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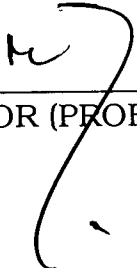
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By **PRINCE BONIFACE MWINGA**

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HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF ZAMBIA: AN APPRAISAL (1964 – 1996)

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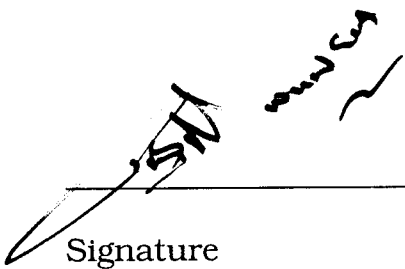
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ABSTRACT

Human rights are inherent in every human being and due to the fact that they are an individual's birth rights, it follows that human rights are found everywhere so long as human beings are found in that particular place.

The quality of enjoyment and protection of human rights in any country depends largely on the laws, administrative and other practices of the country concerned. International Human Rights Laws merely set the global standards against which each country's domestic laws and administrative practices can be assessed.

In Zambia, human rights and fundamental freedoms are entrenched under Part III of the Constitution of Zambia. Therefore, this Essay seeks to evaluate the extent to which human rights have been protected by the Constitution of Zambia from 1964 to 1996. In doing so, a comparative analysis between the Zambian, South African and Namibian Constitutions will be made.

ACKNOWLEDGEMENT

I thank the Almighty God for His mercy and loving kindness without which I would not have made it to this end.

I am equally indebted to my Supervisor Professor Patrick M. Mvunga for the constructive and useful suggestions on the draft which has made me complete my work successfully.

I am grateful to all the lecturers in the Law School for their contributions to this piece of work.

Last but not the least, I wish to sincerely express my profound gratitude to my sponsors, New Fairmont Hotel for their unceasing financial, material and moral support. I would also like to thank my family for their support, love and encouragement.

TABLE OF CASES

Alex Chambala V Zambia Communication CCPR/C/78/856/1999

Amnesty International (on behalf of Banda & Chinula) V Zambia [1998, 1999] Communication 212/98

Attorney General V Million Juma [1984] ZR 1 (SC)

Chiko Bwalya V Zambia Communication CCPR/C/84/D6/314/1988

Harry Mwaanga Nkumbula V Attorney General [1972] ZR 111(HC)

In Re Puta [1973] ZR 133 (HC)

Joyce Banda V Attorney General [1978] ZR 233 (SC)

Kachasu V Attorney General [1967] ZR 145

Mulundika & 7 Others V The People [1995 – 1997] ZR 20 (SC)

Vincent Namushi & 6 Others V Attorney General [1979] ZR 154 (SC)

TABLE OF LEGISLATION

CONSTITUTIONS

1964 Independence Constitution

Section 48 (1) (2) (3)	8
Section 72 (1) (2) (a) (b)	
Section 72 (3) (a) (b) (c)	
Sections 13 – 25	9

1973 Constitution

Section 4 (1) (2)	13
-------------------------	----

1991 Constitution

Articles 16 (2), 17(2) (a)(b), 19(5), 20 (3)(a)(b), 21 (2)(a)(b)and 25	23
Articles 23 (4) (d) (e)	
Article 23 (a)(b) and 26 (i)	
Articles 30 (2)	

1991 Constitution (as amended by Act No. 18 of 1996)

Article 34 (3) (b)(f)	26
-----------------------------	----

Article 25

Constitution of South Africa

Sections 7 (1) (2) (3), 8 (1), 9 (3), 19(1) (a)(b)(c) and 3(b)	34
--	----

Constitution of Namibia

Article 28 (3)	38
Article 20 (1)(2)	40

Statutory Instrument

Statutory instrument number 135 of 1990	21
---	----

TABLE OF CONTENTS

Certification page	i
Declaration.....	ii
Copyright.....	iii
Abstract	iv
Acknowledgement	v
Table of cases	vi
Table of legislation	vii
Table of content.....	viii

CHAPTER ONE

1.0 Introduction	1
1.1 Statement of Problem	3
1.2 Purpose of Study	4
1.3 Objectives	4
1.4 Hypothesis / Research	5
1.5 Significance of the Study	5

CHAPTER TWO

2.0 Historical Development of Zambia's Constitution	6
2.1 Enjoyment of Human Rights & fundamental freedoms under the 1964 Constitution.....	7
2.2 Human Rights and fundamental freedoms under the 1973 Constitution.....	10

2.3 Development of the 1991 Constitution16

2.4 Human rights under the 1991 Constitution (as amended by Act No. 18 of 1996).....17

2.5 Human Rights and fundamental freedoms21

CHAPTER THREE

3.0 Jurisprudence of the United Nations Committee with specific reference
to cases involving Zambia22

3.1 Jurisprudence of the African Human Rights Commission on cases involving
Zambia24

CHAPTER FOUR

4.0 Protection of fundamental rights and freedoms under the Zambian, Namibian
& South African Constitutions compared26

4.1 Human Rights & fundamental freedoms under the South African Constitution27

4.2 Fundamental Rights & freedoms under the Namibian Constitution30

4.3 Data Analysis.....32

CHAPTER FIVE

5.0 Conclusion35

6.0 Recommendations36

7.0 Bibliography37

CHAPTER ONE

1.0 INTRODUCTION

This Essay seeks to assess the human rights and fundamental freedoms under the Constitution of Zambia from 1964 to 1996.

Generally, it is acknowledged that human rights have always existed from the time the human race was created. Man is born with certain inalienable and immutable rights which are considered as man's birthright. Since they are man's birthright, it follows therefore that they are not acquired, transferable, disposable or extinguishable. They cannot be lightly sacrificed even for the good of the greatest, save in circumstances where societal interests are significant enough. Human rights are claims upon the state and therefore the state has the responsibility to satisfy them.

To understand human rights as a subject, one has to look at the historical background. On 10th December 1948, the United Nations General Assembly approved the Universal Declaration of Human Rights. This did set out in thirty articles a "Bill of Rights" for the inhabitants of all the nations throughout the world. However, the Universal Declaration was less useful as it did not provide means for enforcement.

For purposes of a clear understanding of human rights of this Essay the following terms and expressions are defined.

“Human” refers to a human being, that is to say a person (man, woman or child) in contradistinction to other animals.¹

A right is a proper claim to something or an authority to do something, or an interest. Its something one may do or have by law, a legal authority or claim.²

Freedom means the condition of being free, the state of being unrestricted in one’s action.³ Therefore, in Human Rights Law, the idea of freedom implies a claim to be left alone. It suggests that certain areas of human conduct are beyond the scope of interference by the state.

‘Fundamental’ means involving or comprising a foundation, a source of something primary.⁴ Therefore, fundamental can be said to imply something central, basic or primary.

Human rights are the freedoms, immunities and benefits that according to modern values, all human beings in society should be able to claim as a matter of right in the society in which they live.⁵ It can therefore be said that human rights and freedoms constitute those rights and freedoms that form the basis of other rights and freedoms. They are deemed fundamental in that human life, dignity and other significant human values depend on them. However, the fact that human rights are fundamental does not mean that their enjoyment is absolute.

¹ C. Anyangwe, Introduction to Human Rights and International Humanitarian Law (2004) UNZA Press p4

² Ibid p. 2

³ Ibid

⁴ Collins English Dictionary & Thesaurus 4th Edition (2006) P. 483

⁵ B.A. Garner, Blacks Law Dictionary (2004) Thomson West p. 330

A constitution is the fundamental and organic law of a country or state that establishes the institution and apparatus of government, defines the scope of the governmental sovereign powers and guarantees individual rights and liberties.⁶

In any written constitution, human rights and fundamental freedoms are guaranteed in the Constitution. In Zambia, Articles 11 to 26 of Part III of the Zambian Constitution provides for the protection of the fundamental rights and freedoms of individuals.⁷ Constitutional development refers to the process of forming or establishing a constitution. The enjoyment of human rights refers to the satisfaction of the basic, inherent and inalienable rights of all human beings. These rights are a birth right of every individual. Zambia's constitutional development processes have had effects on the enjoyment of fundamental rights and freedoms.

1.1 STATEMENT OF PROBLEM

In its current state, the Constitution of Zambia does not provide adequate protection of the fundamental rights and freedoms of the individual. Although the protection of human rights and fundamental freedoms is provided for in Articles 11 to 26, the protection provided thereunder is full of drawbacks and claw backs. There are only five fundamental rights and freedoms which are enjoyed in absolute terms under the Constitution of Zambia.

⁶ *Ibid* p. 750

⁷ Constitution of Zambia, Chapter 1 of the Laws of Zambia

1.2 PURPOSE OF THE STUDY

To make necessary recommendations on how to enhance the protection of fundamental rights and freedoms.

1.3.0 OBJECTIVES

- 1.3.1 To trace briefly the historical background of Zambia's constitutional developments and find out whether the 1964 Constitution provided adequate protection of human rights and fundamental freedoms.
- 1.3.2 To find out what changes if any, the 1973 Constitution brought about in the area of fundamental freedoms and rights.
- 1.3.3 To find out how the enjoyment of human rights and fundamental freedoms under the One Party Constitution was affected.
- 1.3.4 To compare the protection accorded by the Zambian Constitution with the protection offered by other jurisdictions with specific reference to the Namibian and South African Constitutions.
- 1.3.5 Find out what effects the 1991 Constitution and the 1991 Constitution (as amended by Act No. 18 of 1996) have had on the enjoyment of human rights.

1.4 HYPOTHESIS /RESEARCH QUESTIONS

- 1.4.1 Why does not the Constitution provide adequate protection of human rights and fundamental freedom?
- 1.4.2 Why has the Zambian Constitution failed to provide laws which seek to enhance the protection of human rights despite being a signatory to various Human Rights International Instruments such as the Universal Declaration of Human Rights?
- 1.4.3 Why have most human rights violations been politically motivated?
- 1.4.4 Why are these human rights violations mostly targeted at political opponents?

1.5 SIGNIFICANCE OF THE STUDY

The significance of this study is that it brings to the fore the various human rights violations. It helps in appraising the Constitution as regards human rights and fundamental freedoms by suggesting some measures to enhance the enjoyment of human rights and fundamental freedoms without interference.

CHAPTER TWO

2.0 HISTORICAL DEVELOPMENT OF ZAMBIA'S CONSTITUTION

Zambia, like most former British colonies and protectorates derives its Laws from England. This legacy holds true even to the development of the Constitution of the Republic. In 1964, the final Order-in-Council was promulgated by the British Parliament following negotiations in London held on 18th May 1964 between the British Government and the nationalist African Representatives. The final Order in Council was accompanied by the Order's Schedule II which set forth the Constitution of Zambia.⁸

The 1964 Constitution detailed the structure of government, stipulating clearly the separation of powers among the main organs of government, namely the Executive, Legislature and the Judiciary. The Independence Constitution also vested broad executive powers in the President.⁹ The process of altering the 1964 Constitution simply required a two thirds majority of the members of the National Assembly.¹⁰ It however suffices to state that the amendment of Chapter III of the Constitution required the amendment to be approved by a national referendum.¹¹ Chapter III contained fundamental rights and freedoms. Any alteration to the bill of rights could only be done if such alteration had been submitted to a referendum in which all persons registered as voters for the purpose of election to the National Assembly were entitled to vote

⁸ Zambia Independence Order 1964 and Zambia Independence Act, 1964

⁹ Section 48 (1)(2)(3)

¹⁰ Section 72 (1)(2)(a)(b)

¹¹ Section 72 (3)(a)(b)(c)

and those provisions had been supported by the voters of a majority of all the persons entitled to vote in the referendum. From the foregoing provisions of the Independence Constitution, it can be clearly seen that from the introduction of Zambia's Constitution, the Bill of Rights has always been entrenched.

2.1 ENJOYMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER THE 1964 CONSTITUTION

The 1964 Constitution contained an extensive and entrenched Bill of Rights.¹² Regardless of race, place of origin, religion, political opinion, colour, creed or sex, every person in Zambia was entitled to the enjoyment of fundamental rights and freedoms. Some of the rights enshrined in the 1964 Constitution included: the right to life, security of person, freedom of conscience, expression, assembly and association, freedom from deprivation of property without compensation and freedom for the privacy of the home and other property.¹³

In the light of the foregoing, it must be noted that the enjoyment of fundamental rights and freedoms under the 1964 Constitution was not absolute. The same was subject to limitations normally referred to as 'savings provisions' which were contained in the very sections granting the individual rights. However, subject to these substantial limitations, the fundamental rights were justiciable and enforceable. By section 28 (1) of the Constitution, any person who alleged

¹² Chapter III of the 1964 Constitution

¹³ Sections 13-25

that any of his or her rights as protected by the Constitution were being infringed could apply to the High Court for redress.

Thus in **Kachasu V Attorney General**,¹⁴ a young girl aged between 11 and 12 years suing through her father asked the High Court for an order against the state. She sought redress under section 28 of the Constitution. This section related to the enforcement of the provisions of sections 13-26 of the Constitution which usually were known as the protective provisions which guaranteed the protection of fundamental rights and freedoms of the individual. The applicant was brought up in the religion of the Jehovah's Witnesses and she had been taught that it was against God's Law to worship idols or to sing songs of praise or hymns to any other than Jehovah God Himself. She, her father and many other Jehovah's Witnesses regarded singing of the national anthem as the singing of a hymn or prayer to someone other than Jehovah God Himself; they also regarded the saluting of the national flag as worshipping an idol. The Court held that the requirement that pupils in government schools or grant aided schools should sing the national anthem and salute the national flag was reasonable in a newly established democracy like Zambia thus upheld the suspension and refusal to readmit the applicant without making a commitment to sing the national anthem and salute the national flag.

Similarly, in **Nkumbula V Attorney General**,¹⁵ the applicant appealed against the High Court decision dismissing an application under section 28 of the Constitution for redress on the grounds that the provisions of certain sections of chapter III of the Constitution were likely to be contravened in relation to the appellant. On 25th February 1972, the President announced that the cabinet had taken a decision that the future Constitution of Zambia should provide for a One

¹⁴ (1967) ZR 145

¹⁵ (1972) ZR III

Party Democracy, and that a commission would be set up with the task of determining the form which that One Party Democracy should take. The function of the Commission would not be to consider whether or not there should be a One Party Democracy. The argument before the Supreme Court proceeded on a different basis from that which had been advanced in the court below. In the Supreme Court, the matter was argued on the following basis;

1. That the appointment by the President of the commission of inquiry under section 2 of the Inquiries Act (Cap 181) was null and void because the matters to be inquired into could not be said to be “for the public welfare” within the meaning of those words used in the said section.
2. That if a One Party State were introduced, the appellant’s rights under section 23 (freedom of association) are likely to be infringed.

The Court held that section 28 (1) had no application to proposed legislation of any kind, far less to a proposal to amend Chapter III itself. Thus if there is in the Statute Book an Act of Parliament, or subsidiary legislation, which it is alleged contravenes the Constitution, it is not open to any individual to come to court and ask for a declaration to this effect; before the individual can seek redress there must be an actual or threatened action in relation to him.

2.2 HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER THE 1973 CONSTITUTION

As already noted above, in 1972, the Government announced that it had decided to turn Zambia into a One Party State. The Government averred that its decision was in the interest of unity and economic development. It must be noted here that in 1969, there was a referendum to end all referenda thus through the Constitutional (Amendment) Act (Number 3) of 1969, it would no longer be necessary to submit to a referendum any Act of Parliament which provided for the alteration of Chapter III of the Constitution. The One Party Constitution was enacted by the National Assembly and assented to by the President, thereby giving rise to the birth of the Second Republic on 25th August 1973.

The change in the Constitutional Order had a significant effect on the exercise and enjoyment of human rights and fundamental freedoms. Firstly, the Constitution declared the United National Independence Party as the only political party allowed to exist and to operate in the country.¹⁶ This made it illegal to belong to any political party other than the United National Independence Party. As such, freedom of speech and assembly could only be exercised within the United National Independence Party. Like the 1964 Constitution, the 1973 Constitution contained a Bill of Rights which guaranteed those fundamental individual rights. As such, even under the One Party State, there are a number of decided cases in which the Courts upheld the interests of the individual from unlawful detentions. In **Banda V Attorney General**¹⁷, Baron D.C.J stated at page 240 that “The evidence is in my opinion overwhelming that the grounds for the plaintiff’s arrest and detention were because she was a suspect in a murder investigation; this is not per se a

¹⁶ Section 4 (1) (2) of the 1973 Constitution

¹⁷ (1978) ZR 233

ground falling within the powers conferred by regulation 33 (6). It follows that in my judgment, the arrest of the plaintiff and her detention for nine days were unlawful, and that this appeal should be allowed.”

Throughout the life of the One Party State, the executive powers of detention were misused and targeted political opponents. Numerous cases were taken to courts through for example, Writs of Habeas Corpus.

In **Joyce Banda V Attorney General**,¹⁸ the appellant sued the respondent for damages for false imprisonment. She was arrested and detained under an order expressed to be made under regulation 33(6) of the Preservation of Public Security Regulations and was held in custody for nine days. No grounds for her detention were furnished either during her detention or after her release. The defendant submitted that there was no obligation to furnish grounds for detention as provided in Section 27 (1) (a) of the Constitution where the detained person is released within fourteen days.

Held:

- (i) The obligation to justify deprivation of liberty is a common law obligation which is not affected by statutory inroads into the right to liberty if properly invoked the statutory inroads constitute the justification.
- (ii) The release of the detained person does not relieve the person responsible for a deprivation of liberty of the obligation to justify it in any case where its lawfulness has been put into issue.

¹⁸ (1978) ZR 233(SC)

- (iii) In an action for false imprisonment, if the defendant admits the imprisonment, the onus is on him to justify it. If he fails to establish a legal justification for the deprivation of liberty he fails on merit.
- (iv) The fact that the plaintiff's detention was expressed to be under regulation 33 (6) of the preservation of Public Security Regulations was not itself justification for the deprivation of her liberty.

Similarly, in **Attorney General V Million Juma**,¹⁹ the respondent was detained and served with the grounds of his detention written in the English language, the language he could neither read nor understand. The grounds were explained to him in a vernacular language which he was able to understand. The respondent was granted a Writ of habeas corpus by the High Court on grounds that the constitutional provision requiring that the grounds for detention be written in a language that the detainee understood was mandatory. The Attorney General appealed.

Held on appeal;

That the constitutional provision requiring the grounds of detention to be written in a language which a detainee understands is directory and failure to comply with it is a defect which may be remedied.

In the foregoing case, the Court noted that the object of furnishing a detainee with grounds for his detention in a language that he understands, is to enable him to know what is alleged against him so that he can bring his mind to bear upon it and so enable him to make meaningful

¹⁹ (1984) ZR 1 (SC)

representations to the detaining authority or at a later stage, to the detainees' Tribunal. The danger to be guarded against is that the detainee may not understand the grounds of detention. In evidence, it was not in dispute that the grounds were written in a language the detainee did not understand but there was also no dispute relating to the fact that the grounds, though written in a language the detainee could not understand were fully explained to the respondent in his own language and that there was a certificate to that effect. Thus, the Court contended that the spirit of the constitutional requirement had been observed hence the decision to allow the appeal.

In **Vincent Namushi & 6 Others V Attorney General**,²⁰ the applicants were detained under regulation 33 (1) of the Public Security Regulations and were furnished with grounds of detention in terms of section 27 (1) (a) of the Constitution. The grounds upon which each one of them was detained are stated in the judgment. Counsel for the appellants contended that the grounds of detention were vague and did not comply with section 27 (1) (a) and secondly that since the grounds amounted to criminal offences, criminal charges ought to have been laid against the appellants in preference to detention.

The Court held:

- (i) It is a constitutional requirement that a statement furnished to a detainee in terms of Section 27 (1) (a) must specify in detail the grounds upon which he is detained. In detail, meaning that he must be supplied with sufficient information to enable him make a meaningful representation.

²⁰ (1979) ZR154 (SC)

- (ii) It is important for a detainee to know what has been alleged against him, but as to how much detail must be given and what constitutes vagueness will depend upon the circumstances of each case.
- (iii) Where facts are notorious or the detainee himself must know them, it cannot be said that failure to refer in the ground to these facts causes the ground to fail to be in detail.
- (iii) Where the grounds upon which the appellants were detained amount to criminal charge, the detaining authority has discretion either to institute criminal proceedings or to detain.

Furthermore, in **In Re Puta**,²¹ the applicant was detained by order of His Excellency the President under the Preservation of Public Security Regulations. The Order invoked the powers conferred under regulation 31A. Solicitors for the applicant drew attention to the fact that the relevant regulation has been numbered 33 under the new edition of the laws which came into effect on 1st June 1972. Consequently, on the 21st October 1972 an Order was made under regulation 33 (2) revoking the earlier detention order and making a fresh Order for detention. On 29th October 1972, the applicant was served with a written statement dated 28th October 1972 specifying the grounds of his detention. The statement referred to the detention on 17th October. A notice was published in the Gazette on 3rd November 1972 notifying the detention under regulation 33 (1) without specifying the date of detention.

In an application for a Writ of Habeas Corpus, the applicant contended:

- (i) That there was an infringement of his rights under section 26A (1)(a) of the Constitution in so far as he was not supplied with two separate statements giving grounds of detention relating to the two orders of detention;

²¹ (1973) ZR 133(HC)

- (ii) His right under section 26A (1)(b) of the Constitution had been infringed in so far as two separate Gazette notifications had not been published referring to the two Orders of *detention*.

The Court held:

That the procedures laid down in section 26A of the Constitution for the protection of the individual detained must be strictly complied with. The Executive was under no strict constitutional obligation to furnish grounds of detention in respect of a detention revoked within fourteen days but grounds of detention in relation to an order under which the detainee is being detained must be supplied. It is not an infringement of a person's rights under Section 26A (1)(a) of the Constitution if a notification in respect of every order of detention passed in respect of him is not published in the Gazette provided a notification has been published within one month of detention.

From the case law so far cited, it is clear that Zambian courts dealt with a number of cases which involved allegations or claims of infringement of human rights and fundamental freedoms between 1964 and 1990.

It is important to note further that during the same period and the years which followed the re-introduction of multi party politics in 1990, Zambia also faced a number of human rights violation complaints channeled either through the United Nations Human Rights Commission or the African Human Rights Commission. All the cases referred to the above mentioned Commissions will be dealt with in the chapters to follow. It suffices however to mention that Zambia lost all the cases (or complaints) submitted to the two Commissions.

2.3 DEVELOPMENT OF THE 1991 CONSTITUTION

The years of the One Party State were difficult for Zambia. During this period, the country experienced economic stagnation leading to attendant discontentment of many segments of society. In particular, the trade union movement, scholars and students at the University of Zambia, the legal profession, churches and the business community all from time to time expressed increasing hostility. In addition, coup attempts though foiled, also contributed to the unsettled quality of the political atmosphere in the country. As such, towards the close of the decade of the 1980s, demands for an end to the One Party State and the return to plural politics became more insistent. To this, Government's first reaction was the announcement of a referendum on whether to continue the One Party State or not.

However, in September 1990, the Government abandoned its call for a referendum. Instead, it promptly amended the 1973 Constitution to allow for the formation of other political parties. Government also announced an undertaking to introduce comprehensive amendments to the Constitution. To achieve the foregoing, the Government appointed a Constitutional Review Commission chaired by the then Solicitor General, Patrick Mphanza Mvunga.²² The Mvunga Commission toured the country by holding sessions at provincial centres and obtained views of a broad range of people on a future Constitution for Zambia. The Commission produced recommendations some of which were rejected by both the Government and the opposition Movement for Multiparty Democracy. The Government picked recommendations it preferred and prepared a Constitution for adoption by Parliament. Despite the document providing for multiparty elections, the Movement for Multiparty Democracy rejected it not only due to its contents but also because the Commission was perceived as having been dominated by the

²² Statutory Instrument, number 135 of 1990. Commission was appointed on 8th October 1990.

United National Independence Party, thus its product was to the extent approved by that Party to be enacted by a Parliament overwhelmingly dominated by the ruling party. This led to a stalemate which was softened but not ended by a conference organised by students at the University.

The solution to the stalemate only came when the churches organised a national conference and mediated the dispute. This led to agreement to reformulate the 1973 Constitution in order to facilitate the re-introduction of Multi-party politics²³. Following this agreement, the 1991 Constitution was enacted by Parliament on 2nd August 1991 and assented to by the President on 29th August 1991. Section 4 of the 1973 Constitution which provided that the United National Independence Party was to be the sole political party was removed and repealed. This development undoubtedly led to enhanced enjoyment of the rights conferred upon citizens by Article 21 of the Constitution relating to the right to assemble freely and associate with other persons and in particular to form or belong to any political party.

2.4 HUMAN RIGHTS UNDER THE 1991 CONSTITUTION

(AS AMENDED BY ACT NUMBER 18 of 1996)

In 1991, the Movement for Multiparty Democracy Government came into power pledging to put in place a constitution which would be above partisan considerations and one which would enhance the enjoyment of fundamental freedoms and rights. To this end, the then Zambian President Mr. F.T.J. Chiluba appointed the Mwanakatwe Constitutional Review Commission. This Constitutional Review Commission had terms of reference sufficiently broad and generous to accommodate opinions aimed at enhancing or securing individual liberty. The Commission was in fact granted power to make reference to the Constitutions of other countries.

²³ Mwanakatwe Constitution Commission Report at p 218

After extensive travel throughout the country and receiving submissions from petitioners, the Commission submitted its report to the Government.²⁴

However, although the Commission's terms of reference included enhancement and enjoyment of fundamental rights and freedoms, the Mwanakatwe Commission report included a chapter on Directive Principles of State Policy. This was an inspirational list of principles for the guidance of all branches of government in law making, administration and adjudication. This was done in the interest of establishment of a just and democratic society. The principles covered a wide range of policy areas. However, they were expressly made non-enforceable in court proceedings.²⁵

In the field of fundamental rights, the draft recommended strengthening some rights and adding others. Those included referred to residence, human dignity and reputation, culture, marriage, a clean environment and equal pay for equal work.²⁶ Press freedom and related rights of journalists were strengthened.²⁷ Also scheduled for protection were academic and intellectual freedom and the right to strike and lock out.²⁸ Notably also was a drastic increase in the protection of rights of women and the prohibition of laws, customary practices and stereotypes which worked against the dignity of women.²⁹

The foregoing recommendations were very progressive and could have enhanced the protection and enjoyment of human rights and fundamental freedoms. However, the recommendations in respect of Part III were deferred by the Government. This therefore meant that there would be no

²⁴ Report of the Constitutional Review Commission, Government Printers Lusaka 1995

²⁵ Ibid chapter 7. Paragraph 7.2, 15

²⁶ Ibid chapter 7, paragraph 7.2, 15 and paragraph 7.2, 16, 18

²⁷ Ibid chapter 7, paragraph 7.2.21, 19 (24)

²⁸ Ibid chapter 7, paragraph 7.2. 23, 19

²⁹ Ibid chapter 7, paragraph 7.6, 21

changes to the Bill of Rights. Through the Constitution of Zambia (as amended by Act No. 18 of 1996), one notable change to it happened which change, it is submitted adversely affected human rights. This was in respect of the election of a President.

The Constitution read in part:

“A person shall be qualified to be a candidate for election as President if

both his parents are Zambians by birth or descent or he or she has been domiciled in Zambia for a period of at least twenty years.”³⁰ It is submitted that although the Government did not expressly state as to whom the foregoing provisions were targeted at, the same was meant to bar the first Republican President Dr. Kenneth Kaunda from contesting in the 1996 Presidential and General Elections. Further, a strict interpretation of Article 34 (3)(f) clearly shows that the provision automatically disqualified the then Zambia Democratic Congress President, Mr. Pate Dean Namulya Mung’omba as he had not (by 1996) been domiciled in Zambia for at least twenty years.

Article 11 of the Zambian Constitution states in part that: “it is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

- (a) Life, liberty, security of person and the protection of the law
- (b) Freedom of conscience, expression, assembly, movement and association.

³⁰ Article 34 (3)(b)(f), Constitution of Zambia

Whereas the Constitution has very progressive provisions for the protection of the fundamental rights and freedoms, the provisions as those found in Article 11 make it very difficult to see how one would adequately enjoy his or her rights with all those derogations. How, for example could Dr. Kaunda enjoy his constitutional right to freely assemble and associate politically when Article 34(3)(b) does bar such a person to vie for presidency due to parentage reasons? Why should one's candidature to the Office be based on the origins of his parents? Why can not one's enjoyment of these rights be solely based on the individual's personal circumstances (e.g. his being personally Zambian by birth? It is questions of this kind which make me submit that I find such actions to be discriminatory. However, it is impossible for the victim to have any legal recourse because such actions have legal backing as the actions are part of the Constitution.

One notable improvement in the enjoyment of fundamental human rights and freedoms relates to the landmark Supreme Court decision in the case of **Mulundika & 7 Others V The People**.³¹ In this case, section 5 (4) of the Zambia Public Order Act required that any one wishing to assemble should first apply for and obtain a police permit. The appellants did assemble and addressed a public rally without first obtaining a police permit in accordance with section 5 (4) of the Public Order Act. As a consequence, they were arrested and charged with unlawful assembly.

The High Court for Zambia held that the requirement of a permit was constitutional. On appeal, the Supreme Court declared section 5 (4) of the Public Order Act unconstitutional. This led to Parliament having to promptly amend the said section to read that any one wishing to assemble should notify the police at least seven days before the date of the planned assembly. This was a very progressive decision and step in enhancing the enjoyment of fundamental rights and freedoms.

³¹ (1995-1997) ZR 20 (SC)

2.5 HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Like its predecessor, the 1991 Constitution provided for the protection of fundamental rights and freedoms of the individual. It is however noteworthy to state that the 1991 Constitution retained the limitations contained in the 1973 Constitution.³² To cite as an example, provisions outlawing discrimination continued to be subject to the application of customary law, thus continuing the disadvantaging of women.³³ Another example is that of the freedom of movement which remained subject to detention laws.³⁴ It suffices to state here that one notable improvement was that a state of emergency under the 1991 Constitution was made subject to parliamentary approval.³⁵

In summary, the 1991 Constitution may, when compared to its predecessor be said to have enhanced the enjoyment of fundamental human rights and freedoms especially so far as political pluralism is concerned in that through the removal of section 4 of the 1973 Constitution which made it illegal to belong to any other political party other than UNIP, citizens were now legally able to politically assemble freely and associate with others through the formation of political parties other than just UNIP. This undoubtedly enhanced the exercise of the rights and freedoms by citizens of Zambia, pursuant to Article 21 of the Constitution. In addition, the freedom of speech and expression was also enhanced such that since 1991, Zambian citizens are able to express themselves without fear of being reprimanded by those in political office(s).

³² Part III of the Constitution: Arts 16 (2), 17 (2) (a)(b), 19(5), 20(3) (a)(b), 21 (2) (a) (b) and 25

³³ Ibid Art 23 (4) (d) (e)

³⁴ Ibid Art 23 (a)(b) and 26 (i)

³⁵ Ibid Art 30 (2)

CHAPTER THREE

3.0 JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS

COMMITTEE WITH SPECIFIC REFERENCE TO CASES INVOLVING

ZAMBIA

Zambia is a signatory to various International Human Rights treaties. Therefore, some cases involving alleged Human Rights abuses by Zambia have been determined by the United Nations Human Rights Committee. The Essay shall therefore evaluate Zambia's Human Rights performance on the international scene.

Alex Chambala V Zambia.³⁶ In this case, the author claimed to be a victim of a violation by Zambia of the International Covenant on Civil and Political Rights and cited Article 9, paragraphs 3 and 5 of the Covenant as the basis of his claim. He alleged that he was arrested and detained without charge on 7th February 1987. He was served with a Police Detention Order pursuant to Regulation 33 (b) of the Preservation of Public Security Act on 12th February 1987. On 24th February, the Police Detention Order was revoked but on the same day, he was served with a Presidential Detention Order pursuant to Regulation 33(1) of the Preservation of Public Security Act. The grounds for his detention were served on him on 5th March 1987. The grounds stated that he was being detained for receiving and keeping an escaped prisoner at his house whom the author knew was detained for offences under the Preservation of Public Security Act. That he assisted Mr. Kalenga to flee to a country hostile to Zambia and that he never reported the presence of Mr. Kalenga to the security forces. The author was in detention for over one year

³⁶ Communication No. CCPR/C/78/856/1999

without trial before he applied for his release. On 22nd September 1988, the High Court released him stating that there were no reasons for keeping him in detention. Nevertheless, he was not released till December 1988. He contended that under Zambian law, he could not seek compensation for unlawful detention. Thus, no domestic remedies are available.

To the foregoing allegations, the State party conceded the events described in the communication and indicated that it would be contacting the complainant with a view to compensating him.

The Human Rights Committee in its view stated that the detention was arbitrary and constituted a violation of Article 9 of the Optional Protocol to the International Covenant on Civil and Political Rights 1966 and thus recommended compensation to the author.

In **Chiko Bwalya V Zambia**,³⁷ the author claimed to have been detained for 31 months on charges of belonging to the People's Redemption Organisation, an association considered illegal under the country's One Party Constitution and for having conspired to overthrow the Government of the then President, Dr. Kenneth Kaunda. At an unknown date, he was released and the reasons for the release were unknown. The State party failed to provide the Committee with any such information. The Committee consequently gave due weight to the author's allegations to the extent that they had been substantiated. The Committee was of the opinion that the failure of the State party to give the Committee any information amounted to clear indication that they had violated his rights under Article 9 of the Covenant. The Committee urged the State party to compensate the author.

³⁷ Communication No. CCPR/C/84/D6/314/1988

3.1 JURISPRUDENCE OF THE AFRICAN HUMAN RIGHTS COMMISSION ON CASES INVOLVING ZAMBIA

Amnesty International (on behalf of **Banda and Chinula**) **V Zambia**.³⁸

The complainant alleged that Zambia had violated the provisions of the African Charter on Human and People's Rights in that:

(a) Mr. William Steven Banda was served with a deportation order on 10th November 1991.

The reason given was that in the opinion of the authorities, by his presence, he was a likely danger to peace and good order in Zambia. He contested the Order through the courts of Zambia. On 25th October 1994, William Steven Banda was deported to Malawi unlawfully, wrongfully and out of political malice. The complainant alleged that the Zambian Government's deportation of the two men amounted to "forcible exile". Attempts to seek redress through existing national and legal remedies both in Zambia and Malawi proved futile. Zambia was represented. However, the Commission was of the view inter alia;

1. In deporting the two men, the Government of Zambia had denied them their right to freedom of association. This was so because they had been prevented from associating freely with their colleagues in the United National Independence Party and participating in their activities.
2. Citing its own ruling in **Modise V Botswana**, the African Commission was of the view that by forcing Banda and Chinula to live as stateless persons under degrading conditions, the Zambian Government had deprived them of their

³⁸ Communication No. 212/98

families and their families of the men's support and that this constituted a violation of the dignity of a human being thereby violating Article 5 of the Charter.

3. By denying Mr. Chinula the opportunity to appeal against his deportation order, the Zambian Government deprived him of the right to fair hearing which contravened all Zambian domestic laws and international human rights laws.

The Commission thus held that Zambia violated Articles 2, 5, 7(1)(a), 7(2), 8, 9(1), 9(2), 10, 12 (4) and 18 (1) and (2) of the African Charter on Human and People's Rights.

From the foregoing jurisprudence from both the United Nations Human Rights Commission and the African Commission, it is evident that the cases had political overtones involved. Most if not all the cases dealt with at these International Human Rights bodies relate to persons perceived to be political threats to the continued hold to power by those in office at a particular time. It suffices to say that at both the United Nations Human Rights Committee and the African Commission, Zambia has to date not won a single case against it. This paints a very bad Human Rights record to the international community. Clearly, most of the cases relate to the period of the One Party era. One would have hoped that the situation would improve following the restoration of political pluralism in 1991, but this does not seem so, what with the Mulundika and William Banda cases to mention but a few. It is experiences of this sort which prompt contending that we need to strengthen the protection of fundamental human rights and freedoms in our Republican Constitution.

CHAPTER FOUR

4.0 PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE ZAMBIAN, SOUTH AFRICAN AND NAMIBIAN CONSTITUTIONS COMPARED

The Constitutions of the Republics of Zambia, South Africa and Namibia all have fundamental rights and freedoms entrenched in the national constitutions. Zambia's fundamental rights and freedoms are provided for under Article 11 to 26 of the Constitution. The rights contained in the Zambian Constitution look very attractive on paper. However, the drafting style of the Zambian Constitution is characterized by a lot of derogations which come in form of:

“Without prejudice to any liability for a contravention of any other law, nothing contained in or done under the authority of any law shall be held to be inconsistent with the Constitution.....”

In addition, despite the fact that the Articles providing for fundamental rights and freedoms do themselves provide for savings provisions, Article 25 provides for derogations from fundamental rights and detention.

The Article states as follows: “Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of Article 13, 16, 17, 20, 22, 23 and 24”³⁹ In addition, though Zambia is a signatory to various International Human Rights Treaties and Conventions, its human rights record at the international level indicates that there has been an improvement but also that the country can do better if only there is political will.

³⁹ Article 25 Constitution of Zambia

4.1 HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER THE SOUTH AFRICAN CONSTITUTION

Human rights and fundamental freedoms under the South African Constitution are contained in Chapter 2 which contains the Bill of Rights. The Bill of Rights ranges from Article 7 to Article 39 of the Constitution.

Article 7 reads as follows:

- (1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all our people in our country and affirms the democratic values of human dignity, equality and freedom.
- (2) The state must respect, protect, promote and fulfill the rights in the Bill of Rights.
- (3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36 or elsewhere in the Bill.⁴⁰

Section 8(1) states that:

“The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of state.”⁴¹

⁴⁰ Article 7 Constitution of South Africa

⁴¹ Ibid Section 8 (1)

The drafting style of the South African Constitution is most admirable. The sections providing for these fundamental rights and freedoms do not contain any savings provisions like most of the Articles under the Constitution of Zambia. In addition, the language employed is simple and clear. An example of this is to be found in section 9 (3) which states that:

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, culture, language or birth.⁴²

The foregoing provision when compared to Article 34 (3) (b) of the Constitution of Zambia, leads to a conclusion that the Constitution of Zambia discriminates against citizens whose parents are both not Zambians either by birth or descent. This is because it requires that for one to be eligible to qualify as presidential candidate, both his or her parents must be Zambian citizens either by birth or descent.

In line with political rights, the Constitution of South Africa does not bring to the fore birth related factors. It states as follows in section 19(1):

Every citizen is free to make a political choice which includes the right to

- (a) form a political party;
- (b) participate in activities of, or recruit members for a political party; and
- (c) campaign for a political party or cause.

⁴² Ibid section 9 (3)

3. Every citizen has the right -

(b) to stand for public office and if elected, to hold office.⁴³

The foregoing provision shows that all you need in order to hold political office in South Africa is that you must be an adult citizen. The issue of parentage does not arise at all. Although human rights and freedoms are fundamental, it is admitted that human rights are never enjoyed absolutely. Normally, they are subject to limitations. However, these limitations must be reasonable and not aimed at serving the interests of those in political office at a given period of time.

Unlike the Constitution of Zambia which has savings provisions in almost each of the Articles providing for fundamental rights and freedoms, under the Constitution of South Africa, limitations of rights are only found in one section. This is contained in section 36 which states that:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) Nature of the right;

(b) Importance of the purpose of the limitation;

(c) nature and extent of the limitation;

(d) Relationship between the limitation and purpose; and

⁴³ Ibid section 19 (1)(a)(b)(c) and 3(b)

- (e) Less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

From the evaluation of some of the provisions of the Constitution of South Africa, it can clearly be seen that the Constitution of South Africa is more progressive in a number of ways when compared to the Constitution of Zambia. This is seen from the wide range of rights contained therein, the drafting style and especially the fact that the Constitution of South Africa does not seem to give rights at the same time take them or restrict enjoyment through saving provisions.

4.2 FUNDAMENTAL RIGHTS AND FREEDOMS UNDER THE NAMIBIAN CONSTITUTION

Under the Namibian Constitution, fundamental rights and freedoms are enshrined in Chapter III. They are provided for under Articles 5 to 34. The drafting style is not very different from that of the Constitution of Zambia in so far as derogations are concerned. However, the Namibian Constitution provides for a wider range of rights than the Zambian Constitution. In addition, it is written in a simpler language than the Zambian Constitution. The following are some of the examples of progressive provisions found under the Constitution of Namibia.

Article 28 (3) states as follows:

Every citizen of Namibia by birth or descent over the age of thirty-five (35) years and who is eligible to be elected to office as a member of the National Assembly shall be eligible for election as President.⁴⁴

Human rights and fundamental freedoms are an individual's entitlement. As such, the protection accorded to the individual should be based on the individual's personal circumstances and not on his or her parent's origin. In Article 34 (3) (b), the Zambian Constitution seems to suggest that for an individual to be elected President, there need to be a consideration of his parent's circumstances (i.e. origin). This, it would be submitted is discriminatory. Therefore, when Article 28 (3) of the Namibian Constitution is compared to Article 34 (3) (b) of the Zambian Constitution, it can be concluded that the Namibian provision is not only progressive but also non discriminatory.

Another progressive provision relates to the Presidential term of office. Article 29 (4) states:

If a President dies, resigns or is removed from office in terms of this Constitution, the vacant office of President shall be filled for the unexpired period thereof as follows:

- (a) If the vacancy occurs not more than one year before the date on which the Presidential elections are to be held, the vacancy shall be filled in accordance with provisions of Article 34.

Article 34 simply states that the unexpired period of the President's tenure shall be filled either by the Prime Minister, Deputy Prime Minister or a person appointed by cabinet.⁴⁵

⁴⁴ Article 28 (3) Constitution of Namibia

The Namibian Constitution also provides for the right to education as a justitiable right.⁴⁵

On the contrary, in Zambia, the right to education is non justitiable as it is merely contained in the preamble. Furthermore, the Namibian Constitution provides for the right to life which is enjoyed absolutely while in Zambia, the right to life is not absolute.

Having compared the Zambian, South African and Namibian Constitutions, one is able to bring to the fore the deficiencies contained in the Zambian Constitution in respect of the enjoyment of fundamental rights and freedoms. In addition, a leaf may be taken especially from the South African Constitution which does not only provide for a wide range of rights but also does so without derogations contained within the same section which confer rights. It has only one section (i.e. section 36) which provides for derogations.

4.3 DATA ANALYSIS

From the readings on human rights in Zambia, it is evident that the Zambia Independence Constitution did adequately provide for the protection of human rights and fundamental freedoms. However, although the rights as enshrined in the 1964 Independence Constitution appeared adequate on paper, this was not so in practice. The bill of rights itself did have a lot of savings provisions which in turn tended to defeat the main purpose. In addition, there seems to have been lack of political will on the part of the Executive branch of government.

⁴⁵ Ibid

⁴⁶ Ibid Article 20 (1)(2)

Since independence, Zambia has always been a democratic state. The essential tenets of democracy include regular free and fair election, separation of powers in form and in their making, political pluralism, accountability of the governors to the governed and the respect of individual rights.

Therefore, as regards the 1973 Constitution, it is submitted that human rights and fundamental freedoms were exercised in a restricted manner. This is because people could not freely assemble and associate politically as this could only be possible by belonging to the United National Independence Party as provided for by section 4 of the One Party Constitution. During this period, the freedom of speech was also curtailed. Furthermore, there were a lot of arbitrary detentions and arrests.

The return to multipartism in 1990 brought renewed hope as regards the enjoyment of human rights and fundamental freedoms. The 1991 Constitution was one which was thought of as a Constitution which was to be the beginning of practical protection of human rights. The Mwanakatwe Constitutional Review Commission, in the area of human rights did make very progressive recommendations but this was deferred by the Government. This was contrary to the promises made by the Movement for Multiparty Democracy during campaigns to the effect that once elected into office, it would put in place a constitution which would be above partisan politics and one which would enhance the protection and enjoyment of human rights.

Once again the lack of political will and desire to remain in power took centre stage. All those perceived to be political opponents were targets of brutality by those in power. For example, first Republican President Dr. Kenneth Kaunda and Dr. Rodger Chongwe had their vehicles shot at by the police using live bullets as they attempted to address a peaceful rally in Kabwe.

Furthermore, the 1991 Constitution (as amended by Act No. 18 of 1996) came up with provisions aimed at barring Dr. Kaunda from ever qualifying for candidature for republican presidency.

Zambia's successive Constitutions have had in fact a wide range of rights entrenched therein, save there has been lack of genuine political will to enable the attainment of the desired enjoyment.

CHAPTER FIVE

5.0 CONCLUSION

The information gathered from the study of the Bill of Rights under the Constitution of Zambia reveals that the Constitution has had human rights protection adequately provided for under Part III. The aim of the Constitution in a democratic society and in respect of fundamental rights and freedoms is the protection and enhancement of the enjoyment of individual rights to the maximum practicable as there is no liberty which can be enjoyed in absolute terms. Freedoms of expression, assembly and association are a basic feature of democracy. Public discussions on issues relating to administration have positive value. Thus, people should be allowed to freely express themselves as well as to freely assemble. The only time a restriction should be imposed is when such expression or assembly would result into disorder or breach of peace.

Despite having a Bill of Rights with adequate provisions on the protection and enjoyment of human rights, the problem emanating from the same Articles guaranteeing individual rights has been that there are too many savings provisions. The effect of this has been that there normally is a restriction on the enjoyment of human rights, for example the freedom of assembly and association. Admittedly, the judgment of the Supreme Court in the case of **Mulundika and Seven Others** was a very good step with respect to the enhancement of the enjoyment of the freedoms of expression, assembly and association. However, despite the judgment in the **Mulundika** case, police are still able to stop a meeting from taking place through their broad and uncontrolled powers. All they need to say as they indeed have often done on numerous occasions is to say that they do not have adequate manpower to police the meeting or procession.

6.0 RECOMMENDATION

It is accepted that due to competing claims which include individual, societal and the state, no human right(s) can be enjoyed in absolute terms. However, interference in the enjoyment of human rights should only be in instances where it is absolutely necessary to do so. As already pointed out, the Bill of Rights under the Constitution of Zambia is full of drawbacks and claw backs which in effect implies that the right is being given while at the same time it is being taken away from you. Due to this, it is difficult to have meaningful protection of human rights. It is therefore recommended that the several savings provisions currently present in our Bill of Rights be removed and be placed in say only one Article as is the case with the Constitution of South Africa. Lastly, it is recommended that we should gradually consider and practically ensure that some of the economic, social and cultural rights such as the right to education and health are made justiciable. This can be done by say ensuring that pupils from grade one to twelve receive free education and also that in Government hospitals, patients receive free medical services without the need to pay anything. Furthermore, it is recommended that there must be congruence between the stipulation of the law and the administrative action responsible for the enforcement of the law for instance the Public Order Act.

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