The decision of the traditional court, including the decision or order of the traditional court; and
7. A list of exhibits.

4.2 PROCEDURE IN TRADITIONAL COURTS

1. Sessions of a traditional court are held at the time and at a place which is accessible to members of the community in question.

2. The procedure at any proceedings of a traditional court, including the notice to attend the proceedings of that traditional court and the manner of preserving the dignity of the traditional court and the manner of execution of any order imposed by it, must be in accordance with customary law and custom.

3. During its proceedings, a traditional court must ensure that:

   a. Women, as parties to any proceedings or members of the traditional court, are afforded full and equal participation in the proceedings, as men are; and

   b. Vulnerable persons, with particular reference to children, the elderly, the youth, the indigent, persons with disabilities and persons who are subject to discrimination on the basis of sexual
orientation or gender identity, are treated in a manner that takes into account their vulnerability; and

c. The following rules of natural justice are adhered to:
   i. That persons who may be affected by a decision must be given a fair hearing by the traditional court before the decision is made; and
   ii. That any decision by the traditional court must be impartial.

4. A party to a dispute before a traditional court may be assisted by any person of his or her choice in whom he or she has confidence.

5. No party to any proceedings before a traditional court may be represented by a legal practitioner acting in that capacity.

6. Where two or more different systems of customary law may be applicable in a dispute before a traditional court, the traditional court must apply the system of customary law that the parties expressly agree should apply.

7. In the absence of any agreement contemplated in paragraph 6, the traditional court must decide the matter in accordance with the following guidelines:
   a. The system of customary law applicable in the area of the traditional court should take precedence over any other system of customary law; or
   b. The traditional court may apply the system of customary law with which the parties or the issues in the dispute have their closest connection.

8. Traditional courts must be open to all members of the community.

9. Proceedings of traditional courts must be conducted in the presence of both parties to the dispute and traditional courts must allow the full participation of all interested parties without discrimination on any of the prohibited grounds of unfair discrimination.

10. The customary law of procedure and evidence applies in traditional courts.

11. The proceedings and records of traditional courts must be in the language most widely spoken in the area of the traditional court in question.

12. If any of the parties does not understand the language used in the traditional court, an interpreter must be provided.

4.3 ORDERS THAT MAY BE MADE BY TRADITIONAL COURTS

A traditional court may make any of the following orders after having deliberated on a dispute before it, specifically, an order in favour of the party who instituted proceedings:

1. Expressed in monetary terms or otherwise, including livestock:
   a. Accepting a settlement between the parties to the dispute;
   b. For the payment of any damages in respect of any proven financial loss;
   c. For the payment of compensation; or
   d. For the payment of damages to an appropriate body or organization which is not connected in any manner whatsoever to a member of the traditional court or a traditional leader.
2. Provided that any such order expressed in monetary terms or otherwise, including livestock, may not exceed the value as determined for this purpose.

4.4 ENFORCEMENT OF ORDERS OF TRADITIONAL COURTS

1. If an order made by a traditional court is not satisfied within the period determined by the traditional court, the party in whose favour the order was made, may bring the matter to the attention of the court again.

2. The clerk or secretary must inquire into or cause to be inquired into, the reasons for non-compliance with the order and decide as to whether the non-compliance is due to fault on the part of the party against whom the order was made.

3. If the clerk finds that the non-compliance is not due to fault on the part of the party against whom the order was made, he or she must assist the party to comply with the order on such conditions as may be agreed upon between the parties.
5.0 PROCEEDINGS IN TRADITIONAL COURTS

Any person may institute proceedings in respect of a dispute in any traditional court.

A traditional court may hold a session thereof at a place other than where sessions of the traditional court in question ordinarily take place and, for that purpose, the traditional leader who ordinarily convenes the traditional court may, where necessary, in the presence of members of the community in the traditional court, delegate a person or persons to convene such a session and indicate who may participate therein.

Filing in of case: The clerk or secretary of the court will issue summons to the complainant. Once a case has been handled, a record will be maintained by the court in question with the details of the parties, the nature of the case complained of, the date fixed for the hearing and ultimately the verdict once passed is entered for purpose of enforcement.

Calling of witnesses: Before the matter commences, the Chair of the presiding committee gives out the rules of the court, including the calling of witnesses; conduct of parties and the case is read out for it to commence. Insubordination is contemptuous to the court. So is perjury, usually requiring a chicken to be paid as a fine. The judgment is reached upon weight of evidence. The decision is all about logic, and what is reasonable.

Fines and penalties: When a matter has been concluded, a fine is imposed. Payment of fines in the form of livestock is convenient for the rural poor but should be re-evaluated regularly.

The traditional courts therefore need to be alerted that a sentence of corporal punishment is contrary to the law.

It is common knowledge that many claims in traditional courts touch on issues relating to the status of women and children and that therefore traditional leaders will resist attempts to deprive them of jurisdiction over matters such as custody and guardianship.

Monetary jurisdiction of traditional courts is limited to four cows for a chief’s court while sub courts’ maximum fine could be two goats. The main claim of these courts is simplicity uncluttered by technical legal know-how and they should not handle cases involving thousands of kwachas.

In the past, transactions arising out of customary law did not involve a lot of money. However, today, such cases could arise, for instance in matters of inheritance, damage to property, or customary contracts. In some other African countries, there is a monetary ceiling imposed in civil cases in traditional courts which can be emulated by Zambian customary courts.

Since traditional courts award damages in customary delicts, this is another reason to impose a monetary ceiling on jurisdiction. Although, the amount is usually fixed by custom, with traditional society getting more and more integrated into the modern economy, the amount awarded by these courts is bound to keep going up and therefore needs to be limited so that the more complex cases or cases involving a lot of money can be more accurately assessed.
Chiefs’ courts are permitted to award compensation and restitution. The purpose of customary proceedings is to bring about reconciliation of the parties and restore harmony in the community, rather than retribution or the award of deterrent damages as at common law.

Where no actual damage or injury is suffered then an apology suffices. These remedies should be retained as appropriate and should be encouraged even in other courts.

Disputes over customary land rights should be handled like any other dispute before a chief or headman in his/her adjudicative, rather than administrative capacity.
ANNEX A: HOW TO INCORPORATE HUMAN RIGHTS BASED APPROACH

Traditional authorities can incorporate human rights based approach in the work they do by adopting the following:

1. Recognizing the existence of human rights and avoid implying that human rights represent western ideals.

2. Acknowledging that human rights derive ethical strength from their universal appeal.

3. Simply applying those universal human rights standards or principles into all aspects of their work in the customary distribution of justice.

4. Asking themselves the following four questions before they take a decision:
   • Is it fair and just?
   • Is it humane?
   • Does it respect the dignity of human person?
   • Does it promote equal treatment of all persons?
ANNEX B: FUNCTIONS AND DUTIES OF THE CHIEF’S COUNCIL

1. The functions and duties of the Chief’s Council shall be, but not limited to:
   a. Providing a forum for dialogue with all levels of government on matters of customs and traditions;
   b. Intervening to resolve intertribal disputes by applying customary and traditional conflict resolution mechanisms;
   c. Fostering peace building and resolution of conflicts through mediation and other conciliatory mechanisms;
   d. Advising all levels of government on matters of traditions and customs of the area; and
   e. Performing other functions and duties as provided for in the Villages Act or any other applicable law or regulations.

2. The duties of the Chief’s Council shall be, but not limited to:
   a. Organizing regular sessions of dialogue with stakeholders on customs and traditions;
   b. Initiating, establishing and disseminating processes and traditional conflict resolution mechanisms for interventions in the settlement of inter-tribal disputes; and
   c. Establishing, promoting and maintaining linkages and peaceful coexistence with all traditional leaders.